

OPEN SOCIETY JUSTICE INITIATIVE

OPEN SOCIETY INSTITUTE-BUDAPEST V. HUNGARY

EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION

September 2018

INTRODUCTION

1. This Application concerns human rights violations caused by recently enacted Hungarian laws that criminalise “organising activities” that support asylum and residence permit applications (Section 353/A of the Criminal Code (“Section 353/A”)), and impose a 25% tax on funding for any activity or organisation that supports immigration (Section 253 of Act XLI of 2018 (“Section 253”)). Hungarian officials refer to these laws as the “Stop Soros Package” and the “Soros Tax” respectively.
2. George Soros is the representative of Open Society Fund, Inc . The latter is the founder of Open Society Institute Budapest Foundation (OSI-Budapest), the Applicant in this case. OSI-Budapest is a national not-for profit foundation located in Hungary that promotes human rights and democracy in Hungary and internationally. (Annex 4, pp. 83-87). OSI-Budapest and its civil society grantees have been vocal critics of the Hungarian government’s human rights and rule of law violations.
3. The aims of Section 353/A and Section 253 are twofold: first, to dismantle Hungary’s vibrant civil society, thereby silencing critics of the Hungarian Government, and second, to limit or bar almost all forms of migration, including legal migration, into Hungary (Annex 2, pp. 21-27 and Annex 3, pp. 74-79)

STATEMENT OF FACTS

“Stop Soros Package”

4. Act VI of 2018 (the “Stop Soros Package”) entered into force on 1 July 2018, inserting a new section—Section 353/A—into the Hungarian Criminal Code. (Section 353/A and “General Reasoning” of Bill T333, now Act VI, in Annex 2, pp. 21-22).
5. Section 353/A criminalises “[a]nyone who engages in organising activities,” including, inter alia, “prepar[ing] or distribut[ing] information materials or entrust[ing] another with such acts,” and “build[ing] or operat[ing] a network” in order to facilitate applications for asylum for persons “who are not persecuted . . . or do not have a well-founded reason to fear direct persecution,” or for a residence permit for persons “entering or staying illegally in Hungary.” Section 353/A(1),(5). The “detailed reasoning” for this provision states that “the exact content of the organising activity cannot be fully listed, therefore . . . [subsection 5] . . . defines the most typical components of the organisational activities with an appropriate abstraction as an interpretive provision.” (“Detailed Reasoning” of Bill T333 in Annex 2, p. 24).
6. Section 353/A(2) criminalises “anyone who provides material resources” for such “organising activities.” (Annex 2, p. 21)
7. The “detailed reasoning” explains that Section 353/A applies to both individuals and legal entities. (“Detailed Reasoning” of Bill T333, Annex 2, p. 25).
8. Section 353/A imposes on individuals a criminal penalty of up to 1 year imprisonment if the offence is committed for the purpose of financial gain, support is provided to more than one person, or the offence is committed in the border zone. Where none of those aggravating circumstances apply, the penalty is “custodial arrest” from 5 to 90 days. (Annex 2, p. 21 and Sections 33.1, 46 of the Criminal Code). For legal entities, the penalties are: “a) dissolving the legal entity, b) limiting the activity of the legal entity, and c) fines.” (Section 4, Act CIV of 2001 on the Criminal Code measures against a legal person, Annex 2, pp. 45-46). Thus, Section 353/A could potentially lead to the dissolution of an entire organisation even if only a small fraction of its work related to migrants’ rights.

9. The reasoning for Act VI states that its purpose is to “prevent Hungary from becoming a migrant country,” and that “immigration poses serious risks and is therefore a question of national security.” It adds that the Act’s purpose is to “combat illegal immigration and activities that facilitate it.” (“General Reasoning” of Bill T333, Annex 2, pp. 21-22). Similarly, the detailed reasoning states that Section 353/A protects public order and security by protecting the state border. (“Detailed Reasoning” of Bill T333, Annex 2, p. 24). But, as the Venice Commission has observed, “[s]eeking asylum or requesting a title of residence is not a crime, and thus, it should not be a crime to support a person in this position. Whether or not in the end asylum is granted is a matter of decision of the State and not a decision taken by an NGO. Transferring this burden in the form of criminal sanctions for ‘getting it wrong’ about whether or not an asylum seeker has reason to fear persecution or not onto organisations effectively prevents any attempt by NGOs to assist the migrant concerned. It is not clear how an NGO employee is expected to know at the border which asylum seeker falls in the category of persons falling under . . . [Section] 353A. In addition, it is important to stress that the mere fact that a person has arrived from or through a safe (third) country cannot be considered as proof that this person does not have reasons to fear persecution.” (Annex 6, p. 324)
10. As the Venice Commission notes, section 353/A “may apply in reality to a large number of migrants, irrespective of whether they are illegal or not.” Thus, the Commission concludes, Section 353/A “runs counter to the role of assistance to victims by NGOs, restricting disproportionately the rights guaranteed under Article 11 ECHR, and . . . criminalises advocacy and campaigning activities, which constitute an illegitimate interference with the freedom of expression guaranteed under Article 10 ECHR.” The Commission recommends that the provision “should be repealed,” noting that its “extremely hasty adoption did not allow any actors, including the general public and experts, to engage in any meaningful discussion on the legislative package.” (Annex 6, pp. 310, 326, and 331-332)
11. On 19 July 2018, the European Commission issued a letter of formal notice to Hungary, finding that the Stop Soros Package violates EU law.

“Soros Tax”

12. Act XLI entered into force on 25 August 2018. Section 253 of this Act (Soros Tax) imposes a 25% tax on financial support for “immigration supporting activity” in Hungary or to any Hungarian organisation “that carries out activities to promote migration.” (Section 253(1), Annex 2, p. 26). The plain language of this provision suggests that even if a funder provided financial support to a Hungarian organisation for activities other than promoting migration, the entirety of that financial support could be subject to the 25% tax as long as that organisation carried out any activity, however miniscule and at any point in time (after Section 253 entered into force), to promote migration. The penalty for failure to pay the tax is 50% of the tax deficiency. It could be increased to 200% if an organization fails to declare an income that may be subject to the tax. (Section 215 (3),(4) of Act CL of 2017).
13. An “immigration supporting activity” is “any programme, action or activity that is directly or indirectly aimed at promoting immigration (the permanent relocation of people from their country of residence to another country . . .)” . . . and is realised as part of “carrying out media campaigns, media seminars and participating in such activities,” “organising education,” “building and operating networks” or “propaganda activities that portray immigration in a positive light.” (Section 253(2), Annex 2, p. 26).
14. The primary taxable entity is the funder, apparently regardless of whether it is based in or outside Hungary, with respect to funding for activities implemented in Hungary and grantee organisations located in Hungary. The funder is obliged to declare to the grantee by the 15th day of the month of the grant (the last day of the deadline for tax declaration) that it paid the tax. Should the funder fail to make this declaration, the grantee (the organisation aiding immigration) becomes obliged to pay the tax. (“Section 253(5),(6),(8) and Detailed Reasoning” of Section 250, Bill T625, Annex 2, pp. 26-28).
15. Act XLI states that its purpose is to “contribute to the additional expenditures of the public finances caused by immigration.” (Annex 2, p. 27)

OSI-Budapest and the impact of the “Stop Soros” package

16. OSI-Budapest is a not-for-profit foundation registered in Hungary. It was founded by the Open Society Fund, Inc. represented by George Soros in 1993 in Budapest, to promote human rights and democracy in Hungary and internationally. OSI-Budapest consists of a board of trustees, employees, and its founder. (Annex 4, pp. 83-87). It is funded by entities within the Open Society Foundations, a global network that works to build vibrant and tolerant societies whose governments are accountable and open to the participation of all people. (OSF website, Annex 4, pp. 89, 91).
17. The Charter for OSI-Budapest states, in relevant part, that the objectives of the foundation include, inter alia, “to organise and support programmes in connection with human rights (minority) problems,” provide “professional, technical financial support” to “institutions and legal entities,” and assist them “in their administrative and coordinative functions” in support of those objectives, among others. Other relevant objectives include to “elaborate and support legal programmes,” “coordinate and support programmes related to freedom of expression, freedom of information and arts and culture” and “support initiatives aimed at social reform oriented towards an open society.” (Annex 4, pp. 83-84). These objectives encompass financial and non-financial support for migrants’ rights.
18. OSI-Budapest has supported migrants’ rights by, inter alia, (i) funding human rights organisations’ projects in the field of migration; (ii) preparing and distributing informational materials such as statements on violations of migrants’ rights; and (iii) building and operating networks including by conducting meetings with Hungarian organisations for the exchange of opinions and ideas in the protection of such rights.
19. Between 1 January 2015 and 30 June 2018, OSI-Budapest funded a number of Hungarian non-profit organisations (including e.g., Hungarian Helsinki Committee, Annex 8, pp. 751- 808) working in the field of migration, awarding them a total of approx. USD 2.5 million in grants. Moreover, OSI-Budapest and OSF have issued several public statements of public interest, advocating for migrants’ rights and criticising the government for violating those rights. (Annex 5, pp. 95-98).

