

**THE COUNCIL OF EUROPE V. STATE RESTRICTION OF NGOS:
CAN THEY DO MORE TO PROTECT CIVIL SOCIETY?**

by

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H.B.A., The University of Toronto, 2018

M.A., The University of Toronto, 2021

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF ARTS

in

The Faculty of Graduate and Postdoctoral Studies

(Political Science)

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

October 2022

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The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the thesis entitled:

The Council of Europe v. State Restriction of NGOs: Can They Do More to Protect Civil Society?

submitted by Tzu-Yu Yao in partial fulfilment of the requirements for

the degree of Master of Arts

in Political Science

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Abstract

Shrinking civic space has become increasingly widespread worldwide since the mid-2000s, including in recognized liberal democracies. A component of shrinking civic space includes violent and non-violent state backlash against civil society organizations to restrict their activities. The Council of Europe, armed with the ratified European Convention of Human Rights and the European Court of Human Rights, has been widely regarded as the most effective human rights system in the world. Thus, using the Council of Europe as a case study, this paper examines the CoE's response to non-violent state backlash against NGOs. How is the Council of Europe responding to CoE member states increasing use of legal and administrative tools to restrict civil society freedoms? Are they acting to their full capacity? If not, why not?

Lay Summary

Since the mid-2000s, countries have increasingly restricted civic space often through violent and non-violent mechanisms against civil society organizations. This thesis focusses on the latter, specifically how human rights systems have responded to non-violent restriction of NGO activities, using the Council of Europe as a case study. My research question is: how is the Council of Europe responding to CoE member states increasing use of legal and administrative tools to restrict civil society freedoms? Are they acting to their full capacity? If not, why not? I argue that while the Council of Europe bodies have sponsored and published extensive reports, public opinions, resolutions, policies, and case law in response to state restriction of NGOs, CoE bodies have yet to develop a unified strategy and are still limited by their piecemeal and deferential response.

Preface

This thesis is the original, unpublished work of the author, Tzu-Yu Yao.

Table of Contents

Abstract.....	iii
Lay Summary.....	iv
Preface	v
Table of Contents.....	vi
List of Abbreviations	vii
Acknowledgements.....	viii
1 - Introduction	1
2 - Shrinking Civic Space	4
The Third Wave of Autocratization	4
Autocratization During the COVID-19 Pandemic	8
State Backlash Against ICs Becoming More Widespread and Successful	11
Legal and Administrative Restrictions on NGOs	14
<i>Russia's Foreign Agent Law</i>	15
<i>Anti-NGO Laws in Other CoE Member States</i>	17
3 - Current Literature	22
4 - Methodology.....	25
5 - Council of Europe Responses to Legal and Administrative Crackdown Against NGOs	27
Relevant ECtHR Case Law	27
The Case of <i>Ecodefence and Others v. Russia</i>	31
CoE Bodies	35
6 – Areas for Improvement and Recommendations.....	42
Areas Needing Improvement	42
<i>ECtHR's Lack of a Unified Strategy</i>	42
<i>Appeasement in Response to State Backlash</i>	48
Recommendations.....	54
7 - Conclusion.....	56
References.....	61

List of Abbreviations

CoE	Council of Europe
ECtHR	European Court of Human Rights
NGO	Non-governmental organization

Acknowledgements

I am extremely grateful to my supervisor, Professor Lisa Sundstrom, for her mentorship and support, I look forward to continuing to work with her. I am also grateful to my examiner, Professor Max Cameron, for his helpful questions and feedback on my paper.

To Kyle: Thank you for supporting me and my projects, and for listening to me talk endlessly about them.

Finally, I'd like to thank me.

1 - Introduction

In the past decade, authoritarian resurgence and democratic recession have increased around the world, predominantly as the consolidation and expansion of executive power by autocratic leadership. Regimes vary in degrees of autocratization, but recently, scholars have observed a common global trend among them: shrinking and changing civic space. Within the shrinking civic space trend is increasing state restriction on NGOs, including but not limited to media restriction, censorship, surveillance, smear campaigns, legal and administrative restriction, and violence.¹ Common forms of state violence against human rights defenders include arrest, threats, torture, physical assault, raids or break ins, theft, forced disappearances, and killings.² Front Line Defenders reported at least 331 defenders were killed in 2020 in 25 countries (including Europe and North America), and Human Rights Defenders Memorial confirmed at

¹ Human Rights Watch. “Turkey: Mass Arrests, Anti-LGBT Violence at Pride,” June 30, 2022. <https://www.hrw.org/news/2022/06/30/turkey-mass-arrests-anti-lgbt-violence-pride>.; Pirro, Andrea L. P., and Ben Stanley. “Forging, Bending, and Breaking: Enacting the ‘Illiberal Playbook’ in Hungary and Poland.” *Perspectives on Politics* 20, no. 1 (March 2022): 86–101. <https://doi.org/10.1017/S1537592721001924>.; Annan, Nancy, Maurice Beseng, Gordon Crawford, and James Kiven Kewir. “Civil Society, Peacebuilding from below and Shrinking Civic Space: The Case of Cameroon’s ‘Anglophone’ Conflict.” *Conflict, Security & Development* 21, no. 6 (November 2, 2021): 697–725. <https://doi.org/10.1080/14678802.2021.1997454>.; Figari, Andrea, Cade Diehm, and Rose Regina Lawrence. “Shrinking Civil Space: A Digital Perspective.” Tactical Tech. Accessed June 30, 2022. <https://ourdataourselves.tacticaltech.org/posts/shrinking-civil-space-a-digital-perspective/>.; Buyse, Antoine. “Why Attacks on Civic Space Matter in Strasbourg: The European Convention on Human Rights, Civil Society and Civic Space.” *Deusto Journal of Human Rights*, no. 4 (December 1, 2019): 13–37. <https://doi.org/10.18543/djhr-4-2019pp13-37>.; Buyse, Antoine. “Squeezing Civic Space: Restrictions on Civil Society Organizations and the Linkages with Human Rights.” *The International Journal of Human Rights* 22, no. 8 (September 14, 2018): 966–88. <https://doi.org/10.1080/13642987.2018.1492916>.; Poppe, Annika Elena, and Jonas Wolff. “The Contested Spaces of Civil Society in a Plural World: Norm Contestation in the Debate about Restrictions on International Civil Society Support.” *Contemporary Politics* 23, no. 4 (June 21, 2017): 469–88.

² Front Line Defenders. “Front Line Defenders Global Analysis 2020.” Front Line Defenders, 2020: 5 https://www.frontlinedefenders.org/sites/default/files/fl_d_global_analysis_2020.pdf.; Front Line Defenders. “Front Line Defenders Global Analysis 2021.” Front Line Defenders, 2021: 17. https://www.frontlinedefenders.org/sites/default/files/2021_global_analysis_-_final.pdf.; Wesche, Philipp. “Post-War Violence against Human Rights Defenders and State Protection in Colombia.” *Journal of Human Rights Practice* 13, no. 2 (July 1, 2021): 319. <https://doi.org/10.1093/jhuman/huab018>.

least 358 defenders were killed in 35 countries (including Europe and North America).³ Shrinking civic space through intimidation and repression is observed worldwide, including in recognized liberal democracies.

For the scope of this paper, I focus on increasing non-violent restriction of NGOs, that is, state use of legal and administrative mechanisms to significantly stall or halt NGO human rights protection efforts and activities. Non-violent state backlash against NGOs often receives less attention since the category is less urgent than violent state backlash. However, it also warrants academic study.

The Council of Europe (CoE) is viewed by many as the most effective human rights system in the world, and the European Court of Human Rights (ECtHR) in particular, as the “most effective international human rights court in existence.”⁴ Hence, this paper uses the Council of Europe as a case study regional human rights system, encompassing the Venice Commission, the Parliamentary Assembly of the Council of Europe (PACE), and the European Court of Human rights (ECtHR)). Of the CoE bodies, I focus heavily on the ECtHR, since it is one of the most influential and effective mechanisms available to the CoE. I also focus on the Russian Foreign Agent Law to illustrate shortcomings of the CoE in addressing state restriction of NGOs.

³ Front Line Defenders, “Front Line Defenders Global Analysis 2020,” 4.; Front Line Defenders, “Front Line Defenders Global Analysis 2021,” 5.

⁴ Sundstrom, Lisa McIntosh, Valerie Sperling, and Melike Sayoglu. Abstract of *Courting Gender Justice: Russia, Turkey, and the European Court of Human Rights*. Oxford University Press, 2019. <https://doi.org/10.1093/oso/9780190932831.001.0001>.; Bates, Ed. *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*. Oxford University Press, 2010. <https://academic.oup.com/book/32634/chapter/270520435>.

This paper's main research question is: how is the Council of Europe responding to CoE member states' increasing use of legal and administrative tools to restrict civil society freedoms? Are they acting to their full capacity? If not, why not?

I argue that while the Council of Europe bodies have sponsored and published extensive reports, public opinions, resolutions, policies, and case law in response to state restriction of NGOs, CoE bodies have yet to develop a unified strategy and are still limited by their piecemeal and deferential response.

2 - Shrinking Civic Space

The Third Wave of Autocratization

There is a consensus in the literature that we are currently witnessing a variety of regime types among CoE member states (and internationally) that range along the political spectrum from democracies to hybrid regimes to autocracies. Lührmann and Lindberg define this third wave of autocratization as the “substantial de-facto decline of core institutional requirements for electoral democracy.”⁵ Member states are witnessing a resurgence of nationalism, xenophobia, ethnic nationalism, Euroskepticism, populism, nativism, as well as the rise and electoral success of far-right parties across Europe.⁶ While there are numerous varieties of autocratization, they do share similar autocratic strategies to subvert the rule of law.

Scholars have identified several common strategies: autocratic legalism, abusive judicial review, as well as administrative and judicial harassment.⁷ Kim Lane Scheppele defines “**autocratic legalism**” as the use of the law to achieve autocratic objectives as well as dismantle liberal norms and the rule of law. For instance, autocratic legalism includes the phenomenon

⁵ Lührmann, Anna, and Staffan I. Lindberg. “A Third Wave of Autocratization Is Here: What Is New about It?” *Democratization* 26, no. 7 (October 3, 2019): 1096. <https://doi.org/10.1080/13510347.2019.1582029>.

⁶ Bugarić, Bojan. “The Two Faces of Populism: Between Authoritarian and Democratic Populism.” *German Law Journal* 20, no. 3 (2019): 390–400; Mudde, Cas. “Europe’s Populist Surge.” *Foreign Affairs*. New York, United Kingdom: Council on Foreign Relations NY, December 2016; Pap, András L. *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy*. London: Routledge, 2017. <https://doi.org/10.4324/9781315168005>; Simon, Zoltan. “Orban Says He Seeks to End Liberal Democracy in Hungary.” *Bloomberg*, July 28, 2014. <https://www.bloomberg.com/news/articles/2014-07-28/orban-says-he-seeks-to-end-liberal-democracy-in-hungary#xj4y7vzkg>; Sadurski, Wojciech. *Poland’s Constitutional Breakdown*. Oxford University Press, 2019. <https://doi.org/10.1093/oso/9780198840503.001.0001>; Albertazzi, Daniele, and Sean Mueller. “Populism and Liberal Democracy: Populists in Government in Austria, Italy, Poland and Switzerland.” *Government and Opposition* 48, no. 3 (July 2013): 343–71. <https://doi.org/10.1017/gov.2013.12>; Landau, David. “Populist Constitutions.” *The University of Chicago Law Review* 85, no. 2 (March 2018): 521–43; ECJ, Case C- C-715/17, Commission v. Republic of Poland and Others, ECLI:EU:C:2020:257 (Apr. 2, 2020) (not yet published) <https://curia.europa.eu/juris/liste.jsf?num=C-715/17>

⁷ Çalı, Başak. “Autocratic Strategies and the European Court of Human Rights.” *European Convention on Human Rights Law Review* 2 (2021): 11–19.

when political leaders are voted in by democratic election and then proceed to “use their electoral mandates to [legally] dismantle the constitutional systems they inherited”⁸ in order to extend their powers indefinitely. She underscores that the process of autocratic legalism includes the regimes “masquerading as democracy”⁹ while capitalizing on their electoral mandate to launch illiberal constitutionalist changes to the law. According to Landau and Dixon, “**abusive judicial review**” is the autocratic use of courts and judicial review to “intentionally attack the core of electoral democracy”¹⁰ and erode democratic norms. “**Administrative and judicial harassment**”¹¹ is the use of administrative or judicial tools to harass or silence civil rights movements and human rights defenders. In my view, autocratic legalism is a general tool that encompasses both abusive judicial review and administrative and judicial harassment. Abusive judicial review usually involves the dismantling of the judiciary, while administrative and judicial harassment is the targeting of individual human rights defenders or NGOs.

Başak Çalı adds that legalist autocratic regimes often misuse domestic law and legal mechanisms to persecute NGOs, human rights defenders, journalists, and political opposition. Instead of shutting organizations down outright, they will restrict “political parties, bar associations, media outlets and judicial institutions...through legal means, such as financial regulations, bans on their activities, or redesigning their legal frameworks.”¹² Çalı’s argument

⁸ Scheppele, Kim Lane. “Autocratic Legalism.” *The University of Chicago Law Review* 85, no. 2 (2018): 545.

⁹ Scheppele, “Autocratic Legalism,” 547.

¹⁰ Landau, David, and Rosalind Dixon. “Abusive Judicial Review: Courts against Democracy.” *UC Davis Law Review* 53, no. 3 (2020 2019): 1313.

¹¹ “Human Rights Defenders in the Council of Europe Area: Current Challenges and Possible Solutions.” Council of Europe - Commissioner for Human Rights, March 29, 2019. <https://rm.coe.int/hr-defenders-in-the-coe-area-current-challenges-andpossible-solutions/168093aabf>.

¹² Çalı, “Autocratic Strategies,” 12.

lines up with OO Varol's theory of "stealth authoritarianism,"¹³ which underscores the expansion of autocratic powers through the very same legal tools used in democratic regimes.

