

OBSERVATIONS

Relating to Case C-821/19 *Commission v Hungary*

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I. INTRODUCTION AND SUMMARY

1. These observations (the *Observations*) are made on behalf of the International Service for Human Rights (*ISHR*),¹ and the Pravno-informacijski center nevladnih organizacij (Legal-Informational Centre for NGOs, Slovenia) (*PIC*)² (together, the *Organisations*) in support of the proceedings commenced by the European Commission (the *Commission*) against Hungary under Article 258 of the Treaty on the Functioning of the European Union (the *Application*).

* * *

2. On 20 June 2018, Hungary adopted a set of legislative measures that the Hungarian Government referred to as the “Stop Soros” legislation (the *Asylum Legislation*).³ Among other things, the Asylum Legislation established: (a) a new admissibility criterion deeming applications for asylum inadmissible if made by persons arriving from a State in which they were not exposed to persecution or did not face a direct threat of persecution (the *Admissibility Criterion*); and (b) a criminal offence of engaging in “organising activity” to assist an asylum seeker to make an application for asylum in Hungary which is not well-founded (in practical terms, where that application is subsequently rejected by the Hungarian authorities and the person rendering the assistance anticipated such risk at the time of assisting) (the *Section 353/A Offence*).
3. The Asylum Legislation places Hungary in breach of its legal obligations under EU and international law to protect asylum seekers.

¹ The ISHR is an independent, non-governmental organisation (*NGO*) dedicated to promoting and protecting human rights through supporting human rights defenders, strengthening human rights systems, and leading and participating in coalitions for human rights change. See International Service for Human Rights, ‘About us – What we do’, available at: <https://www.ishr.ch/what-we-do>.

² See Legal-Informational Centre for NGOs, ‘About’, available at: <http://pic.si/about/>.

³ The legislation has been named after Hungarian-American businessman and philanthropist George Soros, who has been accused by the Hungarian Government of “orchestrating migration to Europe”. See Euractiv, “EU takes Hungary to court over ‘Stop Soros’ migrant law”, 25 July 2019, available at: <https://www.euractiv.com/section/justice-home-affairs/news/eu-takes-hungary-to-court-over-stop-soros-migrant-law/>. See also Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, General reasoning (“In order to protect Hungary, an action plan is needed, this is the STOP Soros Act package.”), available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

4. Until very recently, the Admissibility Criterion allowed the automatic denial of essentially all asylum applications to Hungary through the creation of a new ground of inadmissibility in addition to the grounds provided for under EU law, raising serious issues in respect of Hungary's compliance with its obligations to asylum seekers under international law, including the obligation of *non-refoulement* (direct and indirect).⁴
5. The Section 353/A Offence criminalises a wide range of asylum support work undertaken by NGOs and other individuals in Hungary and thus violates Hungary's specific obligations as regards asylum under EU law, as well as the individual freedoms of human rights defenders and asylum seekers.
6. On 25 July 2019, the Commission referred Hungary to the Court of Justice of the European Union (the *CJEU* or the *Court*) on the basis of the incompatibility of the new Admissibility Criterion and Section 353/A Offence with Hungary's obligations under EU law.
7. On 19 March 2020, the CJEU in its preliminary ruling in *LH v Bevándorlási és Menekültügyi Hivatal* held that Hungary's introduction of the new Admissibility Criterion violated EU law. This confirms the first limb of the Commission's position in the present case, in which the CJEU is expected to follow its analysis in *LH v Bevándorlási és Menekültügyi Hivatal*.
8. The decision in *LH v Bevándorlási és Menekültügyi Hivatal* does not, however, concern the part of the Commission's Application in the present case that relates to the Section 353/A Offence.
9. The Organisations are not entitled formally to intervene in proceedings commenced by the Commission against an EU State. These Observations therefore record the Organisations' position in respect of the Asylum Legislation's violations of EU and international law, focussing on the incompatibility of the new Section 353/A Offence

⁴ As set out below, the focus of these Observations is on the incompatibility of the new Section 353/A Offence with the international human rights framework applicable to human rights defenders.

with the international human rights framework applicable to human rights defenders—that is, people who, individually or with others, act to promote or protect human rights.⁵

* * *

10. These Observations are structured as follows: after this introduction and summary in section I, section II provides an overview of the Asylum Legislation, section III addresses the jurisdiction of the CJEU and the relevance of international law, and section IV sets out the Organisations’ submissions on how the Asylum Legislation, in particular the Section 353/A Offence, violates Hungary’s obligations under EU and international law. The Appendix to these Observations contains a survey of the international and EU law relevant to the Organisations’ analysis.

II. HUNGARY’S ASYLUM LEGISLATION

11. On 29 May 2018, the Hungarian Government introduced in its domestic Parliament a set of legislative proposals purportedly aimed at combatting illegal immigration into Hungary.⁶
12. These proposals were officially termed the “STOP Soros Act Package” by the Hungarian Government,⁷ referring to Hungarian-American businessman Mr George Soros and the activities of his philanthropic organisation the Open Society Foundations,

⁵ United Nations Office of the High Commissioner for Human Rights, “Who is a defender”, available at: <https://www.ohchr.org/en/issues/srhrdefenders/pages/defender.aspx>.

⁶ Venice Commission, OSCE/ODHIR, *Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package Which Directly Affects NGOs*, 25 June 2018, para 11; Hungarian Helsinki Committee, Unofficial Translation of Bill T/332, available at: <https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf>; Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

⁷ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, General reasoning, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>. The original “Stop Soros legislative package” was submitted to the Hungarian Parliament in February 2018. It comprised: (1) Bill T/19776 on the licensing of organisations supporting migration; (2) Bill T/19774 on the creation of immigration restraining orders; and (3) Bill T/19775 on the establishment of an immigration financing duty. See Hungarian Helsinki Committee, Unofficial Translations of Bills T/19776, T/19774 and T/19775, available at: <https://www.helsinki.hu/wp-content/uploads/Stop-Soros-package-Bills-T19776-T19774-T19775.pdf>. Following elections in April 2018, however, the Hungarian Government announced that the original proposals would not be considered by Parliament. Instead, they were replaced with the updated legislative package introduced on 29 May 2018, which was eventually passed into law.

which describes itself as “the world’s largest private funder of independent groups working for justice, democratic governance, and human rights”.⁸

13. The Government stated that the purpose of the proposals was “to prevent Hungary from becoming a migrant country” by “us[ing] all means to combat illegal immigration and activities that facilitate it”—in particular, by “mak[ing] the organization of illegal immigration punishable”.⁹
14. On 20 June 2018, the Hungarian Parliament passed the “STOP Soros Act Package” into law as *az egyes törvényeknek a jogellenes bevándorlás elleni intézkedésekkel kapcsolatos módosításáról szóló, 2018. évi VI. törvény* (Act VI of 2018, amending certain laws in relation to measures against illegal immigration) and the seventh amendment to the Hungarian Fundamental Law (the *Asylum Legislation*).¹⁰
15. The Asylum Legislation entered into force on 1 July 2018.¹¹
16. The Organisations address below: (a) the new Admissibility Criterion established in the Asylum Legislation; (b) the new Section 353/A Offence created by the Asylum Legislation; (c) the impact of the Asylum Legislation since its entry into force; and (d) the Commission’s proceedings against Hungary before the CJEU.

A. THE NEW ADMISSIBILITY CRITERION

17. The Asylum Legislation amended Hungary’s Fundamental Law and its Asylum Act to provide that a person is not entitled to asylum in Hungary if they have arrived in Hungary through a State in which they did not face a risk of persecution.

⁸ Open Society Foundations, “Who we are”, available at: <https://www.opensocietyfoundations.org/who-we-are>.

⁹ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, General reasoning, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>. See also Hungarian Helsinki Committee, Unofficial Translation of Bill T/332, General reasoning, available at: <https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf>.

¹⁰ Reuters, “Hungary approves ‘STOP Soros’ law, defying EU, rights groups”, 20 June 2018, available at <https://uk.reuters.com/article/uk-hungary-soros/hungary-approves-stop-soros-law-defying-eu-rights-groups-idUKKBN1JG1V1>.

¹¹ Section 12 of Act VI of 2018 provides that the Act enters into force on the first day of the calendar month following its promulgation.

18. Article XIV of Hungary's Fundamental Law was amended, *inter alia*, to add a new Section (4), which reads as follows:

Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.¹²

19. Section 51(2) of the Asylum Act was likewise amended to include a new subsection (f) making an asylum application inadmissible if:

... 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.¹³

20. The Government justified the introduction of the new Admissibility Criterion on the basis that:

If the applicant arrives in Hungary through a country where he or she was not exposed to persecution that could serve as a basis for their recognition as a refugee or a serious harm that could serve as a basis for their recognition for subsidiary protection, or if the country through which he or she travelled has provided or would have provided adequate protection if the applicant had applied for such protection, it is reasonable for the applicant to use the protection provided by the community of nations in that country. The provision is in line with Subsection (1) of Article 31 of the Geneva Convention, which protects only those who came directly from an area where their lives or their freedom were at risk. An adequate level of protection is ensured if the applicant had resided in the country on any grounds of residence (e.g. employment, humanitarian residence).¹⁴

¹² Official translation of the Fundamental Law of Hungary by the Ministry of Justice, Article XIV(4), available at: http://njt.hu/translated/doc/TheFundamentalLawofHungary_20191213_FIN.pdf.

¹³ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, Section 7, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

¹⁴ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, General reasoning and Detailed reasoning for Section 7, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

B. THE NEW SECTION 353/A OFFENCE

21. The Asylum Legislation also established a new criminal offence of “Facilitating and assisting illegal immigration” by adding a new Section 353/A to the Hungarian Criminal Code. It provides that:

(1) A person who engages in any organising activity aimed at

a) enabling a person to initiate an asylum procedure in Hungary even though he is not exposed to persecution in his home country, the country of his habitual residence or the country he transited through because of his race, nationality, membership in a particular social group, religion or political beliefs, or his fear of direct persecution is groundless, or

b) having a person obtain any title to residence even though he entered or resides in Hungary illegally,

is guilty of a misdemeanour and shall be punished by confinement, unless a criminal offence of greater gravity is established.

(2) A person who provides material means for the commission of the criminal offence specified in paragraph (1) or regularly engages in such organising activity shall be punished by imprisonment for up to one year.

(3) A person shall be punishable under paragraph (2) if he commits the criminal offence specified in paragraph (1)

a) for financial gain,

b) by assisting more than one person, or

c) within 8 km from the external border of Hungary or a border sign, as defined in Article 2(2) of [the “Schengen Borders Code”].]

(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 dispensed with if he reveals the circumstances of its commission before his indictment.

(5) For the purposes of this section, organising activity means, in particular,

a) the organisation of border monitoring at the external border of Hungary or a border sign, as defined in Article 2(2) of the Schengen Borders Code, for a purpose specified in paragraph (1),

b) the making or dissemination of information materials, or engaging others to do so, for a purpose specified in paragraph (1),

c) the establishment or operation of a network for a purpose specified in paragraph (1).¹⁵

22. The new provision makes it a criminal offence to engage in organising activity aimed at:¹⁶ (a) enabling the initiation of asylum proceedings by persons who are not persecuted in their home country, their country of habitual residence or the country through which they arrived in Hungary, or whose fear of direct persecution is “groundless”;¹⁷ or (b) having a person entering or residing illegally in Hungary obtain any title to residence.¹⁸
23. “Organising activity” is said to include, “in particular”, but not exclusively, the organisation of border monitoring, the making or dissemination of information materials, as well as the establishment or operation of a network.¹⁹
24. The offence is punishable by confinement, which is a form of detention in a low-security penal institution for a maximum term of 90 days. The punishment rises to imprisonment of up to one year if the individual has provided “material means for the commission of the criminal offence specified in paragraph (1)”, has “regularly engage[d] in such organising activity”, if the offence is committed for financial gain, if it involves assisting more than one person, or if it is carried out near border zones.²⁰
25. The Government justified the introduction of the new Section 353/A Offence on the basis that:

In connection with illegal migration, the abusive use of asylum procedures and the organizational activity promoting the stay in the country, which is increasingly threatening public order and public security, justifies having to deal with such practices by means of the most rigorous public authority, i.e. by criminal sanctioning.

¹⁵ Official translation of Act C of 2012 on the Criminal Code by the Ministry of Justice, Section 353/A, available at: http://njt.hu/translated/doc/J2012T0100P_20200331_FIN.PDF.

¹⁶ Under Section 4(1), the offence needs to be committed intentionally. *See* Official translation of Act C of 2012 on the Criminal Code by the Ministry of Justice, Section 4(1) (“A criminal offence shall mean an act committed intentionally or, where negligent commission is punishable under this Act, negligently which is a danger to society and is subject to punishment under this Act.”), available at: http://njt.hu/translated/doc/J2012T0100P_20200331_FIN.PDF.

¹⁷ Hungarian Criminal Code, Section 353/A(1)(a).

¹⁸ Hungarian Criminal Code, Section 353/A(1)(b).

¹⁹ Hungarian Criminal Code, Section 353/A(5)(b)-(c).

²⁰ Hungarian Criminal Code, Section 353/A(2)-(3).

...

Practical experience confirms that unauthorized entry into Hungary and the entering into Hungary by persons residing in Hungary illegally is assisted not only by international organizations, but also by Hungarian organizations, which justifies acting against it with a criminal law instrument. By introducing the new legal provisions, the responsibility of legal entities providing organizational, personal and material frameworks for such activities can also be examined and -- in accordance with the legal provisions applicable on the basis of Act CIV of 2001 on the Criminal code measures against a legal person -- will be sanctionable under the conditions set out in the Act.²¹

26. The introduction of the Section 353/A Offence was accompanied by an amendment to Chapter V of Hungary's Police Law, found in Section 46/F of the Police Law, which provides that any person subject to criminal proceedings for allegedly committing the Section 353/A Offence is automatically banned from being within eight kilometres of the Hungarian border (the *Section 46/F Ban*). The amended provision reads as follows:

In order to ensure the unrestricted state border regime and the border surveillance activity, the police officer shall prevent a person from entering the territory of Hungary in accordance with the external border line as defined by point 2 of Article 2 of the Schengen Borders Code, or within an 8 km area of the border line, and order the person present there to leave, who is under criminal proceedings due to the criminal offence of the unlawful crossing of the border barrier (Criminal Code Section 352/A.), damaging the border barrier (Criminal Code Section 352/B.), the obstruction of the construction work on the border barrier (Criminal Code Section 352/C.), human smuggling (Criminal Code Section 353.), facilitating unlawful residence (Criminal Code Section 354.), facilitating illegal immigration (Criminal Code Section 353/A.)²²

C. THE IMPACT OF THE ASYLUM LEGISLATION

27. From its entry into force and until it stopped being applied in July 2019, the new Admissibility Criterion resulted in the automatic rejection of virtually all asylum claims in Hungary by the Bevándorlási és Menekültügyi Hivatal (the *Asylum Authority*).²³

²¹ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, General reasoning and Detailed reasoning for Section 11, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

²² Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, Section 2, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

²³ See Information update by the Hungarian Helsinki Committee, 'One year after – How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention', 1 July 2019, p 2, available at: <https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf>; United Nations, General Assembly, *Report of the Special Rapporteur on the human rights of migrants*,

28. This is because, from 28 March 2017 until very recently (when changes were imposed in purported response to the COVID-19 pandemic),²⁴ asylum applications by persons without the right to stay in Hungary could only be lodged inside the transit zones at the Hungarian-Serbian border, requiring any applicant for asylum in Hungary to enter the country from Serbia.²⁵ Because Hungary regards Serbia as a safe third country,²⁶ the

A/HRC/44/42/Add.1, 11 May 2020, para 41. The Organisations understand that the Asylum Authority has since granted asylum in a number of cases.