20. The threats of criminal prosecution and abusive taxation imposed by Sections 353/A and 253 have restricted OSI-Budapest from producing materials, issuing statements, funding organisations, and building and operating networks (including by conducting meetings with Hungarian organisations for exchanging opinions and ideas) relating to migrants' rights. OSI-Budapest has therefore been restricted from fulfilling the objectives of its lawfully registered charter.
21. After an earlier version of the Stop Soros Package was introduced in Parliament in February 2018 (Annex 2, pp. 57-70), OSI-Budapest decided to move its Budapest-based staff and international operations out of Hungary (Annex 4, pp. 92-93). That decision remained unaltered after the new Stop Soros Package and the Soros tax were enacted into law.

Political and legal context of the “Stop Soros” Act and the “Soros Tax”

22. The two laws at issue in this case are part of the Hungarian Government's sustained assault on democratic institutions and the rule of law. Indeed, since taking office in 2010, the Government has taken numerous measures to limit the independence of Hungarian courts, media, higher education and civil society. In response, the European Union and other institutions have repeatedly expressed concern, including through six European Parliament resolutions adopted between 2011 and 2017 (Annex 6, pp. 130-139, 212-245, 251-254, 263-267, and 272-293).
23. *Courts.* The Hungarian Government has progressively restricted the role and the independence of the courts (Annex 8, pp. 672-725). For example, on 5 July 2010, the selection process for Constitutional Court judges was changed to allow the Government's political party to unilaterally elect all Constitutional Court justices. In 2012, the Government adopted a national scheme requiring the compulsory retirement of judges at the age of 62, which the CJEU held in *Commission v. Hungary*, was contrary to EU law (Annex 6, p. 277). However, most judges (173 out of 229) did not return to their former positions (Annex 6, p. 278). Through the 4th Amendment to the Fundamental Law, adopted in 2013, the Government has reversed politically sensitive Constitutional Court decisions

relating to human rights and the rule of law (Annex 6, p. 211), including by granting extensive powers to the National Judicial Office to reallocate cases within the courts and reintroducing criminal penalties on homeless people for living in a public area. In effect, the Government-dominated Parliament has used the 4th Amendment to send a message to the Constitutional Court not to intervene in politically sensitive issues (Annex 1, para. 71). In 2011 and 2012, the Venice Commission criticised the extensive powers entrusted to the President of the National Judicial Office. Similar views were expressed in 2012 and 2013 by the UN Special Rapporteur on the independence of judges and lawyers, and by the Group of States against Corruption (GRECO) in its report adopted on 27 March 2015. (Annex 6, pp. 277-278, and 140-144).

24. *Media.* In 2010, the Government introduced a series of laws tightening its control over the media (through amendments to existing media laws Act LXXXI of 2010, Act CIV of 2010 and Act CLXXXV of 2010). (Annex 9, p. 831). In particular, it consolidated media regulation under the supervision of a single entity (the National Media and Info-communications Authority) and gave the head of the Parliament-elected Media Council (which regulates content) the right to interfere in the nomination of the executive directors of all public media entities (Annex 8, p. 748). The 2010 media laws were criticised by the European Parliament, the OSCE Representative on Freedom of the Media, and the Commissioner for Human Rights. (Annex 6, pp. 111-112)
25. *Higher education.* On 4 April 2017, the Government adopted Act XXV of 2017 amending Act CCIV of 2011 on National Higher Education. Act XXV imposed restrictive requirements on the licensing and operation of foreign universities in Hungary and targeted the Central European University (Annex 2, pp. 54-57). On 7 December 2017, the European Commission brought an action for infringement before the Court of Justice for the EU (CJEU) against Hungary on the basis that the law was in breach of EU and international law (Annex 6, p. 264).
26. *Civil society.* In 2017, the Government enacted an anti-NGO law requiring recipients of foreign funding to publicly identify themselves as such (Act LXXVI/2017, Annex 2, pp. 51-54). The 2017 law, widely condemned by the

international community, was adopted by the Hungarian Government with only minor adjustments, despite the Venice Commission's recommendations (Annex 6, pp. 307-332). The European Commission also concluded that the 2017 law violates EU law and on 7 December 2017 brought an action for infringement before the CJEU (Annex 6, pp. 268-269).

27. On 12 September 2018 the European Parliament called on the Council of the European Union to start an Article 7(1) procedure against Hungary and prevent a systemic threat to the Union's founding values. The Parliament's concerns relate to a number of issues including restrictions to freedom of association and expression and to judicial independence.

Government statements targeting George Soros, OSI-Budapest and its grantees

28. For years, as part of its attacks against democratic institutions and independent voices, the Hungarian Government has mounted a concerted campaign to vilify George Soros, OSI-Budapest and associated Hungarian civil society organisations (CSOs). In 2017, as government rhetoric against George Soros surged (Annex 3, pp. 71-72), thousands of anti-Soros billboards were prominently displayed in Budapest and other major cities. The billboards, widely condemned as anti-Semitic, contained images of Soros alongside the phrase "Let's not let Soros have the last laugh." (Annex 7, pp. 588-592). In April 2018, the UN Human Rights Committee found that high-ranking officials in Hungary have "nurtured conspiracy theories relating to George Soros." (Annex 3, p. 72; Annex 6, p. 299).
29. Government officials, such as the Parliamentary State Secretaries of the Ministry of Defence and the Ministry of Justice, have issued a number of statements targeting OSI-Budapest, its civil society grantees, and their employees, as part of a "Soros network" that has to be curtailed (Annex 3, pp. 72-74; Annex 7, pp. 595-596). Government statements have also disclosed a broader Government strategy to silence CSOs and to reduce or ban almost all forms of migration, including by "tak[ing] up the struggle against international

organisations” through laws that have a “strong deterrent effect” (Annex 3, p. 76).

STATEMENT OF ALLEGED VIOLATIONS AND EXPLANATIONS

A. Violation of the right to freedom of expression (Article 10) (See more Annex 1, paras. 2-24)

1. Section 353/A interferes with OSI-Budapest’s right to freedom of expression by criminalising preparing or distributing informational materials, building or operating networks, funding (*Bowman v. UK*, paras. 33 and 47), and other unenumerated activities, including advocacy, in support of asylum or residence applications. Section 253 interferes with OSI-Budapest’s right by imposing a tax on its funding of expressive activities to promote migration and subjecting all of the Applicant’s operations to a 25% tax. The laws pursue illegitimate aims (see analysis of Article 18 below), are not prescribed by law, and are not necessary in a democratic society, violating OSI-Budapest’s right to freedom of expression.
2. Sections 353/A and 253 are not prescribed by law, as they lack foreseeability and certainty (*Goodwin v. UK*, para. 31). Section 353/A criminalises an open-ended list of “organising activities” and Section 253 imposes a 25% tax upon all funding for any organisation that that “carries out activities to promote migration” as well as “any programme, action or activity that is directly or indirectly aimed at promoting immigration.”
3. OSI-Budapest’s role, alongside its grantees, as a public watchdog (*Guseva v. Bulgaria*, para. 38), calls for “the most careful scrutiny” by the Court when assessing measures taken by the Government to restrict freedom of expression (*Osterreichische Vereinigung Zur Erhaltung, Starkung und Schaffung v. Austria*, para. 33). “The most careful scrutiny” is also applicable to prior restraints (*RTBF v. Belgium*, para. 105), such as Section 353/A(5)’s criminalisation of the preparation of informational materials.

