



TÉLÉCOPIE • FACSIMILE TRANSMISSION

DATE: 8 March 2018

A/TO: Her Excellency
Ms. Zsuzsanna Horváth
Ambassador Extraordinary and Plenipotentiary
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A handwritten signature in blue ink, appearing to read "Beatriz Balbin", written over the typed name and title.

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REF: OL HUN 1/2018

PAGES: 10 (Y COMPRIS CETTE PAGE/INCLUDING THIS PAGE)

OBJET/SUBJECT: **JOINT COMMUNICATION FROM SPECIAL PROCEDURES**

Please find attached a joint communication sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

We would be grateful if this letter could be transmitted at your earliest convenience to His Excellency Mr. Péter Szijjártó, Minister for Foreign Affairs and Trade.



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Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

REFERENCE:
OL HUN 1/2018

8 March 2018

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; Independent Expert on human rights and international solidarity; Special Rapporteur on the human rights of migrants; and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, pursuant to Human Rights Council resolutions 34/18, 34/5, 35/3, 34/21 and 34/35.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the package of draft legislation on organizations supporting migration that has been recently submitted to the Hungarian National Assembly, also known as the 'Stop Soros Legislative Package'. If adopted, the draft legislation would lead, to undue restrictions on the right to freedom of association and freedom of expression in Hungary and further fuel the xenophobic and discriminatory public discourse on migration.

We have previously raised our concerns about the potential effect of the NGO Transparency Law in a letter dated 9 May 2017 (HUN 2/2017), to which we regret not to have received a reply from your Excellency's Government up to now.

Related concerns regarding anti-migrant campaigns in Hungary were previously raised in a letters dated 7 September 2015 (HUN 1/2015) and 6 October 2016

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His Excellency
Mr. Péter Szijjártó
Minister for Foreign Affairs and Trade

(HUN 1/2016). We acknowledge receipt of the replies of your Excellency's Government dated 24 November 2015 and 21 December 2016.

According to the information received:

On 13 February 2018, the Government of Hungary introduced to the National Assembly a package of three draft laws concerning organizations supporting migration, and introducing a new regulatory framework for non-governmental organizations (NGOs) working not only on issues related to migration and refugees, but also more broadly. This new regulation, if adopted, could have significant negative consequences with regard to the protection of the right to freedom of association and freedom of expression in Hungary and the support NGOs extend to migrants, regardless of their status, hereby further fuelling the xenophobic and anti-migrant public discourse, which we wish to address herein.

The legislative package contains three draft bills (T/19776; T/19775 and T/19774), which aim to regulate different aspects of the work of civil society organizations. These are the Bill on the Social Responsibility of organizations supporting illegal migration; the Bill on Immigration Financing Duty and the Bill on Immigration Restraining Orders.

Below we wish to highlight our concerns with regards to undue gaps and potential restrictions to the rights to freedom of association and freedom of expression posed by the proposed draft legislative package, which further increases the already very burdensome reporting requirements foreseen for civil society organizations, and contributes to further stigmatising them in the society.

Bill on the Licencing of Organizations Supporting Migration (T/19776)

Brief overview

According to article 1 of the draft bill, an association or foundation registered and seated in Hungary will be qualified as an 'organization supporting migration', if it 'sponsors, organizes or otherwise supports the entry into and stay in Hungary of third country nationals, through safe third countries, with the aim of providing international protection'. Activities falling under the definition include in particular: undertaking migration-related advocacy activities and campaigns, or organizing them; conducting activities aiming at influencing the legislative process; monitoring borders; preparing or commissioning information materials related to migration; building a network or recruiting volunteers; using financial or property benefits originating directly or indirectly from abroad; or providing monetary or property benefits to this end.

According to article 2, such activities may be carried out on the basis of a licence obtained from the minister responsible for migration and refugee policies (the Minister of Justice). The decision of the minister would make the CSO concerned an 'organization with a licence' (and thus with the necessary approval to function).

