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## Safeguarding Democracy in Europe: A Bulwark Against Hungary's Subversion of Civil Society

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# SAFEGUARDING DEMOCRACY IN EUROPE: A BULWARK AGAINST HUNGARY'S SUBVERSION OF CIVIL SOCIETY

## INTRODUCTION

On February 18, 2018, the Prime Minister of Hungary, Viktor Orbán, addressed his citizenry with an ominous message: Hungary and Europe were on the precipice of ruin.<sup>1</sup> Since 2015, Europe has faced a migrant crisis unprecedented in recent decades, largely stemming from regional conflicts and atrocities in the Middle East and Africa that have given rise to vast incidents of forced displacement and refugee resettlement.<sup>2</sup> In his State of the Nation address, Orbán warned about the dangers of accepting those seeking refuge from predominantly Muslim-majority states and prophesized, “[i]f things continue like this, our culture, our identity and our nations as we know them will cease to exist. Our worst nightmares will have become reality. The West will fall, as Europe is occupied without realizing it.”<sup>3</sup> Orbán subsequently admonished his fellow European governments, lamenting, “[t]hey want us to adopt their policies: the policies that made them immigrant countries and that opened the way for the decline of Christian culture and the expansion of Islam.”<sup>4</sup> Orbán’s address underscored his nationalistic ideals, and his unabashed anti-immigrant rhetoric highlighted Hungary’s position at odds with the values held by the broader European community.

Since that State of the Nation address, Orbán’s government has matched proclamation with policy. In summer 2018, the Hungarian Parliament passed two separate, but parallel legis-

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1. Viktor Orbán, Hung. Prime Minister, State of the Nation Address (Feb. 18, 2018), in Viktor Orbán’s “State of the Nation” Address, WEBSITE HUNGARIAN GOV’T (Feb. 19, 2018), <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-state-of-the-nation-address>.

2. U.N. High Comm’r for Refugees, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees*, 2–3 (July 1, 2015), available at <https://www.refworld.org/docid/5595045a4.html>.

3. Orbán, *supra* note 1.

4. Specifically, Orbán referenced the immigration policies of Belgium, Germany, and France and promised to oppose European governments he claimed promote post-national systems of governance. *Id.*

lative acts: the first, a bundle of laws referred to as the Stop Soros bills;<sup>5</sup> the second, a constitutional amendment decreeing Hungary to be a state where no foreign population can resettle.<sup>6</sup> The Stop Soros bills function to criminalize the provision of assistance to illegal immigrants by Civil Society Organizations (CSOs),<sup>7</sup> while the amendment to Hungary's Constitution prohibits the resettlement of foreign populations within Hungary<sup>8</sup> and limits asylum only to those who enter Hungary directly from their country of origin.<sup>9</sup> As Hungary is a landlocked state, this constitutional amendment virtually eliminates the availability of legal immigration status to refugees and asylees and, consequently, expands the scope of the Stop Soros bills. Orbán punctuated his anti-immigrant efforts on July 20, 2018, when the Parliament adopted a new special tax amendment imposing a 25 percent tax on civil society funding that supports or promotes immigration.<sup>10</sup>

This Note will analyze Hungary's recent immigration legislation in the context of its obligations under the European Union

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5. This nomenclature comes from the text of the General Reasoning following the provisions of the bills themselves. GOV'T OF HUNG., BILL NO. T/333, AMENDING CERTAIN LAWS RELATING TO MEASURES TO COMBAT ILLEGAL IMMIGRATION (May 2018), <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf> (unofficial English translation of Bill and explanatory memorandum). [hereinafter BILL NO. T/333].

6. Vanessa Romo, *Hungary Passes 'Stop Soros' Laws, Bans Aid to Undocumented Immigrants*, NAT'L PUB. RADIO (June 20, 2018), <https://www.npr.org/2018/06/20/622045753/hungary-passes-stop-soros-laws-bans-aid-to-undocumented-immigrants>.

7. Civil society refers to organizations and communities that work collaboratively towards a shared, often public interest-related, goal. Commonly referred to as the "third sector" of a state, civil society operates distinctly from, and at times in opposition to, governmental and business sectors within society. Adam Jezard, *Who and What is 'Civil Society?'*, WORLD ECON. F. (Apr. 23, 2018), <https://www.weforum.org/agenda/2018/04/what-is-civil-society/>.

8. Romo, *supra* note 6.

9. GOV'T OF HUNG., BILL NO. T/332, SEVENTH AMENDMENT OF THE BASIC LAW OF HUNGARY, art. 5 (May 2018), <https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf> (unofficial English translation of Bill and explanatory memorandum).

10. GOV'T OF HUNG., BILL NO. T/625, AMENDING CERTAIN TAX LAWS AND RELATED LAWS, ON THE SPECIAL TAX ON IMMIGRATION, ch. X, § 250 (June 2018), <https://www.helsinki.hu/wp-content/uploads/t-625.pdf> [hereinafter BILL NO. T/625].

(EU) treaties<sup>11</sup> and the European Convention on Human Rights (ECHR).<sup>12</sup> It will argue that Hungary's anti-immigration laws dismantle the role and scope of civil society in Hungary and violate the rights of CSOs to freedom of expression and freedom of association in contravention of both EU institutional law<sup>13</sup> and the ECHR.<sup>14</sup> As such, it is imperative that the EU and the Council of Europe intervene in defense of democracy and send the message that autocracy and state-sponsored xenophobia, even under the veil of nationalism, will not be tolerated.

Part I of this Note will survey Hungary's political landscape following its emergence out of Soviet rule and the contemporaneous rise of nationalist ideologies. It will also highlight Orbán's election and subsequent aggrandizement of consolidated political influence to the detriment of Hungary's democratic institutions. Part II will map the European migration crisis of 2015 both generally and specifically in regard to Hungary, followed by a chronology of EU collective response initiatives and Hungary's deviations from those EU mandates. In Part III, this Note will discuss the EU Charter of Fundamental Rights ("the Charter") and the Council of Europe's ECHR provisions on freedom of expression and freedom of association and how Hungary's laws facially violate those rights. Part IV will analyze the permissible derogations from Hungary's ECHR obligation to ensure freedom

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11. In 2009, the Lisbon Treaty was enacted by EU member states to amend its foundational treaties and grant "treaty-like status" to the Charter of Fundamental Rights. Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 VA. J. INT'L L. 919, 921–22 (2010). After 2009, the main legal bases of EU law are the Treaty of the European Union and the Treaty on the Functioning of the European Union, which outline the functioning and institutional laws of the EU, and the Charter of Fundamental Rights, outlining human and civil rights obligations. *Id.*

12. The institutional bodies of the European Union include the EU Commission, Parliament, and Council of the European Union. The latter is not to be confused with the Council of Europe, a separate organization that predates the EU and has more state members, including Russia. The Council of Europe oversaw the drafting and subsequent enforcement of the ECHR. For more information distinguishing the EU and the Council of Europe, see *Do Not Get Confused*, COUNCIL EUR., <https://www.coe.int/en/web/about-us/do-not-get-confused?desktop=true> (last visited Jan. 12, 2019).

13. Charter of Fundamental Rights of the European Union arts. 11–12, June 7, 2016, 2016 O.J. (C 202) 59 [hereinafter *The Charter*].

14. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 10–11, Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221 [hereinafter *ECHR*].

of expression and association, and how Hungary's laws fail to meet the standard of such exemptions, ultimately violating those fundamental democratic rights. Finally, Part V will lay out proposals for two avenues of legislative and judicial punitive action and redress in response to Hungary's violations. These avenues will address the specific mechanisms available in relation to the violated treaty, either the Charter or the ECHR. Accordingly, each proposal will demonstrate options available to different agents, including CSOs, the EU, and individual member states.

### I. POLITICAL CONTEXT IN HUNGARY: FROM SOVIET RULE TO ORBÁN

Orbán and his conservative Fidesz Party came to power during Hungary's 2010 elections,<sup>15</sup> garnering him the prime ministership and the party a two-thirds majority in the Parliament.<sup>16</sup> This majority empowered Orbán, as Prime Minister and head of the ruling party, to make drastic changes to the Hungarian political and legal landscape.<sup>17</sup> Within one year, the Orbán government eliminated a rule requiring a four-fifths majority for Parliament to vote on constitutional changes, consequently enabling itself to write an entirely new constitution.<sup>18</sup> Promulgated in 2012, the new Fundamental Law of Hungary proclaimed Christianity as the foundation of Hungarian values, granted increased authority to the governing party, and reduced the efficacy of institutional limits on that power.<sup>19</sup>

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15. Orbán had previously been Prime Minister of Hungary from 1998 to 2002, leading a coalition government where no party had dominant power. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549 n.10 (2018).