For example, in Hungary, Prime Minister Victor Orbán and the Fidesz party established autocratic leadership with a major electoral victory in 2010. Taking advantage of loopholes in the Hungarian constitution and electoral system, the Fidesz party has continued to expand political control through legal means, initiating institutional changes in the Hungarian judiciary, passing an entirely new constitution,¹⁴ and implementing hundreds of bills and constitutional amendments.¹⁵ Drinóczi and Bień-Kacała highlight that although these constitutional amendments are technically legal, their content substantially contravenes the spirit of the rule of law.¹⁶ Scheppele notes that Orbán "borrowed [...] illiberal tactics"¹⁷ from Russian President Vladimir Putin and Turkish Prime Minister (now President) Recep Tayyip Erdoğan. Orbán copied Putin's legal consolidation of power: for instance, in 2004, Putin "centraliz[ed] many local government functions in his new constitution and then handpick[ed] all of the local government leaders"¹⁸ to strengthen personal loyalty and allow a "direct line"¹⁹ to control local

¹³ Varol, Ozan O. "Stealth Authoritarianism." *Iowa Law Review* 100, no. 4 (May 2015): 1673.

¹⁴ "Opinion on the New Constitution of Hungary." Council of Europe - European Commission For Democracy Through Law (Venice Commission), June 20, 2011.
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e).

¹⁵ Krekó, Péter and Zsolt Enyedi. "Explaining Eastern Europe: Orbán's Laboratory of Illiberalism." *Journal of Democracy* 29, no. 3 (2018): 39-51.; Article 7(2) of Hungarian Constitution 1949.; Kosar, David, and Katarina Sipulova. "The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law." *Hague Journal on the Rule of Law* 10 (2018): 87.; Point 5 of Closing and Miscellaneous Provisions in Fundamental Law of Hungary (FL).

¹⁶ Drinóczi and Bień-Kacała, "Illiberal Constitutionalism," 1156.

¹⁷ Scheppele, "Autocratic Legalism," 550.

¹⁸ Scheppele, "Autocratic Legalism," 551.

¹⁹ Scheppele, "Autocratic Legalism," 551.

government and bypass parliament.²⁰ Orbán also copied Erdoğan's method of court packing: in 2010, Erdoğan shuffled, reregulated, and expanded the number of constitutional court judges so he could add judges of his own choosing, but also expanded their jurisdiction to include individual complaints of constitutional violations.²¹ This combination confused critics: was Erdoğan "politically compromis[ing the courts or...] judicially bolster[ing them?]"²² Orbán copied Erdoğan's example when he passed the new Hungarian Constitution (aka Fundamental Law) in 2011 which, among many things, expanded the constitutional court from 11 to 15 judges and changed the election process for constitutional court judges so the Fidesz party could effectively select their preferred judges.²³

In Poland, after Jarosław Kaczyński and the Law and Justice Party (PiS) regained power in 2015, Kaczyński applied an "accelerated and condensed version"²⁴ of Orbán's model: "dismantling the rule of law, subordinating the separation of powers to executive decisionism, and curbing the civil liberties of minorities in the interests of a national majority."²⁵ All this to

²⁰ Scheppele, Kim Lane. "'We Forgot about the Ditches': Russian Constitutional Impatience and the Challenge of Terrorism Constitutional Law Symposium: Constitutionalism and the War on Terror." *Drake Law Review* 53, no. 4 (2005): 1012-15.

²¹ Oder, Bertil Emrah. "Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular." *Verfassungsblog* (blog), May 2, 2017. <https://verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/>; Library of Congress. "Turkey: Legislature Approves Amendments to Constitution." Library of Congress, Washington, D.C. 20540 USA, May 12, 2010. <https://www.loc.gov/item/global-legal-monitor/2010-05-12/turkey-legislature-approves-amendments-to-constitution/>; Library of Congress. "Turkey: Individual Access to Constitutional Court." Library of Congress, Washington, D.C. 20540 USA, October 12, 2012. <https://www.loc.gov/item/global-legal-monitor/2012-10-12/turkey-individual-access-to-constitutional-court/>.

²² Scheppele, "Autocratic Legalism," 552.

²³ Scheppele, Kim Lane. "Understanding Hungary's Constitutional Revolution." In *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, edited by Armin von Bogdandy and Pál Sonnevend, London: Hart/Beck, 2015: 115.

²⁴ Puddington, Arch, and Tyler Roylance. "The Freedom House Survey for 2016: The Dual Threat of Populists and Autocrats." *Journal of Democracy* 28, no. 2 (2017): 112. <https://doi.org/10.1353/jod.2017.0028>.

²⁵ Pirro and Stanley. "Forging, Bending, and Breaking," 87.

illustrate how autocratic legalist tactics are becoming more widespread among CoE member states.

Autocratization During the COVID-19 Pandemic

Since the COVID-19 pandemic, autocratic practices and expansions of power have accelerated, ostensibly as political-legal reactions to the global health crisis. For instance, constitutional protections of fundamental rights were temporarily suspended by emergency acts and laws which significantly expanded powers of the executive with blank check emergency powers and restricted the freedom of assembly, association, and expression.²⁶

Hungary has been among the most notorious examples of autocratic opportunistic expansions of power during COVID-19 pandemic. On March 11, 2020, the Hungarian Ministry of Justice declared a ‘state of danger’ type of state emergency (‘State of Danger’ is one of the six types of state emergencies codified in the Fundamental Law of Hungary (the constitution)), which granted the government emergency powers for a 15 day period.²⁷ On March 30, 2020, the government bypassed this time limit and extended emergency powers by passing the

²⁶ Grogan, Joelle. “Power, Law and the COVID-19 Pandemic – Part I: The Year of Pandemic.” *Verfassungsblog* (blog), May 15, 2021. <https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-i-the-year-of-pandemic/>; Drinóczi, Tímea, and Agnieszka Bień-Kacała. “COVID-19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism.” *The Theory and Practice of Legislation* 8, no. 1–2 (May 3, 2020): 171–92. <https://doi.org/10.1080/20508840.2020.1782109>; Vassileva, Radosveta. “COVID-19 in Autocratic Bulgaria.” *Verfassungsblog* (blog), March 5, 2021. <https://verfassungsblog.de/covid-19-in-autocratic-bulgaria/>; Krisch, Nico. “COVID, Crisis and Change in Global Governance.” *Verfassungsblog* (blog), April 17, 2020. <https://verfassungsblog.de/covid-crisis-and-change-in-global-governance/>; Bethke, Felix S., and Jonas Wolff. “COVID-19 and Shrinking Civic Spaces: Patterns and Consequences.” *Zeitschrift Für Friedens- Und Konfliktforschung* 9, no. 2 (October 1, 2020): 363–74. <https://doi.org/10.1007/s42597-020-00038-w>; Honstein, Emily. “Top Trends: COVID-19 and Civic Space.” International Center for Not-For-Profit Law (ICNL), May 27, 2020. <https://www.icnl.org/post/analysis/top-trends-covid-19-and-civic-space>.

²⁷ Hungarian Ministry of Justice. March 11, 2020. 2640/2020. (III.11) Korm.rend. a veszélyhelyzet kihirdetéséről [Government Decree 40/2020 on the declaration of state of danger], https://njt.hu/translation/J2020R0040K_20200326_FIN.pdf; The Constitutional Court of Hungary, “The Fundamental Law of Hungary (as in force on 23 December 2020),” <https://hunconcourt.hu/rules/fundamental-law>

Coronavirus Act.²⁸ After international criticism, Orbán finally ended the state of danger on June 17, 2020 only to replace it with two laws that preserved the expansion of power by declaring a ‘state of medical emergency’, which has been renewed every six months until June 18, 2022.²⁹ Then on November 3, 2020 the government announced a state of danger again, renewing it in February 2021.³⁰ Hungary has adopted and regularly renewed COVID-19 legislation that grants the executive government blank check powers to issue decrees during states of danger: Act XII of 2020 on the Containment of the Coronavirus (March 30, 2020),³¹ Act CIX of 2020 on the Containment of the Second Wave of the Coronavirus Pandemic (November 10, 2020),³² Act I of 2021 on the Containment of the Coronavirus Pandemic (February 22, 2021), Act XL of 2021 (May 22, 2021),³³ Act CII of 2011 (September 30, 2021), and Act CXXX of 2021 (January 1,

²⁸ Győry, Csaba. “Hungary’s Response to COVID-19 Vastly Expands Executive Power.” *Bill of Health*, June 9, 2020. <https://blog.petrieflom.law.harvard.edu/2020/06/09/hungary-global-responses-covid19/>

²⁹ Hungarian Ministry of Justice. June 17, 2020. Act LVII of 2020 Terminating the State of Danger, https://njt.hu/translation/J2020T0057P_20200618_FIN.pdf; Hungarian Ministry of Justice. June 17, 2020. Government Decree 282/2020 Terminating the state of danger declared on 11 March 2020, https://njt.hu/translation/J2020R0282K_20200618_FIN.pdf ; Halmai, Gábor, Mészáros, Gábor; Scheppele, Kim Lane: “So It Goes – Part I.” *Verfassungsblog*, November 19, 2020, <https://verfassungsblog.de/so-it-goes-part-i/>; “NEVER-ENDING STORY? Rapid analysis of the Bills T/10747 and T/10748.” *The Hungarian Helsinki Committee*, May 27, 2020. <https://www.helsinki.hu/en/never-ending-story/>; “Overview of Hungary’s Emergency Regimes Introduced Due to the COVID-19 Pandemic.” Hungarian Helsinki Committee, January 1, 2022: 1-2. https://helsinki.hu/en/wp-content/uploads/sites/2/2022/01/HHC_Hungary_emergency_measures_overview_01012022.pdf.

³⁰ Hungarian Ministry of Justice. November 3, 2020. Government Decree 478/2020 (3 November) on the declaration of state of danger, https://njt.hu/translation/J2020R0478K_20201104_FIN.pdf

³¹ Hungarian Ministry of Justice. March 30, 2020. Act XII of 2020 on the containment of coronavirus, https://njt.hu/translation/J2020T0012P_20200401_FIN.pdf.

³² Hungarian Ministry of Justice. November 10, 2020. Act CIX of 2020 on the containment of the second wave of the coronavirus pandemic, https://njt.hu/translation/J2020T0109P_20201111_FIN.pdf.

³³ Lakatos, Köves és Társai Ügyvédi Iroda. “Update: Hungarian Government Extends State of Emergency but Phases out Certain Protective Measures,” May 28, 2021. <https://www.lakatoskoves.hu/en/news/update-hungarian-government-extends-state-of-emergency-but-phases-out-certain-protective-measures/>.

2022)).³⁴ Act CXXX of 2021 and Hungary's state of danger was due to expire in May 31, 2022, so on May 24, 2022 Orbán declared a state of danger, but this time, in response to the war in Ukraine.³⁵ Orbán and the Fidesz party have used the global health crisis as a vehicle to substantially expand their executive powers through emergency decrees permitted during the constantly renewed states of emergency.

Although Hungary may be one of the worst cases of unnecessary executive expansions of power and bypassing parliamentary supervision during the pandemic, it is one of many in Europe. On March 23, 2020, the French Parliament adopted Emergency Law no. 2020-290 in response to the COVID-19 pandemic, establishing a new emergency health regime. Within the next year, the executive government enacted 94 emergency orders under this act.³⁶ In other cases, one of the most concerning trends during the pandemic was the “marginalisation of the role of parliaments”³⁷ that lasted longer than a year in many countries, including CoE member

³⁴ “Overview of Hungary’s Emergency Regimes Introduced Due to the COVID-19 Pandemic.” Hungarian Helsinki Committee, January 1, 2022: 2. https://helsinki.hu/en/wp-content/uploads/sites/2/2022/01/HHC_Hungary_emergency_measures_overview_01012022.pdf.

³⁵ Hungarian Ministry of Justice. May 24, 2022. Government Decree 180/2022 (24 May) declaring state of danger having regard to the ongoing armed conflict and humanitarian catastrophe within the territory of Ukraine and in order to mitigate the consequences thereof in Hungary and on certain state-of-danger rules, https://njt.hu/translation/J2022R0180K_20220525_FIN.pdf ; Reuters. “Hungary’s Government Gets Emergency Powers Due to Ukraine War, PM Orban Says.” *Reuters*, May 24, 2022, sec. Europe. <https://www.reuters.com/world/europe/hungarys-government-gets-emergency-powers-due-ukraine-war-pm-orban-says-2022-05-24/>; RFE/RL’s Hungarian Service. “Orban Imposes New State Of Emergency In Hungary, Saying Ukraine War Poses ‘Constant Danger.’” *RadioFreeEurope*, May 24, 2022. <https://www.rferl.org/a/hungary-orban-state-of-emergency-ukraine-war-russia/31866003.html>.

³⁶ LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 (1), *Journal officiel de la République française (JORF)*, March 24, 2020. <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041746313/>. For more on the unnecessary expansion of executive power in France during the COVID-19 crisis, see Basilien-Gainche, Marie-Laure. “French Response to COVID-19 Crisis: Rolling into the Deep*.” *Verfassungsblog* (blog), March 18, 2021. <https://verfassungsblog.de/french-response-to-covid-19-crisis-rolling-into-the-deep/>.

³⁷ Grogan, “Power, Law and the COVID-19 Pandemic.”

states Bulgaria and Cyprus. In the Czech Republic, “executive arrogance”³⁸ led the executive government to declare their third state of emergency via an “unconstitutional loophole”³⁹ in an attempt to extend their expanded emergency powers. Bieber recently outlined how the COVID-19 pandemic impacted “exclusionary nationalism”⁴⁰ and offered an opportunity for “pre-existing nationalist dynamics”⁴¹ to reinforce their rhetoric and ideas. The Venice Commission has issued many reports and country-specific opinions regarding constitutional changes and legislation in response to the pandemic, highlighting the common trend of sidelining or suspending Parliament in favour of the executive government.⁴²

State Backlash Against ICs Becoming More Widespread and Successful

Over the past five to ten years, multiple states have been systematically “undermining and delegitimizing international human rights accountability mechanisms”⁴³ in a process of state backlash against international courts.