As part of the licencing process, the minister is required to examine whether the activities falling under the scope of the draft law are financed from funds originating from abroad. To that end, the minister is mandated to request the help of the national tax authority. Additionally, the minister would have to obtain the opinion of the national security authority as to whether the organization poses a potential threat to national security. The minister's decision may be challenged through a summary lawsuit for breach of essential rules of procedure.

According to bill T/19776, if an organization carries out the activities falling within the scope of the draft law, without having applied for a licence, the prosecutor could initiate an examination of the organization. Likewise, the prosecutor is entitled to order the tax authority to carry out an audit of the use of the funds by the organization in question. Based on the outcome of these oversight proceedings, the prosecutor may call on the organization to cease such activities within 15 days; or pay a fine. Eventually the prosecutor could also initiate the de-registration and dissolution procedure of the organization. The organization would be required to notify the competent tax authority within three days of receiving the foreign funding or property, regardless of its value, of the receipt of such funding originating from abroad.

Key concerns under IHRL

The above-mentioned requirements and procedures of licencing seem to pose significant restrictions both on the rights to freedom of association and to freedom of expression. In this connection, we wish to draw attention to articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Hungary in 1974.

Under article 19, any limitation to the right to freedom of expression must be determined by law, seek to protect national security, public order, or public health or morals, and must conform to the strict test of necessity and proportionality. Similarly, article 22 provides that no restrictions may be placed on freedom of association other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.'

In the case of the draft legislation under analysis here, it is stated that its purpose is to 'ensure the survival of the nation' and to 'protect its citizens and culture'. The draft introduction states that 'any activity intended to promote illegal migration and to intensify the migratory pressure is against the Hungarian state interest and causes quantifiable damage to the budget. (...) Therefore, a regulation is needed that identifies organizations that support migration and takes action against persons who jeopardize national security'.

It is our view that, while national security, the survival of the nation, and the protection of its citizens and culture, may be in themselves legitimate objectives under international law, it is unclear why the activities of NGOs in the field of migration pose a

danger to any of them, and how the framework of registration, licencing and oversight proposed are necessary and proportional to achieve these objectives. It is not sufficient to simply rely on such alleged objectives as a justification to undertake measures that will result in the hindering of the work of civil society organizations and silencing critical voices, which run counter to the realization of a democratic society. As pointed out by the Human Rights Committee, the state has to demonstrate that it is necessary to do so to achieve a legitimate objective (CCPR/C/GC/34).

Additionally, article 22 needs to be read in conjunction with article 2 (1) of the ICCPR. The draft proposal creates a new category of NGOs, titled ‘organizations supporting migration’ and imposes distinctive additional requirements on organizations that receive foreign funding, thereby discriminating between different categories of organizations.

The lack of individual assessments and of the possibility for migrants to state their claims, outlining the risks they may face when returned to their countries of origin, creates a potential violation of the international principle of non-refoulement. In order to ensure due process guarantees, which include access to information, to legal aid and to an interpretation services, relevant service providers should be able to be present at international borders. The provisions of the draft law, if adopted, would effectively prevent civil society from protecting and promoting the rights of refugees, asylum seekers and migrants from carrying out their legitimate and lawful activities, including providing the above mentioned assistance to individual migrants or from carrying out advocacy campaigns on their behalf, among others. We would like to bring to Your Excellency’s Government’s attention article 26 of the International Covenant on Civil and Political Rights stating that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Furthermore, we would like to note that the ‘protection afforded by article 22 extends to all activities of an association’, as the Human Rights Committee confirmed (Human Rights Committee, *Viktor Korneenko et al v Belarus*, Communication No 1274/2004, para 7.2). It is also pertinent to note that, as the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, has stressed ‘the right to freedom of association not only includes the ability of individuals or legal entities to form and join an association, but also to seek, receive and use resources – human, material and financial – from domestic, foreign and international sources’ (A/HRC/23/39, para 8).

Similarly, it is relevant to note that 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, also known as the UN Declaration on Human Rights Defenders States in its article 13 that ‘[e]veryone 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’.