4. These legal provisions are also not necessary in a democratic society, on account of:
 - a. the nature and severity of sanctions, including criminal penalties and abusive taxation (*Gra Stiftung Gegen Rassismus and Antisemitismus v. Switzerland*, paras. 77-78 and *Lombardo and Others v. Malta*, para. 61);
 - b. their overbreadth, e.g., Section 353/A criminalises support to lawful applications for asylum and residence permits (Venice Commission Joint Opinion) and could lead to the dissolution of an entire organisation even if only a small fraction of its work related to migrants' rights; Section 253 targets all activities and organisations promoting migration, including legal migration;
 - c. lack of evidence of national security threats (*Stomakhin v. Russia*, para. 85 and *Case of A. and others v. UK*, para. 186); and
 - d. lack of public consultation (Recommendation CM/rec(2007)14, para. 77).

B. Violation of the right to freedom of association and assembly (Article 11)

(See more Annex 1, paras. 25-42)

5. Section 353/A and Section 253 interfere with OSI-Budapest's right to freedom of association with respect to building and operating networks (including by holding meetings, *Koretskyy and Others v. Ukraine*, para. 40), receiving funding, and providing funding (*Ramazanova v. Azerbaijan*, para. 59, where the Court protected receipt and use of financial support under Article 11) for migrants' rights. The laws also interfere with OSI-Budapest's right to freedom of assembly with respect to holding meetings on migrants' and refugees' rights with Hungarian organisations. (*Yilmaz Yildiz and Others v. Turkey*, paras. 33 and 41).
6. The legal provisions violate OSI-Budapest's rights under Article 11, as they pursue predominantly illegitimate aims (see analysis under Article 18 below). Moreover, they are not prescribed by law, as they are not "formulated with sufficient precision to enable [persons concerned][...] to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action

may entail” (*Koretskyy and others v. Ukraine*, paras. 46-47 and analysis of Article 10 above).

7. In addition, the provisions are not necessary in a democratic society, because of the nature and severity of sanctions they impose and their overbreadth (see Article 10 analysis, and *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, paras. 67-68).
8. Finally, Section 353/A is also disproportionate on account of lack of public consultation associated with its adoption, and lack of evidence regarding the alleged aim of protecting “national security” (*United Macedonian Organisation Ilinden-Pirin v. Bulgaria*, para. 61; *Sidiropoulos v. Greece*, para. 41).

C. Violation of the limitation on the use of restrictions on rights (Article 18 in conjunction with Articles 10 and/or 11) (See more Annex 1, paras. 43-55)

9. The totality of the circumstances in this case as detailed in the facts section above (Statement of facts, paras. 22-29) demonstrate that Section 353/A and Section 253 were enacted predominantly for purposes other than those prescribed in the Convention (*Merabishvili v. Georgia*, para. 317). In reality, these laws are predominantly aimed at silencing civil society (*Mammadov v. Azerbaijan*, para. 143; *Hasanov v. Azerbaijan*, paras. 125-127) and barring almost all forms of migration, including legal migration, in part by restricting OSI-Budapest’s rights to freedom of expression and freedom of association (*United Macedonian Organisation Ilinden-Pirin v. Bulgaria*, para. 83). These aims are evident from their legislative intent (Annexes 2 and 3, and *Freedom and Democracy Party v. Turkey*, para. 37 and *Tebieti v. Azerbaijan*, para. 53), their overbreadth, their lack of foreseeability (*Cumhuriyet Vakfı and Others v. Turkey*, para. 62 and 63), the legal and political context (Statement of facts, paras. 22-27), the official campaign against Soros and OSI-Budapest (Annex 3,

pp.71-73), and the official nomenclatures of Act VI and Section 253 of Act XLI (“Stop Soros Package” and “Soros Tax,” respectively).

D. Violation of the right to property (Article 1 Protocol 1) (See more Annex 1, paras. 56-62)

10. Making it a crime to provide financial means to any “organising activity” related to migration and imposing a 25% tax on funding for “immigration supporting activities” and organisations interferes with OSI-Budapest’s right to dispose of its property (*Marckcx v. Belgium*, para. 63). These interferences are not prescribed by law (*Beyeler vs Italy*, para. 109), and are not in the general interest of the community (see Article 18 analysis). In addition, the laws’ overbreadth renders them disproportionate (see Article 10 analysis).

E. Lack of effective remedy (Article 13)

11. No effective remedy exists in Hungary to provide redress for OSI-Budapest’s claims. The Constitutional Court is the only court in Hungary that can review facial challenges to legislation. But as explained in section G below, OSI-Budapest is barred from raising its claims against the tax law before that court. Moreover, there are no effective domestic remedies for obtaining damages for unconstitutional laws.

COMPLIANCE WITH ADMISIBILITY CRITERIA

(See Annex 1, paras. 63-75 for full admissibility arguments and supporting references)

1. For the reasons set forth below, there are no effective domestic remedies for OSI-Budapest to exhaust in this case. Nonetheless, out of an abundance of caution, on 24 September 2018, it filed a complaint before the Constitutional Court (Annex 10).

2. First, the Hungarian Fundamental Law prohibits the Constitutional Court from considering the constitutionality of tax provisions like Section 253 with respect to violations of rights not specifically enumerated by Article 37(4) read in conjunction with Article 24(2). Therefore, the Constitutional Court cannot consider whether the tax provisions violate the constitutional rights to freedom of association, expression, assembly, and property or have been adopted for an illegitimate purpose.
3. Second, Article 24(2)(f) of Hungarian Fundamental Law read in conjunction with Article 32(2) of the Constitutional Court Act does not allow civil society organisations (like OSI-Budapest) to challenge the compatibility of legal tax provisions with international treaties.
4. Third, as this Court has recently recognized in *Vekony v. Hungary*, paras 22-24, there are no effective remedies in Hungary for obtaining damages relating to unconstitutional laws because the Applicant would have to first prevail before the Constitutional Court and then bring successive civil litigation in order to seek damages. OSI-Budapest seeks damages in this case for establishing a fund to protect Hungarian civil society organisations' rights to freedom of expression, association, and assembly including with respect to migrants' rights. Given that access to the Constitutional Court for vindication of the rights at issue is barred in this case, there is no effective remedy for the damages the Applicant has suffered.
5. Fourth, the general legal and political context (*Akvidar v. Turkey*, paras. 68-69) means that in practice, any domestic remedies which might exist in theory are not in practice effective and available to OSI-Budapest through the Constitutional Court. As noted in the Statement of Facts, the Hungarian Government has progressively restricted the role and the independence of the courts. The Government has also reversed, through the 4th Amendment to the Fundamental Law, politically sensitive Constitutional Court decisions relating to rights and the rule of law, including on the power of the National Judicial Office to reallocate cases within the courts (Annex 9, p. 816, 842-848).

6. Fifth, the history of Constitutional Court practice makes clear that the length of time that it would take the Constitutional Court to hear any constitutional challenge would render ineffective any remedy it awarded (*Mikalauskas v. Malta*, para. 50; *Bellizzi v. Malta*, para. 38). The implications of a delay in OSI-Budapest's case are particularly serious because the laws chill OSI-Budapest's rights to freedom of expression, association, and assembly on an ongoing basis.
7. Finally, special circumstances (*Aksoy v. Turkey*, paras. 56-57), including the widespread animus generated by the Hungarian Government's sustained campaign to vilify George Soros, OSI-Budapest, and its grantees, further confirm that effective domestic remedies are not available in practice.

Six Month Rule

8. This application is being filed within six months of the date that the "Stop Soros" Law and the Soros Tax law entered into force, i.e. within six months of 1 July 2018 and 25 August 2018, respectively.