³⁸ Vikarská, Zuzana. “Czechs and Balances – One Year Later.” *Verfassungsblog* (blog), March 30, 2021. <https://verfassungsblog.de/czechs-and-balances-one-year-later/>.

³⁹ Vikarská, “Czechs and Balances.”

⁴⁰ Bieber, Florian. “Global Nationalism in Times of the COVID-19 Pandemic.” *Nationalities Papers* 50, no. 1 (January 2022): 13. <https://doi.org/10.1017/nps.2020.35>.

⁴¹ Bieber, “Global Nationalism,” 13.

⁴² Venice Commission, “Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights,” CDL-AD(2020)018-e, October 8, 2020, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)018-e) ; Venice Commission. “Observatory of Situations of Emergency in Venice Commission Member States.” https://www.venice.coe.int/WebForms/pages/?p=02_EmergencyPowersObservatory&lang=EN.

⁴³ Hillebrecht, Courtney. “Advocacy and Accountability in the Age of Backlash: NGOs and Regional Courts,” in *Contesting Human Rights*, ed. Alison Brysk and Michael Stohl (Cheltenham, UK: Edward Elgar Publishing, 2019), 171. See also Voeten, Erik. “Populism and Backlashes against International Courts.” *Perspectives on Politics* 18, no. 2 (June 2020): 407–22. <https://doi.org/10.1017/S1537592719000975>; Madsen, Mikael Rask, Pola Cebulak, and Micha Wiebusch. “Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts.” *International Journal of Law in Context* 14, no. 2 (June 2018): 197–220. <https://doi.org/10.1017/S1744552318000034>; Madsen, Mikael Rask. “From Boom to Backlash? The European

In recent years, backlash politics against international courts has become more pervasive, and in many cases, backlash involves significant judicial action as an assertion of national authority over international courts. While pushback and backlash from Hungary and Russia is less surprising in the current political context, the ECtHR faces more pressure from countries that have comparably better implementation rates and fewer cases, such as the UK and Denmark. Both have asserted the supremacy of their national parliaments and criticized the court for “over-centralization and over-intervention,”⁴⁴ likely as a political reaction to increasing right-wing anti-immigration sentiments at home.

Karen Alter identifies three critical junctures in history that have shaped the development of ICs: the “Hague Peace Conference Juncture (1899-1935)[...the] Post-WWII Juncture (1945-1960) [...and the] Post Cold War Juncture (1990-2010).”⁴⁵ She argues that we are currently in the fourth critical juncture moment, which differs significantly from the previous three in four key ways: (1) Many ICs exist now, so proposals have shifted from IC creation to IC adjustment, such as “creat[ing] regional alternatives to global adjudicative bodies, or consolidat[ing] existing adjudicatory systems into a slightly different configuration.”⁴⁶ (2) Many ICs have “new-style design features”⁴⁷ that make it more difficult for states to block cases from continuing to court,

Court of Human Rights and the Transformation of Europe.” In *The European Court of Human Rights*, edited by Helmet Aust and Esra Demir-Gürsel, 21–42. Cheltenham, UK: Edward Elgar Publishing, 2021. <https://www.elgaronline.com/view/book/9781839108341/book-part-9781839108341-9.xml>.; Sandholtz, Wayne, Yining Bei, and Kayla Caldwell. “Backlash and International Human Rights Courts.” In *Contracting Human Rights: Crisis, Accountability, and Opportunity Elgar Studies in Human Rights*, edited by Alison Brysk and Michael Stohl, 159–78. Edward Elgar Publishing, 2018. <https://www.elgaronline.com/view/9781788112321.00021.xml>.

⁴⁴ Madsen, “From Boom to Backlash?,” 41.

⁴⁵ Alter, Karen J. “Critical Junctures and the Future of International Courts in a Post-Liberal World Order.” In *The Future of International Courts*, edited by Avidan Kent, Nikos Skoutaris, and Jamie Trinidad, 15. London: Routledge, 2019. <https://doi.org/10.4324/9780429463280-2>.

⁴⁶ Alter, “Critical Junctures,” 19.

⁴⁷ Alter, “Critical Junctures,” 19.

which means contemporary ICs are much more likely to face “politically explosive cases”⁴⁸ than in the past. (3) The old international legal order of Western hard and soft power that pressured states into judicial accountability is increasingly resisted. (4) State resistance against ICs is becoming more widespread and successful. Previously, states attempted to recontract power, which required “collective action that is difficult to organize.”⁴⁹ Today, they have shifted to “‘rule by law’ tactics”⁵⁰ instead.

Çalı argues that legalist autocratic regimes are “appropriat[ing] key concepts of European human rights law while advancing autocratic legalist strategies.”⁵¹ When arguing cases before the ECtHR, states will interpret the European Convention of Human Rights to claim legitimate aims ranging from “national security, to the protection of rights of others, to the protection of public morals and to the prevention of crime.”⁵² States will argue that their administrative and judicial harassment of plaintiffs are “‘proscribed by law’ [...] ‘necessary in a democratic society’” [...and] a matter of constitutional pluralism in Europe.”⁵³ As the final nail in the proverbial coffin, they ask the Council of Europe and ECHR bodies to respect their national sovereignty, including their domestic judicial processes.

⁴⁸ Alter, “Critical Junctures,” 19.

⁴⁹ Alter, “Critical Junctures,” 20-21.

⁵⁰ Alter, “Critical Junctures,” 21.

⁵¹ Çalı, “Autocratic Strategies,” 12.

⁵² Çalı, “Autocratic Strategies,” 12.

⁵³ Çalı, “Autocratic Strategies,” 12.

Legal and Administrative Restrictions on NGOs

Since the mid-2000s, shrinking civic space has worsened globally, as more governments seek to “restrict the scope of civil society activity through legal and extralegal measures.”⁵⁴ Starting in 2012, The CIVICUS Monitor began to publish annual State of Civil Society Reports, detailing the state of shrinking civic space in 196 countries.⁵⁵ In their 2019 State of Civil Society Report, CIVICUS reported that peaceful activism is under attack in 111 out of 196 countries.⁵⁶

Scholars generally agree on the types of restrictions on NGOs: violence, attacking the legitimacy of CSOs to cause public mistrust, and legal and administrative measures.⁵⁷ The legal and administrative measures category includes abusive judicial review as well as administrative and judicial harassment. This may include passing laws, national security measures, tax code amendments, anti-terror measures and the like in order to limit funding, stifle freedom of speech online and offline, and restrain NGO activity.⁵⁸

Chaudhry’s research found that in terms of state crackdown on NGOs, states tend to prefer administrative over violent, since violent crackdown “may increase the state’s criminal liability, reduce its legitimacy, violate human rights treaties, and further intensify mobilization

⁵⁴ Annan, Nancy, Maurice Beseng, Gordon Crawford, and James Kiven Kewir. “Civil Society, Peacebuilding from below and Shrinking Civic Space: The Case of Cameroon’s ‘Anglophone’ Conflict.” *Conflict, Security & Development* 21, no. 6 (November 2, 2021): 700. <https://doi.org/10.1080/14678802.2021.1997454>.

⁵⁵ CIVICUS. “State of Civil Society Reports.” CIVICUS Global Alliance, n.d. <https://www.civicus.org/index.php/media-center/reports-publications/socs-reports>.

⁵⁶ CIVICUS. “State of Civil Society Report 2019: The Year in Review.” CIVICUS Monitor, March 2019. <https://www.civicus.org/index.php/state-of-civil-society-report-2019>, 218.

⁵⁷ Annan, et al, “Civil Society, Peacebuilding from below and Shrinking Civic Space,” 697-725; Brechenmacher, Saskia, and Thomas Carothers. “Civic Freedoms Are Under Attack. What Can Be Done?” *Carnegie Endowment for International Peace* (blog), October 29, 2019. <https://carnegieendowment.org/2019/10/29/civic-freedoms-are-under-attack.-what-can-be-done-pub-80168>.

⁵⁸ Brechenmacher and Carothers, “Civic Freedoms Are Under Attack.”

against the regime.”⁵⁹ On the other hand, administrative crackdown is far less likely to incite international criticism.⁶⁰ Her research on violent and administrative crackdown on NGOs from 1990 to 2013 found that “ongoing protests are positively and significantly associated with the use of violence against NGOs,”⁶¹ while countries that face “longer-term threats, such as when elections become increasingly competitive and NGOs can influence electoral outcomes,”⁶² are more likely to restrict NGO activity with administrative crackdowns instead.

Russia’s Foreign Agent Law

In Russia, NGO-repressive legislation began in the mid-2000s: the 2006 NGO law granted authorities the power to deny registration to any NGO they considered “a threat to the sovereignty, political independence, territorial integrity, national unity, unique character, cultural heritage, and national interests of the Russian Federation.”⁶³ The law also came with increased reporting requirements for NGOs who received foreign funding and expanded government powers to interfere in NGO activities.

Russia’s 2006 NGO law was followed by the infamous Foreign Agent Law. Passed in July 2012, the Foreign Agent Law required all Russian NGOs who engaged in “political activity” and received “foreign funding” to register as “foreign agents,” or face administrative

⁵⁹ Chaudhry, Suparna. “The Assault on Civil Society: Explaining State Crackdown on NGOs.” *International Organization*, February 2, 2022, 1. <https://doi.org/10.1017/S0020818321000473>.

⁶⁰ Chaudhry, “The Assault on Civil Society,” 9.

⁶¹ Chaudhry, “The Assault on Civil Society,” 36.

⁶² Chaudhry, “The Assault on Civil Society,” 36.

⁶³ Machalek, Katherin. “Factsheet: Russia’s NGO Laws.” In *Contending with Putin’s Russia: A Call for American Leadership*, edited by Arch Puddington, Tyler Roylance, Katherin Machalek, and Morgan Huston, 10–13. Freedom House, 2013.

and criminal sanctions.⁶⁴ The Act was updated in June 2014 to grant the Ministry of Justice the power to place NGOs on the foreign agents list at its own discretion. “Foreign agent” NGOs face higher administrative burdens: they are audited up to four times a year, face higher audit costs and must label themselves and all public communications (hardcopy or online) as from a “foreign agent” organization. Failure to comply will result in administrative and criminal sanctions.⁶⁵ The law’s definition of “political activity” is extremely vague and raised suspicions that the law would be weaponized against any civil rights organisation who criticized the government.⁶⁶

As a follow up, in 2015 the Russian Duma passed the “undesirable organizations” law, which grants the Attorney General and the Foreign Ministry the power to declare any foreign NGO as “undesirable” against their will, and ban its activities (and participation in its activities) altogether, or face civil and criminal sanctions.⁶⁷ In an interview, Duma deputy Aleksandr Tarnavsky (one of the legislation’s coauthors), described the law as “taken from the experience of developed democracies.”⁶⁸ Supporting Chaudhry’s argument that states prefer administrative crackdown measures, Tarnavsky explained that the undesirable organizations law would serve as

⁶⁴ *Ecodefence and Others v. Russia* (Judgment), Applications nos. 9988/13 and 60 others (European Court of Human Rights June 14, 2022). <https://hudoc.echr.coe.int/eng?i=001-217751>

⁶⁵ Kriener, Florian. “Ecodefence v Russia: The ECtHR’s Stance on Foreign Funding of Civil Society.” *EJIL: Talk!* (blog), June 21, 2022. <https://www.ejiltalk.org/ecodefence-v-russia-the-ecthrs-stance-on-foreign-funding-of-civil-society/>.

⁶⁶ Brechenmacher, Saskia. “Civil Society Under Assault: Repression and Responses in Russia, Egypt, and Ethiopia.” Carnegie Endowment for International Peace, 2017. <https://www.jstor.org/stable/resrep26904>.

⁶⁷ Amnesty International. “Russia: Move to Outlaw ‘Undesirable’ Foreign Organizations Suffocates Human Rights,” July 8, 2015. <https://www.amnesty.org/en/latest/news/2015/07/russia-move-to-outlaw-undesirable-foreign-organizations/>.; Brechenmacher, “Civil Society Under Assault.”

⁶⁸ Tarnavsky, Aleksandr. ‘Pure pragmatism—nothing personal’ ‘Meduza’ interviews the author of Russia’s new law against ‘undesirable’ organizations, May 21, 2015. <https://meduza.io/en/feature/2015/05/21/pure-pragmatism-nothing-personal>.

“a weapon hanging on the wall and that never fires,”⁶⁹ but serves as a “warning to potentially uncooperative NGOs.”⁷⁰

In November 2017, the Russian government amended the law “On Mass Media,” making it possible to label foreign media as ‘foreign agents’ as well.⁷¹ In November 2019, Putin signed a law making it possible to label ordinary individuals as foreign agents.⁷² In July 2022, Putin signed another law that will come into force in December, whereby anyone “under the influence of foreigners”⁷³ can be designated as a foreign agent.

Anti-NGO Laws in Other CoE Member States

Similarly, in June 2017, Hungary adopted Hungarian Law LXXVI of 2017 (on the transparency of organisations that receive financial support from abroad) which required certain NGOs receiving annual foreign funding exceeding HUF7.2million (approximately EUR 20,000) to register themselves and label all their publications and report their foreign funding details to

⁶⁹ Tarnavsky, “‘Pure pragmatism—nothing personal’.”

⁷⁰ Chaudhry, “The Assault on Civil Society,” 9.