Moreover, following the Court's judgment in *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, Hungarian courts regained the power to grant protection themselves in those cases in which the Asylum Authority ignores instructions set out in a prior judgment remanding an asylum application—a power of which the courts had been stripped by the Hungarian legislature on 15 September 2015—rather than simply being able to repeatedly refer the case back to the Asylum Authority with their instructions falling on deaf ears. See Case C-556/17, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, Judgment, 29 July 2019, ECLI:EU:C:2019:626, paras 17-20, 33-36, 53-59, 62, 66-67 and especially 72-78. It is the Organisations' understanding that this has also resulted in the granting of international protection to a significant number of asylum seekers by the courts directly.

²⁴ See Information update by the Hungarian Helsinki Committee, 'One year after – How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention', 1 July 2019, p 2, available at: <https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf>.

At present, the Organisations understand that the transit zones are not operational. On 1 March 2020, Hungary announced the indefinite suspension of new admissions into the transit zones, citing "a connection between the coronavirus and illegal migration". See Cabinet Office of the Prime Minister Press Release, 3 March 2020, available at: <https://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/coronavirus-hungary-to-suspend-admission-of-illegal-migrants-to-transit-zone-indefinitely>. On 26 May 2020, the Hungarian Government then issued Government Decree no 233/2020 (V. 26.), which required asylum seekers to submit a statement of intent at a Hungarian embassy located outside of the Schengen Area, before being issued with a single-entry travel permit and allowed to travel to Hungary. See Hungarian Helsinki Committee, Unofficial Translation of Government Decree no 233/2020 (V. 26.), available at: https://www.helsinki.hu/wp-content/uploads/Government-Decree-no.-233_2020-on-the-rules-of-the-asylum-procedure-during-the-state-of-danger.pdf. The Organisations understand that, on 18 June 2020, Hungary adopted a further restriction, providing that statements of intent could only be lodged at the Hungarian embassies in Belgrade or in Kiev.

²⁵ Access to the transit zones was also limited. On 25 June 2020, Advocate General Pikamäe issued an opinion in Case C-808/18 finding that asylum applicants had been forced to wait between 11 and 18 months before being able to access one of the only two transit zones where applications could be lodged, both located at the Hungarian-Serbian border. Among other things, Advocate General Pikamäe concluded that: "the legislative obligation to travel to one of the transit zones in order to make an application for international protection coupled with the drastic reduction in the number of persons allowed to enter those zones [as little as one per day in each transit zone] is not compatible with the obligation to ensure effective access to the procedure for granting international protection, as inferred from the purpose of Article 6 of Directive 2013/32". In the light of recent jurisprudence of the Court, Advocate General Pikamäe also opined that the "placing [of] an applicant in the transit zone while his application for international protection is being examined must be regarded as constituting 'detention' within the meaning of Article 2(h) of Directive 2013/33". See Case C-808/18, *European Commission v Hungary*, Opinion of Advocate General Pikamäe, 25 June 2020, ECLI:EU:C:2020:493, paras 59, 61, 140. On the point that holding persons in transit zones constitutes a form of detention, see Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA and SA junior v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Judgment, 14 May 2020, ECLI:EU:C:2020:367.

²⁶ AIDA and ECRE, 'Hungary Adopts List of Safe Countries of Origin and Safe Third Countries', 23 July 2015, available at: <https://www.asylumineurope.org/news/30-03-2017/hungary-adopts-list-safe-countries-origin-and-safe-third-countries>.

new Admissibility Criterion effectively rendered all asylum applications inadmissible.²⁷ This is because the Admissibility Criterion denied asylum to any person arriving in Hungary from a country in which he or she was not exposed to persecution or a direct risk of persecution or serious harm, no matter how horrific the threat to them in their country of origin.

29. In practice, this resulted in the attempted expulsion to Serbia of asylum applicants whose applications had been rejected in Hungary, on the basis that they should have lodged their asylum application in Serbia as a safe third country.²⁸ It also resulted in instances of the Hungarian authorities expelling asylum seekers to their countries of origin, due to Serbia's policy of not readmitting persons who have failed to obtain asylum in Hungary.²⁹ These measures—that is, attempting to expel asylum seekers to Serbia³⁰ and returning asylum seekers to their countries of origin without evaluating their claim to

²⁷ Information update by the Hungarian Helsinki Committee, 'One year after – How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention', 1 July 2019, pp 2-3, available at: <https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf>.

²⁸ Information update by the Hungarian Helsinki Committee, 'One year after – How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention', 1 July 2019, p 4, available at: <https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf>.

²⁹ Information update by the Hungarian Helsinki Committee, 'One year after – How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention', 1 July 2019, p 4, available at: <https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf>.

³⁰ Asylum Procedures Directive, Article 38 states that: "Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking protection will be treated in accordance with the following principles in the third country concerned: ... (c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected ... (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention". See also *Ilias and Ahmed v Hungary*, ECtHR [GC], no 47287/15, Judgment, 21 November 2019, para 134, holding that Hungary breached its obligations under Article 3 of the European Convention on Human Rights (the *ECHR*) by forcing two Bangladeshi nationals to return to Serbia: "... it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned." See also Council of Europe: Committee of Ministers, *Recommendation N° R (97) 22 of the Committee of Ministers to Member States containing Guidelines on the Application of the Safe Third Country Concept*, 25 November 1997, stating that: "In order to assess whether a country is a safe third country to which an asylum-seeker can be sent, all the criteria indicated below should be met in each individual case: ... c) the third country will provide effective protection against refoulement and the possibility to seek and enjoy asylum ... See also Council of Europe: Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009, stating that: "The following criteria must be satisfied when applying the safe third country concept: ... b. the principle of *non-refoulement* is *effectively respected*; c. the asylum seeker concerned *has access, in law and in practice, to a full and fair asylum procedure in the third country with a view to determining his/her need for international protection*; and d. *the third country will admit the asylum seeker*" (emphasis added).

asylum³¹—were clear violations of Hungary’s obligations under both EU and international law.³²

30. The introduction of the Section 353/A Offence has had an equally pernicious effect on Hungary’s asylum regime. As of May 2020, no criminal prosecutions were known to have been brought on the basis of the new offence.³³ However, NGOs and civil society groups have voiced widespread concern over the uncertainty caused by the loose manner in which the offence is defined. They have also attested to its chilling effect on legitimate asylum support work carried out by human rights defenders, its negative impact on the availability of services on which asylum seekers rely in their application process, as well as the psychological burden imposed on human rights defenders as a result. For instance, according to the Special Rapporteur on the human rights of migrants:

The uncertainty about the scope of application of this provision creates a chilling effect on civil society organizations engaged in activities that could fall under the offence, depending on how the provision is interpreted and applied. Organizations that are affected may apply self-censorship and reduce or terminate services, which further hinders asylum seekers and migrants from exercising their right to seek asylum and international protection, as many of them rely on the services provided by civil society organizations, such as legal advice and representation, in their asylum- or protection-seeking processes.³⁴

31. As discussed above, the Section 353/A Offence was introduced in the context of a disparaging narrative emanating from the Hungarian Government concerning the role

³¹ This is a violation of the principle of *non-refoulement* expressly recognised in: Asylum Procedures Directive, Recital (3), Articles 9(3), 28(2), 35(b), 38(c), 39(4), 41, Annex I; Reception Conditions Directive, Recital (3); Refugee Convention, Article 33(2); Convention against Torture, Article 3.

³² With respect to EU law, *see also* Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA and SA junior v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Judgment, 14 May 2020, ECLI:EU:C:2020:367, where the CJEU *inter alia*: (i) held that an asylum seeker should have recourse to national courts to challenge a decision of an asylum authority whereby the country of destination mentioned in a prior return decision is amended (*eg* from Serbia—after it denies readmission—to the asylum seeker’s country of origin) (paras 109-147); (ii) confirmed its holding from *LH v Bevándorlási és Menekültügyi Hivatal* that the Admissibility Criterion is contrary to EU law (paras 148-165); and (iii) held that an asylum application shall not be considered an inadmissible “subsequent application”, in the sense of Article 33(2)(d) of the Asylum Procedures Directive, when a prior application is rejected by an asylum authority on grounds contrary to EU law (*eg* the Admissibility Criterion) (paras 166-203).

³³ United Nations, General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/44/42/Add.1, 11 May 2020, para 56.

³⁴ United Nations, General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/44/42/Add.1, 11 May 2020, para 56.

of NGOs in allegedly promoting and assisting illegal migration. Referring generally to the trend of such narratives and consequent criminalisation of civil society organisations that work with migrants, the Special Rapporteur has also noted that:

These smear campaigns have created a hostile environment for groups providing services to migrants, and have a significant negative effect on fundraising, recruitment and the psychological well-being of civil society organization staff and volunteers. Most devastatingly, these toxic narratives set the stage for the passage or usage of laws that criminalize humanitarian acts or erect administrative obstacles against the work of these organizations, effectively censoring acts that embody the principles and values of humanity and civility.

...

... Criminal indictments, or the risk thereof, also force civil society organizations to spend significant time, money and resources dealing with these threats and negative media exposure rather than carrying out their work by providing services to migrants. This is particularly a problem for smaller organizations with minimal resources.

There are also significant negative physical, mental and financial repercussions on the individual staff members or volunteers of civil society organizations that work with migrants who are the direct target of criminal indictments. They face the pain of spending time in detention, paying high fees for attorneys and loss of reputation. The stress of confronting these charges is significant considering the disproportionately high penalties at stake. ...³⁵

D. THE COMMISSION'S APPLICATION TO THE CJEU

32. On 19 July 2018, the Commission formally notified Hungary that its Asylum Legislation raised concerns as regards its compatibility with EU law, in particular as regards its criminalisation of activities in support of asylum and residence applications (*ie*, the Section 353/A Offence) and introduction of a new non-admissibility ground for asylum applications (*ie*, the new Admissibility Criterion).³⁶
33. Hungary failed to address or alleviate these concerns. The Commission accordingly issued a reasoned opinion on 24 January 2019 highlighting its concerns as regards the

³⁵ United Nations, General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/44/42, 13 May 2020, paras 68 and 72-73.

³⁶ European Commission, Press Release: 'Migration and Asylum: Commission takes further steps in infringement procedures against Hungary', 19 July 2018, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4522.

Asylum Legislation's criminalisation of support to asylum applicants, restriction of individual freedoms and unlawful limitation to the right to asylum.³⁷

34. Hungary again failed to address or alleviate these concerns. On 25 July 2019, the Commission decided to refer the matter to the CJEU.³⁸
35. On 8 November 2019, the Commission filed its Application to the CJEU under Article 258 of the Treaty on the Functioning of the European Union (the *TFEU*). In the Application, the Commission requested the Court to declare that Hungary has failed to fulfil its obligations under:
 - (a) Article 33(2) of Directive 2013/32/EU (the *Asylum Procedures Directive*) (setting out the grounds on which Member States may consider an application for international protection inadmissible) by adding a new Admissibility Criterion to those expressly established in the directive;
 - (b) Articles 8(2), 12(1)(c) and 22(1) of the Asylum Procedures Directive (confirming, respectively, Member States' obligation to ensure effective access to applicants present at border crossing points by organisations and persons providing advice and counselling; applicants' right to communicate with UNHCR or with other organisations providing legal advice or other counselling; and applicants' right to consult legal advisers or other counsellors on matters relating to their applications for international protection); and
 - (c) Article 10(4) of Directive 2013/33/EU (the *Reception Conditions Directive*) (confirming Member States' obligation to ensure that legal advisers and counsellors and persons representing relevant NGOs are able to communicate with and visit applicants in conditions that respect privacy), by introducing the Section 353/A Offence criminalising organising activity carried out in order to enable asylum proceedings to be brought in respect of persons who do not meet the criteria established in Hungary's national asylum law, and prescribing the

³⁷ European Commission, Press Release: 'Asylum: Commission takes next step in infringement procedure against Hungary for criminalising activities in support of asylum applicants', 24 January 2019, available at: https://ec.europa.eu/commission/presscorner/detail/ro/IP_19_469.

³⁸ European Commission, Press Release: 'Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones', 25 July 2019, available at: https://europa.eu/rapid/press-release_IP-19-4260_en.htm.

adoption of restrictive measures with regard to persons accused or convicted of such an offence.³⁹

36. Subsequent to the Commission's Application, the CJEU effectively ruled on the legality under EU law of the Admissibility Criterion in the context of a preliminary ruling requested by the Budapest Administrative and Labour Court as to the compatibility of the Admissibility Criterion with EU law.⁴⁰
37. In *LH v Bevándorlási és Menekültügyi Hivatal*, the CJEU confirmed that the new Admissibility Criterion violates the Asylum Procedures Directive, on the basis that it cannot be justified under any of the exhaustive grounds for declaring an application for international protection inadmissible set out in Article 33(2).⁴¹ In particular, the CJEU held that the Admissibility Criterion could not be considered to be implementing either of the inadmissibility grounds in Article 33(2)(b) or (c) (*ie*, that a country which is not a Member State is considered as a first country of asylum or safe third country for the applicant) on the basis that it did not comply with the requirements of Article 35 or Article 38 (setting out the conditions on Member States' transposition of the first country of asylum or safe third country concept, respectively).
38. The Court subsequently confirmed this holding in *FMS, FNZ, SA and SA junior v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* and went further by ruling that in cases where the applicant was previously rejected as a result of the new Admissibility Criterion, the applicant must be able lodge a new asylum application without the negative consequences otherwise attached to a subsequent application.⁴²
39. As the Admissibility Criterion has already been evaluated by the Court and found to be in violation of EU law, the remainder of these Observations focusses on the

³⁹ Official Journal of the European Union, C 19, Vol 63, 20 January 2020, pp 34-35.

⁴⁰ Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal*, Judgment, 19 March 2020, ECLI:EU:C:2020:218.

⁴¹ Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal*, Judgment, 19 March 2020, ECLI:EU:C:2020:218, para 55.

⁴² Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA and SA junior v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Judgment, 14 May 2020, ECLI:EU:C:2020:367, paras 148-165. *See also* footnote 32 above.

incompatibility of the Section 353/A Offence and the related Section 46/F Ban with Hungary's obligations under EU and international law.

III. THE JURISDICTION OF THE CJEU AND RELEVANCE OF INTERNATIONAL LAW

40. The Commission's Application was made pursuant to Article 258 TFEU, which provides that:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.⁴³

41. The EU is subject to international law in all areas in which it has competence.⁴⁴ Article 3(5) of the Treaty on European Union (*TEU*) states that:

... the Union ... shall contribute to ... the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.⁴⁵

42. This has implications for the CJEU, which is one of the primary organs of the EU and bound to act in accordance with EU law. In particular, it means that the CJEU must

⁴³ Case C-364/10, *Hungary v Slovak Republic*, Judgment, 16 October 2012, ECLI:EU:C:2012:630, para 67.

⁴⁴ The Court has held that it has no mandate under the Treaties to rule on the interpretation or application of an international agreement entered into by the Member States which is outside of the competencies of the EU. Case C-132/09, *European Commission v Kingdom of Belgium*, Judgment, 30 September 2010, ECLI:EU:C:2010:562, para 45; Case C-457/18, *Slovenia v Croatia*, Judgment, 31 January 2020, ECLI:EU:C:2020:65, para 91. However, the Court can rule and has ruled on claims concerning the infringement of EU law even if the underlying facts also relate to or give rise to claims concerning the violation of international law by an EU Member State. *See, eg*, Case C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, Judgment, 12 September 2006, ECLI:EU:C:2006:543.