16. James Mark et al., *After 1989 Remembering the End of State Socialism in East-Central Europe*, in THINKING THROUGH TRANSITION: LIBERAL DEMOCRACY, AUTHORITARIAN PASTS, AND INTELLECTUAL HISTORY IN EAST CENTRAL EUROPE AFTER 1989 463, 469 (Michal Kopeček & Piotr Wciślik eds., 2015).

17. *Id.* at 470.

18. Miklós Bánkuti et al., *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 139 (2012).

19. Mark et al., *supra* note 16, at 470; Translated text of the Fundamental Law of Hungary can be found at *The Fundamental Law of Hungary*, WEBSITE HUNGARIAN GOV'T (Apr. 25, 2011), <https://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>.

Through the new Constitution, Orbán and the Fidesz Party paved the way for autocratic governance by constricting the power of the judiciary and the media and undermining fair elections.<sup>20</sup> Orbán handicapped the ability of the Constitutional Court to effectively check the government by reducing the court's jurisdiction over budgetary matters and increasing the number of judges from eight to fifteen.<sup>21</sup> This empowered Orbán to appoint seven new judges, nearly half of the court, thus heavily shifting power and control in favor of the Fidesz Party and its interests.<sup>22</sup> After diminishing judicial power over the budget, Orbán established a Budgetary Commission and filled it with Fidesz Party members, giving the party long-lasting control over the national economy.<sup>23</sup>

The Prime Minister strengthened his autocratic rule further by weakening democratic election processes.<sup>24</sup> Orbán invalidated laws mandating partisan diversity in the Election Commission<sup>25</sup> and immediately filled the majority of seats with Fidesz Party members, giving his own party control of monitoring elections and granting referendums.<sup>26</sup> The government further undermined the electoral process through a 2013 constitutional amendment that stated in part:

In order to guarantee the conditions for the formation of a democratic public opinion, political parties which have a nationwide support and other organizations that nominate candidates must be provided free and equal access, as defined in a Cardinal Act, to political advertising in public media outlets during elections for Members of Parliament and Members of the European Parliament. Cardinal Act may limit the publication of other forms of political campaign.<sup>27</sup>

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20. Scheppele, *supra* note 15, at 549–50.

21. Bánkuti et al., *supra* note 18.

22. *Id.* at 140.

23. David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 536 (2018).

24. Bánkuti et al., *supra* note 18, at 140.

25. This Commission is tasked with overseeing election fairness, previously required to have opposition party members on the commission. *Id.*

26. *Id.*

27. OFFICE OF THE PARLIAMENT, T/9929, FOURTH AMENDMENT TO HUNGARY'S FUNDAMENTAL LAW art. 5 (Feb. 8, 2013), <https://lapa.princeton.edu/host-eddocs/hungary/Fourth%20Amendment%20to%20the%20FL%20-Eng%20Corrected.pdf>.

This provision prohibited private media coverage of election propaganda and effectively granted the government control of campaign coverage by limiting it to public, state-owned media sources.<sup>28</sup>

Prime Minister Orbán's consolidation of power and steady march towards authoritarianism stand in stark contrast with the democratic ideals of 1990s post-Soviet Hungary.<sup>29</sup> After the fall of the Soviet Union, Hungarian ethos celebrated the long-awaited triumph of democracy over Communist occupation.<sup>30</sup> The seeming paradox of Hungary's return to near authoritarianism, however, is not an isolated outlier among post-Communist states whose civil societies had been throttled under Soviet rule.<sup>31</sup> Parallel trajectories have notably occurred in Poland, Slovakia, and the Czech Republic.<sup>32</sup> Post-Communist states are particularly vulnerable to reverting to autocratic or authoritarian rule in part because they lack the tradition and historical underpinning of established democratic institutions.<sup>33</sup> Without proven and robust democratic foundations, states transitioning out of communism have been less equipped to withstand political tumult and instability, enabling strong centralized leaders to gain power.<sup>34</sup> It is necessary to note this underlying vulnerability of

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28. Dan Van Raemdonck et al., *Hungary: Democracy Under Threat*, FIDH, Nov. 2016, at 22, available at [https://www.fidh.org/IMG/pdf/hungary\\_democracy\\_under\\_threat.pdf](https://www.fidh.org/IMG/pdf/hungary_democracy_under_threat.pdf).

29. Mark et al., *supra* note 16, at 464.

30. A central, unifying moment in Hungarian collective memory was the thwarted 1956 Revolution. Hungarian dissidents cut the Soviet symbol out from the center of their national flags and led coordinated uprisings throughout Budapest and the countryside, attempting to push out Soviet occupiers and establish a democratic government under Imre Nagy. The uprising was quelled by Soviet troops, leading to a brutal period of retaliation on the part of the Soviet Union against the leaders of the uprising and anyone proven to have been involved. For more, see U.N. GAOR, 11th Sess., Supp. No. 18 (1957); Rep. of the Special Comm. on the Problem of Hung., 125–30, 233, U.N. Doc. A/3592 (1957).

31. Peter Wilkin, *The Rise of 'Illiberal' Democracy: The Orbánization of Hungarian Political Culture*, 24 J. WORLD SYS. RES. 5, 11 (2018).

32. *Id.* at 12.

33. Bojan Bugarić, *A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-Between" Democracy and Authoritarianism*, 13 INT'L J. CONST. L. 219, 223 (2015).

34. *Id.* at 244.

burgeoning democracies in the aftermath of authoritarian occupation in order to recognize the extent to which Orbán has consolidated power and to underscore the need for external action.

## II. THE MIGRANT CRISIS AND ITS IMPACT THROUGHOUT EUROPE

Spurred in large part by a mounting crisis in Syria, record numbers of refugees and asylum seekers arrived in Europe in 2015.<sup>35</sup> The number of asylum applicants in 2015 and 2016 more than doubled from 2014, increasing from 627,000 to more than 1.3 million in 2015 and 1.2 million in 2016.<sup>36</sup> In a Pew Research Center study of the number of asylum applicants per 100,000 people in the receiving country's population, Hungary received the most applicants compared to other European countries.<sup>37</sup> A total of 174,000 applicants sought asylum in Hungary in 2015, second only to the 442,000 in Germany.<sup>38</sup> The majority of applicants arrived from Syria, followed by Iraq and Afghanistan.<sup>39</sup> Since 2016, the total number of applicants arriving in Europe has steadily declined, reaching just over 700,000 in 2017,<sup>40</sup> but

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35. *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RES. CENTER (Aug. 2, 2016), <http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>.

36. *Asylum Statistics*, EUROSTAT (Mar. 12, 2019), [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics).

37. *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, *supra* note 35.

38. Germany received the highest total number of asylum applicants irrespective of population size. *Id.*

39. *Id.*

40. *Asylum Statistics*, *supra* note 36.

the impact on European geopolitics and daily life has been immediate and drastic.<sup>41</sup> The disparate responses among EU member states emphasized deep political and ideological fractures within the EU concerning resettlement.<sup>42</sup>

### *A. European Union Coordinated Efforts to Address Asylees and Refugees*

Laws and policies responding to asylees and refugees fall under the purview of both member states and the EU collectively.<sup>43</sup> The Treaty on the Functioning of the European Union (TFEU) contains express provisions mandating the acceptance of asylees and refugees<sup>44</sup> in accordance with the Convention and Protocol Relating to the Status of Refugees (“the Refugee Convention”).<sup>45</sup>

41. Most notably, states have had to grapple with housing shortages, increased demand for public social services, unaccompanied children, language barriers, and difficulties providing programming for assimilation. ALFONSO LARA MONTERO & DOROTHEA BALTRUKS, EUR. SOC. NETWORK, *THE IMPACT OF THE REFUGEE CRISIS ON LOCAL PUBLIC SOCIAL SERVICES* 9–12 (2016), [https://www.esn-eu.org/sites/default/files/publications/Refugee\\_Briefing\\_paper\\_FINAL.pdf](https://www.esn-eu.org/sites/default/files/publications/Refugee_Briefing_paper_FINAL.pdf). Furthermore, the migrant crisis highlighted deep fissures within the EU regarding foreign policy and shared migration responsibilities, and brought tensions of national identity and international obligations bubbling back to the surface. Matthew Karnitschnig, *Migration Reopens EU's Political Divide*, POLITICO (Dec. 18, 2017), <https://www.politico.eu/article/migration-reopens-eu-political-divide/>.