⁷¹ Russian Federation. Федеральный закон от 25.11.2017 № 327-ФЗ "О внесении изменений в статьи 10-4 и 15-3 Федерального закона “Об информации, информационных технологиях и о защите информации” и статью 6 Закона Российской Федерации “О средствах массовой информации,” No. 327-FZ § (2017). <http://publication.pravo.gov.ru/Document/View/0001201711250002?index=0&rangeSize=1>; Meduza. “10 лет назад в России приняли первый закон об «иностранных агентах» Сначала казалось, что это мало кого касается. Теперь «иноагентами» могут объявить просто всех.” *Meduza*, July 20, 2022. <https://meduza.io/feature/2022/07/20/10-let-nazad-v-rossii-prinyali-pervyy-zakon-ob-inostrannyh-agentah>.

⁷² Meduza. “Путин подписал закон, который разрешает признавать любых людей «иностранными агентами».” *Meduza*, December 2, 2019. <https://meduza.io/news/2019/12/02/putin-podpisal-zakon-kotoryy-razreshaet-priznavat-lyubyyh-lyudey-inostrannymi-agentami>.

⁷³ Meduza. “Путин подписал новый закон об «иноагентах». Такой статус теперь смогут присвоить кому угодно.” *Meduza*, July 14, 2022. <https://meduza.io/news/2022/07/14/putin-podpisal-novyy-zakon-ob-inoagentah-takoy-status-teper-smogut-prisvoit-komu-ugodno>. See also RFE/RL’s Russian Service. “Putin Signs Off On Harsher ‘Foreign Agent’ Law.” *RadioFreeEurope*, July 14, 2022. <https://www.rferl.org/a/putin-signs-off-harsher-foreign-agent-law/31943645.html>.

the Hungarian authorities, under threat of sanctions.⁷⁴ The Hungarian Law emulated Russia's Foreign Agent Law example.

Other cases of restrictive NGO legislation in Europe have been in response to the 2015 refugee crisis, as CoE member states attempt to restrict refugee movements and threaten humanitarian aid by targeting humanitarian NGOs. A year after the foreign funding law, Hungary passed the "Stop Soros" law in June 2018 which criminalised the act of providing any assistance to undocumented immigrants, effectively banning many humanitarian NGOs' activities and barring refugees from accessing aid.⁷⁵ Two months later, the Hungarian government passed Act XLI/2018 which added a special immigration tax of 25% to any organisation that supported immigration, directly or indirectly.⁷⁶ Pirro and Stanley note that while these measures do not severely change freedom of association and assembly, they still put NGOs "under disproportionate pressure"⁷⁷ and restrict civic space by "pos[ing] strenuous conditions for the activities of nonaligned NGOs."⁷⁸

Along the same vein, on August 5, 2019, the Italian Parliament passed an emergency law (Law Decree no. 53 of 14 June 2019) that further tightened restrictions on migration and

⁷⁴ European Commission. "INFRINGEMENTS - Hungary: Commission launches infringement procedure for law on foreign-funded NGOs." Press Release, July 13, 2017. https://ec.europa.eu/commission/presscorner/detail/SK/IP_17_1982.

⁷⁵ Kingsley, Patrick. "Hungary Criminalizes Aiding Illegal Immigrants." *The New York Times*, June 20, 2018, sec. World. <https://www.nytimes.com/2018/06/20/world/europe/hungary-stop-soros-law.html>; Pirro and Stanley, "Forging, Bending, and Breaking," 86–101.

⁷⁶ "Hungary - Section 253 on the Special Immigration Tax of Act XLI of 2018 Amending Certain Tax Laws and Other Related Acts and on a Special Immigration Tax." Council of Europe - European Commission For Democracy Through Law (Venice Commission), November 22, 2018. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2018\)059-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2018)059-e).

⁷⁷ Pirro and Stanley, "Forging, Bending, and Breaking," 94.

⁷⁸ Pirro and Stanley, "Forging, Bending, and Breaking," 94.

criminalized humanitarian help for migrants and refugees in the Mediterranean Sea, including closing Italian ports to NGO refugee rescue ships and threatening them with “fines of up to €50,000 and an impounding of the vessel.”⁷⁹ The law forced many search-and-rescue NGOs to cease operations.⁸⁰

In March 2015, Spain passed the Citizen Security Law (AKA the gag law), which limited freedom of assembly by setting excessive bureaucratic hurdles to obtain permission to hold a protest and severe fines for violations, ranging from €600 “for failing to notify authorities about demonstrations in public areas”⁸¹ to €30,000 “for holding protests that result in ‘serious disturbances of public safety’ near parliament and Spain’s regional government buildings.”⁸² The law also allows the summary expulsion of undocumented immigrants and expands the powers of the police (granting them broad stop-and-search powers and permission to fine protestors for taking and sharing photos of police officers).⁸³ In a letter to the European Commission, multiple

⁷⁹ Tondo, Lorenzo. “Migrant Rescue Ship Defies Salvini’s Ban to Enter Italian Port.” *The Guardian*, June 26, 2019, sec. World news. <https://www.theguardian.com/world/2019/jun/26/ngo-boat-carrying-migrants-defies-matteo-salvini-veto-lampedusa-italy>; United Nations - The Office of the High Commissioner for Human Rights (OHCHR). “Italy: UN Experts Condemn Criminalisation of Migrant Rescues and Threats to the Independence of Judiciary,” July 18, 2019. <https://www.ohchr.org/en/press-releases/2019/07/italy-un-experts-condemn-criminalisation-migrant-rescues-and-threats>; Trilling, Daniel. “How Rescuing Drowning Migrants Became a Crime.” *The Guardian*, September 22, 2020, sec. News. <https://www.theguardian.com/news/2020/sep/22/how-rescuing-drowning-migrants-became-a-crime-iuventa-salvini-italy>; European Center for Not-For-Profit Law (ECNL). “Italian Law Increases Penalties Related to Protests and Criminalises NGOs’ Rescue of Migrants at Sea | ECNL,” August 9, 2019. <https://ecnl.org/news/italian-law-increases-penalties-related-protests-and-criminalises-ngos-rescue-migrants-sea>; Pusterla, Francesca. “Legal Perspectives on Solidarity Crime in Italy.” *International Migration* 59, no. 3 (2021): 79–95. <https://doi.org/10.1111/imig.12740>.

⁸⁰ Negri, Giada. “How European Civil Society Is Pushing Back Against Democratic Erosion.” Reshaping European Democracy. Carnegie Endowment for International Peace, March 2020. <https://carnegieeurope.eu/2020/03/12/how-european-civil-society-is-pushing-back-against-democratic-erosion-pub-81254>.

⁸¹ Matjašič, Peter. “Spanish Gag Law: The Original Sin and Ongoing Penance.” Aljazeera, March 1, 2021. <https://www.aljazeera.com/opinions/2021/3/1/spanish-gag-law-the-original-sin-and-ongoing-penance>.

⁸² Matjašič, “Spanish Gag Law.”

⁸³ Galloway, Heather. “Do Proposed Reforms of Spain’s Controversial ‘gag Law’ Go Far Enough?” *Euronews*, February 11, 2022, sec. my-europe_my-europe-series. <https://www.euronews.com/my-europe/2022/02/11/do-proposed-reforms-of-spain-s-controversial-gag-law-go-far-enough>; Matjašič, “Spanish Gag Law.”

NGOs underlined how the gag law restricts “freedom of assembly and expression, including targeting journalists covering police actions during public gatherings, with negative repercussions on the Rule of Law.”⁸⁴

In December 2020, the Turkish Parliament passed Law No. 7262 on Preventing Financing of Proliferation of Weapons of Mass Destruction, ostensibly to fight terrorism and money laundering. In reality, only 6 of its 43 articles discuss counter-terrorism measures, while the other 37 articles “introduce restrictions and strict oversight rules affecting NGOs, business partnerships and associations, and fundraising.”⁸⁵ Nearly 680 Turkish NGOs, the Council of Europe, and other international NGOs have all criticized the law as restricting civic space in Turkey.⁸⁶

On February 27, 2019, the German Federal Fiscal Court (Bundesfinanzhof, BFH), Germany’s supreme court for tax and customs matters, revoked the nonprofit tax status of an NGO, the German branch of Association for the Taxation of financial Transactions and Aid to Citizens (ATTAC), due to involvement in political activities.⁸⁷ Poppe and Wolff note that in the

⁸⁴ No Somos Delito, Defender a quien Defiende, European Civic Forum, Civil Society Europe, and CIVICUS. “Citizens’ Security Law under Reform, Rule of Law in Spain at Stake,” February 11, 2022. <https://www.civicus.org/index.php/media-resources/media-releases/open-letters/5593-citizens-security-law-under-reform-the-right-to-freedom-of-peaceful-assembly-and-expression-rule-of-law-in-spain-at-stake>.

⁸⁵ Freedom House. “Turkey: Passage of NGO Law Strips Away Fundamental Rights and Freedoms.” Press Release, January 4, 2021. <https://freedomhouse.org/article/turkey-passage-ngo-law-strips-away-fundamental-rights-and-freedoms>.

⁸⁶ Commissioner for Human Rights - Council of Europe. “Turkey: Authorities Should Refrain from Further Restricting NGOs Activities and Freedom of Association in the Name of Counter-Terrorism.” Letter. Commissioner for Human Rights, February 25, 2021. https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/turkey-authorities-should-refrain-from-further-restricting-ngos-activities-and-freedom-of-association-in-the-name-of-counter-terrorism; Freedom House. “Turkey: Passage of NGO Law Strips Away Fundamental Rights and Freedoms.” Press Release, January 4, 2021. <https://freedomhouse.org/article/turkey-passage-ngo-law-strips-away-fundamental-rights-and-freedoms>; Jones, Dorian. “New Law Threatens Future of Turkish NGOs.” *VOA News*, January 20, 2021. https://www.voanews.com/a/europe_new-law-threatens-future-turkish-ngos/6200957.html.

⁸⁷ Poppe, Annika Elena, and Jonas Wolff. “Germany Sets a Poor Example: The Case of ATTAC in Light of Globally Closing Civic Spaces.” *Center for Strategic & International Studies (CSIS)* (blog), July 17, 2017.

current global context of shrinking civic space, this case sends a dangerous message and legitimizes the notion of “limit[ing] civil society actors to “non-political” forms of social engagement.”⁸⁸

A 2019 report found that 57 countries worldwide have set legal restrictions on foreign funding for civil society organisations, not including foreign funding restrictions on political parties.⁸⁹

Among them are Council of Europe member states, ranging from excessive administrative requirements and foreign funding limitations (e.g. Azerbaijan, Hungary, Ireland, Russia, Turkey, Poland, Bosnia and Herzegovina, Romania, and Ukraine)⁹⁰ to bans on specific organisations from receiving foreign funding (Austria’s ban on foreign funding for Islamic organisations.)⁹¹

<https://www.csis.org/blogs/international-consortium-closing-civic-space/germany-sets-poor-example-case-attach-light>.

⁸⁸ Poppe and Wolff, “Germany Sets a Poor Example.”

⁸⁹ Baldus, Jana. “Legal Foreign Funding Restrictions on Civil Society Organizations (CSOs) Worldwide.” From Closing Space to Contested Spaces: Re-Assessing Current Conflicts over International Civil Society Support. Peace Research Institute Frankfurt, 2019.
https://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif137_table_Update2019.pdf.

⁹⁰ Baldus, “Legal Foreign Funding Restrictions.”; Amnesty International. “Laws Designed to Silence: The Global Crackdown on Civil Society Organizations.” Amnesty International, February 21, 2019: 41-43.
<https://www.amnesty.org/en/documents/act30/9647/2019/en/>.

⁹¹ Nasralla, Shadia. “Austria Passes ‘Law on Islam’ Banning Foreign Money for Muslim Groups.” *Reuters*, February 25, 2015, sec. World News. <https://www.reuters.com/article/us-austria-muslims-idUSKBNOLT28420150225>.

3 - Current Literature

There's a significant gap in the literature specifically about the factors that determine how regional human rights systems (such as the CoE) respond to states' increasing restrictive NGO legislation.

The research on shrinking civic space mostly comes from NGOs and policy analysts, less from academia (though it is increasing). Practitioners and policy analysts often write “policy-oriented publications”⁹² intended to spread awareness, while academics have mostly approached the issue from a “political science perspective, including studies on democracy, international co-operation, and the non-profit sector.”⁹³ Heidi Nichols Haddad points out that the understudied and piecemeal nature of academic scholarship on NGO and IC relationships is likely due to “disciplinary and subfield boundaries that cordon off, prioritize, and obscure certain aspects of these participatory relationships at the expense of viewing the phenomenon as a whole.”⁹⁴

Additionally, in the literature, more emphasis has been focussed on how local CSOs and INGOs adapt or combat restrictive NGO laws, focussed on actionables for NGOs and INGOs, since these efforts are faster and more effective when successful.⁹⁵

⁹² Buyse, “Squeezing Civic Space,” 967.

⁹³ Buyse, “Squeezing Civic Space,” 967.

⁹⁴ Haddad, Heidi Nichols. *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts*. Cambridge: Cambridge University Press, 2018: 6 <https://doi.org/10.1017/9781108557313>.

⁹⁵ Eilstrup-Sangiovanni, Mette, and J. C. Sharman. *Vigilantes beyond Borders: NGOs as Enforcers of International Law. Vigilantes beyond Borders*. Princeton University Press, 2022. <https://doi.org/10.1515/9780691232249>; Annan et al, “Civil Society, Peacebuilding from below and Shrinking Civic Space,” 697–725; Ibezim-Ohaeri, Victoria. “Confronting Closing Civic Spaces in Nigeria.” *Sur International Journal on Human Rights, English Ed.* 14, no. 26 (December 2017): 129–40.; Berger-Kern, Nora, Fabian Hetz, Rebecca Wagner, and Jonas Wolff. “Defending Civic Space: Successful Resistance Against NGO Laws in Kenya and Kyrgyzstan.” *Global Policy* 12, no. S5 (2021): 84–94. <https://doi.org/10.1111/1758-5899.12976>; Negri, Giada. “How European Civil Society Is Pushing Back Against Democratic Erosion.” *Reshaping European Democracy*. Carnegie Endowment for International Peace, March 2020.