⁴⁵ *TEU*, Article 3(5). *See also* Case C-363/18, *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* Judgment, 12 November 2019, ECLI:EU:C:2019:954, para 48.

consider, interpret and apply international law in the exercise of its powers,⁴⁶ including rules of customary international law,⁴⁷ and general principles of international law.⁴⁸

43. Article 3(5) TEU also requires the EU to respect and abide by the rules of international law in the exercise of its powers. EU law and EU regulations must therefore be interpreted in the light of relevant rules of international law.⁴⁹
44. The CJEU has consistently interpreted EU law in accordance with fundamental human rights, which, as commentators observe, has had the effect of imposing human rights obligations on the EU Member States as a matter of EU law.⁵⁰ Notably, the CJEU has proceeded in this manner both before⁵¹ and after⁵² the adoption of the Charter of Fundamental Rights of the European Union (the *EU Charter*).
45. In respect of EU asylum policy and law, the CJEU has confirmed that the relevant EU regulations and directives need to be interpreted in the light of and in conformity with relevant international law, including the 1951 Convention relating to the Status of Refugees (the *Refugee Convention*), as well as the rights set out in the EU Charter:

⁴⁶ Case C-466/11, *Gennaro Currà and Others v Bundesrepublik Deutschland and Repubblica italiana*, Order, 12 July 2012, ECLI:EU:C:2012:465, para 18.

⁴⁷ Case C-162/96, *Racke GmbH & Co v Hauptzollamt Mainz*, Judgment, 16 June 1998, ECLI:EU:C:1998:293 paras 44-46; Case C-366/10, *ATAA v Secretary of State for Energy and Climate Change*, Judgment, 21 December 2011, ECLI:EU:C:2011:864.

⁴⁸ Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment, 25 February 2010, ECLI:EU:C:2010:91.

⁴⁹ Case C-286/90, *Anklagemyndigheden v Poulsen and Diva Navigation*, Judgment, 24 November 1992, ECLI:EU:C:1992:453, para 9. This embodies the principle of harmonious interpretation under EU law. See G de Búrca, “Internationalization of international law by the CJEU and the US Supreme Court” (2016) Vol 13(4) *International Journal of Constitutional Law* p 987, p 995, especially footnote 34.

⁵⁰ P Craig and G de Búrca, *EU Law – Text, Cases, and Materials* (6th edition 2015), p 408: “Another way in which the EU judiciary has increasingly taken account of fundamental rights is by interpreting EU measures, even when their annulment is not sought, in conformity with such rights. This technique of requiring EU legislation to be interpreted and implemented in compliance with fundamental human rights has the effect both of insulating EU legislation against challenge and, as we shall see below, of imposing human rights obligations, as a matter of EU law, on national authorities. In the famous case of *Google Spain*, for example, the CJEU interpreted the EU Data Processing Directive in the light of Articles 7 and 8 of the Charter in such a way that a ‘right to be forgotten’ (*ie* the right to have data concerning oneself deleted from search engines, in certain circumstances) had to be protected by the operator of a search engine.”

⁵¹ Case C-219/91, *Criminal Proceedings against Ter Voort*, Judgment, 28 October 1992, ECLI:EU:C:1992:414, paras 33-38.

⁵² Joined Cases C-148/13 to C-150/13, *A, B & C v Staatssecretaris van Veiligheid en Justitie*, Judgment, 2 December 2014, ECLI:EU:C:2014:2406, paras 45-46.

It is apparent from recitals 3, 16 and 17 in the preamble to Directive 2004/83 that the [Refugee] Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (judgment in *N.*, C-604/12, EU:C:2014:302, paragraph 27).

*Directive 2004/83 must, therefore, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the [Refugee] Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter (judgment in X and Others, C-199/12 to C-201/12, EU:C:2013:720, paragraph 40).*⁵³

46. The need to take account of relevant international law is expressly recognised in EU primary law and secondary legislation relating to asylum.
- (a) Article 18 of the EU Charter provides that “the right to asylum shall be guaranteed with due respect for the rules of the [Refugee] Convention”;
 - (b) Article 78(1) TFEU provides that the EU’s common asylum policy “must be in accordance with the [Refugee] Convention”;
 - (c) The recitals to each of the Asylum Procedures Directive, Reception Conditions Directive, EU Qualification Directive and the Dublin III Regulation recall the 1999 agreement of the European Council in Tampere to “work towards establishing a Common European Asylum System, based on the full and inclusive application of the [Refugee] Convention”,⁵⁴ and the fact that Member

⁵³ Joined Cases C-148/13 to C-150/13, *A, B & C v Staatssecretaris van Veiligheid en Justitie*, Judgment, 2 December 2014, ECLI:EU:C:2014:2406, paras 45-46 (emphasis added). See also Joined Cases C-175/08, C-176/08, C-178/08, C-179/08, *Salahadin Abdulla and Others v Bundesrepublik Deutschland*, Judgment, 2 March 2010, ECLI:EU:C:2010:105, paras 51-54.

⁵⁴ European Council, Presidency Conclusions, 15-16 October 1999, Tampere, para 13, available at http://www.europarl.europa.eu/summits/tam_en.htm; Asylum Procedures Directive, Recital (3); Reception Conditions Directive, Recital (3); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (the *Qualification Directive*), Recital (3); Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (*Dublin III Regulation*), Recital (3). See also Qualification Directive, Article

States are bound by their obligations under instruments of international law to which they are parties;⁵⁵

- (d) The recitals to each of the Asylum Procedures Directive, Reception Conditions Directive, EU Qualification Directive, Dublin III Regulation and EURODAC Regulation provide that they “respect[] the fundamental rights and observe[] the principles recognised in particular by the [EU] Charter” and “should therefore be implemented accordingly”;⁵⁶
- (e) In addition, the recitals to each of the Asylum Procedures Directive, Reception Conditions Directive, EU Qualification Directive and the Dublin III Regulation refer to the Convention on the Rights of the Child,⁵⁷ and the Reception Conditions Directive and the Dublin III Regulation refer to the ECHR;⁵⁸ and
- (f) Article 3(5) of the EURODAC Regulation requires fingerprinting procedures to be in accordance with the safeguards set out in the EU Charter, the ECHR and the Convention on the Rights of the Child.⁵⁹

47. In these circumstances, the CJEU has confirmed that the provisions of the Asylum Procedures Directive must be interpreted in the light of its general scheme and purpose

9.1, elaborating on the meaning of an act of persecution within the Article 1(A) of the Refugee Convention.

⁵⁵ Asylum Procedures Directive, Recital (15); Reception Conditions Directive, Recital (10); Qualification Directive, Recital (17); Dublin III Regulation, Recital (32).

⁵⁶ Asylum Procedures Directive, Recital (60); Reception Conditions Directive, Recital (35); Qualification Directive, Recital (16); Dublin III Regulation, Recital (39); Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (*EURODAC Regulation*), Recital (50).

⁵⁷ Asylum Procedures Directive, Recital (33); Reception Conditions Directive, Recital (9), Recital (18); Qualification Directive, Recital (18); Dublin III Regulation, Recital (13).

⁵⁸ Reception Conditions Directive, Recital (9); Dublin III Regulation, Recital (14). *See also* Qualification Directive, Article 9.1, elaborating on the meaning of an act of persecution within the Article 1(A) of the Refugee Convention by reference to standards set out in the ECHR.

⁵⁹ EURODAC Regulation, Article 3(5).

and in a manner consistent with the Refugee Convention, relevant international law and the fundamental rights recognised by the EU Charter.⁶⁰ Further, it has held that:

[I]t is clearly in the interests of the European Union that, in order to forestall future differences of interpretation, the provisions of international agreements which have been taken over by national law and by EU law should be given a uniform interpretation, irrespective of the circumstances in which they are to apply ...⁶¹

48. It follows that, even if the CJEU is ultimately pronouncing on the infringement of EU law, the interpretation and application of EU law aimed at establishing the common asylum policy is informed by the Refugee Convention and other relevant international law, as well as the fundamental rights protected by the EU Charter and other international instruments (such as the ECHR).
49. In addition, when considering the scope and content of human rights and fundamental freedoms in the case at hand, the CJEU should also be informed by the relevant guidance offered in the following instruments:
- (a) the UN Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (the *UN Principles and Guidelines*);⁶²
 - (b) the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights (the *Declaration on Human Rights Defenders* or the *Declaration*);⁶³

⁶⁰ See, *inter alia*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others v Bundesrepublik Deutschland*, Judgment, 2 March 2010, ECLI:EU:C:2010:105, paras 51-54; Case C-31/09, *Bolbol v Bevándorlási és Állampolgársági Hivatal*, Judgment, 17 June 2010, ECLI:EU:C:2010:351, paras 36-38; Joined Cases C-57/09 and C-101/09, *B and D v Bundesrepublik Deutschland*, Judgment, 9 November 2010, ECLI:EU:C:2010:661, paras 76-78; Joined Cases C-71/11 and 99/11, *Y and Z v Bundesrepublik Deutschland*, Judgment, 5 September 2012, ECLI:EU:C:2012:518, paras 47-48; Case C-364/11, *Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal*, Judgment, 19 December 2012, ECLI:EU:C:2012:826, paras 42-43; Joined Cases C-443/14 and C-444/14, *Alo and Osso v Region Hannover*, Judgment, 1 March 2016, ECLI:EU:C:2016:127, paras 28-30; Case C-573/14, *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*, Judgment, 31 January 2017, ECLI:EU:C:2017:71, paras 41-42.

⁶¹ Case C-481/13, *Mohammad Ferooz Qurbani*, Judgment, Judgment, 17 July 2014, ECLI:EU:C:2014:2101, para 26.

⁶² See paras 133-135 and 166-170 below.

⁶³ See paras 140-165 below.

(c) the OSCE/ODIHR Guidelines on the Protection of Human Rights Defenders (the *ODIHR Guidelines*);⁶⁴ and

(d) the Council of Europe Declaration of the Committee of Ministers on action to improve the protection of human rights defenders and Resolution 2225 (2018).⁶⁵

50. As discussed in the Appendix to these Observations, these instruments reflect and are derived from principles and rights guaranteed under legally binding international instruments, such as the EU Charter. They do not purport to set out new standards or create new rights for asylum seekers or human rights defenders; rather they elaborate on the protection of such individuals within the framework of existing international human rights law.⁶⁶

IV. HUNGARY'S FAILURE TO FULFIL ITS OBLIGATIONS UNDER EU AND INTERNATIONAL LAW

51. As set out in full at paragraph 21 above, Section 353/A of the Hungarian Criminal Code now provides that anyone who “engages in any organising activity aimed at enabling a person to initiate an asylum procedure in Hungary” where that person is not persecuted in their country of origin, of habitual residence or through which they arrived in Hungary, is guilty of a crime. The punishment for this crime increases if such facilitation is undertaken for financial gain, by assisting more than one person or within eight kilometres of the border. The statute provides for an inclusive definition of prohibited “organising activity” that covers, but is not limited to, “border monitoring”, the making or dissemination of “information materials” and the establishment or operation of “a network”.

52. In the sections below, the Organisations address how the Section 353/A Offence and, where applicable, the associated Section 46/F Ban: (a) violate Hungary’s obligation to establish and maintain a framework conducive to the work of human rights defenders under EU law; (b) fail to respect the fundamental rights of human rights defenders under the EU Charter and ECHR; and (c) in restricting the activities of human rights defenders

⁶⁴ See paras 171-173 below.

⁶⁵ See paras 174-179 below.

⁶⁶ See paras 134, 141-144, 168 and 172 below.

engaged in asylum support work, also violate the rights of asylum seekers under EU law, the EU Charter and ECHR.

A. THE ASYLUM LEGISLATION VIOLATES HUNGARY'S OBLIGATION TO ESTABLISH AND MAINTAIN A FRAMEWORK THAT ENABLES HUMAN RIGHTS DEFENDERS TO ASSIST ASYLUM SEEKERS

53. The Asylum Procedures Directive and Reception Conditions Directive require Member States to implement and maintain a legal framework that allows human rights defenders to work, communicate with asylum seekers and provide them with the information and assistance to which they are entitled.⁶⁷

54. In particular, EU Member States must establish and maintain a legal framework that:

- (a) allows asylum seekers to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants;⁶⁸
- (b) ensures those providing advice and counselling have effective access to applicants present at border crossing points, including transit zones;⁶⁹
- (c) ensures the provision of a basic level of free legal assistance (including by ensuring that a legal adviser has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting with an asylum applicant) and guarantees the right of applicants to consult (at their own cost) a legal adviser or counsellor at all stages of the procedure;⁷⁰
- (d) allows asylum seekers to receive information on organisations and groups of persons that are able to provide legal assistance or to inform them of the reception conditions;⁷¹

⁶⁷ See paras 185-188 below.

⁶⁸ Asylum Procedures Directive, Article 12(1)(c).

⁶⁹ Asylum Procedures Directive, Article 8(2).

⁷⁰ Asylum Procedures Directive, Articles 19-25.

⁷¹ Reception Conditions Directive, Article 5(1).

- (e) ensures that family members, those providing legal advice and representatives of relevant NGOs have the possibility to visit and communicate with asylum seekers in conditions that respect privacy;⁷² and
- (f) informs detained asylum seekers of the possibility of requesting free legal assistance in the first place.⁷³

55. To be effective, the Asylum Procedures Directive and Reception Conditions Directive require that individuals and organisations are able to operate and render legal and other assistance to asylum seekers. Member States are obliged to establish and maintain a legal framework that does, *in fact*, make the specified legal and other forms of assistance available to asylum seekers. It is a necessary corollary of that obligation that measures obstructing or preventing individuals, groups and organisations from providing such services constitute a violation of the obligation to establish and maintain a legal framework making those services available to asylum seekers.

56. The Asylum Procedures Directive and Reception Conditions Directive do not provide expressly for the protection of the persons, groups or organisations who provide the services that form part of the legal framework that Member States are required to establish and maintain. However, the obligations under the Asylum Procedures Directive and Reception Conditions Directive assume that certain services provided by such persons, groups or organisations will be available to asylum seekers. The ability of such persons to provide those services to asylum seekers and their entitlement to legal protection within a Member State is thus implicit in the Asylum Procedures Directive and Reception Conditions Directive. This underscores the essential role such persons play in ensuring that the rights and benefits conferred on asylum seekers under EU and international law are real and effective. The importance of ensuring that such persons are protected is recognised by international instruments under which they qualify as and are entitled to the protections afforded to “human rights defenders”. These include:

- (a) the Declaration on Human Rights Defenders, which, among other things, affirms the right of human rights defenders to lawfully exercise their profession or

⁷² Reception Conditions Directive, Article 10(4)

⁷³ Reception Conditions Directive, Article 9(4).

occupation and to offer and provide professionally qualified legal assistance or other relevant advice and assistance,⁷⁴ and

- (b) the UN Principles and Guidelines, which provide that States should create the appropriate legal environment to enable human rights and humanitarian actors to protect and assist migrants (Principle 1, Guideline 6), ensure that organisations and individuals who rescue or provide assistance to migrants are not criminalised or otherwise punished for doing so (Principle 4, Guideline 7) and provide a safe and accessible environment for human rights defenders, not criminalise or otherwise penalise them for the provision of support and assistance to migrants and ensure that legislation and restrictions affecting their activity, including their access to funding, are in accordance with international standards (Principle 18, Guidelines 1, 2 and 6).⁷⁵

- 57. Although these instruments are themselves not legally binding, the principles set out in them reflect and are derived from principles and rights guaranteed under legally binding instruments of international human rights law. The General Assembly of the United Nations adopted the Declaration on Human Rights Defenders by consensus in Resolution 53/144 of 9 December 1998,⁷⁶ thus confirming the widespread support enjoyed by the principles it contains within the international community. The EU has also endorsed the Declaration on Human Rights Defenders and annexed it to its 2004 Guidelines on Human Rights Defenders, observing that such “Guidelines also contribute to reinforcing the EU’s human rights policy in general.”⁷⁷
- 58. The CJEU should therefore be guided by these instruments in its understanding and interpretation of Member States’ obligations under the Asylum Procedures Directive and Reception Conditions Directive, including by making explicit the obligations of Member States to protect and facilitate the work of persons who qualify as “human rights defenders” as a necessary part of a legal framework that relies on the ability of

⁷⁴ Declaration on Human Rights Defenders, Articles 9(3)(c) and 11. *See also* paras 164-165 below.