42. *How is the Migrant Crisis Dividing EU Countries?*, BBC (Mar. 4, 2016), <https://www.bbc.com/news/world-europe-34278886>.

43. E.U. AGENCY FOR FUNDAMENTAL RIGHTS, *HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS AND IMMIGRATION* 35 (2014).

44. Consolidated Version of the Treaty on the Functioning of the European Union art. 78, June 7, 2016, 2018 O.J. (C 202) 1 [hereinafter TFEU].

45. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol codify the customary law principle of nonrefoulement, mandating that a refugee cannot be returned to a state where their life or liberty would be threatened. The Convention defines a refugee as someone who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Furthermore, the Schengen acquis,<sup>46</sup> ratified by all but four EU member states, guarantees open borders throughout much of the EU, with external borders protected by national patrol.<sup>47</sup>

This unobstructed internal travel mandate prompted the EU to develop a Common European Asylum System (CEAS) overseen by the European Asylum Support Office and codified in the TFEU Article 78.<sup>48</sup> In actualizing CEAS, the European Parliament and the Council of the European Union enacted a series of laws in 2013, including the Dublin Regulation and the Eurodac Regulation.<sup>49</sup> The Dublin Regulation sets forth member state obligations and responsibilities in regard to receiving refugees,<sup>50</sup> and the Eurodac Regulation mandates fingerprinting refugees to facilitate that process.<sup>51</sup>

In response to the overwhelming number of refugees arriving via the Mediterranean, the EU developed a quota system to disperse over 150,000 refugees throughout its member states in order to alleviate pressure on coastal states, particularly Italy and Greece.<sup>52</sup> The quota system was established in 2015 and delegated 1,294 refugees to Hungary that year.<sup>53</sup> Despite the new binding protocol, Hungary refused to admit a single asylum seeker mandated by the quota system.<sup>54</sup>

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Convention Relating to the Status of Refugees art. 1(2), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

46. The Schengen acquis is an agreement among twenty-two EU member states, including Hungary, and four non-EU states in the Schengen border to have open borders internally and coordinated border control over external borders. Migration and Home Affairs, *Europe Without Borders: The Schengen Area*, at 4, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen\\_brochure/schengen\\_brochure\\_dr3111126\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen_brochure/schengen_brochure_dr3111126_en.pdf).

47. Maryellen Fullerton, *Borders, Bans, and Courts in the European Union*, 23 ROGER WILLIAMS U. L. REV. 393, 396 (2018).

48. Eur. Asylum Support Office, *An Introduction to the Common European Asylum System for Courts and Tribunals*, 13 (Aug. 2016), <https://www.easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF>; TFEU, *supra* note 44, art. 78.

49. Eur. Asylum Support Office, *supra* note 48, at 17.

50. 2013 J.O. (L 180) 31.

51. 2013 J.O. (L 180) 1, 7.

52. *Europe Migrant Crisis: EU Court Rejects Quota Challenge*, BBC (Sept. 8, 2017), <https://www.bbc.com/news/world-europe-41172638>.

53. *Id.*

54. *Id.*

*B. Hungary's Response to the Migrant Crisis and the EU's Mandates*

Hungary's response to the influx of asylum seekers throughout Europe was swift and absolute. By fall 2015, Hungary had erected a fence along its borders with Croatia and Serbia, and it continued to lengthen and strengthen its border protection through April 2017.<sup>55</sup> As walls popped up along the EU external borders, the structure of the Schengen acquis began to crumble. Slovakia and Hungary reinstated border controls, as did Germany and Austria.<sup>56</sup>

In addition to constructing walls, Hungary also built billboards.<sup>57</sup> In a national propaganda campaign vilifying immigrants, Hungary erected scores of billboards warning refugees not to come to Hungary to allegedly steal jobs and commit crime.<sup>58</sup> While the billboards, written in Hungarian, had a minimal deterrent effect on the predominantly Middle Eastern refugees, they fulfilled their primary purpose: to instill fear among native born Hungarians.<sup>59</sup> The billboards promulgated a widespread fear that immigrants would steal jobs and commit acts of terror if they were permitted within Hungary's borders.<sup>60</sup>

Hungary was also one of only four EU member states to vote against the refugee quota system and, after its passage, complained on the grounds that it was unprecedented for a majority vote to decide matters of state sovereignty.<sup>61</sup> Along with Slovakia, Hungary took the issue to the European Court of Justice.<sup>62</sup> Ultimately, the court ruled against Hungary and Slovakia and affirmed the quota system.<sup>63</sup> Hungary has since protested

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55. Fullerton, *supra* note 47, at 400.

56. *Id.* at 402.

57. Timea Drinoczi & Agoston Mohay, *Has the Migration Crisis Challenged The Concept Of The Protection Of The Human Rights Of Migrants? The Case Of Ilias And Ahmed v. Hungary*, in *IRREGULAR MIGRATION AS A CHALLENGE FOR DEMOCRACY* 100 (Elzbieta Kuzelewska et al. eds., 2017).

58. *Id.*

59. *Id.*

60. A Spring 2016 Global Attitudes Survey documented that Hungarians topped the list of European populations who feared immigrants posed a threat to national security and state economy. *Id.*

61. *Europe Migrant Crisis: EU Court Rejects Quota Challenge*, *supra* note 52.

62. *Id.*

63. *Id.*

the ruling as effectively being a violation of its sovereignty.<sup>64</sup> Further, the Hungarian Foreign Minister proclaimed after the ruling that Hungary's stance on the quota system had not changed, despite the unfavorable court decision.<sup>65</sup>

### III. FREEDOM OF EXPRESSION AND ASSOCIATION: HUNGARY'S PRIMA FACIE VIOLATIONS

Hungary has remained steadfast in its opposition to accepting asylum seekers and refugees, as demonstrated in the state Parliament. The Stop Soros bills, officially Bill No. T/333, are a series of amendments to pre-existing domestic law that have the express function of enhancing Hungary's ability to thwart unlawful immigration, though in practice they have been applied to impede virtually all immigration.<sup>66</sup> Article 9 of the Stop Soros bills contains an amendment to Act C of the 2012 Penal Code Section 353/A.<sup>67</sup> Notably, this is the Penal Code chapter dealing with crimes against public order.<sup>68</sup>

The first change to Section 353/A was a new subheading, which now reads: "Facilitating Illegal Immigration."<sup>69</sup> The law was then substantively amended to make it a misdemeanor offense, pursuant to Subsection 1, for "[a]nyone who conducts organizational activities" that assist a foreign national in initiating asylum proceedings if they did not suffer persecution on the enumerated grounds to warrant asylum in either "their country of origin or in the country of their habitual residence or another country via which they had arrived. . . ."<sup>70</sup> The amendment thus criminalizes organizations that facilitate asylum applications and procedures for anyone who does not meet the standard of a refugee as defined by the Refugee Convention, but adds additional language to require persecution in countries through which refugees travel en route to seeking asylum in Hungary.<sup>71</sup> This limits refugee status beyond the scope of the Refugee Con-

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64. *Id.*

65. *Id.*

66. BILL NO. T/333, *supra* note 5.

67. *Id.* § 353/A.

68. *Id.* at Detailed Reasoning, § 11.

69. *Id.* § 353/A.

70. *Id.* § 353/A(1)

71. *Id.*

vention by imposing a requirement that refugees must flee continuous persecution from their country of origin through transitional states along their journey in order to warrant asylum.

The remaining subsections of Section 353/A, namely Subsections 2 and 5, increase the scope of the unlawful conduct set out in Subsection 1. Subsection 2 makes punishable by up to one year of imprisonment the provision of financial support to facilitate the crimes of Subsection 1, as well as the regular continuance of those criminal acts.<sup>72</sup> The detailed reasoning relating to that provision explains that “[r]egular perpetration means at least two offenses with a short period of time in between them, in accordance with established practice.”<sup>73</sup> This clarifies, in part, the constituent requirements of regular and continued offenses to Subsection 1, but is ambiguous in regard to the meaning of “established practice” and “a short period of time.” Subsection 5 further outlines an expansive definition of constituent activities encompassed within the meaning of “organi[z]ational activity” related to the facilitation of asylum processes as prohibited in Subsection 1.<sup>74</sup> Sections 353/A(5)(b) and (c) reveal that included within the penumbra of prohibited organizational activity is the following conduct: “[b] [Anyone who] prepares or distributes information materials or commissions such activities, [or] [c] builds or operates a network.”<sup>75</sup> Such specifications are simultaneously excessively broad and entirely opaque.