The UN Human Rights Council, in its resolution A/HRC/RES/22/6 called upon States ‘to ensure that reporting requirements placed on individuals, groups and organs of society do not inhibit functional autonomy, and that restrictions are not discriminatory imposed on potential sources of funding’. We would also like to express concern that such restrictions violate the crucial principle of international solidarity, as reflected in the Draft Declaration on the right to international solidarity (A/HRC/35/35). Lastly, the Government of Hungary, at the September 2016 session of the Universal Periodic Review (UPR) accepted recommendations including that it ‘refrain from targeting or restricting the activities of civil society organizations based on their political affiliation or their receipt of foreign funding (para 128.38, recommendation by Australia, 2nd review of Hungary under the UPR).

We are concerned that the bill introduces a new category of CSOs called ‘organization supporting migration’ and thereby discriminates among non-governmental organizations based on their activities and their sources of funding. The draft law, if adopted, would impose significant additional reporting requirements and financial burdens on CSOs, resulting in the potential cessation of their activities. We recall that based on the 2017 NGO law on foreign-funded organizations (Act LXXVI of 2017), non-governmental organizations receiving more than 24,000 Euros of foreign funding are already required to register on a separate list and publicly label themselves as ‘foreign-funded organizations’. The current draft law, if adopted, would add a second layer of administrative burdens, in the form of a licencing requirement for a segment of NGOs working on issues related to asylum and migrants. Furthermore, even licenced CSOs would be required to pay the 25% duty on foreign funding or face a fine of 50% of their foreign funding.

Finally, we are concerned that the bill further fuels racial discrimination, xenophobia and intolerance towards non-citizens in contravention of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which was ratified by Hungary on 4 May 1967. Article 2(c) of the Convention obliges States to adopt immediate and effective measures to review and rescind any legislation, which has the effect of perpetuating racial discrimination. Article 5 (d) (viii) and (ix) further require States Parties to prohibit and eliminate racial discrimination with regards to the enjoyment of the rights to freedom of expression and to freedom of association.

The Durban Declaration and Declaration and Programme of Action (DDPA) reiterate that xenophobia against migrants, refugees and asylum seekers constitutes one of the main sources of contemporary racism. It therefore request States to combat the generalized rejection of, and xenophobic attitudes towards, migrants (para. 24). In this context, the DDPA stresses the vital role of NGOs in combatting racial discrimination, xenophobia and related intolerance. The DDPA calls for the removal of unlawful barriers to the effective functioning of NGOs working in this field and urges States to provide an open and conducive environment that enables them to operate freely within their societies (paras. 118 and 213).

Bill on Immigration Financing Duty (T/19776)

Brief overview

According to the proposed draft law, an organization supporting illegal migration is obliged to pay a so-called immigration financing duty of 25% if ‘it receives any financial or property benefit either directly or indirectly from abroad’.

The immigration financing duty would be due by 30 June the following year. The organization would be exempted from paying parts of the duty if it was able to demonstrate to the tax authority that the foreign funding was not used for the purpose of sponsoring or supporting the entry and residence of a third-country applicants on the territory of Hungary from a financial or property benefit and deriving from abroad either directly or indirectly. An organization would be also exempted from paying the immigration financing duty where it can effectively prove that the foreign funding was used to provide humanitarian assistance.

Similarly, the bill determines that the non-payment of the duty can be sanctioned with a fine double the amount of the original amount due, and that the revenue from the immigration financing duty will be allocated to the central budget and shall be spent on border protection tasks.

Key concerns under IHRL

We are concerned that the imposition of a 25% duty on foreign funding would discourage foreign donors from providing funds in solidarity to CSOs in Hungary, working on protecting the rights of refugees, asylum seekers and migrants, including those carrying out advocacy efforts domestically and internationally. The excessive fines imposed in cases of non-compliance could lead to the closing of CSOs.