⁷⁵ *See* paras 166-170 below.

⁷⁶ *See* para 140 below.

⁷⁷ European Union, *Ensuring Protection – European Union Guidelines on Human Rights Defenders*, available at: https://eeas.europa.eu/sites/eeas/files/eu_guidelines_hrd_en.pdf (the *EU Guidelines*), para 4 and Annex I.

those persons to make certain services available to asylum seekers. A failure to recognise the interrelationship between establishing and maintaining a real and effective legal framework for asylum seekers within the EU and the need to afford legal protection to persons who qualify as human rights defenders would create the risk of some Member States seeking to discharge their obligations through superficial measures that do not make the relevant rights effective in practice. Worse still, in the present case Hungary has introduced domestic laws targeting such persons and their work in an attempt to undermine the effective operation of the legal framework for asylum that they are obliged to establish and maintain as a matter of EU law.

59. The Section 353/A Offence and the related Section 46/F Ban place Hungary in breach of its obligations under these Directives for at least the following four reasons.
60. *First*, the Section 353/A Offence effectively creates a regime under which whether the enabling of an application for asylum is criminal is to be determined primarily on the basis of whether objectively considered—presumably by the Hungarian authorities—the applicant qualifies for asylum under Hungarian law. This requires a person rendering assistance to an asylum seeker accurately to determine for themselves at the time of providing assistance whether, objectively, an asylum seeker would qualify for asylum. That appears to be the only way in which the person exposed to potential criminal liability can know whether assisting with an application for asylum will result in such criminal liability.
61. The fact that, in order to convict a person of the Section 353/A Offence, a prosecutor would also need to prove a subjective intent to commit the act on the part of the person rendering assistance⁷⁸ provides limited comfort in cases where the strength of an asylum seeker’s application may not be clear cut. In such cases, should the application ultimately be rejected, the person rendering assistance would run the risk of being subsequently held to have had the requisite intent at the time of providing such assistance to the extent he or she had, or could be assumed to have had, any doubts as to the likely success of the application.

⁷⁸ Official translation of Act C of 2012 on the Criminal Code by the Ministry of Justice, Section 4(1) (“A criminal offence shall mean an act committed intentionally or, where negligent commission is punishable under this Act, negligently which is a danger to society and is subject to punishment under this Act.”), available at: http://njt.hu/translated/doc/J2012T0100P_20200331_FIN.PDF.

62. The forms of assistance that are criminalised include the making or dissemination of “information materials” and the establishment or operation of “a network” that could be used to prepare and distribute such materials and to provide support or advice to persons seeking or considering whether to seek asylum. If such information or advice is provided to a person who then initiates asylum proceedings that turn out to be unsuccessful, it appears that the person providing the information, support or advice may have been guilty of a criminal offence from the moment of providing the information, support or advice. Providing assistance to asylum seekers who are ultimately unsuccessful, where the risk of such application being unsuccessful is anticipated, through providing information, support and advice is thus criminalised.
63. The range of conduct to which the Section 353/A Offence appears to apply is extremely broad. It would appear to capture the dissemination of pamphlets or other informational resources to persons applying or considering applying for asylum in Hungary. Through its application to the establishment or operation of a “network” it would appear also to capture the referral of an asylum seeker to qualified legal advisers or other counsellors.
64. A critical difficulty with all of this is that, when he or she is seeking asylum, an asylum seeker may not be able to determine and those assisting the asylum seeker may not be able to determine, particularly initially, whether he or she will or will not ultimately be found to qualify for asylum in a particular place, in this case Hungary. The provision of information, support, advice and representation to asylum seekers, whether, once everything relevant is known and has been evaluated, they are likely to be successful or not, is an important aspect of promoting conditions in which their legal rights, or absence thereof, can be fairly determined. What those legal rights are is ultimately a matter for the competent authorities, not for those assisting asylum seekers to determine for themselves in advance of providing them with any assistance.
65. By criminalising the provision of assistance to asylum seekers whose applications may ultimately be unsuccessful, the Section 353/A Offence plainly seeks to deter the provision of assistance to all asylum seekers. It is inconsistent with the existence of a legal framework in which the rights of asylum seekers can be fairly determined on an informed basis. The Asylum Procedures Directive and Reception Conditions Directive provide, among other things, that Hungary must allow asylum seekers to:
(a) communicate with the UNHCR and other organisations providing legal advice or

other counselling;⁷⁹ (b) receive information on organisations and groups of persons that are able to provide legal assistance or to inform them of the available reception conditions;⁸⁰ and (c) inform detained asylum seekers of the possibility to request free legal assistance in the first place.⁸¹

66. Hungary cannot fulfil its obligations to allow asylum seekers these opportunities when it has criminalised the provision of such information under the Section 353/A Offence in such a broad way. This is particularly so in circumstances where Hungary also imposed the Admissibility Criterion discussed above, which made it exceedingly difficult, if not impossible, to succeed in an application for asylum in Hungary. The fact that virtually all applications for asylum were rejected as inadmissible pursuant to the Admissibility Criterion meant that assistance to effectively all asylum seekers in Hungary was criminalised. The Admissibility Criterion has now been declared unlawful by the CJEU and is no longer applied by the Hungarian Government to *automatically* render applications inadmissible. However, the Section 353/A Offence still has the effect of exposing a person rendering assistance to an asylum seeker to the risk of criminal liability based on the strength of a particular application *based on a substantive assessment of the merits*, thus disincentivising and limiting the provision of assistance to those with all but the strongest and most clear-cut asylum claims.
67. *Second*, the Section 353/A Offence’s criminalisation of the dissemination of information and other assistance to certain asylum seekers contains no exception in respect of legal assistance. On its face, the Section 353/A Offence therefore appears to criminalise even the provision of legal advice or other assistance on how to lodge an application to such asylum seekers. According to the UN Special Rapporteur on the human rights of migrants, the Hungarian Government has represented that the provision of legal advice, information and humanitarian assistance is not captured by the Section 353/A Offence.⁸² However, as the Special Rapporteur notes, in the absence of express exceptions in the wording of the legislation, the activities covered by the Section 353/A Offence “could be interpreted as *any* support or assistance provided by civil society

⁷⁹ Asylum Procedures Directive, Article 12(1)(c).

⁸⁰ Reception Conditions Directive, Article 5(1).

⁸¹ Reception Conditions Directive, Article 9(4).

⁸² United Nations, General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/44/42/Add.1, 11 May 2020, para 56.

organizations to asylum seekers exercising their legal right to submit an asylum application.”⁸³ The breadth of the plain words of the provision creates a chilling effect on those who would ordinarily provide legal advice, and may cause them to apply “self-censorship” by withholding services.⁸⁴

68. Any resultant reduction in the provision of services, in turn, undermines the numerous procedural guarantees specifically relating to legal assistance set out in the Asylum Procedures Directive, which require Member States to allow asylum seekers to communicate with organisations providing legal advice,⁸⁵ ensure the provision of a basic level of free legal assistance and guarantee the right of applicants to consult at their own cost a legal adviser or counsellor at all stages.⁸⁶ Self-evidently, such rights relating to legal assistance cannot be ensured where the provision of such assistance could be subject to criminal sanction.
69. The potential criminalisation of such assistance, together with the imposition of a heightened penalty where the assistance is rendered for financial gain and/or for multiple persons,⁸⁷ also constitutes an infringement of the right of asylum support lawyers or other advisers lawfully to exercise their profession or occupation and to offer and provide professionally qualified legal assistance or other relevant advice and assistance pursuant to the Declaration on Human Rights Defenders.⁸⁸
70. *Third*, the Section 353/A Offence imposes a heightened penalty when the facilitation offence is committed within eight kilometres of the Hungarian border.⁸⁹ The explanatory note accompanying the introduction of the Section 353/A Offence explains that the heightened penalty is justified in such circumstances due to the “greater risk” implied when a person “carries out the activity on the location where the conditions for

⁸³ United Nations, General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/44/42/Add.1, 11 May 2020, para 56 (emphasis added).

⁸⁴ United Nations, General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/44/42/Add.1, 11 May 2020, para 56.

⁸⁵ Asylum Procedures Directive, Article 12(1)(c).

⁸⁶ Asylum Procedures Directive, Articles 19-25.

⁸⁷ Hungarian Criminal Code, Section 353/A(3)(a)-(b).

⁸⁸ Declaration on Human Rights Defenders, Articles 9(3)(c) and 11.

⁸⁹ Hungarian Criminal Code, Section 353/A(3)(c).

the offence are best available (within 8 kms)".⁹⁰ However, as noted above, Hungary itself had (since 2017 and until recently due to the COVID-19 pandemic) required all asylum applications to be lodged at the Hungarian-Serbian border.⁹¹ The effect, and presumably the intent, of the heightened penalty was therefore to restrict access by human rights defenders to asylum applicants at the Serbian border, where their services were most in demand. This is further confirmed and exacerbated by the Section 46/F Ban, which applies to prevent any person subject to criminal proceedings for allegedly having committed the Section 353/A Offence (without actually having been convicted of such offence) from coming within eight kilometres of the border.

71. This is contrary to the express provisions of the Asylum Procedure Directive, which require that those providing advice and counselling have effective access to applicants present at border crossing points, including transit zones, at external borders⁹² and that legal advisers have access to closed areas, such as detention facilities and transit zones, for the purpose of consulting with asylum applicants.⁹³ It is also contrary to the Reception Conditions Directive, which requires that legal advisers and counsellors, as well as representatives of NGOs, have the possibility to communicate with and visit asylum seekers.⁹⁴ Effective access cannot be ensured when it is subject to criminal sanction (pursuant to the Section 353/A Offence) or prevented altogether (as a result of the Section 46/F Ban).⁹⁵

⁹⁰ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, General reasoning and Detailed reasoning for Section 11, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

⁹¹ See para 28 above.

⁹² Asylum Procedures Directive, Article 8(2).

⁹³ Asylum Procedures Directive, Article 23(2).

⁹⁴ Receptions Conditions Directive, Article 10(4).

⁹⁵ The Asylum Procedures Directive and Reception Conditions Directive permit limitations on access to crossing points and detention facilities to be imposed only when "they are objectively necessary for the security, public order or administrative management" and "provided that access is not thereby severely restricted or rendered impossible". See Asylum Procedures Directive, Article 8(2) and Reception Conditions Directive, Article 10(4). Neither the Section 353/A Offence nor the Section 46/F Ban, however, are "objectively necessary" for the reasons set out in the Directives. Moreover, the Section 353/A Offence's heightened penalty for commission of the offence within eight kilometers of the border (including the transit zones) constitutes a severe restriction on access, while the Section 46/F Ban renders access impossible for individuals subject to criminal proceedings for allegedly committing the Section 353/A Offence—the same individuals likely to be engaged in rendering asylum support services to applicants at transit zones.

72. *Fourth*, the Section 353/A Offence contravenes numerous protections set out in the Declaration on Human Rights Defenders and UN Principles and Guidelines, most notably those obliging States to ensure a safe and accessible environment for human rights defenders to undertake their work and to refrain from criminalising their activities. The Section 353/A Offence thus places Hungary in breach of the international standards of protection applicable to human rights defenders embodied in the Declaration on Human Rights Defenders and the UN Principles and Guidelines, and by doing so, also places Hungary in breach of its obligations under the EU Directives, which implicitly assume a certain level of protection for human rights defenders in the rights guaranteed to asylum seekers thereunder.

B. THE ASYLUM LEGISLATION FAILS TO RESPECT THE FUNDAMENTAL RIGHTS OF HUMAN RIGHTS DEFENDERS

73. As well as violating specific provisions of EU law, Hungary's Asylum Legislation also fails to respect, promote and guarantee the fundamental rights of persons and organisations seeking to provide support and information to asylum seekers. As Hungary's implementation of the Asylum Procedures Directive and the Reception Conditions Directive, including through the Asylum Legislation, falls within the competencies of the EU, such implementation must respect the fundamental rights guaranteed by the EU Charter, as well as other international instruments such as the ECHR pursuant to the general principles of EU law.⁹⁶

74. The Organisations address below how the Section 353/A Offence constitutes an illegal restriction on human rights defenders' rights to: (1) freedom of association; and (2) freedom of expression; as well as (3) how the Section 46/F Ban constitutes a restriction on human rights defenders' right to freedom of movement.

1. Freedom of association

75. Article 12 of the EU Charter provides that:

Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

⁹⁶ See paras 190-198 below.

76. Thus, pursuant to Article 12, everyone has the right to peaceful assembly and freedom of association “at all levels”, including, but not only, in respect of “civic matters”.
77. As Article 5 of the Declaration of Human Rights Defenders explains, freedom of association entails that everyone has the right to meet or assemble peacefully, to form, join and participate in NGOs, associations or groups and to conduct activities in pursuit of common interests without State interference.⁹⁷
78. The Section 353/A Offence directly limits the right to freedom of association of asylum support NGOs and their members by criminalising the act of engaging in “organising activity” to assist certain asylum seekers with the initiation of asylum proceedings.
79. As is well known, many relevant NGOs largely function, and provide support to asylum seekers, through a network of volunteers with the skills to assist individuals with the asylum application process. The Section 353/A Offence specifically defines illegal “organising activity” to include “the establishment or operation of a network”. Thus, the Section 353/A Offence effectively exposes to potential criminal liability any membership and involvement of individuals in NGOs, associations and other groups providing general assistance to asylum seekers without first ascertaining for themselves that, as may be determined by the Hungarian authorities in the future, any application for asylum would be valid under Hungarian law.
80. Freedom of association also includes the right to access funding.⁹⁸ This is recognised in Article 13 of the Declaration on Human Rights Defenders, which confirms that everyone has the right to solicit, receive and utilise resources for promoting and protecting human rights and fundamental freedoms.⁹⁹
81. By also exposing to potential criminal liability anyone “who provides material means” to those assisting asylum seekers and who otherwise comes within the provision, the Section 353/A Offence restricts, and plainly seeks to restrict, the ability of NGOs working to support asylum seekers to access funding. Many NGOs depend at least

⁹⁷ See paras 149-153 below.

⁹⁸ See *eg Parti Nationaliste Basque – Organisation Régionale d’Iparralde v France*, ECtHR, no 71251/01, Judgment, 7 June 2007, paras 36-38; *Ramazanova and others v Azerbaijan*, ECtHR, no 44363/02, Judgment, 1 February 2007, paras 59-60.