The amendments to the tax law follow a similarly abstruse vein. Bill No. T/625 amends Hungarian tax law, with specific provisions including a “special tax on immigration.”<sup>76</sup> Section 250 imposes a 25 percent tax on any “financial support of an immigration supporting activity.”<sup>77</sup> It includes within “immigration supporting activity” a broad plethora of conduct, such as developing and maintaining networks and any media messaging that “portray[s] immigration in a positive light,” which the law sweepingly labels as propaganda.<sup>78</sup>

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72. *Id.* § 353/A(2).

73. *Id.* at Detailed Reasoning, §11.

74. *Id.* § 353/A(5).

75. *Id.*

76. BILL NO. T/625, *supra* note 10, § 250.

77. *Id.* § 250(1) and (4).

78. *Id.* § 250 (2).

The Stop Soros bills and the immigration tax expressly outline the reasoning behind amending the laws.<sup>79</sup> The Parliament justified imposing criminal sanctions on CSOs working in immigration under the guise of protecting public order and security, arguing that immigration poses a national security threat and CSOs that assist immigration are acting, effectively, as accessories.<sup>80</sup> The Parliament's explicit reasoning for the tax bill posited that immigration supporting activities increase the rate of immigration and, therefore, cost Hungarian society and the state money related to such "discharge of public burdens."<sup>81</sup>

The combined effect of the bills adversely impacts the dissemination of information and formation of partnerships that are integral to the functioning of civil society and foundational to the freedoms of expression and association. Those freedoms are echoed in both the ECHR and the Charter, though Article 52(3) of the Charter provides that the scope of each right shall be read in accordance with the meaning of the ECHR.<sup>82</sup> As such, this Note will analyze Hungary's violations of freedom of expression and association in the context of the ECHR, though the analysis equally applies to the Charter.

#### *A. The Stop Soros Bills and the Immigration Tax Restrict CSO's Freedom of Expression*

The ECHR expressly provides for the freedom of expression. Article 10(1) of the ECHR, in relevant part, reads as such: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."<sup>83</sup> In its General Considerations on Article 10, the Council of Europe emphasizes the right to freely impart and receive information as fundamental to a functioning

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79. BILL NO. T/333, *supra* note 5, at General Reasoning; BILL NO. T/625, *supra* note 10, at Detailed Reasoning.

80. BILL NO. T/333, *supra* note 5, at General Reasoning and Detailed Reasoning, §11.

81. BILL NO. T/625, *supra* note 10, at Detailed Reasoning.

82. The Charter, *supra* note 13, art. 52(3).

83. ECHR, *supra* note 14, art. 10.

democracy.<sup>84</sup> Encompassed within this right is the ability to criticize the government.<sup>85</sup> Furthermore, the right entails the freedom to access information necessary for a public to be “adequately informed, particularly on matters of public interest,” and prior European Court of Human Rights (ECtHR) jurisprudence holds that, in the interest of the “legitimate gathering of information on a matter of public importance . . . the law cannot allow arbitrary restrictions which may become a form of indirect censorship.”<sup>86</sup> The court considers, in its calculus concerning the right to information, the party’s intention to contribute the information to the “public debate on good governance.”<sup>87</sup> Such dicta emphasizes the court’s concern that censorship, especially when arbitrarily imposed through law, undermines a state’s democratic functions.<sup>88</sup>

The Stop Soros bills prohibit the creation and circulation of information about the immigration and asylum processes in Hungary if that information may assist in the filing of a meritless application.<sup>89</sup> These provisions contravene the ECHR-guaranteed freedom to “receive and impart information and ideas without interference by the public authority. . . .”<sup>90</sup> While the prohibition is limited to information sharing that facilitates an asylum application in instances where the applicant does not meet the standard of a refugee, it does not specify how directly the information must be distributed or when the merits of the claim must be determined.<sup>91</sup> The fluid nature of information means it may reach meritorious and non-meritorious applicants alike. Additionally, the merit of an application often cannot be

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84. DOMINIKA BYCHAWSKA-SINIARSKA, COUNCIL OF EUR., PROTECTING THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13 (2017), <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.

85. *Id.*

86. *Id.* at 15–16.

87. *Id.* at 16.

88. Importantly, the Council of Europe and the ECtHR have noted specific enumerated incidents of speech and expression that are not protected by Article 10. These include incitement to violence, hate speech, racism, Holocaust denial, and promoting the ideologies of Nazism. While Article 10 also includes a provision permitting certain restrictions on the freedom of expression, it is important to note that the express limits do not include disseminating information regarding immigration. *Id.* at 23–30.

89. BILL NO. T/333, *supra* note 5, § 353/A(5)(b).

90. ECHR, *supra* note 14, art. 10.

91. BILL NO. T/333, *supra* note 5, § 353/A(1).

determined with finality until it has undergone judicial review.<sup>92</sup> As a result, the provision effectively threatens to criminalize any and all CSO activity related to immigration and asylum.

The tax law similarly quells the dissemination of information by threatening severe economic repercussions for CSOs providing immigration services.<sup>93</sup> It goes further than the Stop Soros bills to include a tax on any media messaging that is a positive representation of immigration as a whole, not just illegal immigration.<sup>94</sup> This distinction underscores the true motive of the bills: to block support channels for immigration in general, not just when it is deemed unlawful.

### *B. The Stop Soros Bills and the Immigration Tax Restrict CSO's Freedom of Association*

The ECHR expressly provides for the freedom of assembly and association. Article 11(1) of the ECHR, in relevant part, reads as such: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others."<sup>95</sup> The Venice Commission, the advisory body for the Council of Europe, and the Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (ODIHR) jointly created an interpretive guide to the ECHR-guaranteed freedom of association.<sup>96</sup> The guide defines an association as any "organized, independent, not-for-profit body based on the voluntary grouping of persons with a common interest, activity or purpose."<sup>97</sup> It relates the significance of the freedom to associate as "a human right, crucial to the functioning of a democracy, as well as an essential prerequisite for other fundamental freedoms."<sup>98</sup> Networks of CSOs are thus vital in a democratic society and play an important role in promoting and protecting the public interest.<sup>99</sup> The ODIHR and Venice Commission further acknowledged

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92. Hungarian Helsinki Committee, *Regular Procedure*, ASYLUM INFO. DATABASE, <https://www.asylumineurope.org/reports/country/hungary/asylum-procedure/procedures/regular-procedure> (last visited Mar. 21, 2018).

93. BILL NO. T/625, *supra* note 10, § 250(4).

94. *Id.* § 250(2)(c).

95. ECHR, *supra* note 14, art. 11.

96. OFFICE FOR DEMOCRATIC INST. AND HUMAN RIGHTS, GUIDELINES ON FREEDOM OF ASSOCIATION 5 (2015), <https://www.osce.org/odihr/132371?download=true>.

97. *Id.* at 15.

98. *Id.*

99. *Id.*

the freedom of association—the backbone of civil society—as essential to the protection of other rights and freedoms for all people.<sup>100</sup>

In acknowledging the paramount importance of associations to democratic institutions, the ECtHR has recognized that states bear an affirmative responsibility to facilitate their functioning, even if they operate in an adversarial role to the government.<sup>101</sup> This infers, as the interpretive guide relays, an obligation to restrict the freedom of association only when necessary, using a strict and narrow standard.<sup>102</sup> Furthermore, laws restricting the freedom of association should be clear and specific, promulgated after thorough and inclusive legislative procedures, and subject to impartial review.<sup>103</sup> The disproportionate power of the Fidesz Party in the Hungarian Parliament, combined with its influence over the Constitutional Court, call into question both the inclusivity of legislative procedures and the impartiality of review.