Notably, Brechenmacher and Carothers have published reports on shrinking civic space, including areas of progress in the international response, factors limiting the international response, and policy recommendations.⁹⁶ While their focus is on international NGOs, donors, and how other governments can respond to shrinking civic space, their recommendations and analysis are relevant and applicable to this paper's research.

Başak Çalı recently published an article about how the ECtHR lacks a united strategy against autocratic or autocratizing member states who defend their abuse of administrative and judicial processes by “attempting to appropriate the Convention.”⁹⁷ This paper agrees with and builds upon her research and argument, expanding to including other Council of Europe bodies in its analysis.

Further, Antoine Buyse highlights the importance of shrinking civic space on Strasbourg jurisprudence, underlining how the two mutually affect and inform each other.⁹⁸ In his article, he also includes the Court's development of case law on freedom of expression, assembly, and association - which has been very helpful for this paper's research.

<https://carnegieeurope.eu/2020/03/12/how-european-civil-society-is-pushing-back-against-democratic-erosion-pub-81254>.

⁹⁶ Brechenmacher, Saskia, and Thomas Carothers. “Defending Civic Space: Is the International Community Stuck?” Carnegie Endowment for International Peace, October 22, 2019. <https://carnegieendowment.org/2019/10/22/defending-civic-space-is-international-community-stuck-pub-80110>.; Carothers, Thomas, and Saskia Brechenmacher. *Closing Space: Democracy and Human Rights Support Under Fire*. Carnegie Endowment for International Peace, 2014. <https://carnegieendowment.org/2014/02/20/closing-space-democracy-and-human-rights-support-under-fire-pub-54503>.

⁹⁷ Çalı, “Autocratic Strategies,” 13.

⁹⁸ Buyse, “Why Attacks on Civic Space Matter,” 13–37.

Many studies focus on human rights systems' response to violent state crackdown against human rights defenders, rightfully so.⁹⁹ However, there is a significant absence of studies that examine human rights systems' responses to non-violent crackdown against NGOs. Legal and administrative crackdown is becoming increasingly prevalent as the preferred and quieter form of NGO repression, and must be studied closely to protect human rights and preserve civil society freedoms.

Agreeing with Alter's theory that we are in a fourth critical juncture moment, this paper aims to assess the Council of Europe's response to this alternate form of crackdown on civil society so that we can better diagnose and adjust adjudicatory systems to protect human rights and civic space.

⁹⁹ Vet, Freek van der, and Laura Lyytikäinen. "Violence and Human Rights in Russia: How Human Rights Defenders Develop Their Tactics in the Face of Danger, 2005–2013." *The International Journal of Human Rights* 19, no. 7 (October 3, 2015): 979–98. <https://doi.org/10.1080/13642987.2015.1075306>; Nah, Alice M., ed. *Protecting Human Rights Defenders at Risk*. London: Routledge, 2020. <https://doi.org/10.4324/9780429402111>; Wesche, "Post-War Violence," 317–38. <https://doi.org/10.1093/jhuman/huab018>; Terto Neto, Ulisses. *Protecting Human Rights Defenders in Latin America: A Legal and Socio-Political Analysis of Brazil*. Governance, Development, and Social Inclusion in Latin America. Palgrave Macmillan Cham, 2018.;

4 - Methodology

This paper includes extensive focus on Russia's Foreign Agent Law to illustrate shortcomings in the CoE response. The Russian case represents one of the major initial cases of restrictive NGO legislation and the CoE's inadequate response to it illustrates their failure to resolve state restriction of NGOs. Moreover, Russia's successful resistance to implement unsavoury ECtHR rulings (eventually legalizing selective compliance of international court rulings in 2015,¹⁰⁰ constitutionalizing it in 2020,¹⁰¹ and finally leaving the CoE in 2022¹⁰²) is the loudest among a chorus of other CoE member states' backlash against the human rights system, so it is particularly important to study the CoE's response to the Russian case. I also cite examples of restrictive NGO legislation in other CoE member states, to highlight the widespread nature of the phenomenon, as well as debunk the myth that Western liberal democracies do not restrict civic space and civil society rights.

The research methodology of this investigation is qualitative analysis using triangulation to marshal sufficient evidence from various sources, and mainly involves scrutiny of legal

¹⁰⁰ "Постановление КС РФ "по делу о проверке конституционности положений статьи 1 Федерального закона "О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней", пунктов 1 и 2 статьи 32 Федерального закона "О международных договорах РФ", частей первой и четвертой статьи 11, пункта 4 части четвертой статьи 392 ГПК РФ, частей 1 и 4 статьи 13, пункта 4 части 3 статьи 311 АПК РФ, частей 1 и 4 статьи 15, пункта 4 части 1 статьи 350 Кодекса административного судопроизводства РФ и пункта 2 части четвертой статьи 413 УПК РФ в связи с запросом группы депутатов Госдумы"" [The decision of the Constitutional Court of the Russian Federation of July 14, 2015, № 21-П in Saint Petersburg "re the judgment on the constitutionality of section 1 of the Federal Act 'On the Ratification of the Convention on the Protection of Human Rights and Basic Freedoms and Protocols,' paragraphs 1 and 2 of section 32 of the Federal Act 'On International Agreements of the Russian Federation,' part 1 and 4 of section 11, paragraph 4 of part 4 of section 392 of the Code of Civil Procedure of the Russian Federation, part 1 and 4 of section 13, paragraph 4 of part 3 of section 311 of the Code of Arbitration Procedure of the Russian Federation, part 1 and 3 of section 15, paragraph 4 of part 1 of section 350 of the Code of the Administrative Legal Proceeding of the Russian Federation and paragraph 2 of part 4 of section 413 of the Code of Criminal Procedure of the Russian Federation initiated by a group of members of the State Duma]. *Rossiiskaya Gazeta*. <https://rg.ru/documents/2015/07/27/ks-dok.html>.

¹⁰¹ Article 125(5-1.b) of the Constitution of the Russian Federation [RF] (as amended in 2020).

¹⁰² Reuters. "Russia Quits Council of Europe Rights Watchdog." *Reuters*, March 15, 2022, sec. Europe. <https://www.reuters.com/world/europe/russia-formally-quits-council-europe-rights-watchdog-2022-03-15/>.

documents (e.g. ECtHR case judgments, domestic legislation, constitutional amendments), news articles, and Council of Europe publications (e.g. annual reports, opinions, resolutions about shrinking civic space and freedom of assembly). I also examined relevant literature and scholarly arguments on shrinking civic space, the use of administrative and judicial mechanisms to restrict NGO activity, and state backlash against ICs.

I closely assessed domestic legislation in cases of NGO restriction via legal and administrative procedures, especially in Russia, Hungary, Italy, Spain, Turkey, and Germany. I also studied reports on countries that have implemented foreign funding restrictions on civil society organisations worldwide, which included Azerbaijan, Hungary, Ireland, Russia, Turkey, and Austria.

To compile and evaluate Council of Europe responses to legal and administrative crackdown against NGOs, I combed through ECtHR case law (especially the *Ecodefence v. Russia* case), as well as other publications by CoE bodies (Venice Commission Opinions have been particularly helpful).

Finally, to investigate backlash politics across consolidated democracies in Europe (and the CoE's increased deference to Western liberal democracies), I studied relevant ECtHR rulings as well as legal and constitutional changes in multiple CoE member states to demonstrate the trend of backlash and draw comparisons across different states.

5 - Council of Europe Responses to Legal and Administrative Crackdown Against NGOs

Relevant ECtHR Case Law

Although ECtHR case law does not yet explicitly mention “civic space,”¹⁰³ the Court does have case law that is relevant to civic space, presented as cases about freedom of assembly, association, and expression.

In the 1976 judgment of *Handyside v. United Kingdom*, the Court established that the Convention’s principles of freedom of expression also include the expression of ideas or information that “offend, shock or disturb the State or any sector of the population,”¹⁰⁴ and “are the demands of that pluralism, tolerance and broadmindedness[,] without which there is no ‘democratic society.’”¹⁰⁵ In the 1998 judgment of *United Communist Party of Turkey and Others v. Turkey*, the Court stated that the “protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11.”¹⁰⁶ Although this case was regarding a political party, it also applies to NGOs. The Court has repeatedly stated that “democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”¹⁰⁷

¹⁰³ Buyse, “Why Attacks on Civic Space Matter,” 26.

¹⁰⁴ *Handyside v. The United Kingdom* (Judgment), Application no. 5493/72 (European Court of Human Rights December 7, 1976). <https://hudoc.echr.coe.int/eng?i=001-57499>

¹⁰⁵ *Handyside v. The United Kingdom* (Judgment).

¹⁰⁶ *United Communist Party of Turkey and Others v. Turkey* (Judgment), Application no. 19392/92 (European Court of Human Rights January 30, 1998). <https://hudoc.echr.coe.int/eng?i=001-58128>

¹⁰⁷ *Young, James and Webster v. The United Kingdom* (Judgment), Application nos. 7601/76 and 7806/77 (European Court of Human Rights August 13, 1981). <https://hudoc.echr.coe.int/eng?i=001-57608> ; See also *Chassagnou and Others v. France* (Judgment), Application nos. 25088/94, 28331/95 and 28443/95 (European Court

In multiple cases, the Court has emphasized the importance of NGOs “for the proper functioning of democracy.”¹⁰⁸ In the 1998 judgment of *Sidiropoulos and Others v. Greece*, the Court stated that “the right to form an association is an inherent part of the right set forth in Article 11,”¹⁰⁹ and declared the freedom of association a requirement of democratic society. They noted that “[t]he way in which national legislation enshrines this freedom [of association] and its practical application by the authorities reveal the state of democracy in the country concerned.”¹¹⁰ The Court declared that “only convincing and compelling reasons can justify restrictions on freedom of association,”¹¹¹ and member state interpretation of Article 11 § 2 is subject to “only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.”¹¹²

In the 2004 judgment of *Vides Aizsardzības Klubs v. Latvia*, the Court “extended recognition of a watchdog function beyond the media to a civil society organisation”¹¹³ for the first time, highlighting that work by a “non-governmental organisation specialising in this

of Human Rights April 29, 1999). <https://hudoc.echr.coe.int/eng?i=001-58288> ; Christian Democratic Peoples’ Party v. Moldova (Judgment), Application no. 28793/02 (European Court of Human Rights February 14, 2006). <https://hudoc.echr.coe.int/eng?i=001-72346>

¹⁰⁸ Bekir-Ousta and Others v. Greece (Judgment), Application no. 35151/05 (European Court of Human Rights October 11, 2007). <https://hudoc.echr.coe.int/eng?i=001-82662>. See also Gorzelik and Others v. Poland (Judgment), Application no. 44158/98 (European Court of Human Rights February 17, 2004). <https://hudoc.echr.coe.int/eng?i=001-61637>

¹⁰⁹ *Sidiropoulos and Others v. Greece* (Judgment), Application no. 26695/95 (European Court of Human Rights July 10, 1998). <https://hudoc.echr.coe.int/eng?i=001-58205>

¹¹⁰ *Sidiropoulos and Others v. Greece* (Judgment).

¹¹¹ *Sidiropoulos and Others v. Greece* (Judgment).

¹¹² *Sidiropoulos and Others v. Greece* (Judgment).

¹¹³ Buyse, “Why Attacks on Civic Space Matter,” 28.

field...was essential in a democratic society.”¹¹⁴ The Court added that “in order to fulfil its [watchdog] mandate, an [NGO] association had to be able to report facts that were likely to interest the public and thus contribute to transparency in the public authorities' actions.”¹¹⁵ Therefore, the Court now assesses the compatibility of restrictions on freedom of expression of NGOs with Article 10 of the Convention with the same criteria as that of the press.¹¹⁶ The Court has also determined that state interference with the “social watchdog role of civil society”¹¹⁷ must also be scrutinized closely for violations against freedom of expression.

Further, the Court has specified that an NGO can advocate for any change, even changes to the “legal and constitutional structures of the State”¹¹⁸ so long as “the means used to that end are in every respect legal and democratic and if the change proposed is itself compatible with fundamental democratic principles.”¹¹⁹ Citing *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*¹²⁰ and *Stankov and the United Macedonian Organisation Ilinden*

¹¹⁴ Vides Aizsardzības Klubs v. Latvia (Judgment), Application no. 57829/00 (European Court of Human Rights May 27, 2004). <https://hudoc.echr.coe.int/eng?i=001-66349> ; “Rapport de Recherche: Les Organisations Non Gouvernementales Dans La Jurisprudence de La Cour Européenne Des Droits de l’homme.” Cour européenne des droits de l’homme - European Court of Human Rights, October 2016. https://www.echr.coe.int/Documents/Research_report_NGOs_FRA.PDF

¹¹⁵ Vides Aizsardzības Klubs v. Latvia (Judgment).

¹¹⁶ “Rapport de Recherche.”

¹¹⁷ Buyse, Antoine. “Why Attacks on Civic Space Matter in Strasbourg: The European Convention on Human Rights, Civil Society and Civic Space.” *Deusto Journal of Human Rights*, no. 4 (December 1, 2019): 28. <https://doi.org/10.18543/djhr-4-2019pp13-37>; Társaság a Szabadságjogokért v. Hungary (Judgment), Application no. 37374/05 (European Court of Human Rights April 14, 2009). <https://hudoc.echr.coe.int/eng?i=001-92171>

¹¹⁸ Zhechev v. Bulgaria (Judgment), Application no. 57045/00 (European Court of Human Rights June 21 2007). <https://hudoc.echr.coe.int/eng?i=001-81209>

¹¹⁹ Zhechev v. Bulgaria (Judgment).