The selective imposition of a 25% duty on foreign funding received by NGOs working in the field of migration is not only discriminatory, but also violates article 22 of the ICCPR and article 2(2) of the Declaration on Human Rights Defenders, which states that ‘each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed’. The imposition of a 25% duty on these types of financial sources would have a negative impact on the functioning of civil society in the country and would curtail the right of human rights defenders to promote and protect human rights and fundamental freedoms.

Bill on Immigration Restraining Orders (T/19774)

Brief overview

The Bill foresees the banning of any person residing or present in Hungary or in a certain part of Hungary who may pose a threat to the national security interests or a

danger to the public interest, from the frontiers or from within an 8-kilometres of the external borders. The process would be initiated by the minister of interior, who, in exceptional cases, may ban third-country nationals from the entire territory of Hungary.

The Bill defines an activity deemed to be contrary to the national security interest of Hungary or a person posing a danger to the public interest as someone who ‘supports the unlawful entry and residence of a third-country national in Hungary with his or her behaviour related to the migration situation, or provides financial or property benefit for such an activity’.

The immigration restraining orders would be ordered by the minister for a maximum period of six months, but not exceeding duration of the crisis situation caused by mass migration. The immigration restraining order might be challenged on the basis of a breach of essential rules of procedure in a summary lawsuit within eight days and would be considered by the courts.

Key concerns under IHRL

We are concerned that the draft law would empower the minister of interior to ban individuals from an 8 kilometres zone from the borders, or to ban third-country nationals from the entire territory of the country, merely based on the Government’s opinion that the person poses a danger to the public interest. Such provisions may amount to collective expulsion of non-nationals, acts explicitly prohibited under international law. The lack of individual assessment and possibility for each migrant to state his or her claim outlying the risk he or she may face when returned to a third country or his or her country of origin, may potentially violate the international principle of non-refoulement. The principle of non-refoulement is stronger as codified in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, where it is considered to be absolute and without exception, than in refugee law, meaning that persons may not be returned even when they might not otherwise qualify as refugees under the Convention relating to the Status of Refugees or national law, even when national security is involved. Accordingly, non-refoulement under the Convention against Torture must be assessed independently of the determination of refugee or asylum status, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases in which protection against refoulement under refugee law might not be available. Further concern is expressed regarding the lack of special measures envisioned at protecting people who might be particularly at risk of human rights violations, including children, persons with disabilities, LGBT persons, older people, victims of torture or victims of gender-based violence or trafficking.

The right to recourse would only be available based on the significant breach of procedural rules, not on the basis of factors contributing to the designation of the person as a threat to the public interest. Further significant concerns are expressed as to the designation of the so-called ‘crisis situation caused by mass migration’. While the Law on Asylum (Law LXXX of 2007) establishes fairly strict criteria for the ordering of such crisis situations, the recent bylaws implementing the law (including 24/2017 and 41/2016) do not appear to fulfil the requirements imposed by the Law on Asylum and the

reasoning for the legal basis of ordering the crisis situation have been classified for ten years.

General conclusions

We express our serious concerns about the impact of the draft laws which, if adopted, would not only interfere with the ability of organizations to carry out their legitimate activities in support of human rights in an enabling environment, but would also further stigmatize individuals and organizations working on issues related to refugees, asylum seekers and migrants and expressing solidarity with these groups. We are of the opinion that the introduction of the draft laws needs to be considered in the framework of an already hostile environment towards migrants, refugees and asylum seekers as well as the organizations working on their behalf. We are gravely concerned that, if adopted, the draft laws would fuel and legitimize the xenophobic rhetoric and racist attitudes towards non-citizens, further exposing them to abuse, hatred and violence. Furthermore, we are concerned that the draft laws appear to be part of a broader campaign aimed at obstructing the work of CSOs with critical voices towards the Government's policies.

We would like to inform you that this communication will be made available to the public and will be posted on the website page of the mandate of the Special Rapporteur on the right to freedom of expression:

<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.



David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression



Michel Forst

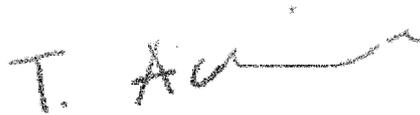
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