The Stop Soros bills make punishable by imprisonment any organizational activity that supports illegal immigration.<sup>104</sup> Section 535/A(5)(c) specifies that the mere development of a network that functions to assist asylum and immigration constitutes a punishable organizational activity.<sup>105</sup> Similarly, the special tax targets CSOs for “building and operating networks” that support immigration.<sup>106</sup> The ambiguity of the bills and potential for broad applicability do not adhere to the precision called for by the Venice Commission and the ODIHR, nor do they abide by the affirmative responsibility to minimize any impediment made by the government to the functioning of associations. Such legislation exemplifies a direct attack on the ability of CSOs to collaborate, and consequently, violates their freedom to associate.

#### IV. EXEMPTIONS TO THE RIGHTS OF EXPRESSION AND ASSOCIATION: HUNGARY STILL IN VIOLATION

The Charter and the ECHR allow for permissible limitations of both the freedom of expression and freedom of association insofar as the restrictions, with the aim of protecting an expressly

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100. *Id.* at 17.

101. *Ouranio Toxo v. Greece*, App. No. 74989/01, 2005-X Eur. Ct. H.R. ¶ 37.

102. OFFICE OF DEMOCRATIC INST. AND HUMAN RIGHTS, *supra* note 96, at 18.

103. *Id.*

104. BILL NO. T/333, *supra* note 5, § 353/A(2).

105. *Id.* § 353/A(5)(c).

106. BILL NO. T/625, *supra* note 10, § 250(2)(b).

provided interest, are “prescribed by law and are necessary in a democratic society. . . .”<sup>107</sup> They differ slightly in the ensuing enumerated interests. Article 10 of the ECHR permits restrictions that are:

in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>108</sup>

By contrast, Article 11 uses the following language:

in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.<sup>109</sup>

The rights to freedom of expression and association are, therefore, lawfully restricted pursuant to an apparent tripartite test.<sup>110</sup> In the first prong, the restriction must be “prescribed by law.”<sup>111</sup> The second prong mandates that the restriction be in the protection of an enumerated interest.<sup>112</sup> Finally, the third prong requires the restriction to be necessary in a democratic society to protect that interest.<sup>113</sup> The state must meet all three prongs of the tripartite test and bears the burden of proof that the prongs have been satisfied.<sup>114</sup> It is further relevant to note that Article 17 of the ECHR, as a threshold matter, prohibits any limits on freedoms enumerated within the ECHR that would effectively vitiate the rights as prescribed.<sup>115</sup> Article 17 reads as follows:

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107. ECHR, *supra* note 14, arts. 10–11.

108. *Id.* art. 10.

109. *Id.* art. 11.

110. *Id.* arts. 10(2) and 11(2).

111. *Id.*

112. *Id.*

113. *Id.*

114. BYCHAWSKA-SINIARSKA, *supra* note 84, at 32–33.

115. ECHR, *supra* note 14, art. 17.

[N]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.<sup>116</sup>

The ECtHR has imposed a strict interpretation standard on these restrictions, namely in the case of *The Sunday Times v. the United Kingdom*.<sup>117</sup> The court stated the restrictions cannot be interpreted beyond the ordinary meaning of the language used and established a balancing test weighing the significance of the ECHR-guaranteed freedom to the restricted party against the government interest for its restriction.<sup>118</sup>

While the freedoms of expression and association would seemingly carry an inherently elevated level of significance given their designation as fundamental by the Charter, the government is afforded a degree of deference by the ECtHR.<sup>119</sup> Doctrinally, the ECtHR reserves for states a "margin of appreciation" when it comes to interpreting the ECHR and its relationship to domestic laws and restrictions.<sup>120</sup> The ECtHR jurisprudence on the scope of the margin of appreciation doctrine recognizes that state governments, on account of their direct knowledge of and interaction with domestic society, are best equipped to determine the necessity of laws and policies that would restrict an Article 10 right.<sup>121</sup>

The margin of appreciation is not limitless, however, and the court explained, "the requirements of proportionality and pressing social need had to be satisfied and domestic practice was subject to European supervision. . . ."<sup>122</sup> As such, while the margin of appreciation accords states a degree of deference concerning the necessity on a restriction on enumerated freedoms, it is not

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116. *Id.*

117. BYCHAWSKA-SINIARSKA, *supra* note 84, at 33.

118. *Id.*

119. STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2000).

120. *Id.*

121. The case referenced is *Handyside v. the United Kingdom* in 1976. It involved a dispute over the government seizure of the applicant's stock of *The Little Red Schoolbook* under the Obscene Publications Acts. The ECtHR used this case to summarize its approach to the margin of appreciation. *Id.* at 37.

122. *Id.*

determinative.<sup>123</sup> Ultimately, the ECtHR is the final arbiter of permissible derogations from the ECHR.<sup>124</sup>

*A. Hungary's Restrictions on Freedom of Expression and Association Are Not Adequately Prescribed by Law in the Stop Soros Bills and Immigration Tax.*

The first prong of the tripartite test for permissible restrictions on both the freedoms of Articles 10 and 11 requires the derogation be *prescribed by law*.<sup>125</sup> This means the restriction must be pursuant to a codified domestic law that adequately affords implicated parties the requisite notice to adjust their conduct to avoid violation.<sup>126</sup> It is a principle value of legal systems and the rule of law to provide certainty and foreseeability in order to serve the dual purpose of (a) informing subjects of the law about permissible and impermissible conduct and lawful compliance, and (b) preventing arbitrary enforcement.<sup>127</sup> The Venice Commission and ODIHR's joint guide to freedom of association includes a list of guiding principles to the interpretation of Article 11.<sup>128</sup> Principle 9, addressing whether a state's derogation from its obligation to respect the freedom of association is permissible, states "the law concerned must be precise, certain and foreseeable" in order to be adequately prescribed by law.<sup>129</sup>

The ECtHR case law similarly mandates precision in the law. In *Hashman and Harrup v. the United Kingdom*, the court held that a restriction to Article 10 freedom of expression was not prescribed by law because the law was so vague as to have failed to provide the applicants with sufficient guidance on how to adjust their behavior for future compliance.<sup>130</sup> The court reiterated that standard in *Gaweda v. Poland*, holding that the relevant

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123. *Id.*

124. *Id.*

125. ECHR, *supra* note 14, arts. 10(2) and 11(2).

126. JIM MURDOCH, COUNCIL OF EUR., PROTECTING THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 37 (2002) (The "prescribed by law" language appears in ECHR Articles 8–11. This Council of Europe Handbook discusses ECHR Article 9, but the interpretation is equally valid and applicable to Articles 10 and 11.).

127. *Id.*

128. OFFICE OF DEMOCRATIC INST. AND HUMAN RIGHTS, *supra* note 96, at 24.

129. *Id.*

130. COUNCIL OF EUROPE ET AL., FREEDOM OF EXPRESSION IN EUROPE: CASE-LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 (Mario Oetheimer ed., 2007).

domestic law “was not formulated with sufficient precision to enable the applicant to regulate his conduct,” and as such “was not ‘prescribed by law’ within the meaning of Article 10 § 2 of the Convention.”<sup>131</sup>

Hungary’s laws fail to satisfy this prong of the test because they do not enable CSOs to regulate their conduct. Several provisions within the bills are sufficiently vague so as to leave their applicability entirely in question. The Stop Soros bills criminalize organizational activities, including networking and the dissemination of information, that assist asylees whose claims are not meritorious.<sup>132</sup> In many cases, however, the merits of an asylum application are not known until a final determination by the courts.<sup>133</sup> Additionally, it is uncertain whether there is an intent or knowledgeability requirement in the laws because the bills do not indicate whether a CSO must know the asylum claim is meritless, or at what point that determination must be made, in order for the CSO to be found in violation. For instance, it is unclear whether a CSO that facilitates an asylum application it believes to be meritorious would be liable for criminal sanctions if the asylee were to be denied asylum later on in the courts. Such abundant ambiguities are likely to cause a chilling effect, in which CSOs self-censor and self-restrict their conduct beyond the scope of the law.<sup>134</sup>

The Stop Soros bills also hold criminally liable anyone who provides “financial means for committing the criminal offence specified in Subsection (1), or who regularly carries out such organi[z]ational activities. . . .”<sup>135</sup> Here, again, the law is imprecise and does not clearly relay conduct that would fail to comply. For example, it is unclear whether a CSO that provides funding for pro-bono lawyers who may occasionally, but not primarily, work with asylees would constitute a violation of the law, thus inviting criminal sanctions. Additionally, the Parliament specified that “regularly carries out” means an offender must partake in

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131. *Gaweda v. Poland*, App. No. 26229/95, 2002-II Eur. Ct. H.R. 301, ¶ 48.