¹²⁰ The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria, Application no. 59489/00 (European Court of Human Rights October 20, 2005). <https://hudoc.echr.coe.int/eng?i=001-70731>

v. Bulgaria,¹²¹ the Court underlined that “the mere fact that an organisation demands such changes cannot automatically justify interferences with its members' freedoms of association and assembly.”¹²² As long as their advocacy is legal and democratic, they cannot be refused registration by domestic courts even if the state believes the organisation’s goals and activities will be political. The *Zhechev v. Bulgaria* judgment has been cited in other contexts, especially, Buyse notes, as more and more states are restricting NGO activities by labelling them as “‘political’ to separate them from organisations that focus on the provision of services.”¹²³

In 2018, the Court made a significant judgment in the case of *Aliyev v. Azerbaijan*. They found Aliyev’s arrest and detention unlawful and a violation of Article 18, but also examined the “general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding”¹²⁴ and connected the case to many similar cases of state crackdown on human rights defenders. Considering a significant amount of contextual information in the case, the Court concluded that “the measures taken against him were part of a larger campaign to ‘crack down on human-rights defenders in Azerbaijan.’”¹²⁵ In addition to compensation to the applicant, the Court required that Azerbaijan take “the necessary general measures [...and] must focus, as a matter of priority, on the protection of critics of the government, civil society activists and human-rights defenders against arbitrary arrest and detention. The measures to be taken must

¹²¹ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (Judgment), Application nos. 29221/95 and 29225/95 (European Court of Human Rights October 2, 2001). <https://hudoc.echr.coe.int/eng?i=001-59689>

¹²² *Zhechev v. Bulgaria* (Judgment).

¹²³ Buyse, “Why Attacks on Civic Space Matter,” 29.

¹²⁴ *Aliyev v. Azerbaijan* (Judgment), Application nos. 68762/14 and 71200/14 (European Court of Human Rights September 20, 2018). <https://hudoc.echr.coe.int/fre?i=001-186126>

¹²⁵ *Aliyev v. Azerbaijan* (Judgment).

ensure the eradication of retaliatory prosecutions and misuse of criminal law against this group of individuals and the non-repetition of similar practices in the future.”¹²⁶

The Case of *Ecodefence and Others v. Russia*

In terms of ECtHR judgments directly against anti-NGO legislation, the Court finally passed a judgment on *Ecodefence and Others v. Russia* on June 14, 2022, nearly 9.5 years after the case application was first submitted.¹²⁷ The case concerned Russia’s Foreign Agent Law in 2012 and its updated restrictions in 2014 and 2016, and all applicants were either NGOs who had been registered as “foreign agents” or NGO directors who had been criminally or administratively sanctioned.¹²⁸ The Court’s judgment grouped 65 applications, representing 73 NGOs.

As aforementioned, Russia’s Foreign Agent Law severely restricts civil society in Russia. Moreover, on February 24, 2022, Russian forces invaded Ukraine.¹²⁹ A week later, on March 4, 2022, the State Duma passed two new laws that “criminalize independent war reporting and protesting the war, with penalties of up to 15 years in prison.”¹³⁰ The laws also criminalized “public dissemination [...] of knowingly false information containing data on the exercise by state bodies of the Russian Federation of their powers outside the territory of the Russian

¹²⁶ Aliyev v. Azerbaijan (Judgment).

¹²⁷ *Ecodefence and Others v. Russia* (Judgment).

¹²⁸ Kriener, “*Ecodefence v Russia*.”

¹²⁹ As of the writing of this paper, Russia is still waging war on Ukraine. Reuters. “Timeline: The Events Leading up to Russia’s Invasion of Ukraine.” *Reuters*, March 1, 2022, sec. Europe. <https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/>.

¹³⁰ Human Rights Watch. “Russia Criminalizes Independent War Reporting, Anti-War Protests,” March 7, 2022. <https://www.hrw.org/news/2022/03/07/russia-criminalizes-independent-war-reporting-anti-war-protests>.

Federation in order to protect the interests of the Russian Federation and its citizens, maintain international peace and security,”¹³¹ with a fine of 700,000 to 1.5 million rubles or imprisonment for up to three years, or ten to fifteen years if such actions “cause grave consequences.”¹³² Between February and March 2022 alone, over 15,000 anti-war protestors were arrested, in at least 168 locations across Russia.¹³³

In recent years, Russia has engaged in backlash against the ECtHR, enacting a federal law authorizing Russian Constitutional Court (RCC) evaluation of enforceability of international court decisions (Federal Constitutional Law No.7/2015)¹³⁴ and resisting ECtHR rulings.¹³⁵ A week before the Ecodefence judgment came out, Chairman of the State Duma Vyacheslav Volodin reiterated that ECtHR decisions contradict the Russian Constitution and the “European Court of Human Rights has become a tool of political struggle against our country used by the Western politicians.”¹³⁶ On March 15, 2022, the Committee of Ministers voted to expel Russia

¹³¹ Государственная Дума. “Приняты поправки об ответственности за фейки о работе госорганов РФ за рубежом,” March 22, 2022. <http://duma.gov.ru/news/53773/>.

¹³² Государственная Дума. “Приняты поправки об ответственности за фейки о работе госорганов РФ за рубежом,” March 22, 2022. <http://duma.gov.ru/news/53773/>.

¹³³ The Economist. “More than 15,000 Russians Have Been Arrested in Anti-War Protests,” March 22, 2022. <https://www.economist.com/graphic-detail/2022/03/22/more-than-15000-russians-have-been-arrested-in-anti-war-protests>.

¹³⁴ Федеральный закон о получении КС права признавать решения международных судов неисполнимыми: Федеральный закон о внесении изменений в ФЗ “О Конституционном Суде Российской Федерации” [Federal law on obtaining the Constitutional Court the right to recognize decisions of international courts as unenforceable Federal Law on Amendments to the Federal Law “On the Constitutional Court of the Russian Federation”] *Российской газеты*, <https://rg.ru/documents/2015/12/15/ks-site-dok.html>

¹³⁵ “19 Апреля 2016 Года Конституционный Суд Провозгласил Постановление По Делу о Возможности Исполнения Постановления Европейского Суда По Правам Человека От 4 Июля 2013 Года «Анчугов и Гладков Против России».”; Judgment of 19 January 2017 No. 1-П/2017 in the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 31 July 2014 in the case of OAO Neftyanaya Kompaniya Yukos v. Russia in connection with the request of the Ministry of Justice of the Russian Federation.

¹³⁶ The State Duma. “The State Duma Adopted Laws on Non-Implementation of the ECHR Verdicts,” June 7, 2022. <http://duma.gov.ru/en/news/54515/>.

from the Council of Europe due to Russia's invasion of Ukraine "in violation of international law."¹³⁷ In short, this means Russia will cease to be a member of the CoE as of September 16, 2022 and the ECtHR will no longer accept applications concerning violations that occur after September 16, 2022.¹³⁸ On June 11, 2022, President Putin signed a federal law that cancels the implementations of all ECtHR rulings issued after March 15, 2022.¹³⁹ All in all, the Ecodefence judgment may have come 9.5 years too late for Russian civil society.

However, the Ecodefence judgment made several key contributions to general ECtHR caselaw defence against restriction of NGOs. Notably, the Court found that state restriction of foreign funding interferes with freedom of association. Kriener points out how this has been a controversial subject, since many states have reserved the right to restrict foreign funding, arguing that foreign funding "distorts the internal political processes and infringes their sovereign right to decide upon their own political system."¹⁴⁰ In the Ecodefence judgment, the ECtHR directly rejected this argument, stating that "the regulation appears to be based on a notion that matters such as respect for human rights and the rule of law are "internal affairs" of

¹³⁷ Committee of Ministers. "2.3 Situation in Ukraine." 1426bis Meeting. Council of Europe, February 24, 2022. https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5a1f1.ma

¹³⁸ Committee of Ministers. "Russia Ceases to Be a Party to the European Convention on Human Rights on 16 September 2022." Council of Europe, March 23, 2022. https://www.coe.int/en/web/portal/full-news/-/asset_publisher/y5xQt7QdunzT/content/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022; Meduza. "Russians Will Soon Lose Access to the European Court of Human Rights. Here's What You Need to Know.," March 29, 2022. <https://meduza.io/en/cards/russians-will-soon-lose-access-to-the-european-court-of-human-rights-here-s-what-you-need-to-know>; Council of Europe. "2.3 Situation in Ukraine – Measures to Be Taken, Including under Article 8 of the Statute of the Council of Europe." 1426ter (Extraordinary) Meeting of the Ministers' Deputies. Council of Europe, February 25, 2022. <https://go.coe.int/LV2Am>; Committee of Ministers. "Resolution CM/Res(2022)3 on Legal and Financial Consequences of the Cessation of Membership of the Russian Federation in the Council of Europe." Council of Europe, March 23, 2022. <https://rm.coe.int/0900001680a5ee2f>.

¹³⁹ President of Russia. "Law Cancelling Implementation in Russia of European Court of Human Rights Rulings Issued after March 15, 2022," June 11, 2022. <http://en.kremlin.ru/acts/news/68645>.

¹⁴⁰ Kriener, "Ecodefence v Russia."

the State and that any external scrutiny of such matters is suspect and a potential threat to national interests. This notion is not compatible with the drafting history and underlying values of the Convention as an instrument of European public order and collective security: that the rights of all persons within the legal space of the Convention are a matter of concern to all member States of the Council of Europe.”¹⁴¹ This landmark judgment directly confronts one of the tactics autocratic states have used to defend shrinking civic space: borrowing democratic regime justifications of national interests, national security, and counter-terrorism measures.

The judgment also found the interferences and administrative burdens implemented by the Foreign Agent Law “inherently vague”, “not prescribed by law,” “not necessary in a democratic society.”¹⁴² In no uncertain terms, the Court stated that “excessive use of the power to interfere with the operation of a civil society organisation should never be used as a tool to exercise control over NGOs.”¹⁴³ Kriener notes that the judgment also sends a “clear signal to other ECHR member states that have taken interest in the Russian clampdown on civil society,”¹⁴⁴ such as Hungary and Poland. He adds that the judgment officially confirms that Russian state restriction of foreign funding of NGOs is incompatible with the Convention, which may encourage foreign funders to once again fund Russian civil society regardless of domestic legal restrictions.¹⁴⁵

¹⁴¹ *Ecodefence and Others v. Russia* (Judgment).

¹⁴² *Ecodefence and Others v. Russia* (Judgment).

¹⁴³ *Ecodefence and Others v. Russia* (Judgment).

¹⁴⁴ Kriener, “*Ecodefence v Russia*.”

¹⁴⁵ Kriener, “*Ecodefence v Russia*.”

CoE Bodies

The Venice Commission has published many opinions on freedom of association and peaceful assembly in member states (directly mentioning legislation that restricts NGO activity,)¹⁴⁶ roundtables and reports on restrictions on foreign funding of NGOs,¹⁴⁷ and guidelines on freedom of peaceful assembly.¹⁴⁸ The Human Rights House Foundation applauds the Venice Commission's reports, especially since the Venice Commission reinforces the discussion on foreign funding of NGOs, brings global attention to the subject, and reiterates in detail (with recommendations) restrictions on NGOs that do not align with the Convention.¹⁴⁹ The legal status of NGOs is outlined in two non-binding CoE instruments: the 2002 Fundamental Principles on the Status of Non-governmental Organisations in Europe and the 2007 Recommendation CM/Rec (2007) of the Committee of Ministers to member states on the legal

¹⁴⁶ Venice Commission. "Compilation of Venice Commission Opinions Concerning Freedom of Association." Council of Europe - European Commission For Democracy Through Law (Venice Commission), December 3, 2019. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2019\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)007-e); Venice Commission. "Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020, to Amend Laws Affecting 'Foreign Agents.'" Council of Europe - European Commission For Democracy Through Law (Venice Commission), July 6, 2021. [https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)027-e](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)027-e); Venice Commission. "Comparative Study on National Legislation on Freedom of Peaceful Assembly." Council of Europe - European Commission For Democracy Through Law (Venice Commission), June 19, 2014. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)024-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)024-e).

¹⁴⁷ Venice Commission. "Report on Funding of Associations." Council of Europe - European Commission For Democracy Through Law (Venice Commission), March 18, 2019. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)002-e); "Human Rights Defenders in the Council of Europe Area: Current Challenges and Possible Solutions." Council of Europe, March 29, 2019. <https://rm.coe.int/hr-defenders-in-the-coe-area-current-challenges-andpossible-solutions/168093aabf>.

¹⁴⁸ Venice Commission. "Guidelines on Freedom of Peaceful Assembly (3rd Edition)." Council of Europe - European Commission For Democracy Through Law (Venice Commission), July 15, 2020. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)017rev-e); Venice Commission. "Guidelines on Freedom of Peaceful Assembly (2nd Edition)." Council of Europe - European Commission For Democracy Through Law (Venice Commission), July 9, 2010. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)020-e).

¹⁴⁹ Human Rights House Foundation. "Why Is the Venice Commission Study on NGO Funding so Important?," April 11, 2019. <https://humanrightshouse.org/articles/why-is-the-venice-commission-study-on-ngo-funding-so-important/>.

status of non-governmental organisations in Europe, which include minimum standards to guide CoE member states on “legislation, policies, and practice”¹⁵⁰ towards NGOs.¹⁵¹ At the end of the day, the two instruments are minimal, non-binding, and simply recommendations for CoE member states to consider. Moreover, they are long overdue for an update given the recent trend of administrative mechanisms to restrict NGO activity.

Venice Commission Opinions have criticized increasing legislation restricting NGO activity. They have noted that “to condition the views, activities and conduct of an NGO before allowing it to obtain the legal personality necessary for its operation, goes against the core of the values underlying the protection of civil and political rights.”¹⁵² Venice Commission reports have also underlined that “[t]he right of associations to seek financial and material resources is primarily protected as an inherent part of the right to freedom of association and has been confirmed in various international soft-law instruments.”¹⁵³ They cite the ECtHR case law, International Covenant on Civil and Political Rights (ICCPR), the UN Declaration on Human Rights Defenders, reports by the UN Special Rapporteur on the right to freedom of peaceful assembly and of association, the UN Human Rights Committee’s past communications and

¹⁵⁰ “Legal Status of Non-Governmental Organisations in Europe - Recommendation CM/Rec(2007)14 Adopted by the Committee of Ministers of the Council of Europe on 10 October 2007 and Explanatory Memorandum.” Council of Europe, October 10, 2007: 6 <https://rm.coe.int/16807096b7>.