⁹⁹ See paras 152-153 below.

partly, if not wholly, on voluntary donations and grants to pursue their objectives. However, under Section 353/A(2), any person or organisation that provides funding to an NGO could be exposed to criminal liability in Hungary if any representative of the NGO assists with an unsuccessful application in breach of Section 353/A. The Section 353/A Offence thus plainly seeks to discourage the funding of NGOs involved in asylum support work in Hungary, which already tends to occur on a voluntary and discretionary basis, and thereby to deprive NGOs of the funding required to undertake such work.

82. Hungary is permitted to impose limitations on the rights and freedoms recognised in the EU Charter. However, these limitations are subject to certain conditions. Article 52(1) of the EU Charter provides that:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

83. Article 52(3) of the EU Charter further provides that:

In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said [ECHR].

84. Under Article 11 of the ECHR, any interference with the freedom of association must be: (a) “prescribed by law”; (b) pursue a legitimate aim (in particular, one of the aims set out in Article 11(2)); and (c) be “necessary in a democratic society”.¹⁰⁰ The restriction imposed by the Section 353/A Offence satisfies none of these conditions.

85. *First*, “prescribed by law” requires that a law must 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 and to regulate their conduct”.¹⁰¹

¹⁰⁰ ECHR, Article 11(2); *Gorzelik and Others v Poland*, ECtHR [GC], no 44158/98, Judgment, 17 February 2004, para 53.

¹⁰¹ *Gorzelik and Others v Poland*, ECtHR [GC], no 44158/98, Judgment, 17 February 2004, para 64.

86. The Section 353/A Offence falls short of this standard. Not only does it criminalise wide categories of activities such as “the making or dissemination of information materials” and “the establishment or operation of a network” and sanction anyone “who provides material means” for such activities, but it also provides for the general criminalisation of all “organising activity”, which, according to the Hungarian Government, is broad enough to capture “any conduct that may be of assistance to the person mentioned in the legal provision”.¹⁰²
87. The Section 353/A Offence is therefore capable of capturing any act of assistance, direct or indirect, even very minor assistance such as the distribution of a leaflet explaining the application process to an asylum seeker or indirect assistance such as the making of a donation to an NGO that does so.
88. The Section 353/A Offence is framed in such a way that a person or group may not be able to know at the time that they render assistance to an asylum seeker whether their conduct is captured by the Section 353/A Offence. In practical terms, where it is anticipated that an application might be rejected, it would only be after an asylum seeker lodges an application for refugee status with the Hungarian authorities and that application is rejected that the individual or group would know that their conduct constituted all along an offence under Hungarian law.
89. The Section 353/A Offence therefore imposes on those assisting asylum seekers the responsibility to determine whether a request for asylum is likely to be granted by the Hungarian authorities before lending any assistance. The consequence of considering that an asylum seeker arguably has a valid basis for asylum in Hungary, in circumstances where the Hungarian authorities ultimately reject the application for asylum, may be personal criminal liability. This is all the more problematic because the very activities that might enable someone assisting an asylum seeker to evaluate the merits of that person’s claim to asylum, in particular the process of providing advice or counselling on a particular application, may themselves already be in violation of Section 353/A if an application is ultimately pursued by the asylum seeker and denied by the Hungarian authorities.

¹⁰² Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, Detailed reasoning for Section 11, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

90. The Hungarian Government's decision to make criminality at the time of acting depend primarily upon a contingency (*ie*, a future determination of the asylum seeker's status) appears to constitute a deliberate attempt to maximise the chilling effect of the Section 353/A Offence on persons or groups providing assistance to asylum seekers. As a result of Section 353/A, any person or group who assists an asylum seeker in Hungary will have to take the risk that their conduct will subsequently be alleged to have been criminal if an asylum seeker's application is rejected. As explained above, this uncertainty has the effect of discouraging the rendering of support to asylum seekers with all but the strongest cases, and hence limiting access to such support for a wide swathe of asylum seekers.
91. *Second*, to pursue a legitimate aim, any restriction on the right to freedom of association must be imposed on the basis of one or more of the grounds listed in Article 11(2) of the ECHR, namely: protection of national security, public safety, public order, public health, morals, and/or the rights and freedoms of others.¹⁰³
92. The Hungarian Government justified the introduction of the Section 353/A Offence by reference to "the public order and public security of [Hungary] through the protection of the state border", citing "the abusive use of asylum procedures and the organizational activity promoting the stay in the country" in connection with "illegal migration".¹⁰⁴
93. The scope of the new offence goes far beyond criminalising any abuse of Hungary's asylum procedures. As explained further above, it is extremely broad in its scope. Although the Hungarian Government has represented otherwise, on its face the Section 353/A Offence appears to prohibit even basic legal advice and humanitarian assistance in cases falling within the application of the provision.
94. The Hungarian Criminal Code already contains a number of provisions designed to prevent the abusive use of asylum procedures, *eg* by providing criminal sanctions

¹⁰³ ECHR, Article 11(2).

¹⁰⁴ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, Detailed reasoning for Section 11, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

against illegal border crossing, human smuggling, and the facilitation of illegal residence, including through marriage (and other forms of family-related) fraud.¹⁰⁵

95. The circumstances surrounding the introduction of the Section 353/A Offence also undermine any claim that it is in pursuit of public order and public security. The overarching aim of the Section 353/A Offence is to curtail immigration in general, on the asserted basis that “Hungarians ... do not want Hungary to become an immigrant country”.¹⁰⁶ While the Hungarian Government in its explanatory notes supporting the introduction of the Section 353/A Offence asserts that “immigration” in general poses risks to “national security”, it does not explain this alleged connection, fails to distinguish between different kinds of immigration and does not recognise the particular considerations that apply to asylum seekers.¹⁰⁷
96. As noted above, the Section 353/A Offence was formally introduced to the Hungarian Parliament as part of the “STOP Soros Act Package”, and in the context of statements such as that of the spokesperson of the ruling Fidesz’s parliamentary group that:

It is precisely because of such, migrant-friendly organisations threatening national security, that the Stop Soros legislative proposals must be put on Parliament’s agenda.¹⁰⁸

97. Taking all circumstances into account, the Asylum Legislation thus “raise[s] serious doubts about the legitimacy of the aim behind [it]”.¹⁰⁹ In the words of the Venice Commission, the Section 353/A Offence is much more like “a pretext to control NGOs”, “restrict their ability to carry out their legitimate work” and generally “hinder persons

¹⁰⁵ See Official translation of Act C of 2012 on the Criminal Code by the Ministry of Justice, Sections 352/A, 353, 354 and 355, available at: http://njt.hu/translated/doc/J2012T0100P_20200331_FIN.PDF.

¹⁰⁶ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, General reasoning, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

¹⁰⁷ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, Detailed reasoning for Section 11, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

¹⁰⁸ Information update by the Hungarian Helsinki Committee, ‘One year after – How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention’, 1 July 2019, p 2, available at: <https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf>.

¹⁰⁹ Venice Commission, OSCE/ODHIR, *Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package Which Directly Affects NGOs*, 25 June 2018, para 80.

from applying for asylum” than a measure genuinely aimed at curbing any abusive use of asylum procedures or otherwise protecting public order or public safety.¹¹⁰

98. *Third*, to be necessary in a democratic society, legislation restricting rights “must answer a ‘pressing social need’, be proportionate to the ‘legitimate aim’, and the reasons adduced by the national authorities to justify it must be ‘relevant and sufficient’.”¹¹¹ According to the jurisprudence of the ECtHR, only “convincing and compelling reasons” can justify restrictions on the right to freedom of association.¹¹²
99. The Section 353/A Offence falls markedly short of this standard. As explained above, the purported aim of the Section 353/A Offence is to curb the abusive use of asylum procedures. However, the circumstances around the introduction of the offence indicate that the real aim is to curtail all immigration, including from legitimate asylum seekers. This is contrary to Hungary’s obligations to asylum seekers under international law, including the Refugee Convention.¹¹³ Accordingly, the restriction on the right to freedom of association of asylum support NGOs and human rights defenders imposed by the Section 353/A Offence cannot credibly be said to address a pressing social need.
100. Even accepting for the sake of argument that the aim of the Section 353/A Offence is to curb the purportedly abusive use of asylum procedures, the restrictions it imposes on asylum support NGOs and human rights defenders’ freedom of association is manifestly disproportionate to such an aim. The restriction is disproportionate in both scope and in gravity.
101. With respect to scope, the Section 353/A Offence criminalises even basic assistance rendered by NGOs or individual human rights defenders to asylum applicants, such as the dissemination of information and materials, irrespective of the merit of their applications.

¹¹⁰ Venice Commission, OSCE/ODHIR, *Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package Which Directly Affects NGOs*, 25 June 2018, para 80.

¹¹¹ European Court of Human Rights, *Guide on Article 11 of the European Convention on Human Rights, Freedom of assembly and association*, 31 August 2019, para 64.

¹¹² *Gorzelik and Others v Poland*, ECtHR [GC], no 44158/98, Judgment, 17 February 2004, para 88.

¹¹³ See paras 128-132 below.

102. As to gravity, the Section 353/A Offence imposes criminal sanctions for a broad range of legitimate asylum support work rendered by NGOs and individual human rights defenders. This directly contravenes the international standards of protection set out in instruments such as the Declaration on Human Rights Defenders and UN Principles and Guidelines to ensure a safe and accessible working environment for human rights defenders and refrain from criminalising or penalising them for their work (including in the support and assistance rendered to migrants).¹¹⁴ The imposition of personal criminal liability (including imprisonment of up to a year) is also clearly excessive in view of the breadth of the Section 353/A Offence, which could capture even very minor assistance, including indirect assistance such as funding.

2. Freedom of expression

103. Article 11 of the EU Charter provides that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

104. Article 11 thus protects the right to freedom of expression and, in particular, the freedom to receive and impart information without interference. Article 6 of the Declaration of Human Rights Defenders explains that this includes the right, either individually or in association with others, “freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms”.¹¹⁵

105. The Section 353/A Offence directly interferes with the right to freedom of expression by criminalising the dissemination of information by NGOs and individuals engaged in asylum support work. The Section 353/A Offence specifically defines illegal “organising activity” to include the “making or dissemination of information materials” to certain asylum seekers. It therefore amounts to a restriction on the right to freedom of expression guaranteed to every person under the EU Charter and other relevant regional and international human rights instruments.

¹¹⁴ See paras 146 and 169 below.

¹¹⁵ See paras 154-156 below.

106. As noted above, a limitation on a fundamental right such as freedom of expression can only be justified under the ECHR if it: (a) is “prescribed by law”; (b) pursues a legitimate aim (in particular, one of the aims set out in Article 10(2) of the ECHR); and (c) is “necessary in a democratic society”.¹¹⁶ For the same reasons as set out above in respect of the Section 353/A Offence’s restriction on the freedom of association, those conditions are not met here.

3. Freedom of movement

107. Article 2(1) of Protocol No 4 to the ECHR provides that:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

108. The ECHR thus enshrines the right to freedom of movement as a fundamental right, which EU institutions must respect as a general principle of EU law.¹¹⁷

109. The Section 46/F Ban prohibits individuals subject to criminal proceedings for allegedly committing the Section 353/A Offence (*ie* including those in relation to whom criminal conduct has not been proven), from entering the area situated within eight kilometres of the Hungarian border, thereby preventing access to asylum seekers. This is a clear restriction on the right to freedom of movement of such individuals, and it is particularly prejudicial considering that, until recently, asylum applications could only be lodged at the transit zones located on the Hungarian-Serbian border.

110. Article 2(3)-(4) of Protocol No 4 to the ECHR provides that the right to freedom of movement may be restricted only in certain circumstances. Article 2(3) prescribes a test

¹¹⁶ ECHR, Article 10(2).

¹¹⁷ *See* para 197-198 below.

The right to freedom of movement under the ECHR is discussed in this section instead of the right to freedom of movement guaranteed under Article 45(1) of the EU Charter and Articles 20(2)(a) and 21(1) of the TFEU, as the former is broader than the latter, which is primarily concerned with the freedom of movement between, and not within, Member States. *See* Case C-33/07, *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v Gheorghe Jipa*, Judgment, 10 July 2008, ECLI:EU:C:2008:396, para 18: “the right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin”; Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, Judgment, 5 May 2011, ECLI:EU:C:2011:277, para 45: “the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State.”

similar to those applicable to restrictions on the rights to freedom of association and freedom of expression,¹¹⁸ requiring that any restriction (a) be “prescribed by law”; (b) pursue a legitimate aim (specifically, one of the aims set out in Article 2(3)); and (c) be “necessary in a democratic society”. Article 2(4) provides additionally that a restriction on freedom of movement (i) “in particular areas” may be justified where it is (ii) “imposed in accordance with law” and (iii) “justified by the public interest in a democratic society.”

111. Article 2(3) and 2(4) are thus different in scope, with the former “providing for restrictions for specified purposes but without limiting their geographical scope” and the latter “providing broadly for restrictions ‘justified by the public interest’ but limited in their geographical scope”.¹¹⁹ The Section 46/F Ban falls short of the requirements of both.
112. *First*, with respect to the test under Article 2(3), for a restriction to be “prescribed by law”, it must be accessible to the persons concerned and sufficiently precise so as to allow such persons to foresee to a reasonable degree the consequences of their actions.¹²⁰ Even if the Section 46/F Ban could be considered to be accessible and foreseeable (to the extent anyone subject to criminal proceedings for allegedly committing the Section 353/A Offence is informed of that fact),¹²¹ it is premised on the

¹¹⁸ *Timishev v Russia*, ECtHR, nos 55762/00 and 55974/00, Judgment, 13 December 2005, para 45: “... the structure of Article 2 of Protocol No. 4 is similar to that of Articles 8 to 11 of the Convention. In order to be compatible with the guarantees of Article 2 of Protocol No. 4, the impugned restriction should be ‘in accordance with the law’, pursue one or more of the legitimate aims contemplated in paragraph 3 and be ‘necessary in a democratic society’ (see *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, p. 19, § 39) or, where the restriction applies to particular areas only, be ‘justified by the public interest in a democratic society’ as established in paragraph 4.”

¹¹⁹ *Garib v The Netherlands*, ECtHR [GC], no 43494/09, Judgment, 6 November 2017, para 110. See also Council of Europe, *Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, European Treaty Series – No 46, 16 September 1963, para 18.

¹²⁰ See para 85 above.

¹²¹ It is not clear that this would be the case. See Information update by the Hungarian Helsinki Committee, ‘One year after – How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention’, 1 July 2019, p 2, available at: <https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf>: “The provision does not even require formal accusation by a public prosecutor, a mere criminal proceeding initiated by the police suffices to order the ban.”

suspicion of having committed the Section 353/A Offence, which, as already shown above, does not meet the requirements of being “prescribed by law”.¹²²

113. *Second*, to fall within Article 2(3), the restriction must also pursue one of the legitimate aims provided therein.¹²³ As with the Section 353/A Offence, the Hungarian Government justified the introduction of Section 46/F of the Police Act by reference to the public order and public security objective of protecting the integrity of the country’s borders—in particular, to prevent the circumvention of border crossing checks.¹²⁴ It is unclear how the Section 46/F Ban, which prevents persons alleged to have assisted asylum seekers in making asylum applications that were subsequently rejected from coming within eight kilometres of the border, is at all related to this aim. The real aim of the Section 46/F Ban insofar as it relates to those assisting asylum seekers appears to be to prevent them from accessing the transit zones where asylum seekers were forced to stay in order to lodge their applications. In this regard, it is particularly telling that the Section 46/F Ban was introduced as part of the same “STOP Soros Act Package” as the Section 353/A Offence, the overarching aim of which was, as noted above, to prevent Hungary from “becom[ing] an immigrant country.”¹²⁵
114. *Third*, Article 2(3) also requires that the relevant restriction be “necessary in a democratic society”, requiring it to answer a pressing need and be proportionate to the legitimate aim.¹²⁶ The Section 46/F Ban falls short of this standard. The Section 46/F Ban does not pursue a legitimate aim, as explained above. Even if it did, the Section 46/F Ban fails the proportionality test. Not only is it premised on the commission of an offence which itself is disproportionate to its purported aim, as explained above,¹²⁷ the mere allegation that a person committed the Section 353/A Offence—as opposed to the proven fact—is sufficient to trigger the ban. In addition, as the Venice Commission has

¹²² See paras 86-90 above.