132. BILL NO. T/333, *supra* note 5, § 353/A(1).

133. Hungarian Helsinki Committee, *supra* note 92.

134. For a detailed discussion on the link between ambiguity in the law and the chilling effect, see Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 694–701 (1978) (discussing the concept of uncertainty and the chilling effect doctrine in the context of freedom of speech in the United States).

135. BILL NO. T/333, *supra* note 5, § 353/A(2).

an impermissible organizational activity more than twice in “a short period of time” relative to custom.<sup>136</sup> The provision provides no further specification, leaving open to interpretation how short a period of time must be to constitute noncompliance with the bill.

Both the Stop Soros bills and the immigration tax sanction the “building and operating” of networks related to assisting immigration, with no additional clarification.<sup>137</sup> Such language is rife with ambiguity. It fails to indicate the threshold of what constitutes a network—how organized or linked various CSOs would have to be and to what requisite degree their work must interrelate to promote a common purpose—and how directly related the associational activity must be to supporting immigration. Even further, the tax imposes a 25 percent sanction on any “propaganda activities that portray immigration in a positive light.”<sup>138</sup> Thus, a CSO that operates in the realm of immigration would need to decipher what category of activities constitute “propaganda” and “positive light.” For instance, it is unclear whether the dissemination of fact-based information relating to the asylum process may be construed as “positive” merely for not disparaging immigration, or for highlighting facts the government opposes. The open-ended nature of multiple provisions within the Stop Soros bills and the immigration tax fail to guide CSOs towards a path to compliance and conduct regulation.

Beyond the vague language of the bills, their apparent contravention of Hungary’s international obligations furthers their ambiguity. The Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) assert, in Article 3, that states cannot unilaterally legislate their way out of a breach of an internationally wrongful act by promulgating contradictory domestic law.<sup>139</sup> Article 2 defines an internationally wrongful act, in part, as a breach of a binding international obligation.<sup>140</sup> The Stop Soros bills and immigration tax facially breach Hungary’s obligations under international law and EU mandates. Thus, Hungary is likely committing an internationally wrongful

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136. *Id.* at General Reasoning.

137. *Id.* § 353/A(5)(c); BILL No. T/625, *supra* note 10, § 250(2)(b).

138. Bill No. T/ 625 §250(2)(c).

139. The first twenty-seven articles of ARSIWA are generally regarded as customary international law. Int’l Law Comm’n, Rep. on the Work of Its Fifty-third Session, U.N. Doc. A/55/10, at 36–38 (2000).

140. *Id.* at 34–36.

act that cannot be rectified through shifting obligations under domestic law.

Hungary is a signatory to the Refugee Convention, which adopts the principles of non-refoulment and non-penalization.<sup>141</sup> The principle of non-refoulment, found in Article 33 of the Refugee Convention, prohibits state parties from returning an asylee to a state where they face threats to their life or freedom.<sup>142</sup> Article 31 of the Refugee Convention mandates that state parties shall not penalize asylees who enter the state unlawfully, having come directly from a country where they faced persecution.<sup>143</sup> While the Fidesz Party seems to have interpreted the “coming directly” language to validate their laws restricting asylum only to those who did not travel through any states between the persecuting country and Hungary, the UNHRC drafters did not intend such an interpretation.<sup>144</sup> The intention of that provision, and indeed how it has predominantly been applied, was to preclude asylees who had safely and firmly resettled in a third country, while permitting asylum applications from those who merely passed through other states en route to the State in which they seek asylum.<sup>145</sup> Thus, the Stop Soros bills contravene the Refugee Convention by authorizing the criminal penalization of asylees and those who assist them, as well as the possible refoulment of asylum applicants who seek refuge in Hungary.

In addition, the Stop Soros bills directly violate EU law, specifically International Protection Procedures Directive 2013/32.<sup>146</sup> This directive, promulgated in 2013 by the EU Parliament and Council and binding on member states, guarantees asylees a right to communicate with lawyers and organizations

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141. U.N. High Comm'r for Refugees, *Convention and Protocol Relating to the Status of Refugees*, 3 (2010), available at <https://www.unhcr.org/3b66c2aa10>.

142. Refugee Convention, *supra* note 45, art. 33.

143. *Id.* art. 31.

144. Erika Feller, Volker Türk & Frances Nicholson, *Summary Conclusions: Article 31 of the 1951 Convention*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 253, 255 (Erika Fuller et al. eds., 2003), available at <https://www.refworld.org/docid/470a33b20.html>.

145. *Id.*

146. Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 2013 O.J. (L 108/60) art. 12(c), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>.

that provide counsel.<sup>147</sup> That guarantee is stipulated on the grounds that the communication with CSOs providing counsel be in accordance with the national law of the State; as such, it can be inferred that the guarantee may be limited by national law, but not entirely vitiated.<sup>148</sup> The tension between binding international law and Hungary's domestic legislation creates additional ambiguity that muddies the waters for CSOs to garner clear guidance from the Stop Soros bills and immigration tax. The Stop Soros bills and immigration tax as they stand would seemingly force CSOs to disregard international obligations or face sanctions for failing to comply. The ambiguities and conflict between international and domestic law further diminish foreseeability and the opportunity for CSOs to regulate conduct.

*B. Hungary's Restrictions on Freedom of Expression and Association Are Not Aimed at Protecting an Enumerated Interest.*

The second prong of the tripartite test for permissible derogations from ECHR Article 10 and 11 rights requires the restriction to aim to further an enumerated interest. The Hungarian Parliament expressly stated in the Stop Soros bills' General Reasoning section that the amendments were promulgated in the name of national security.<sup>149</sup> The Parliament posits that recent elections and referendums, where Hungarian citizens elected Fidesz and upheld its anti-immigrant platform, indicate the will of the people for Hungary to avoid becoming a country of immigrants.<sup>150</sup> As such, the government deems itself obliged to protect those interests and subsequently denigrate immigration as a "serious risk" and matter of "national security."<sup>151</sup> By contrast, the reasoning provided in the immigration tax amendments makes no mention of any enumerated interest specified in Articles 10 or 11, instead stating the tax is justified in response to the perceived costs and burdens imposed on Hungarian society by the rise in immigration allegedly spurred by the support of CSOs.<sup>152</sup>

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147. *Id.*

148. *Id.*

149. BILL NO. T/333, *supra* note 5, at General Reasoning.

150. *Id.*

151. *Id.*

152. BILL NO. T/625, *supra* note 10, at Detailed Reasoning.

While buffering the state budget is not an expressly permissible ground for restricting the freedoms of expression and association under Articles 10 and 11, protecting national security is.<sup>153</sup> Therefore, on its face, the Stop Soros bills present a possible basis for exemption. Additionally, ECHR Article 15 permits derogation from an ECHR obligation “[i]n time of war or other public emergency threatening the life of the nation” insofar as the derogations are “strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”<sup>154</sup> While states, in accordance with the margin of appreciation principle, are given deference in determining what constitutes a threat to national security, their assessment is not absolute.<sup>155</sup>

The Venice Commission and ODIHR’s joint guide to freedom of association states, “[t]he scope of these legitimate aims shall be narrowly interpreted,” recognizing the potential for states to abuse fundamental freedoms in the name of national security if given complete deference.<sup>156</sup> The ECtHR has further recognized the need for the courts to be the final determiner of legitimate interests.<sup>157</sup> In *Case of Janowiec and Others v. Russia*, the ECtHR explained that states have the obligation to show the basis of a claim of national security is reasonably based in fact.<sup>158</sup>

Hungary would bear the burden of proof in arguing that the influx of immigration—and specifically asylum seekers and refugees—poses a national security threat that is reasonable based on the facts. While the scope of legitimate national security concerns has never been comprehensively enumerated, it is most often successfully invoked in relation to “the protection of state security and constitutional democracy from espionage, terrorism, support for terrorism, separatism and incitement to breach military discipline.”<sup>159</sup> While the Fidesz Party’s billboard and media campaigns linking immigrants to terrorism and economic

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153. ECHR, *supra* note 14, arts. 10–11.

154. *Id.* art. 15.

155. GREER, *supra* note 119, at 37.

156. OFFICE OF DEMOCRATIC INST. AND HUMAN RIGHTS, *supra* note 96, at 24.

157. Eur. Ct. H.R. Research Division, *National Security and European Case-Law*, 2 (2013), available at <https://rm.coe.int/168067d214>.