ANNEX 1

ADDITIONAL SUBMISSIONS

I. STATEMENT OF FACTS

1. This case concerns human rights violations caused by two recently enacted laws that are part of the Hungarian Government's sustained assault on democracy and the rule of law over the last eight years. The facts relevant to this application are set out in the Application Form. As set forth in the cover letter, the Applicant requests priority under Rule 41 (Category II).

II. VIOLATIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. Article 10: violation of the right to freedom of expression

2. For the reasons set forth below, Section 353/A of the Criminal Code (“Section 353/A”) and Section 253 of Act XLI of 2018 (“Section 253”) violate OSI-Budapest’s Article 10 rights.

Interference

Section 353/A of the Criminal Code (Adopted with Act VI of 2018, or the “Stop Soros Package,” Annex 2, p. 21)

3. Section 353/A criminalises “[a]nyone who engages in organising activities,” including, *inter alia*, “prepar[ing] or distribut[ing] information materials or entrust[ing] another with such acts,” and “build[ing] or operat[ing] a network” in order to facilitate applications for asylum for persons “who are not persecuted . . . or do not have a well-founded reason to fear direct persecution,” or for a residence permit for persons “entering or staying illegally in Hungary.” Section 353/A(1),(5). The “detailed reasoning” for this provision states that “the exact content of the organising activity cannot be fully listed, therefore . . . [subsection 5] . . . defines the most typical components of the organisational activities with an appropriate abstraction as an interpretive provision.” (“Detailed Reasoning” of Bill T333 in Annex 2, p. 24).
4. Section 353/A interferes with OSI-Budapest’s Article 10 rights by restricting it from (i) preparing or distributing “informational materials”; (ii) building or operating networks (including through conducting meetings and exchanging opinions and ideas with Hungarian organisations); (iii) funding expressive “organising activities” that help migrants apply for asylum or residence permits; and (iv) engaging in other “organising activities” including advocacy and criticism of the government on migrants’ rights issues. Given the nature of these activities, even if the Applicant were not prosecuted under Section 353/A, the threat of prosecution chills the Applicant’s exercise of its Article 10 rights.¹
5. *Preparation*: By criminalising not only the distribution but also the preparation of information, Section 353/A(5)(b) grants the Government power to search the Applicant’s premises on suspicion that “information materials” are being prepared there, to seize the materials, and to arrest persons suspected of having

¹ *Yilmaz Yildiz and others v. Turkey* (2015) paras. 33 and 41.

prepared the materials.² This provision thus constitutes a prior restraint on publication, which this Court strongly disfavours and subjects to “the most careful scrutiny.”³

6. *Distribution*: By criminalising the distribution of information, Section 353/A(5)(b) interferes with Applicant’s Article 10 rights.⁴ (Application, Statement of Facts paras. 5, and 17-18, and Statement of Violations, paras. 1-4; Annex 4, pp. 88-98; Annex 7, pp. 580-587, and 595-607). There is nothing illegitimate about distributing information to migrants about how they can avail themselves of rights.⁵ Moreover, as the Venice Commission has noted, although the heading of Section 353/A “speaks about ‘illegal migration’, the provision may apply in reality to virtually a large number of migrants, irrespective of whether they are ‘illegal’ or not.”⁶
7. *Building or Operating Networks*: OSI-Budapest builds and operates networks by conducting meetings with Hungarian organisations for the exchange of opinions and ideas on migrants’ rights, a subject of significant public interest. (Application, Statement of Facts, paras. 16-20). By criminalising this activity, Section 353/A interferes with the Applicant’s Article 10 rights.⁷
8. *Funding*: By criminalising the funding of “organising activities” that help migrants apply for asylum or residence permits, Section 353/A(2) interferes with the Applicant’s right under Article 10 to provide financial support for expressive activities (e.g., preparing or distributing materials, building and operating networks, advocacy and dissent) relating to migrants’ rights. Indeed, this Court has recognised that Article 10 protects financial contributions to produce “publications and other means of communication” directed at promoting electoral candidates during an election period.”⁸ It has also

² Such measures are governed by the Code of Criminal Procedure, as of 1 July 2018 Act No. XC of 2017, more specifically Section 272 listing all measures that are applicable in the criminal procedure, as well as Chapter XLIV (Section 274-275) on detention, Chapter XLIX on search (Sections 302-305) and Chapter L on seizure (Sections 308-3014). Annex 2, p.57.

³ *RTBF v. Belgium* (2011), para. 105.

⁴ *Open Door and Dublin Well Woman v. Ireland* (1992), para. 73.

⁵ *Open Door*, para.73.

⁶ Venice Commission Joint Opinion, para. 81, Annex 6, p. 326.

⁷ *Lindon, Otchakovsky-Laurens and July v. France* (2007), para. 48.

⁸ *Bowman v. United Kingdom* (1998), paras. 33 and 47.

recognised “that there exists a strong public interest in enabling . . . groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest.”⁹ Accordingly, financial contributions directed at expressive activity promoting the human rights of migrants, an issue of “general public interest,” should also be protected under Article 10. Moreover, Article 10 protects the Applicant’s funding for migrants’ rights as a form of protest or “expression of opinion” against the Government’s violations of those rights.¹⁰

9. *Other activities including advocacy and criticism of the government on matters of public interest:* Since the detailed reasoning makes clear that the aforementioned activities are only illustrative and non-exhaustive, Section 353/A deters OSI-Budapest from additional Article 10 protected activities such as advocacy and criticism of the government on migrants’ rights issues.¹¹ (Detailed Reasoning, Annex 2, p. 24; Application, Statement of Facts, para. 5, and Statement of Violations, para. 2)

Section 253 of Act XLI of 2018 (The “Soros Tax,” Annex 2, pp. 26-27)

10. Section 253 imposes a 25% tax on (1) “financial support of an immigration supporting activity” in Hungary; and (2) “financial support to the operations of an organisation with a seat in Hungary that carries out activities to promote migration.” The detailed reasoning for this section states that “the taxable entity is primarily the organisation which provides the support.” (Annex 2, pp. 27-28)
11. This provision interferes with the Applicant’s Article 10 rights by (i) imposing a tax on financial contributions it makes to organisations that engage in expressive activities to promote migration¹²; and (ii) potentially subjecting funding for all of the Applicant’s operations (including non-migration-promoting activities) to a 25% tax, if the Applicant continues to engage in expressive activity promoting migration (such as “building and operating networks” or “propaganda activities that portray immigration in a positive

⁹ *Steel and Morris v. United Kingdom* (2005), para. 89.

¹⁰ *Hashman & Harrup v. United Kingdom* (1999), para. 28 (Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed).

¹¹ *Arslan v. Turkey* (1999), para. 46.

¹² *Bowman v. United Kingdom* (1998), paras. 33 and 47.

light,” or funding others to engage in expressive activity). The law therefore restricts the Applicant’s ability to engage in such expressive activity. (Application, Statement of Violations, para. 1; Annex 4, pp. 88-98; Annex 7, pp. 580-587, and 595-607). It also restricts the Applicant from funding others to engage in “migration promoting” activities including “carrying out and participating in media campaigns and seminars,” “organising education,” “building and operating networks,” or engaging in “propaganda activities that portray immigration in a positive light.” (Section 253, Annex 2, p. 26). In the past, OSI-Budapest has engaged in the latter two forms of speech and funded most of them. Significantly, on 22 July 2018, István Hollik, Spokesperson of Fidesz-KDNP parliamentary group, stressed that “Soros-organisations will be heavily charged, if they conduct any kind of activities supporting migration, and if they receive funding for such aims from anyone.”¹³ (Annex 3, p. 75)

12. Section 253 is an additional financial burden in a not-for-profit field where governments typically grant tax exemptions. Indeed, the Council of Europe’s Committee of Ministers has recommended exempting NGOs from such taxes.¹⁴
13. The interferences by the “Stop Soros” law and the “Soros Tax” are not justified by Article 10, as they pursue predominantly illegitimate aims (Section on Article 18, paras. 46-55, below), are not prescribed by law, and are disproportionate.

Not prescribed by law

¹³ A bevándorlási különadó egy újabb védelem az országnak, 22 July 2018, [Annex 3, p. 75](#).