¹²³ *Stamose v Bulgaria*, ECtHR, no 29713/05, Judgment, 27 November 2012, para 30.

¹²⁴ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, Detailed reasoning for Section 2, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>: “Hungary can thus comply with the requirement of Article 13 (2) of the Schengen Borders Code, according to which border surveillance must be implemented in such a way as to prevent and discourage persons from circumventing the checks at border crossing points.” See also para 92 above.

¹²⁵ Hungarian Helsinki Committee, Unofficial Translation of Bill T/333, General reasoning, available at: <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>. See also paras 95-97 above.

¹²⁶ See para 98 above.

¹²⁷ See paras 99-102 above.

noted, there is no temporal limitation on the ban and Section 46/F of the Police Act is silent on the judicial protection available to the person on whom the ban is imposed.¹²⁸

115. For all these reasons the restriction on the freedom of movement imposed by the Section 46/F Ban cannot be justified by reference to Article 2(3) of Protocol No 4.
116. For similar reasons, the Section 46/F Ban also falls short of the conditions of Article 2(4), which permits restrictions (i) “in particular areas”; (ii) “in accordance with law”; and (iii) “justified by the public interest in a democratic society.”
117. The condition that restrictions be limited to “particular areas” requires that they are “localised within a well-defined area.”¹²⁹ The Section 46/F Ban arguably satisfies this requirement, based on the eight-kilometre zone defined in the legislation.
118. However, the Section 46/F Ban does not satisfy the requirement that any such restriction is “in accordance with law”, a similar condition to that of Article 2(3)’s “prescribed by law”.¹³⁰ Thus, for the same reasons as those set out above, the Section 46/F Ban does not possess the requisite certainty and foreseeability to be “in accordance with law”.¹³¹
119. Further, Article 2(4) also requires that the relevant restriction on the freedom of movement be “justified by the public interest in a democratic society.” This means that: “it must pursue a ‘legitimate aim’ and there must be a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’.”¹³² The Section 46/F Ban fall shorts because, as already shown above, it neither pursues a legitimate aim, nor is it proportionate to its purported aim.¹³³ It cannot therefore be justified by Article 2(4) of Protocol No 4.

¹²⁸ Venice Commission, OSCE/ODHIR, *Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package Which Directly Affects NGOs*, 25 June 2018, paras 97-99.

¹²⁹ Council of Europe, *Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, European Treaty Series – No 46, 16 September 1963, para 18.

¹³⁰ *Garib v The Netherlands*, ECtHR [GC], no 43494/09, Judgment, 6 November 2017, para 114.

¹³¹ See para 112 above.

¹³² *Garib v The Netherlands*, ECtHR, no 43494/09, Judgment, 23 February 2016, para 109.

¹³³ See paras 113-114 above.

C. BY VIOLATING THE RIGHTS OF HUMAN RIGHTS DEFENDERS, THE ASYLUM LEGISLATION ALSO VIOLATES THE RIGHTS OF ASYLUM SEEKERS

120. By imposing limits on and criminalising the activities of NGOs and human rights defenders engaged in asylum support work, Hungary's Asylum Legislation also infringes the rights of asylum seekers.
121. As noted above, the Asylum Procedures Directive and the Reception Conditions Directive oblige Member States to adopt the measures necessary to ensure that applicants for international protection have the opportunity and the right to communicate with persons, including the UNHCR, and to receive information, legal assistance and other counselling.¹³⁴
122. This is consistent with core international law standards that concern asylum seekers, including the right to seek and enjoy asylum from persecution,¹³⁵ the right to public relief and assistance,¹³⁶ the right to information,¹³⁷ the right to access to justice and legal assistance,¹³⁸ and the protection for a child who is seeking refugee status or who is considered a refugee.¹³⁹
123. Asylum seekers' right to information, legal assistance and other counselling is also protected as part of the fundamental freedom "to receive and impart information and ideas without interference by public authority and regardless of frontiers" guaranteed under Article 10 of the ECHR and Article 11 of the EU Charter.
124. By threatening human rights defenders engaged in asylum support work with the risk of personal criminal liability arising out of the support they provide to asylum seekers and thus discouraging the provision of such services, the Section 353/A Offence indirectly deprives seekers of asylum from Hungary of their rights to receive such information, advice and counselling.

¹³⁴ Asylum Procedures Directive, Articles 12(1)(c) and 22(1). *See further* paras 185-188 below.

¹³⁵ Universal Declaration of Human Rights, Article 14.

¹³⁶ Refugee Convention, Article 23.

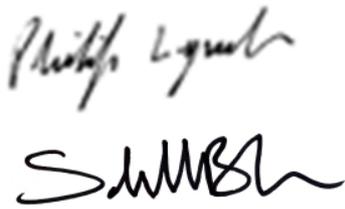
¹³⁷ UN Principles and Guidelines, Principle 16; ECHR, Article 11; ICCPR, Article 19; Universal Declaration of Human Rights, Article 19.

¹³⁸ Refugee Convention, Article 16; UN Principles and Guidelines, Principle 3, Guidelines 2-3.

¹³⁹ Convention on the Rights of the Child, Article 22.

125. For instance, the criminalisation of the specific act of distributing information to asylum seekers can be expected to produce, and is intended to produce, a chilling effect on asylum support work in Hungary and jeopardises the rights of asylum seekers to be informed about their status and rights and to receive legal advice.
126. In addition, the criminalisation of other “organising activity” intrinsic to NGOs and others defending human rights, such as operating networks and accessing funding or other material support, deprive and seek to deprive such organisations of the resources required to operate and accordingly further diminish the support that they are able to provide to asylum seekers.
127. By criminalising the activities of defenders, Hungary renders and seeks to render the rights of those defended (*ie*, asylum seekers)—under the Asylum Procedures Directive, the Reception Conditions Directive and the fundamental rights recognised under EU law, as well as relevant international law—illusory, rather than real and effective.

25 August 2020



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V. APPENDIX

A. RELEVANT INTERNATIONAL LAW

1. International protection of the rights of asylum seekers and migrants

a. *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*

128. The right to seek asylum is a fundamental human right. Article 14 of the Universal Declaration of Human Rights¹⁴⁰ provides that all persons have the right “to seek and to enjoy in other countries asylum from persecution”.¹⁴¹
129. The obligations of States towards asylum seekers and refugees are set out primarily in the Refugee Convention and its Protocol, to which all EU Member States are parties. Hungary acceded to both on 14 March 1989.¹⁴² Although the EU is not a Contracting Party to the Refugee Convention or the Protocol, EU institutions have an obligation, at a minimum, not to impede Member States’ adherence to these international instruments.¹⁴³ Under Article 78 TFEU, the EU’s common policy on asylum, subsidiary protection and temporary protection (*CEAS*), “must be in accordance with the [Refugee Convention] and the [Protocol], and other relevant treaties”.¹⁴⁴
130. Under the Refugee Convention, a refugee is an individual who:
- ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his

¹⁴⁰ United Nations, General Assembly, Resolution 217 A (III), Universal Declaration of Human Rights, 10 December 1948 (the *Universal Declaration of Human Rights*).

¹⁴¹ Universal Declaration of Human Rights, Article 14(1).

¹⁴² Depository Notification C.N.60.1989.TREATIES-1/1, 18 April 1989.

¹⁴³ Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union*, Judgment, 21 September 2005, ECLI:EU:T:2005:332, para 197; Case C-812/79, *Attorney General v Burgoa*, Judgment, 14 October 1980, ECLI:EU:C:1980:231, para 9.

¹⁴⁴ TFEU, Article 78. See also EU Charter, Article 18; Asylum Procedures Directive and Reception Conditions Directive, Preambles. See also Joined Cases C-411/10 and C-493/10 *NS v United Kingdom and ME v Ireland*, Judgment, 21 December 2011, ECLI:EU:C:2011:865, para 4.

former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁴⁵

131. Once a refugee has reached the territory of a State which is a party to the Refugee Convention, he or she enjoys essential rights.¹⁴⁶ Of particular importance for present purposes are the prohibition of expulsion or return (*non-refoulement*),¹⁴⁷ the right to public relief and assistance,¹⁴⁸ as well as the right to legal assistance, an integral part of the right to free access to courts.¹⁴⁹ These rights necessarily imply that States must establish a legal framework that permits asylum seekers to benefit from these rights and permits human rights defenders to provide the support, information and assistance to which refugees are entitled.
132. The 1989 Convention on the Rights of the Child further provides explicitly for the protection of child asylum seekers, requiring States to ensure that children “receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights”,¹⁵⁰ and to cooperate with international, national and other entities so as to facilitate family reunification where possible.¹⁵¹ The protection of such rights likewise requires the establishment of a legal framework conducive to the rendering of support, information and assistance by human rights defenders, particularly given the especially vulnerable situation of child asylum seekers.

b. Rights granted to migrants under international legal instruments

133. In addition to the specific rights granted to asylum seekers and refugees by virtue of their status as such, migrants in irregular situations also benefit from the universal human rights accorded to every person. In this regard, the Universal Declaration of

¹⁴⁵ Refugee Convention, Article 2.

¹⁴⁶ These rights include, *inter alia*, the right not to be forcibly returned to his or her country of origin or to a third State (Article 32 and 33); the right not to be prosecuted for illegal entry into his or her country of refuge (Article 31); economic rights, including a (qualified) right to seek wage-earning employment (Articles 17); the right to subsidised or free public education (Article 21); and the right to housing on terms made available to citizens (Article 22).

¹⁴⁷ Refugee Convention, Article 33.

¹⁴⁸ Refugee Convention, Article 23.

¹⁴⁹ Refugee Convention, Article 16.

¹⁵⁰ Convention on the Rights of the Child, 20 November 1989, United Nations, *Treaty Series*, vol 1577, p 3 (the *Convention on the Rights of the Child*), Article 22(1).

¹⁵¹ Convention on the Rights of the Child, Article 22(2).

Human Rights provides that “everyone” has the right to life, liberty and the security of person,¹⁵² and “no one” shall be subject to arbitrary detention or exile.¹⁵³

134. The UN Principles and Guidelines provide guidance on the application of the international human rights framework to migrants in situations of vulnerability. The principles elucidated therein are “drawn directly from international human rights law and related standards”, and the corresponding guidelines “elaborate international best practice” and “are derived from the instruments themselves, from authoritative interpretations or recommendations by international human rights treaty bodies and special procedure mandate holders of the Human Rights Council”.¹⁵⁴
135. Of note for present purposes, the UN Principles and Guidelines affirm that States have obligations to:
- ensure that human rights are at the centre of efforts to address migration in all its phases (Principle 1), including by ensuring that States’ national laws and measures are consistent with their international obligations and immediately reviewing and suspending, amending or repealing any laws or other measures that have a negative or disproportionate impact on the human rights of migrants;¹⁵⁵

¹⁵² Universal Declaration of Human Rights, Article 3.

¹⁵³ Universal Declaration of Human Rights, Article 9.

¹⁵⁴ UN Principles and Guidelines, p 9.

¹⁵⁵ UN Principles and Guidelines, Principle 1, Guideline 2. This principle draws on legal obligations expressed in the ECHR (Article 1), the International Covenant on Civil and Political Rights (the *ICCPR*) (Article 2(1)), and the Universal Declaration of Human Rights (Article 2).

- ensure that migrants have access to justice (Principle 3),¹⁵⁶ including by ensuring the availability of and their access to competent, independent, free and confidential legal and other assistance;¹⁵⁷
- protect the lives and safety of migrants and ensure that all migrants facing risks to life or safety are rescued and offered immediate assistance (Principle 4);¹⁵⁸
- ensure that all border governance measures protect human rights (Principle 5),¹⁵⁹ including by ensuring that no migrant is criminalised for crossing a border irregularly,¹⁶⁰ and establishing or strengthening practical and effective mechanisms to assess the individual human rights situations of all migrants by, *inter alia*, making competent legal advice and representation available;¹⁶¹ and
- uphold migrants' right to information (Principle 16),¹⁶² including by ensuring that migrants can obtain accurate and reliable information about their rights and situation,¹⁶³ developing information campaigns in consultation with migrants, providing information about their human rights and not deliberately fostering an anti-migrant environment.¹⁶⁴

¹⁵⁶ UN Principles and Guidelines, Principle 3. This principle draws on numerous international obligations that grant the right to equal treatment before the law and/or the right to an effective remedy. *See* ECHR Articles 6, 13; EU Charter, Articles 20, 47; ICCPR, Articles 2, 14; International Convention on the Elimination of All Forms of Racial Discrimination (*ICERD*), Articles 5(a), 6; Universal Declaration of Human Rights, Articles 7, 10. This is further inextricably linked to the right of refugees, asylum seekers and migrants to communicate with counsel of their own choosing: ICCPR, Article 14(3)(b); United Nations, *Report of the Human Rights Committee*, Official Records of the General Assembly, Fifty-First Session, Supplement No 40, Vol II, Annex VIII, section O at 98; *Kelly v Jamaica*, Communication No 537/1993, 17 July 1996, para 9.2.

¹⁵⁷ UN Principles and Guidelines, Principle 3, Guidelines 2 and 3.

¹⁵⁸ UN Principles and Guidelines, Principle 4. This principle is derived primarily from international obligations concerning the right to life. *See* ECHR, Article 2; EU Charter, Article 2; ICCPR, Articles 4, 6(1); Convention on the Rights of the Child, Article 6; Universal Declaration of Human Rights, Article 3.

¹⁵⁹ UN Principles and Guidelines, Principle 5. This principle is derived primarily from international obligations concerning the right to freedom of movement. *See* ECHR, Protocol 4, Article 2; ICCPR, Article 12; Universal Declaration of Human Rights, Article 13.

¹⁶⁰ UN Principles and Guidelines, Principle 5, Guideline 2.

¹⁶¹ UN Principles and Guidelines, Principle 5, Guideline 6.

¹⁶² UN Principles and Guidelines, Principle 16. This principle draws upon international obligations concerning the right to freedom of expression. *See* ECHR, Article 11; ICCPR, Article 19; Universal Declaration of Human Rights, Article 19.

¹⁶³ UN Principles and Guidelines, Principle 16, Guideline 1.

¹⁶⁴ UN Principles and Guidelines, Principle 16, Guideline 2.