¹⁵¹ Venice Commission. “Compilation of Venice Commission Opinions Concerning Freedom of Association.” Council of Europe - European Commission For Democracy Through Law (Venice Commission), December 3, 2019. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2019\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)007-e); “Legal Status of Non-Governmental Organisations in Europe - Recommendation CM/Rec(2007)14 Adopted by the Committee of Ministers of the Council of Europe on 10 October 2007 and Explanatory Memorandum.” Council of Europe, October 10, 2007. <https://rm.coe.int/16807096b7>.

¹⁵² “Opinion on the Compatibility with Human Rights Standards of the Legislation on Non-Governmental Organisations of the Republic of Azerbaijan Adopted by the Venice Commission at Its 88th Plenary Session (Venice, 14-15 October 2011).” Council of Europe - European Commission For Democracy Through Law (Venice Commission), October 19, 2011: 15 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)035-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)035-e).

¹⁵³ Venice Commission. “Report on Funding of Associations,” 8.

interpretations of international law, OSCE commitments, and the European Union’s Guidelines on Human Rights Defenders. The Venice Commission has cautioned that the “legitimate aims [of prevention of money-laundering and terrorist financing] should not be used as a pretext to control NGOs or restrict their ability to carry out their legitimate work, notably in defence of human rights,”¹⁵⁴ and “the prevention of moneylaundering or terrorist financing does not require nor justify the prohibition or a system of prior authorisation by the government of foreign funding of NGOs.”¹⁵⁵

For example, while the Hungarian Law LXXVI of 2017 was still being drafted, the Venice Commission had made multiple recommendations to the Hungarian authorities on the draft law. They asked the Hungarian authorities to consider: (1) opening a “public consultation”¹⁵⁶ on the draft law before finalization, (2) either “justif[ying...or] delet[ing]”¹⁵⁷ the unclear “the rationale behind the exclusion of a number of associations and organisations”¹⁵⁸ in the draft law, (3) reducing the time period in which an NGO “may not receive any foreign funding in order to be entitled to initiate a deregistration procedure”¹⁵⁹ from three years to one, (4) reducing “excessive obligation[s]...imposed on organisations receiving foreign funding,”¹⁶⁰ (5) removing the requirement that foreign funded organisations must label all publications as

¹⁵⁴ “Interim Opinion on the Draft Law on Civic Work Organisations of Egypt.” Council of Europe - European Commission For Democracy Through Law (Venice Commission), June 18, 2013: 8.
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)023-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)023-e).

¹⁵⁵ “Interim Opinion on the Draft Law on Civic Work Organisations of Egypt.” 8.

¹⁵⁶ “Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad.” Council of Europe - European Commission For Democracy Through Law (Venice Commission), June 20, 2017: 8
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e).

¹⁵⁷ “Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad,” 18.

¹⁵⁸ “Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad,” 18.

¹⁵⁹ “Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad,” 18.

¹⁶⁰ “Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad,” 18.

from “an organisation receiving support from abroad,”¹⁶¹ and (6) deleting or reducing disproportional sanctions for violating the law. On June 13, 2017 the Hungarian Parliament adopted the law, ignoring most of the Venice Commission’s recommendations.

On Russia’s Foreign Agent Law, the Venice Commission has issued two Opinions - one in 2014 and one in 2021. In 2014, they recommended: (1) abandoning the “highly controversial”¹⁶² term of “foreign agent,”¹⁶³ (2) clarifying the term “political activities,”¹⁶⁴ (3) adjusting implementation of the law to reasonable standards instead of “numerous extraordinary inspections,”¹⁶⁵ and (4) reconsidering this “creation of a special regime with autonomous registration, special register and a host of additional legal obligations.”¹⁶⁶ The Venice Commission stressed that the “legitimate aim of ensuring transparency of [non-commercial organisations] NCOs receiving funding from abroad cannot justify measures which hamper the activities of NCOs operating in the field of human rights, democracy and the rule of law.”¹⁶⁷ In their second opinion in 2021, the Venice Commission criticized the Russian Duma’s amendments to the Foreign Agent Law in November 2020 that expanded “the scope of entities and individuals that qualify as ‘foreign agents’ as well as [...] the obligations and restrictions on

¹⁶¹ “Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad,” 18.

¹⁶² “Opinion on Federal Law n. 121-Fz on Non-Commercial Organisations (‘Law on Foreign Agents’), on Federal Laws n. 18-Fz and n. 147-Fz and on Federal Law n. 190-Fz on Making Amendments to the Criminal Code (‘Law on Treason’) of the Russian Federation.” Council of Europe - European Commission For Democracy Through Law (Venice Commission), June 27, 2014: 27 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)025-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)025-e).

¹⁶³ “Opinion on Federal Law n. 121-Fz on Non-Commercial Organisations (‘Law on Foreign Agents’),” 27.

¹⁶⁴ “Opinion on Federal Law n. 121-Fz on Non-Commercial Organisations (‘Law on Foreign Agents’),” 28.

¹⁶⁵ “Opinion on Federal Law n. 121-Fz on Non-Commercial Organisations (‘Law on Foreign Agents’),” 28.

¹⁶⁶ “Opinion on Federal Law n. 121-Fz on Non-Commercial Organisations (‘Law on Foreign Agents’),” 27.

¹⁶⁷ “Opinion on Federal Law n. 121-Fz on Non-Commercial Organisations (‘Law on Foreign Agents’),” 27.

these entities and individuals.”¹⁶⁸ Their second opinion was more strongly worded: they criticized the “vague and overly broad terminology”¹⁶⁹ of the amendments that “fail to have a reasonable relation to the aims allegedly pursued,”¹⁷⁰ and found that the amendments “constitute serious violations of basic human rights, including the freedoms of association and expression, the right to privacy, the right to participate in public affairs, as well as the prohibition of discrimination.”¹⁷¹ The Venice Commission recommended that the Russian authorities “abandon the special regime of registration, reporting, and public disclosure requirements for associations, media outlets and individuals receiving ‘foreign support,’ including the related administrative and criminal sanctions.”¹⁷² If not, they recommended that the Russian authorities at least revise the law, specify “the legal definition of a ‘foreign agent,’”¹⁷³ and abandon “the notions of ‘political activities’ and ‘foreign support’ [...] in favour of indicators that would reliably track objectionable forms of foreign interference.”¹⁷⁴ At the very least, they recommended abandoning the “stigmatising and misleading ‘foreign agent’ label [...] in favour of a more neutral and

¹⁶⁸ Venice Commission. “Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020, to Amend Laws Affecting ‘Foreign Agents’, Adopted by the Venice Commission at Its 127th Plenary Session (Venice and Online, 2-3 July 2021).” Council of Europe - European Commission For Democracy Through Law (Venice Commission), July 6, 2021: 26 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)027-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)027-e).

¹⁶⁹ Venice Commission. “Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020,” 26.

¹⁷⁰ Venice Commission. “Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020,” 26.

¹⁷¹ Venice Commission. “Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020,” 26.

¹⁷² Venice Commission. “Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020,” 26.

¹⁷³ Venice Commission. “Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020,” 26.

¹⁷⁴ Venice Commission. “Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020,” 26.

accurate designation.”¹⁷⁵ While the Venice Commission’s 2021 opinion is worded more powerfully than the 2014 opinion, upon time of publication, the Foreign Agent Law had already been in effect for 9 years without facing any international judicial accountability, sending a message of apathetic tolerance to administrative crackdown against NGOs. As of August 2022, the now 10-year old Foreign Agent Law and its amendments in Russia are still enforced, having recently been updated by Putin’s law in July 2022, which expands the ‘foreign agent’ definition to “include anyone who is ‘under foreign influence.’”¹⁷⁶

More broadly, the Council of Europe established the Conference of International Non-Governmental Organisations (INGOs) of the Council of Europe, which is a representative body of INGOs that enjoy participatory status with the Council of Europe.¹⁷⁷ The Conference holds two annual sessions and organizes events to promote participatory democracy. The Conference established the Expert Council on NGO Law in 2008, aimed at “creating an enabling environment for NGOs through examining national NGO legislation and its implementation and providing advice on how to bring national law and practice into line with Council of Europe standards and European good practice.”¹⁷⁸ The Expert Council regularly publishes thematic and country studies on NGO laws, especially regarding their conformity with the European Convention on Human Rights and recommendation (2007)14 on the legal status of NGOs in Europe. The Expert Council provides the Conference with research on the legal and regulatory framework of NGOs and the administrative and judicial practices relevant to NGO activity in

¹⁷⁵ Venice Commission. “Russian Federation - Opinion on the Compatibility with International Human Rights Standards of a Series of Bills Introduced to the Russian State Duma between 10 and 23 November 2020,” 26.

¹⁷⁶ RFE/RL’s Russian Service. “Putin Signs Off On Harsher ‘Foreign Agent’ Law.” *RadioFreeEurope*, July 14, 2022. <https://www.rferl.org/a/putin-signs-off-harsher-foreign-agent-law/31943645.html>.

¹⁷⁷ Council of Europe. “Conference of INGOs - Homepage,” n.d. <https://www.coe.int/en/web/ingo/home>.

¹⁷⁸ Council of Europe. “Expert Council on NGO Law,” n.d. <https://www.coe.int/en/web/ingo/expert-council>.

CoE member states.¹⁷⁹ The Council of Europe currently has a program on their website with resources on shrinking civic space, focussing on impact on youth.¹⁸⁰ The Parliamentary Assembly of the Council of Europe (PACE) also issues resolutions condemning attacks and restrictions on NGOs in member states.¹⁸¹

¹⁷⁹ Council of Europe. “Call for Submissions Pursuant to Human Rights Council Resolution 32/31 on Civil Society Space,” n.d. <https://www.ohchr.org/sites/default/files/Documents/AboutUs/CivilSociety/Procedures/RegionalOrganizations/CouncilOfEurope.pdf>.

¹⁸⁰ Council of Europe. “Shrinking Space for Civil Society: Its Impact on Young People and Their Organisations,” n.d. <https://www.coe.int/en/web/youth/shrinking-space>.

¹⁸¹ Parliamentary Assembly of the Council of Europe (PACE). “PACE Committee Condemns Attacks on NGOs Who Assist Refugees and Migrants,” September 7, 2020. <https://pace.coe.int/en/news/7985/pace-committee-condemns-attacks-on-ngos-who-assist-refugees-and-migrants>.; Council of Europe. “New Restrictions on NGO Activities in Council of Europe Member States,” June 27, 2018. https://www.coe.int/en/web/youth/compendium-records/-/asset_publisher/hfm5cvWBmu2t/content/new-restrictions-on-ngo-activities-in-council-of-europe-member-states.; Council of Europe. “Strengthening the Protection and Role of Human Rights Defenders in Council of Europe Member States,” January 28, 2016. https://www.coe.int/en/web/youth/compendium-records/-/asset_publisher/hfm5cvWBmu2t/content/strengthening-the-protection-and-role-of-human-rights-defenders-in-council-of-europe-member-states?p_r_p_564233524_categoryId=40815265.; Louis, Alexandra. “Restrictions on NGO Activities in Council of Europe Member States.” Parliamentary Assembly of the Council of Europe (PACE), January 6, 2021. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28906&lang=en>.; Cruchten, Yves. “New Restrictions on NGO Activities in Council of Europe Member States.” Parliamentary Assembly of the Council of Europe (PACE), June 27, 2018. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24944&lang=en>.

6 – Areas for Improvement and Recommendations

While the case law and policies developed by Council of Europe bodies have been significant, the CoE's response to restrictive NGO legislation is still limited by their piecemeal approach and lack of a unified strategy, as well as their deferential response to state backlash. In this section, I will outline areas needing improvement as well as a few initial recommendations on CoE bodies' response to state restriction of NGOs. I focus primarily on the ECtHR, since it is one of the most influential and effective mechanisms available to the Council of Europe.

Areas Needing Improvement

ECtHR's Lack of a Unified Strategy

Unfortunately, thus far the Court's efforts against autocratic or autocratizing states' violations of human rights and restriction of NGOs have been "piecemeal, fragmented and contested."¹⁸² Çalı adds that judges often disagree on "how to address autocratic legalism and judicial harassment cases, as reflected in their majority and dissenting opinions."¹⁸³ This reflects the broader "lack of conceptual and strategic clarity"¹⁸⁴ that Brechenmacher and Carothers observe among international actors. They note that this lack of consensus is due to two main areas of confusion: (1) The lack of clear differentiation between "closing civic space and the wider political backlash against the progressive causes"¹⁸⁵ - which can create strategic challenges and (2) disagreement about "the relationship between closing civic space and the broader crisis

¹⁸² Çalı, "Autocratic Strategies," 13.

¹⁸³ Çalı, "Autocratic Strategies," 14.

¹⁸⁴ Brechenmacher and Carothers, "Defending Civic Space," 10.

¹⁸⁵ Brechenmacher and Carothers, "Defending Civic Space," 10.

of liberal democracy”¹⁸⁶ and how to frame and diagnose the issue of civil society restrictions to produce the best mode of approach.

Buyse noted that EU bodies are “relatively successful in getting human rights defenders out of immediate danger,” but far less successful at “address[ing] the deeper structural problems faced by civil society.”¹⁸⁷ Similarly, the ECtHR has failed to effectively address structural attacks on civic space in member states. However, Buyse argues that the European Convention and ECtHR, armed with their “close and mutually beneficial relationship with civil society and its elaborate and refined normative framework developed in its case law,”¹⁸⁸ have the potential to address these deeper structural problems. In particular, in her article Çalı noted several insufficiencies needing improvement, which I expand below: the ECtHR’s case prioritization policy, admissibility criteria, and lack of consensus on Article 18.