¹⁴ Council of Europe Committee of Ministers, Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007, Annex 6, pp. 101-107. The creation of a new tax aimed at restricting the work of human rights organisations brings Hungary closer to countries like Egypt, Annex 6, pp. 261-261; Kazakhstan (Amnesty International: “Kazakhstan: Persecution of NGO for “failure to pay taxes” as authorities again clamp down on dissent.” [Annex 8, pp. 808-812](#); and Russia, where “NGOs receiving grants from donors not on [a government] list [were] required to pay a 24 percent tax on “profits” under [a decree], which entered into force on January 1, 2009” (HRW, Human Rights Watch on Russia: An Uncivil Approach to Civil Society, June 2009), Annex 8, p. 638.

14. Article 10 requires that the “relevant law must provide a clear indication of the circumstances when such restraints are permissible.”¹⁵ The overbreadth of legal provisions reduces the foreseeability of their application.¹⁶
15. As Section 353/A criminalises an overly broad and open-ended list of “organising activities” (including “preparing or distributing informational materials” and “building or operating a network”), it does not allow affected individuals and organisations to “foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”¹⁷ Indeed, the detailed reasoning of the law readily concedes that the list of “organising activities” is non-exhaustive. (Detailed Reasoning, Annex 2, p. 24)
16. Section 253 similarly lacks foreseeability, because it is not clear (i) when an organisation becomes, or ceases to be, one that “carries out activities to promote migration such that funding for all of the organisation’s operations are taxed at 25%. Section 253(1) (Annex 2, p. 26); and (ii) when a “programme, action or activity ... is directly or indirectly aimed at promoting immigration.” Section 253(2) (Annex 2, p. 26)

Illegitimate aims

17. The predominant aims of Act VI of 2018 (the “Stop Soros Package”) and Act XLI of 2018 are illegitimate, as described below in the analysis of Article 18 (paras. 46-55, below).

Not necessary in a democratic society

18. Even if this Court were to find that the “Stop Soros Package” and Act XLI of 2018 were enacted pursuant to a legitimate aim, the means adopted by the Government are disproportionate and not necessary in a democratic society.
19. This Court has determined that organisations like the Applicant that are involved in matters of public interest exercise a public watchdog role of importance similar to that of the press; and therefore their activities related to matters of

¹⁵ *Gaweda v. Poland* (2002), para. 40.

¹⁶ *Dink v. Turkey* (2010), para. 116; *Tatar v. Hungary* (2012), para. 31.

¹⁷ *Goodwin v. United Kingdom* (1996), para. 31.

public interest warrant similar protection to that afforded to the press.¹⁸ This Court has emphasised that “the most careful scrutiny” will be applied when assessing measures taken by national authorities which may potentially discourage the participation of watchdogs in the public debate on matters of legitimate public concern¹⁹ and that a narrow margin of appreciation will be afforded to States.²⁰

20. *Nature and Severity of Sanctions*: This Court has also consistently ruled in the context of the right to freedom of expression that “the nature and severity of the sanctions imposed are ... factors to be taken into account when assessing the proportionality of the interference,”²¹ and that the chilling effect of a provision is relevant to its proportionality.²² Even the imposition of a mild administrative sanction can “have an undesirable chilling effect on public speech.”²³ This Court has also recognised that criminal penalties for political expression or expression on matters of public interest that do not incite violence or hatred are disproportionate.²⁴ In prescribing criminal penalties (including imprisonment and dissolution) for expressive activities relating to migrants’ rights, Section 353/A is clearly disproportionate and not lawful in a democratic society.
21. *Overbreadth*: Section 353/A’s overbreadth is further evidence of its disproportionality. The “general reasoning” for the “Stop Soros Package” states that one of its aims is “to combat illegal immigration and activities that facilitate it.” (Annex 2, pp. 21-22). However, even if that were the actual aim of the law, Section 353/A criminalises support for lawful applications for asylum and residence permits and is not restricted to assistance for false or fraudulent claims. Similarly, Section 253 targets all activities and organisations promoting migration, including legal migration. As the Venice Commission has noted, the Hungarian Criminal Code already contained standard provisions that

¹⁸ *Guseva v Bulgaria* (2015), para. 38; *Társaság a Szabadságjogokért v. Hungary* (2009), para. 27.

¹⁹ *Osterreichische Vereinigung Zur Erhaltung, Stärkung und Schaffung v. Austria* (2013), para. 33.

²⁰ *Animal Defenders International v. United Kingdom* (2013), para. 102.

²¹ *Baka v. Hungary* (2016), para. 160. See also: *Guja v. Moldova* (2008) para. 95, and *Morice v. France* (2015), para. 127. See also *Cumhuriyet Vakfi and Others v. Turkey* (2013), paras. 62 and 63.

²² *Lombardo and Others v. Malta* (2007), para. 61. See also: In *Lewandowska-Malec v Poland* (2012), [para. 70](#) and *Gra Stiftung Gegen Rassismus und Antisemitismus v. Switzerland* (2018), paras. 77-78.

²³ *Tatar and Faber* (2012), para. 41.

²⁴ [Stern Taulats and Roura Capellera v. Spain \(2018\)](#), paras. 36, and 40-42.

criminalise the smuggling of illegal immigrants (Section 353) and facilitation of unauthorised residence (Section 354).²⁵ Moreover, the Venice Commission has observed, “[s]eeking asylum or requesting a title of residence is not a crime, and thus, it should not be a crime to support a person in this position. Whether or not in the end asylum is granted is a matter of decision of the State and not a decision taken by an NGO. Transferring this burden in the form of criminal sanctions for ‘getting it wrong’ about whether or not an asylum seeker has reason to fear persecution or not onto organisations effectively prevents any attempt by NGOs to assist the migrant concerned. It is not clear how an NGO employee is expected to know at the border which asylum seeker falls in the category of persons falling under . . . [Section] 353A. In addition, it is important to stress that the mere fact that a person has arrived from or through a safe (third) country cannot be considered as proof that this person does not have reasons to fear persecution.”²⁶

22. In addition, the fact that criminal prosecution could potentially lead to the dissolution of an entire organisation even if only a small fraction of its work related to migrants’ rights is further evidence of the law’s disproportionality. (Section 4, Act CIV of 2001 on the Criminal Code measures against a legal person, Annex 2 pp. 45-46). Similarly, under Section 253, even if a funder provided financial support to an organisation for activities other than promoting migration, the entirety of that financial support could be subject to the 25% tax as long as that organisation “carrie[d] out” any “activity,” however miniscule, and at any point in time after Section 253 entered into force, to “promote migration.”
23. *Lack of Evidence of National Security Threats*: In the “general reasoning” for the “Stop Soros Package,” the Government alleged, in relevant part, that the law was introduced “because immigration poses serious risks and is therefore a question of national security.” Similarly, the “detailed reasoning” for the “Stop Soros Package” states that its aim is to protect “public order and public security.” (Annex 2, p. 24). However, the means adopted in Section 353/A for

²⁵ Venice Commission Joint Opinion, para. 17, Annex 6, p. 311.

²⁶ Venice Commission Joint Opinion, para. 81, Annex 6, p. 326.

protecting national or public security are disproportionate. As stressed by this Court in *A. and Others v. United Kingdom*, the “distinction between nationals and non-nationals” can be disproportionate and discriminatory, unless there is evidence of threat to national security imposed by non-nationals and not by nationals.²⁷ Such a distinction is not legitimate when Hungary has not offered a single example of a national security risk to which Section 353/A responds. Indeed, this Court has held that general allegations of threats to national security are not sufficient. For example, in *Stomakhin v. Russia*, “the Court reiterate[d] that the concepts of ‘national security’ and ‘public safety’ in Article 10 § 2... must be interpreted restrictively and should be brought into play only where it has been shown to be necessary ... for the purposes of protecting national security and public safety.”²⁸ The Hungarian Government has clearly not met that burden here.

24. *Lack of Public Consultation*: The “Stop Soros Package” is also disproportionate because it was hastily adopted without public consultation with experts and civil society organisations.²⁹ Significantly, the Council of Europe’s Committee of Ministers has recommended that “NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation.”³⁰

B. Article 11: Violation of the right to freedom of association

25. For the reasons set forth below, Sections 353/A and 253 violate OSI-Budapest’s Article 11 rights.

Interference

Section 353/A of the Criminal Code

²⁷ *Case of A and others v. United Kingdom* (2009), para. 186.