2. International protection of the rights of human rights defenders

136. In addition to guaranteeing the human rights of asylum seekers and refugees, States also have the obligation to guarantee the rights of those working to defend asylum seekers, refugees and their rights. Any restrictions and/or violations of the rights of the latter inevitably amount to restrictions and/or violations of the rights of the former. In the words of the Special Rapporteur on the Situation of Human Rights Defenders, “the challenges that defenders face cannot be separated from those confronting those whose rights they defend”.¹⁶⁵ The protection of human rights defenders is thus an integral part of the broader protection of the rights of asylum seekers and refugees.
137. The Special Rapporteur defines “human rights defender” as including any “individuals or groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights”.¹⁶⁶ In the context of asylum seekers and refugees, “defenders working on people on the move” are considered to encompass a broad and diverse group including “affected communities and individuals, lawyers, judges and academics” as well as “government officials, civil servants, members of the private sector ... and whistle-blowers” as long as they are engaged in “the exercise of peaceful activities to address the situation of people on the move.”¹⁶⁷
138. In recognition of the importance of protecting and promoting the rights of human rights defenders in this context, the Special Rapporteur in 2018 called on States to:
- take all measures to protect the right to life, liberty and security of person of people on the move as well as those who defend their rights;
 - recognise publicly the important role played by defenders of people on the move and the legitimacy of their work, condemn publicly all instances of violence, discrimination, intimidation or reprisals against them and emphasise that such practices can never be justified;

¹⁶⁵ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/HRC/37/51, 16 January 2018, para 65.

¹⁶⁶ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/HRC/37/51, 16 January 2018, para 12.

¹⁶⁷ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/HRC/37/51, 16 January 2018, para 13.

- enable people to promote and protect human rights regardless of their immigration status—in particular, permit people on the move and those who defend their rights to exercise, *inter alia*, their right to freedom of information, freedom of expression, freedom of association and freedom of assembly; and
- ensure that national law and administrative provisions and their application facilitate the work of all actors providing humanitarian assistance to and defending the human rights of people on the move, including by avoiding any criminalisation, stigmatisation, impediment, obstruction or restriction thereof (including in assistance provided by local authorities, such as regional or municipal bodies) that is contrary to international human rights law.¹⁶⁸

139. The international instruments providing for the protection of the rights of human rights defenders are surveyed briefly in the sections that follow.

a. The Declaration on Human Right Defenders and other international and regional instruments

140. In Resolution 53/144 of 9 December 1998, the United Nations General Assembly adopted the Declaration on Human Rights Defenders.¹⁶⁹

141. The Declaration sets out the international standards concerning the protection of human rights defenders, in acknowledgement of “the important role of international cooperation for, and the valuable work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals” and recognising “the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels”.

142. In the words of the Special Rapporteur:

The Declaration reaffirms rights that are instrumental to the defence of human rights, including, *inter alia*, freedom of association, freedom of

¹⁶⁸ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/HRC/37/51, 16 January 2018, para 66.

¹⁶⁹ United Nations, General Assembly, Resolution 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.

peaceful assembly, freedom of opinion and expression, and the right to gain access to information, to provide legal aid and to develop and discuss new ideas in the area of human rights. Implementing the Declaration is a precondition for the creation of an enabling environment that enables human rights defenders to carry out their work. National laws, including, in particular, legislation regulating the activities of civil society organizations, should uphold the principles of the Declaration.¹⁷⁰

143. While the Declaration itself is a non-binding instrument, the principles and rights it recalls are guaranteed under legally binding international instruments, such as the ICCPR, the International Covenant on Economic, Social and Cultural Rights (the *ICESCR*), and regional instruments, including the ECHR. The Declaration thus “reaffirms, is underpinned by, and elaborates binding human rights obligations”.¹⁷¹ The Secretary-General of the United Nations has confirmed this view.¹⁷²
144. The EU has also endorsed the Declaration on Human Rights Defenders and annexed it to the EU Guidelines,¹⁷³ noting “the need for all countries to adhere to and comply with the relevant international norms and standards, in particular the UN Declaration” and affirming that “[t]he overall objective should be to bring about an environment in which human rights defenders can operate freely”.¹⁷⁴

(1) The right to promote and protect human rights and fundamental freedoms

145. The Declaration begins, at its Article 1, by setting out the basic proposition 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.

¹⁷⁰ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/63/288, 14 August 2008, Annex, p 19.

¹⁷¹ Joint statement by a group of Chairs, Vice-Chairs and members of the United Nations human rights Treaty Bodies and the UN Special Rapporteur on Human Rights Defenders, “20th anniversary of the UN Declaration on Human Rights Defenders”, 30 May 2018. *See also* United Nations, General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, A/HRC/23/39, 24 April 2013, para 17; Coordination Committee of Special Procedures, Press Release, “Press Statement on the 20th anniversary of the Declaration on Human Rights Defenders”, 5 December 2018.

¹⁷² United Nations, General Assembly, *Report of the Secretary-General, Twentieth anniversary of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/73/230, 27 September 2018, paras 6-7.

¹⁷³ EU Guidelines, para 4 and Annex I.

¹⁷⁴ EU Guidelines, para 11.

146. Article 2 of the Declaration reiterates the obligation of States to ensure an enabling environment for the enjoyment of human rights and fundamental freedoms, by taking the required legislative and administrative measures, as well as any other steps necessary to achieve this:

Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.¹⁷⁵

147. According to the Special Rapporteur, this obligation entails that States should:

refrain from criminalizing the peaceful and legitimate activities of defenders and ensure that they can work in a safe environment without fear of being prosecuted for criticizing Government policy or Government officials.¹⁷⁶

148. In furtherance of the objectives set out in Articles 1 and 2, the Declaration then proceeds in its subsequent provisions to elaborate on the specific rights of human rights defenders guaranteed under international law. These are summarised below.

(2) The rights to freedom of assembly and association

149. Human rights defenders' rights to freedom of assembly and association are affirmed in Article 5 of the Declaration. Article 5 provides that:

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

- (a) To meet or assemble peacefully;
- (b) To form, join and participate in non-governmental organizations, associations or groups;

¹⁷⁵ Declaration on Human Rights Defenders, Article 2(1).

¹⁷⁶ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/HRC/13/22, 30 December 2009, para 36.

- (c) To communicate with non-governmental or intergovernmental organizations.¹⁷⁷

150. The Declaration thus recognises that the right to freedom of assembly is “essential” to the work of human rights defenders in promoting and protecting human rights.¹⁷⁸ According to the 2011 Commentary on the Declaration on Human Rights Defenders issued by the Special Rapporteur, Article 5 protects a wide range of activities and various forms of assembly, ranging from private meetings to public conferences and demonstrations, so long as they are conducted peacefully.¹⁷⁹
151. The Declaration also recognises the importance of the right to freedom of association for human rights defenders. Described by the Special Rapporteur as being “at the heart of an active civil society and a functioning democracy”,¹⁸⁰ the right to freedom of association is understood to encompass both the right of individuals to found and join associations and the right of associations to conduct their activities in pursuit of the common interests of their members, free from interference.¹⁸¹ In their recent Joint Opinion on the Asylum Legislation, the Venice Commission and the OSCE/ODHIR recognised that “[t]he right to freedom of association is ‘an essential prerequisite for

¹⁷⁷ Freedom of assembly is protected under: ECHR, Article 11; ICCPR, Article 21; ICERD, Article 5(d)(ix); Convention on the Rights of the Child, Article 15; African Charter on Human and Peoples’ Rights, Article 11; Arab Charter on Human Rights, Article 24; American Convention on Human Rights, Article 15; Universal Declaration of Human Rights, Article 20(1). Freedom of association is protected under: ECHR, Article 11; ICCPR, Article 21; ICESCR, Article 8; Convention on the Elimination of All Forms of Discrimination against Women, Article 7; African Charter on Human and Peoples’ Rights, Article 10; Arab Charter on Human Rights, Article 24; American Convention on Human Rights, Article 16; Universal Declaration of Human Rights, Article 20.

¹⁷⁸ UN Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p 25.

¹⁷⁹ UN Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p 25.

¹⁸⁰ United Nations, General Assembly, *Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, A/59/401*, 1 October 2004, para 47. The Inter-American Court of Human Rights has likewise acknowledged the importance of this right for human rights defenders. See *Kawas-Fernández v Honduras*, IACHR, Judgment, Series C No 196, 3 April 2009, para 146: “Given the important role of human rights defenders in democratic societies, the free and full exercise of [the right of freedom of association] imposes upon the State the duty to create the legal and factual conditions for them to be able to freely perform their task.”

¹⁸¹ UN Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p 36. See also Venice Commission, OSCE/ODHIR, *Joint Guidelines on Freedom of Association*, 17 December 2014, Principles 2, 4.

other fundamental freedoms”, being closely intertwined with, for example, the right to freedom of expression.¹⁸² As the Special Rapporteur has observed, people on the move (such as asylum seekers) themselves may be or become human rights defenders—sometimes following their first-hand experiences of human rights violations, in which case upholding their freedom of assembly and association becomes all the more pressing in a democratic society.¹⁸³

152. The right to freedom of association further includes as an inherent element the right to access funding.¹⁸⁴ The Declaration recognises the right to access funding as a freestanding right at its Article 13, which provides that:

Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.¹⁸⁵

153. According to the Special Rapporteur, the Declaration thus imposes on States a corresponding “obligation to permit individuals and organizations to solicit, receive and utilize funding”,¹⁸⁶ reasoning that where individuals are denied the resources to carry out activities and operate an organisation, the right to freedom of association becomes

¹⁸² Venice Commission, OSCE/ODHIR, *Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package Which Directly Affects NGOs*, 25 June 2018, para 51. See also European Court of Human Rights, *Guide on Article 11 of the European Convention on Human Rights, Freedom of assembly and association*, 31 August 2019, para 111; *Gorzelik and Others v Poland*, ECHR [GC], no 44158/98, Judgment, 17 February 2004, para 88: “the state of democracy in the country concerned can be gauged by the way in which this freedom [of association] is secured under national legislation and in which the authorities apply it in practice. In its case-law, the Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association and has established the principle that only convincing and compelling reasons can justify restrictions on that freedom.”

¹⁸³ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/HRC/37/51, 16 January 2018, paras 33-49.

¹⁸⁴ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/64/226, 4 August 2009, para 91.

¹⁸⁵ Declaration on Human Rights Defenders, Article 13. Article 3 of the Declaration provides: “Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted.”

¹⁸⁶ United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, A/64/226, 4 August 2009, para 93.

devoid of any effect or value.¹⁸⁷ The former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has additionally confirmed that Article 22 ICCPR (on the right to freedom of association) covers fundraising activities and prohibits any restrictions on funding that impede associations from pursuing their statutory activities.¹⁸⁸ The Human Rights Committee supports this view.¹⁸⁹

(3) The right to freedom of opinion and expression

154. Human rights defenders' right to freedom of opinion and expression is enshrined in Article 6 of the Declaration. Article 6 provides that:

Everyone has the right, individually and in association with others:

- (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
- (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.¹⁹⁰

155. The Declaration thus recognises that the right to freedom of opinion and expression is central to the work of human rights defenders. It also confirms that the right to freedom of opinion and expression in the context of human rights defence work encompasses the right to seek, obtain, receive and hold information about human rights, as well as to

¹⁸⁷ UN Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p 95.

¹⁸⁸ United Nations, General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39*, 24 April 2013, para 16.

¹⁸⁹ United Nations, *Report of the Human Rights Committee*, Official Records of the General Assembly, Sixty-Second Session, Supplement No 40, Vol II, Annex VII, section Q at 157, *Viktor Korneenko et al v Belarus*, Communication No 1274/2004, 31 October 2006, para 7.2.

¹⁹⁰ Freedom of opinion and expression is protected under: ECHR, Article 10; ICCPR, Article 19; ICERD, Article 5(d)(viii); Convention on the Rights of the Child, Article 13; African Charter on Human and Peoples' Rights, Article 9; Arab Charter on Human Rights, Article 32; American Convention on Human Rights, Article 13; Universal Declaration of Human Rights, Article 19.

publish, impart and disseminate views, information and knowledge on all human rights and fundamental freedoms. By recognising these rights, the Declaration “seeks to protect the monitoring and advocacy functions of defenders by recognizing their right to obtain and disseminate information relevant to the enjoyment of human rights”.¹⁹¹

156. In the asylum context, the right of defenders to obtain and disseminate information is complementary to the right of asylum seekers and refugees to seek and receive information concerning their rights.¹⁹² Curtailing the right of the former would thus infringe the right of the latter.

(4) The right to access and communicate with international bodies

157. The Declaration also confirms the right to access and communicate with international bodies. Such right is closely related to and protected under the right to freedom of opinion and expression, as well as under the right to freedom of movement.¹⁹³ In the Declaration, the right to access and communicate with international bodies is also addressed as an integral component of the right to freedom of assembly and association and the right to an effective remedy.

158. As noted above, Article 5(c) of the Declaration (on the right to freedom of assembly and association) confirms that everyone has the right to:

communicate with non-governmental or intergovernmental organizations.¹⁹⁴

159. Meanwhile, Article 9(4) (on the right to an effective remedy) provides that everyone has the right to:

¹⁹¹ UN Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p 58.

¹⁹² See para 135 above.

¹⁹³ UN Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, pp 48-49.

¹⁹⁴ See para 149 above.

unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.¹⁹⁵

160. By referring to “unhindered access”, the Special Rapporteur has confirmed that the Declaration protects a wide range of collaborative activities, “from the submission of information or complaints related to specific cases to the presentation of information on the internal human rights situation in a particular country at human rights venues”, with a wide range of institutions and mechanisms, including “non-governmental organizations, intergovernmental organizations and international bodies”.¹⁹⁶

(5) The right to an effective remedy

161. All human rights would be of much reduced value without the right to an effective remedy for their breach. Article 9 of the Declaration accordingly provides that:

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.

3. To the same end, everyone has the right, individually and in association with others, *inter alia*:

(a) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the

¹⁹⁵ See para 161 below.

¹⁹⁶ UN Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, pp 51-52.

legal system of the State, which should render their decision on the complaint without undue delay;

- (b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;
- (c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

4. To the same end, and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.

5. The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.¹⁹⁷

162. Under Article 9, States thus have the responsibility to ensure that human rights defenders whose rights have been violated are provided with an effective remedy.¹⁹⁸

163. In the asylum context, the protection of the defender's right to an effective remedy for violations of their rights is often complementary to the protection of the rights of asylum seekers and refugees (including their right to an effective remedy). A restriction on the ability of human rights defenders to defend their own rights would accordingly lead to a restriction also of the protection of the rights of those defended.

(6) The right to the lawful exercise of one's profession or occupation

164. Finally, the Declaration also recognises human rights defenders' right to the lawful exercise of their profession at Article 11. Article 11 provides that:

¹⁹⁷ The right to an effective remedy is protected under: ECHR, Article 13; ICCPR, Article 2; ICERD, Article 6; Convention on the Rights of the Child, Article 39; African Charter on Human and Peoples' Rights, Article 7; Arab Charter on Human Rights, Article 23; American Convention on Human Rights, Article 25; Universal Declaration of Human Rights, Article 8.

¹⁹⁸ UN Special Rapporteur on the situation of human rights defenders, *Commentary on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p 89.

Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.¹⁹⁹

165. The placement of undue restrictions on the activities of human rights defenders would thus unduly restrict the right to work of individuals engaged in such defence work as their profession or occupation.

b. The UN Principles and Guidelines

166. The UN Principles and Guidelines, discussed above,²⁰⁰ also address the protection of rights of human rights defenders in addition to the rights of migrants.

167. Specifically, Principle 18 provides that States must “[r]espect and support the activities of human rights defenders who promote and protect the human rights of migrants”.²⁰¹

168. As with the Declaration on Human Rights Defenders, the UN Principles and Guidelines, including Principle 18, are drawn from and informed by the existing legal norms set out in international and regional instruments on the protection of human rights.²⁰² Principle 18 in particular is derived from the right to freedom of expression and the right to freedom of peaceful assembly and association.²⁰³

169. Principle 18 is developed in the UN Principles and Guidelines through six Guidelines, which provide, in relevant part, that States (and other stakeholders) should:

- provide a safe and accessible environment for human rights defenders and not criminalise or otherwise penalise them for the provision of support and assistance to migrants;

¹⁹⁹ The right to work and to free choice of employment is protected under: Universal Declaration of Human Rights, Article 23; ICESCR, Article 6.