158. *Janowiec v. Russia* [GC], App. Nos. 55508/07 and 29520/09, 2013-V Eur. Ct. H.R., ¶ 214.

159. Eur. Ct. H.R. Research Division, *supra* note 157, at 4.

hardship successfully instilled widespread fear throughout Hungary, there has not been a known terrorist attack<sup>160</sup> perpetrated by a refugee in Hungary since the fall of communism in 1989.<sup>161</sup> As such, it is unlikely Hungary would be able to successfully present a national security threat that is materially and factually reasonable so as to justify derogation from the ECHR.<sup>162</sup>

*C. Hungary's Restrictions on Freedom of Expression and Association Are Not Necessary in a Democratic Society.*

The final prong of the tripartite test, requiring any restriction on Article 10 or 11 freedoms to be necessary in a democratic society, closely piggybacks off of the second prong. Whether or not an enumerated interest, such as protecting national security, is deemed legitimate may be determined by the necessity of the restriction imposed.<sup>163</sup> The key principle in determining whether a restriction or derogation is necessary in a democratic society is proportionality; namely, a requirement that the government may only impose restrictions limited to the degree that is required to accomplish the legitimate aim.<sup>164</sup> A law that purports to protect a legitimate aim, such as national security, but that infringes on the freedom of expression and association far more broadly than is necessary to achieve that aim, cannot be proportional.<sup>165</sup>

Proportionality is thus another balancing test that seeks the route of least resistance. In *Case of Dudgeon v. The United Kingdom*, the ECtHR elaborated that the test for necessity and proportionality balances the severity of the punishment imposed by

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160. *Search Results*, GLOBAL TERRORISM DATABASE, [https://www.start.umd.edu/gtd/search/Results.aspx?expanded=no&casualties\\_type=b&casualties\\_max=&start\\_yearonly=1989&end\\_yearonly=2017&dtp2=all&success=yes&country=90&ob=GTDID&od=desc&page=1&count=100#resultstable](https://www.start.umd.edu/gtd/search/Results.aspx?expanded=no&casualties_type=b&casualties_max=&start_yearonly=1989&end_yearonly=2017&dtp2=all&success=yes&country=90&ob=GTDID&od=desc&page=1&count=100#resultstable) (last visited Mar. 20, 2019) (search results from 1988–2017 in Hungary).

161. Drinoczi & Mohay, *supra* note 57.

162. Hungary did convict a Syrian refugee of under anti-terror laws in 2018 for crossing the border with Serbia illegally, but the sentence has been widely condemned as a misuse of terrorism charges. *Hungary Jails 'Terrorist' Over Migrant Border Clash*, BBC (Mar. 14, 2018), <https://www.bbc.com/news/world-europe-43408662>.

163. Eur. Ct. H.R. Research Division, *supra* note 157.

164. JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 665 (8th ed. 2012).

165. *Id.* at 664.

the government with its intended objectives.<sup>166</sup> In *Dudgeon*, a case concerning whether the United Kingdom's sanctions on homosexual conduct were permissible restrictions of Article 8 and 14 ECHR rights, the court remarked that the "breadth and absolute character" of the UK laws and severe sanctions shifted the balance towards disproportionality.<sup>167</sup>

The ECtHR has also found that governments must, when restricting a fundamental ECHR right, do so in a manner that imposes the least prejudice upon the right itself.<sup>168</sup> In *Castells v. Spain*, the ECtHR specially noted that "[t]he dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available. . . ."<sup>169</sup> The ECtHR caselaw demonstrates the court's generally critical lens when supervising state restrictions on fundamental freedoms, especially when the means of restriction are broad and sweeping in a way that abuses the state's disparate power to vitiate the freedom holistically.

The Stop Soros bills and immigration tax would likely fail to satisfy the necessity requirement. The punishment of up to a year imprisonment or a heavy tax burden is severe, while the legislation's ability to further a legitimate aim is minimal. Already, the Stop Soros bills and immigration tax have destabilized civil society in Hungary without providing any tangible protections in the name of national security.<sup>170</sup> Following the promulgation of the immigration tax bill in 2018, the Central European University in Budapest<sup>171</sup> almost immediately halted its Open Leaning Initiative for asylees and refugees in fear of the 25 percent tax.<sup>172</sup> The initiative was aimed towards integrating asylees and refugees into Hungarian and European society

166. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), at 19, ¶ 59 (1981).

167. *Id.* ¶ 61.

168. *Mouvement Raelien Suisse v. Switzerland* [GC], App. No. 16354/06, 2012-IV Eur. Ct. H.R. 373, ¶75 [hereinafter *Mouvement Raelien Suisse*].

169. *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A), at 19, ¶ 46 (1992).

170. See, e.g., *Soros University Says It[s] Being Forced Out of Hungary, Mulls Move*, REUTERS (Oct. 25, 2018), <https://www.reuters.com/article/us-hungary-soros-ceu/soros-ceu-university-says-it-being-forced-out-of-hungary-mulls-move-idUSKCN1MZ1TY>.

171. The Central European University was founded by George Soros, the namesake of the Stop Soros bills. *Id.*

172. Lydia Gall, *University Program First Victim of Hungary Anti-Immigration Tax*, HUM. RTS. WATCH (Aug. 29, 2018),

by providing free educational resources and career and academic advice.<sup>173</sup> Thus, the laws have halted some assimilation initiatives, producing a result which seems counterintuitive to protecting public order. The Hungarian government has since forced the Central European University out of its capital city altogether, demonstrating its willingness to boot a pest that uses information and knowledge to counter government messaging.<sup>174</sup>

The potential for broad chilling effects resulting from ambiguities in the law, coupled with harsh punishments, push Hungary's recent legislation into the realm of disproportionate restrictions on fundamental freedoms. Furthermore, the Stop Soros bills and immigration tax are so broad as to implicate large portions of civil society that work in immigration, and they do so without tailoring the impact to be minimally prejudicial.<sup>175</sup> As such, the restrictions posed by Hungary's laws are disproportionate to any legitimate aim and are unnecessary in a democratic society.

#### V. REDRESS FOR CIVIL SOCIETY IN HUNGARY: JUDICIAL AND LEGISLATIVE AVENUES

The European Union recognizes CSOs as vital to promoting and protecting participatory democracy, transparent governance, social harmony and equality, and state legitimacy.<sup>176</sup> The Stop Soros bills and immigration tax threaten to significantly

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<https://www.hrw.org/news/2018/08/29/university-program-first-victim-hungary-anti-immigration-tax>.

173. *Id.*

174. Susan Adams, *Why Hungary Forced George Soros-Backed Central European University To Leave The Country*, FORBES (Dec. 4, 2018), <https://www.forbes.com/sites/susanadams/2018/12/04/why-hungary-forced-george-soros-backed-central-european-university-to-leave-the-country/>.

175. The *Mouvement Raelien Suisse* case noted that, in order for a restriction on a freedom to be permissible under the necessity and proportionality prong of the exemptions, it must be implemented specifically so as to minimize prejudice to the party whose freedom is being restricted. *Mouvement Raelien Suisse*, *supra* note 168, ¶ 75.

176. *The Roots of Democracy and Sustainable Development: Europe's Engagement with Civil Society in External Relations*, at 3, COM (2012) 492 final (Dec. 9, 2012), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM%3A2012%3A0492%3AFIN%3AEN%3APDF>.

undermine the work of CSOs in immigration or tangentially related fields and continue a trend within Hungary to subvert civic engagement and CSOs' ability to check the government.

Article 2 of the Treaty of the European Union (TEU) enumerates democracy as a paramount and foundational value of the European Union.<sup>177</sup> Orbán's steady march to aggrandize power, including rewriting the constitution, crippling the judiciary, consolidating control over the media, and undermining civil society, all pose a significant and imminent threat to democracy in Hungary.<sup>178</sup> TEU Article 7 provides mechanisms for the EU to protect Article 2 values from its own member states, but it falls short.<sup>179</sup> The EU has attempted to sanction Hungary, and even Poland in the past, but it lacks sufficient procedures to do so.<sup>180</sup> In order to impose Article 7 sanctions on Hungary, including a temporary suspension of voting rights, the EU would need the Council of the European Union to unanimously agree, along with a two-thirds majority of the EU Parliament, that "a serious and persistent breach of EU values has taken place."<sup>181</sup> While the EU Parliament met the two-thirds majority requirement to sanction Hungary in September 2018, the potential for discipline is ultimately minimal.<sup>182</sup> In reality, the unanimous requirement in the Council effectively gives Poland, an ally of Hungary, veto power, which handcuffs the EU's ability to take punitive measures.<sup>183</sup>

Therefore, in order for the EU to back up its bark with any bite, it would need to amend the TEU and TFEU to provide procedural mechanisms to eliminate the effective veto power of allied states. Here again, however, the provisions of those very treaties seem to stymie the EU's ability to enforce and maintain its values. Article 48 of the TEU, concerning procedural require-

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177. Consolidated Version of the Treaty of the European Union art. 2, June 7, 2016, 2016 O.J. (C 202) 1 [hereinafter TEU].