²⁸ *Stomakhin v. Russia* (2018), para. 85. See also, *Case of Stoll v. Switzerland* (2007), para. 54; *Görmüş and Others v. Turkey* (2016), para. 37.

²⁹ Venice Commission Joint Opinion, paras. 9 and 69, Annex 6, pp. 311 and 323; Compare *Animal Defenders Int’l v. United Kingdom* (2013), para. 114.

³⁰ Council of Europe Committee of Ministers, Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007, para.77, Annex 6, p.109.

26. Section 353/A interferes with the Applicant's Article 11 rights by restricting it from "building or operating a network," which could include any meetings with Hungarian organisation partners on migrants' rights, Section 353/A(5)(c), and funding activities in support of applications for asylum or residence permits. Section 353/A(1) and (2).
27. The law also interferes with OSI-Budapest's right to freedom of assembly with respect to holding meetings with Hungarian organisations.³¹
28. As such, even if the Applicant were not prosecuted under Section 353/A, the threat of prosecution chills the Applicant's exercise of its Article 11 rights.³²

Section 253 of Act XLI of 2018

29. Section 253 interferes with OSI-Budapest's Article 11 right to freedom of association by imposing a 25% tax (i) on financial support the Applicant provides to organisations that engage in activities to promote migration; and (ii) potentially subjecting funding for all of the Applicant's operations (including non-migration-promoting activities) to a 25% tax, if the Applicant continues to promote migration, including through "building and operating networks." Section 253(1),(2)(c), and (3).
30. The law also interferes with OSI-Budapest's right to freedom of assembly with respect to holding meetings on migration or migrants' rights with Hungarian organisations.³³
31. Both Section 353/A and Section 253 restrict the Applicant from engaging in two core Article 11 associational activities consistent with its Charter, viz, (i) "building and operating networks" in support of migrants' human rights and (ii) funding organisations that protect these rights. Indeed, OSI-Budapest's Charter, states, in relevant part, that one of the objectives of the foundation is "to organise and support programmes in connection with human rights (minority) problems" and provide financial support to "institutions and legal entities" to achieve that objective (among others listed in the Charter, Annex 4, pp. 83-84; Application, Statement of Facts, paras. 16-17)

³¹ *Yilmaz Yildiz and others v. Turkey* paras. 33 and 41.

³² *Yilmaz Yildiz and others v. Turkey* paras. 33 and 41.

³³ *Yilmaz Yildiz and others v. Turkey* paras. 33 and 41.

32. This Court has recognised a range of activities that comprise the right of freedom of association including, *inter alia*, the carrying-out of an organisational mandate,³⁴ holding public meetings, disseminating information,³⁵ distributing propaganda, lobbying authorities, enlisting volunteers, and publishing.³⁶ In addition, the Court has recognised that receiving and using grants or other financial donations is part of the right to freedom of association.³⁷ Giving funds should equally be protected by Article 11. This Court has held that "the obligation to contribute financially to an association can resemble . . . that of joining an association and can constitute an interference with the negative aspect of the right to freedom of association."³⁸ If being forced to pay an association is a violation of the negative aspect of freedom of association, then being prevented from funding an association should be a violation of the positive aspect of the right (that is, the right to associate with others).
33. The former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has concluded that fundraising activities are protected under Article 22, and funding restrictions that impede the ability of associations to conduct their activities constitute an interference with the right to freedom of association.³⁹
34. In 2016 the UN Human Rights Council passed a resolution "[r]ecognizing that the ability to seek, secure and use resources is essential to the existence and sustainable operation of civil society actors, and that *undue restrictions on funding to civil society actors undermine the right to freedom of association,*"

³⁴ The UN Human Rights Committee has also observed that "the right to freedom of association [also] relates ... to the right of ... an association freely to carry out its statutory activities. The protection afforded by Article 22 of the International Covenant on Civil and Political Rights extends to all activities of an association. Human Rights Committee." *Viktor Korneenko et al. v. Belarus*, Communication No. 1274/2004, para. 7.2.

³⁵ *Koretsky and Others v. Ukraine* (2008), para. 52.

³⁶ *Koretsky and Others v. Ukraine* (2008), para. 52.

³⁷ *Ramazanov v. Azerbaijan* (2007), para. 59. See also Report to the UN Human Rights Council of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 24 April 2013, para.8, Annex 6, p.161; and UN Human Rights Council Resolution 32/31, adopted 1 July 2016, preambular para. 13 and operative para. 8, Annex 6, pp. 255-260.

³⁸ *Geotech Kancev GmbH v. Germany* (2016), para. 53; *Vörður Ólafsson v. Iceland* (2010), para. 48.

³⁹ Human Rights Council. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 24 April 2013, para. 8, Annex 6, p.161.

in which it “underline[d] the importance of the ability to solicit, receive and utilize resources for their work” (*emphasis added*).⁴⁰

35. OSI-Budapest has the right, under Article 11, to provide financial support to groups protecting human rights, including the rights of migrants, in accordance with its Charter. Providing funds to a group, especially consistently over time in a structured relationship, is a core way for one entity to associate, and demonstrate support for common objectives, with another entity. In this vein, OSI-Budapest has engaged, through its funding over the years, in associational activities with grantees, such as Hungarian Helsinki Foundation, aimed at achieving common objectives related to the protection of internationally recognized human rights (Annex 8, pp. 751- 808).
36. Sections 353/A and 253 violate the Applicant’s right to freedom of association because they pursue predominantly illegitimate aims; they are not prescribed by law; and they are disproportionate to any aim alleged by the State.

Not prescribed by law

37. As explained in the Article 10 analysis above, Sections 353A and 253 do not comply with the requirement of foreseeability and are not, therefore, prescribed by law.

Illegitimate aims

38. The “Stop Soros Package” and Act XLI pursue predominantly illegitimate aims, as stated in the section on Article 18 below. Section 353/A and Section 253 violate Article 11.

Not necessary in a democratic society

39. Even if this Court were to find that the “Stop Soros Package” and Act XLI of 2018 were enacted pursuant to a legitimate aim, the means adopted by the Government are disproportionate and not necessary in a democratic society.

⁴⁰ UN Human Rights Council Resolution n 32/31, adopted 1 July 2016, preambular para. 13 and operative para. 8, Annex 6, pp. 255-260.

40. As argued above under Article 10, both provisions are disproportionate because of the nature and severity of sanctions they impose (which create a chilling effect) and their overbreadth (paras. 14-15, and 21-22, above).
41. In *Tebieti*, this Court reiterated that “the exceptions to freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a ‘pressing social need’; thus, the notion ‘necessary’ does not have the flexibility of such expressions as ‘useful’ or ‘desirable’.”⁴¹
42. In addition, as noted above under Article 10, the “Stop Soros Package” is disproportionate on account of the lack of public consultation associated with its adoption (para. 24, above). Finally, as under Article 10, the mere invocation of national security, without further evidence of national security threats, does not justify Article 11 restrictions under Section 353/A.⁴²

C. Article 18: Limitation on use of restrictions on Article 10 and 11 rights

43. The “object and purpose of Article 18 ... is to prohibit the misuse of power.”⁴³ The enactment of Sections 353/A and 253 represent a clear abuse of power, leading to violations of Articles 10 and 11.
44. Section 353/A and Section 253 were enacted, as part of a wider Government strategy, to pursue two illegitimate aims: (i) to dismantle Hungary’s vibrant civil society, thereby silencing critics of the Hungarian Government; and (ii) to limit or bar almost all forms of migration, including legal migration, into Hungary.
45. In assessing Article 18 violations, the Court is not restricted to “direct proof” of the ulterior motive, and should look to the “totality” of the circumstances in the case, including “information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts.”⁴⁴ Relevant information will include reports and opinions by international

⁴¹ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, para. 67.

⁴² *Sidiropoulos v. Greece* (1998), para. 41; *United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria* (2005), para. 68.

⁴³ *Merabishvili v. Georgia* (2017), para. 303.