²⁰⁰ See para 134 above.

²⁰¹ The UN Principles and Guidelines, p 58.

²⁰² The UN Principles and Guidelines mention the following provisions on which Principle 18 is based: ECHR, Article 11; ICCPR, Articles 19, 21-22, 25; African Charter on Human and Peoples’ Rights, Articles 10-11; Arab Charter on Human Rights, Article 30; American Convention on Human Rights, Articles 13, 15-16; Universal Declaration of Human Rights, Articles 19 and 20(1). See pp 115-116.

²⁰³ For a discussion of these rights, see paras 149-156 above.

- ensure that legislation and restrictions affecting the activity of human rights defenders, including their access to funding, are in accordance with international standards; and
- publicly recognise the legitimacy of the work of human rights defenders and the important role they play in society.²⁰⁴

170. Apart from in Principle 18, the UN Principles and Guidelines also address the work of human rights defenders elsewhere, including when affirming States' obligations to:

- create the appropriate legal environment to enable human rights and humanitarian actors to protect and assist migrants and to document human rights violations (Principle 1, Guideline 6),²⁰⁵ and
- ensure that “organizations and individuals who rescue or provide assistance to migrants are not criminalized or otherwise punished for doing so”, with “legislation [to] be modified accordingly” where necessary (Principle 4, Guideline 7).²⁰⁶

c. The ODIHR Guidelines

171. In 2014, the OSCE/ODIHR published a set of Guidelines on the Protection of Human Rights Defenders, an instrument similar to the UN Principles and Guidelines, but specifically focussed on the protection of human rights defenders rather than migrants. The ODIHR Guidelines build on the commitment previously undertaken by the CSCE participating States in the 1994 Budapest Document, in which they “emphasize[d] the need for protection of human rights defenders”.²⁰⁷

172. According to its introduction, the ODIHR Guidelines are “based on ... universally recognized human rights standards that OSCE participating States have undertaken to adhere to” and “are informed by key international instruments relevant to the protection

²⁰⁴ The UN Principles and Guidelines, Principle 18, Guidelines 1-2 and 6, pp 58-59.

²⁰⁵ The UN Principles and Guidelines, Principle 1, Guideline 6, p 22.

²⁰⁶ The UN Principles and Guidelines, Principle 4, Guideline 7, p 28.

²⁰⁷ CSCE, Budapest Document 1994, “Towards a Genuine Partnership in a New Era”, Decision VIII, “The Human Dimension”, para 18.

of human rights defenders, in particular the UN Declaration”.²⁰⁸ Accordingly, such guidelines “do not set new standards or seek to create ‘special’ rights for human rights defenders but concentrate on the protection of the human rights of those who are at risk as a result of their human rights work.”²⁰⁹

173. Similar to the UN Principles and Guidelines, the ODIHR Guidelines affirm that human rights defenders should be protected from judicial harassment, criminalisation, arbitrary arrest and detention or other sanctions related to their work.²¹⁰ According to the ODIHR Guidelines, this means, *inter alia*, that:

24. States should review the domestic legal framework relevant to human rights defenders and their activities for its compliance with international human rights standards. They should broadly and effectively consult with human rights defenders and seek international assistance in doing. Any legal provisions that directly or indirectly lead to the criminalization of activities that are protected by international standards should be immediately amended or repealed.

25. Legal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute human rights defenders for their work, should be amended or repealed. Full due process protections, in line with international fair trial standards, must be ensured.

26. Laws, administrative procedures and regulations must not be used to intimidate, harass, persecute or retaliate against human rights defenders. Sanctions for administrative or minor offences must always be proportionate and must be subject to the possibility of appeal to a competent and independent court or tribunal.²¹¹

d. Protection of human rights defenders within the Council of Europe

174. Within the Council of Europe, Member States have adopted additional instruments recognising the specific need to protect the rights of human rights defenders and promote their work and activities.

²⁰⁸ ODIHR Guidelines, p xi.

²⁰⁹ ODIHR Guidelines, p xi.

²¹⁰ ODIHR Guidelines, pp 5-6.

²¹¹ ODIHR Guidelines, p 5.

175. In 2008, the Committee of Ministers on Council of Europe issued a Declaration of action to improve the protection of human rights defenders.²¹² Recalling the Declaration on Human Rights Defenders and reiterating its importance,²¹³ the Declaration of action of the Committee of Ministers condemned “all attacks on and violations of the rights of human rights defenders in Council of Europe member states or elsewhere, whether carried out by state agents or non-state actors”,²¹⁴ and further called on Member States to, *inter alia*:

- take effective measures to protect, promote and respect human rights defenders and ensure respect for their activities;
- create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the ECHR; and
- ensure that their legislation, in particular on freedom of association, peaceful assembly and expression, is in conformity with internationally recognised human rights standards and, where appropriate, seek advice from the Council of Europe in this respect.

176. Since the 2008 Declaration of the Committee of Ministers, the Parliamentary Assembly of the Council of Europe has also adopted a number of resolutions and recommendations on the protection of the rights of human rights defenders.²¹⁵

²¹² Council of Europe, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders*, 6 February 2008.

²¹³ Council of Europe, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders*, 6 February 2008, recitals: “Recalling the United Nations Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms of 9 December 1998, and reiterating the importance of the declaration for individuals, groups and associations to promote and strive for the protection and realisation of human rights and fundamental freedoms at the national and international level”.

²¹⁴ Council of Europe, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders*, 6 February 2008, para 1.

²¹⁵ See Council of Europe, Parliamentary Assembly Resolution 1660 (2009), *Situation of human rights defenders in Council of Europe member states*; Resolution 1891 (2012), *The situation of human rights defenders in Council of Europe member States*; Resolution 2095 (2016), *Strengthening the protection and role of human rights defenders in Council of Europe member States*; Recommendation 1866 (2009),

177. Most recently, in 2018 the Assembly adopted Resolution 2225 (2018),²¹⁶ paying “tribute to the invaluable work of human rights defenders for the protection and promotion of human rights and fundamental freedoms”.

178. Whilst reiterating the importance of the Declaration on Human Rights Defenders and the Council of Europe’s 2008 Declaration,²¹⁷ the Resolution states that:

over the past few years the number of reprisals against human rights defenders has been on the rise. New restrictive laws on NGO registration and funding have been adopted. Many human rights defenders have been subject to ... criminal investigations launched on dubious charges.

It goes on to condemn such developments and reaffirm its support for the work of human rights defenders.²¹⁸

179. The Resolution also calls on Member States to, *inter alia*:

- respect the human rights and fundamental freedoms of human rights defenders, including their right to liberty and security, a fair trial and freedom of expression, assembly and association;
- ensure an enabling environment for the work of human rights defenders, in particular by reviewing legislation and bringing it in line with international human rights standards, refraining from organising smear campaigns against defenders and other civil society activists and firmly condemning such campaigns where organised by non-State actors;
- encourage human rights defenders to participate in public life and ensure that they are consulted on draft legislation concerning human rights and fundamental freedoms, as well as that concerning the regulation of their activities; and

Situation of human rights defenders in Council of Europe member states; Recommendation 2085 (2016), *Strengthening the protection and role of human rights defenders in Council of Europe member States*; Recommendation 2133 (2018), *Protecting human rights defenders in Council of Europe member States*.

²¹⁶ Council of Europe, Parliamentary Assembly Resolution 2225 (2018), *Protecting human rights defenders in Council of Europe member States*, 26 June 2018.

²¹⁷ Council of Europe, Parliamentary Assembly Resolution 2225 (2018), *Protecting human rights defenders in Council of Europe member States*, 26 June 2018, para 2.

²¹⁸ Council of Europe, Parliamentary Assembly Resolution 2225 (2018), *Protecting human rights defenders in Council of Europe member States*, 26 June 2018, paras 3-4.

- evaluate the sufficiency, as measured by concrete results, of their efforts taken to protect human rights defenders since the adoption of the 1998 Declaration on Human Rights Defenders and the 2008 Declaration of the Committee of Ministers.

B. RELEVANT EU LAW

1. The Common European Asylum System

180. Article 78 TFEU entrusts the EU with the competence for developing:

a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.

181. It further provides that:

[t]his policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

182. The aim of the common asylum policy is to establish common procedures for the international protection and uniform treatment of those who are granted refugee status or subsidiary protection based on the full and inclusive application of the Refugee Convention and its Protocol.²¹⁹

183. On this basis, several legislative measures have been adopted with the aim of establishing common asylum standards and harmonising asylum legislation between EU Member States. Together, these measures make up the CEAS. They include the Asylum

²¹⁹ European Commission, Policies: ‘Common European Asylum System’, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

Procedures Directive, the Reception Conditions Directive, the Qualification Directive,²²⁰ the Dublin Regulation²²¹ and the EURODAC Regulation.²²²

184. The Commission's referral of Hungary's Asylum Legislation to the CJEU invokes the Asylum Procedures Directive and the Reception Conditions Directive.²²³

185. In conformity with relevant international law obligations, the Asylum Procedures Directive (among other things) protects asylum applicants' access to information and counselling in detention facilities and at border crossing points. The preamble of the Asylum Procedures Directive recognises that the procedures for examining the application for international protection should provide an asylum applicant with at least:

the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) and with organisations providing advice or counselling to applicants for international protection; ... the opportunity to consult a legal adviser or other counsellor; the right to be informed of his or her legal position at decisive moments in the course of the procedure, in a language which he or she understands or is reasonably supposed to understand;²²⁴

186. Article 12 of the Asylum Procedures Directive accordingly sets out certain procedural guarantees for all applicants for international protection, which include the right to communicate with human rights defenders engaged in asylum support work:

they shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;²²⁵

²²⁰ The Qualification Directive clarifies the grounds for granting international protection and therefore makes asylum decisions more robust. It also improves the access to rights and integration measures for beneficiaries of international protection.

²²¹ The Dublin III Regulation enhances the protection of asylum seekers during the process of establishing the State responsible for examining the application, and clarifies the rules governing the relations between states. It creates a system to detect early problems in national asylum or reception systems and address their root causes before they develop into full-fledged crises.

²²² The EURODAC Regulation allows law enforcement access to the EU database of the fingerprints of asylum seekers under strictly limited circumstances in order to prevent, detect or investigate the most serious crimes, such as murder, and terrorism.

²²³ European Commission, Press Release: "Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones", 25 July 2019.

²²⁴ Asylum Procedures Directive, Recital (25).

²²⁵ Asylum Procedures Directive, Article 12(1)(c).

187. The Asylum Procedures Directive also requires that Member States ensure those providing advice and counselling have effective access to applicants present at border crossing points, including transit zones, at external borders.²²⁶ In addition, it obliges Member States to ensure the provision of free legal assistance (including by ensuring that a legal adviser has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting with an asylum applicant), guarantees the right of applicants to consult (at their own cost) a legal adviser or other counsellor at all stages of the procedure and imposes additional requirements in respect of asylum applicants in need of special procedural guarantees (such as unaccompanied minors).²²⁷
188. Similar to the Asylum Procedures Directive, the Reception Conditions Directive requires Member States to put in place the necessary legal arrangements to allow asylum applicants to receive information on organisations and groups of persons that are able to provide legal assistance or to inform them of the available reception conditions.²²⁸ It also provides that detained applicants must be immediately informed of the possibility to request free legal assistance and that procedures for access to legal assistance and representation must be laid down in national law.²²⁹ Finally, it also provides that family members, legal advisers or counsellors and persons representing relevant NGOs have the possibility to communicate with and visit applicants in conditions that respect privacy—although limits may be imposed, access may not be severely restricted or rendered impossible.²³⁰
189. The Asylum Procedures Directive and the Reception Conditions Directive do not directly address the rights of human rights defenders. However, the effective realisation of the procedural guarantees accorded to applicants for international protection set out in them necessitates that Member States implement the legal framework required for human rights defenders to operate, communicate with asylum seekers and provide them with information and assistance. Otherwise, the guarantees set out in the directives would be devoid of any practical effect.

²²⁶ Asylum Procedures Directive, Article 8(2).

²²⁷ Asylum Procedures Directive, Articles 19-25.

²²⁸ Reception Conditions Directive, Article 5(1).

²²⁹ Reception Conditions Directive, Articles 9(4), (10).

²³⁰ Reception Conditions Directive, Articles 10(4).

2. Human rights and fundamental rights under EU law

190. Asylum seekers and those who assist them are also protected by virtue of the human rights standards that form part of EU law. Article 2 of the TEU enshrines respect for human rights as a founding value of the EU, providing that:

The Union is founded on the values of ... respect for human rights, including the rights of persons belonging to minorities.²³¹

191. The EU Charter is at the core of EU human rights protection. Pursuant to Article 6(1) of the TEU, the EU Charter and the rights recognised by it enjoy the same legal value as the Treaties. Member States therefore have a duty to respect the EU Charter as “a necessary corollary of the EU’s fundamental rights obligations”.²³² Article 51(1) of the EU Charter makes this clear:

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

192. The CJEU has also confirmed that Member States are bound by the rights guaranteed in the EU Charter when implementing an EU directive or legislating within the scope of application of such a directive. In *Åklagaren v Hans Åkerberg Fransson*, for instance, the CJEU held that:

Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, *situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable*. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.²³³

193. Hungary is therefore bound by the fundamental rights guaranteed by the EU Charter when adopting legislation falling within the purview of the CEAS and related EU

²³¹ TEU, Article 2.

²³² FRA, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*, p 19.

²³³ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, Judgment, 26 February 2013, ECLI:EU:C:2013:105, para 21 (emphasis added).

instruments, as it would be implementing (or failing to implement) EU law within the meaning of Article 51(1) of the EU Charter in doing so.²³⁴

194. Article 18 of the EU Charter specifically protects the right to asylum, with reference to the Refugee Convention and the Protocol, the TEU and the TFEU, providing that:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.²³⁵

195. Other rights relevant to asylum seekers and their defenders are protected in other provisions of the EU Charter. These include human dignity,²³⁶ freedom of expression and information (including the right to receive information),²³⁷ freedom of assembly and association,²³⁸ freedom to choose an occupation and the right to engage in work,²³⁹ *non-refoulement*,²⁴⁰ non-discrimination,²⁴¹ and the right to an effective remedy and to a fair trial.²⁴²
196. Hungary, as a Member State, must therefore respect these rights when enacting legislation in the fields of asylum and international protection.
197. However, its obligations are not limited those set out in the EU Charter.
198. Article 6(3) of the TEU recalls that fundamental rights guaranteed by the ECHR and the constitutional traditions of the Member States are part of the general principles of EU law.²⁴³ Therefore, Hungary, as a Member State, when implementing EU law (including asylum law), must also ensure respect for the fundamental rights guaranteed by the

²³⁴ See Joined Cases C-411/10 and C-493/10 *NS v United Kingdom and ME v Ireland*, Judgment, 21 December 2011, ECLI:EU:C:2011:865, paras 64-69.

²³⁵ EU Charter, Article 18.

²³⁶ EU Charter, Article 1.

²³⁷ EU Charter, Article 11.

²³⁸ EU Charter, Article 12.

²³⁹ EU Charter, Article 15.

²⁴⁰ EU Charter, Article 19.

²⁴¹ EU Charter, Article 21.

²⁴² EU Charter, Article 47.

²⁴³ TEU, Articles 6(1), 6(3).

ECHR as general principles of EU law to the extent such rights are more expansive or otherwise differ from those guaranteed under the EU Charter.