178. Bánkuti et al., *supra* note 18, at 140.

179. Reality Check Team, *What Sanctions Can the EU Impose on Hungary?*, BBC (Sept. 12, 2018), <https://www.bbc.com/news/world-45485994>; TEU, *supra* note 177, art. 7.

180. *EU Parliament Votes to Punish Hungary Over 'Breaches' of Core Values*, BBC (Sept. 12, 2018), <https://www.bbc.com/news/world-europe-45498514>.

181. Reality Check Team, *supra* note 179.

182. Patrick Kingsley & Steven Erlanger, *Hungary's Democracy Is in Danger, E.U. Parliament Decides*, N.Y. TIMES (Sept. 12, 2018), <https://www.ny-times.com/2018/09/12/world/europe/hungary-eu-viktor-orban.html>.

183. Reality Check Team, *supra* note 179.

ments for revising and amending EU treaties, allows for a simple majority vote of the EU Parliament or Commission to examine proposed amendments.<sup>184</sup> Once a convention is called, however, treaty revisions and amendments must be ratified unanimously by all member states.<sup>185</sup> Thus, the EU faces a similar procedural impediment as those handcuffing its ability to impose sanctions on Hungary; if amending treaties to enable sanctions requires unanimity, then Hungary and Poland can again create a roadblock to protect their interests.

The significance of the Parliamentary two-thirds vote to sanction Hungary is not entirely lost despite the roadblocks in the Council of the European Union and Article 48 TEU. The Fidesz Party is a member of the European People's Party (EPP), a conservative alliance within the EU Parliament that has generally served to safeguard Orbán from punitive measures.<sup>186</sup> In the September 2018 vote to sanction Hungary, however, 115 members of the EPP—over half of the EPP—voted to bring Article 7 sanctions against Hungary.<sup>187</sup> This shift indicates a rising concern over Hungary's assault on democracy, even among its center-right allies in the Parliament.<sup>188</sup> While this swing is promising, it is unlikely to be widespread enough to meet the unanimity requirement.<sup>189</sup> Therefore, the language of the EU treaties disproportionately empowers countries in violation of EU values by requiring only one vote in favor of Hungary to buffer it from any significant consequence.

While effective legislative avenues for redress would seemingly require an overhaul of EU treaty procedures, CSOs in Hungary and other EU or Council of Europe member states can still counter Hungary in the judiciary. Individual CSOs or Council of Europe states can bring claims against Hungary for ECHR violations in the ECtHR.<sup>190</sup> Likewise, EU member states or the Commission can bring claims for violations of the Charter in the

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184. TEU, *supra* note 177, art. 48(3).

185. *Id.* art. 48(4).

186. Kingsley & Erlanger, *supra* note 182.

187. *Id.*

188. *EU Parliament Votes to Stop Hungary's 'Threat' to Democracy*, SBS NEWS (Sept. 13, 2018), <https://www.sbs.com.au/news/eu-parliament-votes-to-stop-hungary-s-threat-to-democracy>.

189. Reality Check Team, *supra* note 179.

190. ECHR, *supra* note 14, art. 34.

Court of Justice of the European Union.<sup>191</sup> According to Articles 258 and 259 TFEU,<sup>192</sup> the Commission or EU member states may bring claims in the CJEU for violations of EU treaty obligations.<sup>193</sup>

For violations of the ECHR, contracting states and even individuals and NGOs may bring claims against Hungary in the ECtHR.<sup>194</sup> State parties to the ECHR may bring such claims against another state party for violations of the ECHR, though this is exceptionally rare.<sup>195</sup> For individuals and NGOs, the party may initiate proceedings if it claims a direct harm or “significant disadvantage” resulting from a state’s violation of the ECHR.<sup>196</sup> In addition, all applicants must satisfy exhaustion requirements, in accordance with international law, and bring claims within six months of the final domestic ruling.<sup>197</sup> In customary international law, exhaustion of local remedies, primarily through domestic courts or administrative agencies, is required, barring exceptional circumstances.<sup>198</sup> Such exceptional circumstances would include cases where domestic redress would be futile because the party would be denied justice outright, or the justice received would be ineffective. Most often, futility occurs when there exists no domestic avenues for recourse, or the avenues available render either discriminatory and unjust decisions or would provide ineffective or unduly delayed redress.<sup>199</sup> Orbán and the Fidesz Party’s effective control of the judiciary in Hungary would likely render domestic redress impossible and, therefore, provide the basis for an exemption from custom on futility grounds.

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191. Competences of the Court of Justice of the European Union, EUR. PARL. (2018), available at [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.3.10.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.10.pdf).

192. TFEU, *supra* note 44, arts. 258–59.

193. *Id.*

194. ECHR, *supra* note 14, arts. 33–34.

195. Eur. Ct. H.R., *Inter-States Applications* (Nov. 30, 2018), [https://www.echr.coe.int/Documents/InterStates\\_applications\\_ENG.pdf](https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf)

196. ECHR, *supra* note 14, art. 34.

197. *Id.* art. 35.

198. A. O. Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 HARV. INT'L. L.J. 1, 5 (1977).

199. *Id.* at 15.

## CONCLUSION

The 2015 migrant crisis inadvertently shined a light on the fractures between Hungary and the EU and European Community when it comes to Europe's most foundational values. Hungary's xenophobic response to the influx of refugees and asylees laid bare its willingness to subvert its own civil society to fortify Hungary against those seeking refuge. In his State of the Nation address in February 2018, Orbán warned that the migrant crisis would destroy Western culture and identity and cause the downfall of Europe.<sup>200</sup> Yet, ironically, Orbán's very response to that perceived threat has posed a direct attack on the most core European value: democracy.

Orbán's successful attempts to control the media, aggrandize power for the Fidesz Party in Parliament, and undercut the reach and power of the judiciary has shifted Hungary towards autocracy.<sup>201</sup> The Stop Soros bills and immigration tax are yet another assault on balanced political influence in Hungary. By now targeting civil society, Orbán has not only minimized checks and balances within political institutions, but has also silenced opposition in the public sector. Furthermore, Hungary has done so in flagrant disregard for its international obligations.

The judicial avenues for redress available to CSOs in Hungary through both the EU and Council of Europe institutions provide a possible bulwark against Hungary's anti-democratic legislation on a case-by-case basis. The lack of available sanctions within the EU, however, pose questions about its very legitimacy and efficacy. An institutional system of law and geopolitics that prevents the EU from providing redress and protection for civil society in Hungary is a system fundamentally at odds with its founding principles.<sup>202</sup> The EU cannot premise to be founded on democratic values while standing idle as its members repeatedly and pervasively undermine the very foundation of democratic functions: civic engagement and the freedoms of expression and association. Failing to provide, at the EU's founding, an expulsion failsafe against states that trample on democratic principles

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200. Orbán, *supra* note 1.

201. Bánkuti et al., *supra* note 18, at 139–40.

202. The Editorial Board, *The EU Needs to Take a Stand Against Hungary's Viktor Orbán*, FIN. TIMES (Sept. 11, 2018), <https://www.ft.com/content/6ea7b452-b5ac-11e8-bbc3-ccd7de085ffe>.

was an error of oversight in good faith.<sup>203</sup> Failing to correct that error now, however, threatens to subjugate democracy to the whims of autocratic leaders and to compromise the EU, and its institutional legitimacy, at its core.

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203. As the EU developed into the modern international organization is it today, the make-up of its member states has continually changed and diversified. As the treaty documents were initially drafted, the EU was comprised of predominantly Western states that were confident in their shared ideals. In light of this confidence, the initial drafters of the EU treaty documents did not place significant emphasis on sanctions or punitive provisions. Wojciech Sadurski, *Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jorg Haider*, 16 COLUM. J. EUR. L. 385, 386 (2010).

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