⁴⁴ *Merabishvili*, para. 317 and see *Rashad Hasanov v. Azerbaijan* (2018), para. 118 and *Rasul Jafarov v Azerbaijan*, (2016), para. 162.

human rights organisations.⁴⁵ This is particularly important in cases in which the key probative evidence, by its nature, remains with the Government.⁴⁶

46. That Sections 353/A and 253 are predominantly aimed at *dismantling civil society* and *limiting or barring almost all forms of migration* is evident from the following:
47. *Legislative intent of legal provisions*: The aims of the “Stop Soros Package” go far beyond combating illegal immigration. Indeed, the General Reasoning for Section 353/A expressly states that its aim is “to prevent Hungary from becoming a migrant country,” which this Court’s Article 10 and 11 jurisprudence would not recognise as a legitimate aim (Annex 2, p. 22). As mentioned under Annex 3 pp. 77, the “Stop Soros Package” aims to create a “homogeneous”⁴⁷ society, to “avoid allowing even one single migrant to enter Hungary,”⁴⁸ and to assure that Europe “remain[s] a land of Europeans.”⁴⁹ The aim to restrict migration is even clearer from the text of the “Soros Tax,” which imposes a 25% tax on activities for the mere fact that they “portray immigration in a positive light.”
48. The aim to “prevent Hungary from becoming a migrant country” breaches European values of democracy and pluralism, recognised by European Union Law (Article 2, the Lisbon Treaty) and this Court. Indeed, the Court has decided a number of freedom of association cases, where it found that restraints on plural political parties and associations were “not necessary in a democratic society,” because they unduly limited pluralism. Pluralism, broadly defined to include varied “cultural traditions,”⁵⁰ is a core element of democracy.⁵¹

⁴⁵ *Rashad Hasanov v. Azerbaijan* (2018), para. 125.

⁴⁶ *Rashad Hasanov v. Azerbaijan*(2018), para. 120.

⁴⁷ Ministry of Justice, A világlátásunkat kell megvédenünk, 14 December 2017, Annex 3, p.77.

⁴⁸ Ministry of Foreign Affairs, El kell kerülni, hogy Magyarország legyen a migránsok végállomása, 30 March 2018, Annex 3, p.77.

⁴⁹ Ministry of Foreign Affairs, Az illegális bevándorlást meg kell állítani, 7 April 2018, Annex 3, p.77.

⁵⁰ *Freedom and Democracy Party (Özdep) v. Turkey* (1999), para. 37. See also: *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (2009), para. 53; *Gorzelik and others v. Poland* (2004), para. 92; *Case of Moscow Branch of the Salvation Army v. Russia* (2007), para. 61; *Zhechev v. Bulgaria* (2007), para. 35.

⁵¹ *Freedom and Democracy Party (Özdep) v. Turkey* (1999), para. 37.

49. *Overly broad text of provisions:* Section 353/A purports to combat illegal immigration and thereby protect national or public security (Annex 2, p. 22). But, as noted above, the Hungarian Criminal Code already contains standard provisions that criminalise the smuggling of illegal immigrants (Section 353) and facilitation of unauthorised residence (Section 354). In addition, Section 353/A criminalises assistance to *lawful* applications for asylum and residence permits. Thus, the provision could bar the immigration of individuals (including refugees) who have a legal right to be in Hungary. Similarly, Section 253 targets all activities and organisations promoting migration, including legal migration.
50. Criminal prosecution under Section 353/A could lead to the dissolution of an *entire* organisation even if only a small fraction of its work related to migrants' rights. This disproportionate measure suggests that Section 353/A's aim is to silence civil society organisations, and not just on migrants' rights-related issues.
51. Under Section 253, even if a funder provided financial support to an organisation for activities other than promoting migration, the entirety of that financial support could be subject to the 25% tax under Section 253 as long as that organisation carried out any activity, however miniscule, and at any point in time, to promote migration. This suggests that Section 253's aim is to silence civil society organisations.
52. *Absence of foreseeability:* When combined with criminal penalties and substantial tax consequences, the "lack of clarity" of the provisions, including the open-ended, non-exhaustive list of "organising activities" in Section 353/A and the uncertain text of Section 253 (paras. 14-16, above), also has a chilling effect on civil society organisations' rights to freedom of expression and association.⁵²
53. *Legal and political context of sustained attack on democratic institutions:* The laws' adoption caps a multi-year series of Government attacks against free media, the courts, and civil society organisations. Sections 353/A and 253

⁵² *Cumhuriyet Vakfi and Others v. Turkey* (2013), paras. 62 and 63.

conform to this trend by undermining civil society (Application, Statement of Facts, paras. 22-29).

54. *Official campaign against Soros and OSI-Budapest.* As part of this broader assault, the Hungarian Government has waged a virulent official campaign against George Soros, the representative of the founder of OSI-Budapest, and OSI-Budapest itself,⁵³ including by prominently displaying in public spaces across Hungary billboards that lampoon Soros (Application, Statement of Facts, para. 28), and issuing statements against Soros, OSF, and the Applicant (Annex 3, pp. 71-72). Sections 353/A and 253 target OSI-Budapest, which has criticised human rights violations perpetrated by the Hungarian Government. (Annex 4, pp. 88-92; Annex 5, pp. 94-99; Annex 7, pp. 580-587, and 595-607).
55. *Official Nomenclatures of Act VI and Section 253 of Act XLI:* Hungarian governmental officials refer to the Act and the Section as the “Stop Soros Package” and the “Soros Tax,” respectively, confirming that they are *ad hominem* provisions, aimed at “stopping”⁵⁴ George Soros, OSI-Budapest, and its civil society grantees from opposing the Government on its human rights record. Indeed, the Venice Commission has noted with respect to Section 353/A that, “directing this legislation towards an individual . . . is problematic from a rule of law perspective.”⁵⁵ The same can be said of the “Soros tax.”

D. Article 1 of Protocol No. 1: Violation of the right to property

Interference

56. Section 353/A(2) violates OSI-Budapest’s right to property by making it a crime to provide “material resources” to “organising activities” aimed at facilitating asylum applications and residence permits. Equally, Section 253 interferes with

⁵³ EU Agency for Fundamental Rights, *Fundamental Rights Report 2018* (2018), Annex 6, p. 415.

⁵⁴ The Bill’s reasoning still refers to the “Stop Soros” package. The expression is repeated by public officials every day on Hungarian news, see Annex 2, pp. 22, 56, 62, 64, and 67; Annex 3, pp. 71, and 73-78.

⁵⁵ Venice Commission Joint Opinion, para. 61, Annex 6, p. 322.

OSI-Budapest's right to property by imposing a 25% tax on funding provided to or by OSI-Budapest for "immigration supporting activities."

57. In *Markcx v. Belgium*, this Court recognized that the right to dispose of one's property is an element of the right to property.⁵⁶ An interference with one's right to property is only permissible if it is (i) prescribed by law; (ii) in the general interest of the community and the requirements of the protection of the individual's fundamental rights; and (iii) proportionate.

Not prescribed by law

58. Article 1 of Protocol No. 1 states that any interference should be "subject to the conditions provided for by law," which includes the requirement of foreseeability.⁵⁷ It also refers to the "quality of the law, requiring it to be compatible with the rule of law."⁵⁸
59. As analysed under Articles 10 and 11, Sections 353/A and 253 do not comply with the foreseeability requirement (paras. 14-16, above). They are, therefore, in violation of Article 1 of Protocol No. 1.

General Interest of the Community

60. Sections 353/A and 253 do not serve the general interest of the community for the same reasons that they violate Article 18⁵⁹ (paras. 46-55, above). The Venice Commission's recommendation that Section 353/A be repealed as well as the European Commission's July 2018 notice to Hungary that European Union law had been violated confirm this conclusion.

Lack of Proportionality

61. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied, including those designed to control the use of the property at issue.⁶⁰ This requires a fair

⁵⁶ *Markcx v. Belgium* (1979), para. 63.

⁵⁷ *Beyeler vs Italy* (2000), para. 109. See also: *Hentrich v. France* (1995), para. 42.

⁵⁸ *James and Others v. United Kingdom* (1986), para. 67. See also: *Smirnov v Russia* (2007), paras. 55-56.

⁵⁹ *Beyeler v. Italy* (2000), para. 111.

⁶⁰ *Zelenchuk and Tsytsyura v. Ukraine* (2018), para. 101; *Hutten-Czapska v. Poland* (2006), para. 167.

balance⁶¹ between the general interest of the community and fundamental rights. The measures at issue here fail the test of proportionality.

62. As described above under Article 10, the two provisions are disproportionate because of their overbreadth (paras. 14-15, 21-22, and 40-41, above).

III. ADMISSIBILITY

63. The application should be declared admissible as OSI-Budapest satisfies the criteria set forth in Article 35 of the Convention.

Victim status

64. Section 353/A and Section 253 directly affect the rights of OSI-Budapest by imposing criminal sanctions and a 25% tax on activities aimed at protecting human rights, especially migrants' rights. These activities are central to the objectives set out in the Applicant's lawfully registered Charter (Annex 4, pp. 83-87).
65. The threat of criminal prosecution and abusive taxation violate OSI-Budapest's rights under Articles 10, 11, 13, and 18 and Article 1 of Protocol No. 1.
66. Significantly, the two provisions are named after the representative of OSI-Budapest's founder and are referred to in official documents and by Government officials in the media as "Stop Soros Package" and "Soros Tax" (Annex 2, pp. 22, 56, 62, 64, and 67; Annex 3, pp. 71, and 73-78). This clearly establishes that the laws target the Applicant and that it has victim status in this case.

Exhaustion

67. For the reasons set forth below, there are no effective remedies for OSI-Budapest to exhaust in this case. Nonetheless, out of an abundance of caution, on 24 September 2018, it has filed a complaint before the Constitutional Court.
68. *No domestic remedies for challenge to Section 253*: The Constitutional Court is the only court in Hungary that can review facial challenges to the

⁶¹ See, amongst other cases: *Hutten-Czapska v. Poland* (2006), para. 167; *Former King of Greece and Others* (2000), para. 89; *Pressos Compania Naviera S.A. and Others v. Belgium* (1995), para. 38; *Sporrong and Lönnroth v. Sweden* (1982).

constitutionality of laws. However, the Applicant cannot challenge the tax law before the Constitutional Court because Articles 37(4) and 24(2) of the Hungarian Fundamental Law (read together) bar the Constitutional Court from reviewing a challenge to the constitutionality of tax provisions (including Section 253) unless the challenge is related to rights enumerated in Article 37(4), viz, “inherent rights to life and human dignity, the right to the protection of personal data, the right to freedom of thought, freedom of conscience and freedom of religion, or the rights in connection with Hungarian citizenship.” Because the Applicant’s challenge to Section 253 relates to the rights to freedom of expression, association, assembly, and property, and does not relate to the enumerated rights, it cannot be reviewed by the Constitutional Court.

69. The Constitutional Court can review the compatibility of tax provisions with international treaties (like the European Convention) with respect to other rights beyond those stated under Article 37(4) of the Fundamental Law, but such a claim cannot be brought by OSI-Budapest. This is because Article 24(2)(f) of the Hungarian Fundamental Law read in conjunction with Article 32(2) of the Constitutional Court Act (Act CLI of 2011), does not allow civil society organisations (like OSI-Budapest) to challenge the incompatibility of tax provisions with international treaties.
70. *No domestic remedies for damages with respect to either law*: this Court has recognized in *Vékony v. Hungary*,⁶² that there are no effective remedies in Hungary for obtaining damages relating to unconstitutional laws because the Applicant would have to first prevail before the Constitutional Court and then bring successive civil litigation in order to seek damages. OSI-Budapest seeks damages in this case for the purpose of establishing a fund to protect civil society organisations’ rights to freedom of expression, association, and assembly, including with respect to migrants’ rights. Given that access to the Constitutional Court for vindication of the rights at issue is barred in this case, there is no effective remedy for the damages the Applicant has suffered.

⁶² *Vékony v. Hungary* (2015), paras. 22-24.

71. *Legal and Political Context*: A realistic account of the legal and political context of the formal legal remedies available⁶³ makes it evident that in practice, effective domestic remedies are not available to OSI-Budapest. As noted in the Statement of Facts, the Hungarian Government has progressively restricted the role and the independence of the courts (Application, para. 23). The Government has also reversed, through the Fourth Amendment to the Fundamental Law, politically sensitive Constitutional Court decisions relating to rights and the rule of law, including, *inter alia*, on the power of the National Judicial Office to reallocate cases within the courts.⁶⁴
72. Significantly, the Venice Commission has noted that “[t]he Fourth Amendment ... threatens to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances. ... The limitation of the role of the Constitutional Court leads to a risk that it may negatively affect all three pillars of the Council of Europe: the separation of powers as an essential tenet of democracy, the protection of human rights and the rule of law.”⁶⁵
73. *Delay*: The history of Constitutional Court practice makes clear that the length of time that it would take the Constitutional Court to hear any constitutional challenge would render ineffective any remedy it awarded.⁶⁶ The implications of a delay in this case are particularly serious because the laws chill OSI-

⁶³ *Akdivar and Others v. Turkey* (1996) para. 69; *Khashiyev and Akayeva v. Russia* (2005) paras. 116-17.

⁶⁴ See e.g., Constitutional Court decisions which were reversed: Decision 45/2012 (XII.29) AB available in English at: https://hunconcourt.hu/uploads/sites/3/2017/11/en_0045_2012.pdf, Decision 43/2012 (XII.20) AB available in Hungarian here: <http://public.mkab.hu/dev/dontesek.nsf/0/065D43D1183D5A48C1257AE8004C12E8?OpenDocument>, Decision 6/2013 (III.1) AB available in Hungarian here: <http://public.mkab.hu/dev/dontesek.nsf/0/E57CE6378E537151C1257ADA00524F50?OpenDocument> and summary in English available here: in English: [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2013-1-004?fn=document-frameset.htm&f=templates\\$g=\\$uq=\\$x=\\$up=1\\$force=5381](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2013-1-004?fn=document-frameset.htm&f=templates$g=$uq=$x=$up=1$force=5381), and Decision 38/2012 (XI.14) AB available in Hungarian here: <http://public.mkab.hu/dev/dontesek.nsf/0/1C19F4D0CFDE32FBC1257ADA00524FF1?OpenDocument>

⁶⁵ Venice Commission, Opinion CDL-AD(2013)012, adopted at its 95th Plenary Session (Venice, 14-15 June 2013), paras. 144-145, Annex 6, p. 211.

⁶⁶ *Mikalauskas v. Malta* (2013), para. 50; *Bellizzi v. Malta* (2011), para. 38; *McFarlane v. Ireland* (2010).

Budapest's rights to freedom of expression, association, and assembly on an ongoing basis.

74. *Special Circumstances*: Finally, special circumstances⁶⁷ including the widespread animus generated by the Hungarian Government's sustained vilification campaign against George Soros and OSI-Budapest further confirm that effective domestic remedies are not available in practice. (Application, Statement of Facts, paras. 28-29, and Admissibility Section, para. 7; Annex 3, pp. 71-73).

Six month rule

75. The "Stop Soros Package" entered into force on 1st July 2018 and the "Soros tax" entered into force on 25 August 2018. This complaint is therefore brought within six months of the violations of the Applicant's rights.

IV. JUST SATISFACTION AND CONCLUSION

76. OSI-Budapest respectfully requests that the Court issue a declaration that Section 353/A of the Criminal Code (adopted through the "Stop Soros Package") and the "Soros tax" violate Articles 10, 11, 13, and 18 of the Convention and Article 1 of Protocol No. 1 of the Convention.
77. To end these violations, OSI-Budapest respectfully requests that the Court require the State to conform its legislation to the Convention by repealing Section 353/A of the Criminal Code and Section 253 of Act XLI.
78. The Applicant also requests an award of damages for the purpose of establishing a fund to protect Hungarian civil society organisations' rights to freedom of expression, association, and assembly, including with respect to migrants' rights.

⁶⁷ *Aksoy v. Turkey* (1996), paras. 56-57.