Prioritization of Cases

Administrative and judicial harassment is not top priority; it is second in the ECtHR’s ranking of case priorities. The Court has applied a priority policy since 2009.¹⁸⁹ Primary urgency goes to cases involving “risk to life or health of the applicant”¹⁹⁰ etc. Administrative and judicial harassment falls into second priority, which encompasses “applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) or

¹⁸⁶ Brechenmacher and Carothers, “Defending Civic Space,” 11.

¹⁸⁷ Buyse, “Why Attacks on Civic Space Matter,” 35.

¹⁸⁸ Buyse, “Why Attacks on Civic Space Matter,” 35.

¹⁸⁹ European Court of Human Rights. “The Court’s Priority Policy,” n.d. https://www.echr.coe.int/documents/priority_policy_eng.pdf.

¹⁹⁰ European Court of Human Rights. “The Court’s Priority Policy.”

applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or for the European system).” Buyse underlines the unused potential of the Court’s second priority policy to address urgent cases of shrinking civic space.¹⁹¹

According to Çalı, the Court still lacks a “comprehensive priority strategy.”¹⁹² The Ecodefence judgment took 9.5 years to process, while the Polish cases about the independence of the judiciary were marked as “urgent priority cases [in February 2021].”¹⁹³ She notes the Court needs to make their case prioritization process much more transparent, in order to publicize the Court’s strategy to addressing judicial harassment in order to “maximize impact.”¹⁹⁴

Admissibility Criteria – The Exhaustion of Domestic Remedies

One of the main admissibility criteria listed under Article 35 of the Convention dictates that “the Court may only deal with the matter after all domestic remedies have been exhausted,”¹⁹⁵ and only “within a period of four months from the date on which the final [domestic judicial] decision was taken.”¹⁹⁶ According to the Court, the logic behind the exhaustion rule was “to afford the national authorities, primarily the courts, the opportunity to

¹⁹¹ Buyse, “Why Attacks on Civic Space Matter,” 25.

¹⁹² Çalı, “Autocratic Strategies,” 15.

¹⁹³ Çalı, “Autocratic Strategies,” 15.

¹⁹⁴ Çalı, “Autocratic Strategies,” 15.

¹⁹⁵ Council of Europe. Article 35 § 1, “European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.” https://www.echr.coe.int/documents/convention_eng.pdf

¹⁹⁶ Originally, the time period was six months. It was reduced to four by the Brighton Declaration in 2012. European Court of Human Rights. “Practical Guide on Admissibility Criteria - Updated on 30 April 2022.” Council of Europe, April 30, 2022: 7. https://www.echr.coe.int/documents/admissibility_guide_eng.pdf; Council of Europe. Article 35 § 1, “European Convention on Human Rights.”

prevent or put right the alleged violations of the Convention,”¹⁹⁷ echoing the presumption in Article 13 of the Convention that “the domestic legal order will provide an effective remedy for violations of Convention rights.”¹⁹⁸ The requirement to exhaust domestic remedies means applicants must first use available judicial or administrative complaint procedures under national law before bringing the issue to the ECtHR.¹⁹⁹ It reflects how “the Court is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention.”²⁰⁰ In the “Practical Guide on Admissibility Criteria,” the Court heavily emphasizes how the entire human rights protection system established by the Convention is “based on the principle of subsidiarity”²⁰¹ to member states’ national systems.

However, the Court’s admissibility requirement is counter-productive in the context of autocratic legalism and judicial harassment. In autocratic or autocratizing states, claimants who seek domestic legal remedies are met with “a maze of remedies, appeal procedures and lengthy constitutional review processes.”²⁰² For example, Sundstrom et al gathered interview testimony which evidenced that in Russia, the “combination of rigid hierarchy and strong disincentives to

¹⁹⁷ European Court of Human Rights. “Practical Guide on Admissibility Criteria,” 26.

¹⁹⁸ European Court of Human Rights. “Practical Guide on Admissibility Criteria,” 27.

¹⁹⁹ Stanculescu, Daria. “The Requirement to Exhaust Domestic Remedies and the Future of Climate Change Litigation before the ECtHR.” Public International Law & Policy Group, April 26, 2021. <https://www.publicinternationallawandpolicygroup.org/lawyer-ing-justice-blog/2021/4/26/the-requirement-to-exhaust-domestic-remedies-and-the-future-of-climate-change-litigation-before-the-ecthr>.

²⁰⁰ European Court of Human Rights. “Practical Guide on Admissibility Criteria,” 26.

²⁰¹ European Court of Human Rights. “Practical Guide on Admissibility Criteria,” 7.

²⁰² Çalı, “Autocratic Strategies,” 16.

take on cases that are risky bets for conviction”²⁰³ leads to a “game of ‘ping-pong’”²⁰⁴ where detectives, investigators, the supervising prosecutor, and sometimes even the judge will “alternate back and forth in decisions on whether to open and investigate a formal case”²⁰⁵ or to quash it. Sundstrom et al’s interview with lawyer Furkat Tishaev from the Stichting Justice Initiative (SJI) found that “investigators purposely try to avoid or endlessly delay the establishment of Russian court decisions that could then be appealed to the European Court of Human Rights,”²⁰⁶ in a cyclical process of investigators deciding “whether to launch a case, deciding not to launch it, then higher authorities reversing that decision, and the process repeating itself.”²⁰⁷ One interviewee reported a case of repeating the cyclical process nine times. The cycle of launching and quashing cases prevents victims from fulfilling the ECtHR’s admissibility rule, since they have not technically exhausted all domestic remedies, if there is still “some next step that one could feasibly take domestically.”²⁰⁸ Like so, states will also use the exhaustion rule to appeal to the Court to reject the application.²⁰⁹ That being said, the Court has previous case law that could potentially be applied to these situations, but the case law was

²⁰³ Sundstrom, Lisa McIntosh, Valerie Sperling, and Melike Sayoglu. *Courting Gender Justice: Russia, Turkey, and the European Court of Human Rights*. Oxford University Press, 2019: 73 <https://doi.org/10.1093/oso/9780190932831.001.0001>.

²⁰⁴ Sundstrom et al, *Courting Gender Justice*, 73.

²⁰⁵ Sundstrom et al, *Courting Gender Justice*, 73.

²⁰⁶ Sundstrom et al, *Courting Gender Justice*, 74.

²⁰⁷ Sundstrom et al, *Courting Gender Justice*, 74.

²⁰⁸ Sundstrom et al, *Courting Gender Justice*, 75.

²⁰⁹ Selahattin Demirtaş v Turkey (Judgment), Application no. 14305/17 (European Court of Human Rights December 22, 2020). <https://hudoc.echr.coe.int/eng?i=001-207173>

developed in the context of blatant human rights violations and has not been applied to administrative restrictions.²¹⁰

Lack of Consensus on How to Use Article 18

In the past decade of case law, the Court has been using Article 18 to address authoritarian strategies.²¹¹ Article 18 provides that the “restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”²¹² If the Court found a violation of Article 18, it would mean judging the state as “acting in bad faith.”²¹³ Unsurprisingly, Article 18 violations found by the Court are few and far between: between 2004 to 2019, the Court found 13 violations total.²¹⁴ According to Floris Tan, Article 18 has untapped potential of being applied to cases where governments misused legal and administrative tools to restrict human rights and the rule of law.²¹⁵

Judges cannot agree on whether Article 18 should be used generally or on a case by case violations basis. Çalı found this discrepancy apparent in the conflicting ways “different sections handle Article 18 cases,”²¹⁶ such as between the sections of the Court that handle Azerbaijani

²¹⁰ Çalı, “Autocratic Strategies,” 16.

²¹¹ Çalı, “Autocratic Strategies,” 16.

²¹² Council of Europe. Article 18, “European Convention on Human Rights.”

²¹³ Buyse, “Why Attacks on Civic Space Matter,” 32.

²¹⁴ Tsampi, Aikaterini. “The New Doctrine on Misuse of Power under Article 18 ECHR: Is It about the System of Contre-Pouvoirs within the State after All?” *Netherlands Quarterly of Human Rights* 38, no. 2 (June 1, 2020): 145. <https://doi.org/10.1177/0924051920923606>.

²¹⁵ Tan, Floris. “The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?” *Goettingen Journal of International Law* 9 (2018): 109–41.

²¹⁶ Çalı, “Autocratic Strategies,” 17.

Article 18 cases and those that handle Turkish Article 18 cases. Even Grand Chamber case law cannot agree on the application of Article 18.²¹⁷

In sum, the Court needs to clarify its approach to applying Article 18 case law and address the lack of consensus within different sections of the Court.

Appeasement in Response to State Backlash

As aforementioned, the ECtHR is among the human rights ICs facing increasing backlash from member states and faces ever-worsening compliance issues. Russia represents an extreme case, but the UK has also increasingly disagreed with ECtHR rulings,²¹⁸ which eventually led to the “adoption of Protocol 15 to ‘reinforce the subsidiary nature’ of the ECtHR.”²¹⁹ The Danish government began a campaign to politicize human rights issues by criticizing the ECtHR’s interpretations of the European Convention in 2016,²²⁰ which they maintained until they achieved the Copenhagen Declaration in 2018, heralded by Danish politicians as a victory in their “showdown”²²¹ with the oppressive ECtHR.

²¹⁷ Çalı, “Autocratic Strategies,” 17.

²¹⁸ Hirst v. The United Kingdom (Judgment), Application No. 74025/01 (European Court of Human Rights October 6, 2005) <https://hudoc.echr.coe.int/eng?i=001-70442> ; Othman (Abu Qatada) v. The United Kingdom (Judgment), Application No. 8139/09 (European Court of Human Rights January 17, 2012). <https://hudoc.echr.coe.int/eng?i=001-108629>

²¹⁹ Kurban, Dilek. “Rethinking Effectiveness: Authoritarianism, State Violence and the Limits of the European Court of Human Rights.” In *The European Court of Human Rights: Current Challenges in Historical Perspective*, edited by Helmet Aust and Esra Demir-Gürsel, 177–99. Edward Elgar Publishing, 2021: 178. <https://www.elgaronline.com/view/book/9781839108341/book-part-9781839108341-18.xml>.

²²⁰ “Danmark Kan Udfordre Konvention for at Få Udvist Flere [Denmark Can Challenge the Convention to Get More People Deported],” *Berlingske*, October 1, 2016, <https://www.berlingske.dk/content/item/100239>.

²²¹ Madsen, Mikael Rask. “Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights,” *The British Journal of Politics and International Relations* 22, no. 4 (November 1, 2020): 735. <https://doi.org/10.1177/1369148120948180>.

Much like the Russian Constitutional Court, the German²²² and Italian²²³ Constitutional Courts have both come in conflict with ECtHR rulings, asserting the supremacy of national sovereignty over international law and demonstrating their willingness to wield their Constitutional Courts as a tool to restrain ECtHR jurisdiction when it steps out of line.

Not to mention that long before Russia even joined the Council of Europe, Turkey has been “persistently and systematically violating the ECHR and defying the ECtHR’s authority”²²⁴ for decades.

From the outside, global backlash undermines the legitimacy of international courts. From the inside, Stiansen and Voeten have studied the effects of backlash on institutional behaviour of international courts themselves. Their research shows that IC deferential treatment of state members has increased, mainly as the hiring of more lenient judges and the reluctance to rule against recognized democratic member states.²²⁵ Stiansen and Voeten argue that this selective deference is because accommodation of “democratic critics [comes] at a lower legitimacy cost than non-democratic challengers.”²²⁶ Supporting this argument, Madsen found that after the Brighton Declaration, the Court has been “providing more subsidiarity”²²⁷ to old, Western member states’ domestic legal institutions, increasing “use of the terms ‘margin of

²²² Beschluss des Zweiten Senats vom 14. Oktober 2004 [Order of the Second Senate of 14 October 2004], No. 2 BvR 1481/04, Rn. 1-73 (Bundesverfassungsgericht [Federal Constitutional Court of Germany] October 14, 2004).

²²³ Gaetano Silvestri, Judgment No. 348 of 2007, No. 348/2007 (Italian Constitutional Court October 22, 2007); Giuseppe Tesauro, Judgment No. 349 of 2007, No. 349/2007 (Italian Constitutional Court October 22, 2007).; Judgment No. 264 of 2012, No. 264/2012 (Italian Constitutional Court November 19, 2012).

²²⁴ Kurban, “Rethinking Effectiveness,” 179.

²²⁵ Stiansen, Øyvind, and Erik Voeten. “Backlash and Judicial Restraint: Evidence from the European Court of Human Rights.” *International Studies Quarterly* 64 (2020): 770–84.

²²⁶ Stiansen, and Voeten. “Backlash and Judicial Restraint,” 770.

²²⁷ Madsen, Mikael Rask. “Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?” *Journal of International Dispute Settlement* 9, no. 2 (2018): 199.

appreciation and ‘wide(r) margin’ in case law.”²²⁸ Helfer and Voeten coin the term “walking back dissents” to describe the increasing phenomenon of “opinions asserting that the Grand Chamber has tacitly overturned prior rulings or settled doctrine in a way that favours the respondent state.”²²⁹

For example, among the heavily criticized ECtHR cases that demonstrate deference to member states are when the Court found that the Turkish,²³⁰ French,²³¹ and Belgian²³² veil bans did not contravene the Convention. While these cases are not about NGO freedoms but about other rights issues, they show a wider pattern of court deference to member states, especially in cases of ‘quiet’ restriction of civil liberties. Kalantry and Pradhan note that the prohibition of religious clothing implicates Article 8 & 9 of the Convention.²³³ Article 8 stipulates that “everyone has the right to respect for his private and family life”²³⁴ and public authority is not allowed to interfere in this right unless it is “in the interests of national security, public safety or the economic well-being of the country, 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.”²³⁵

²²⁸ Madsen, “Rebalancing European Human Rights,” 199.

²²⁹ Helfer, Laurence R., and Erik Voeten. “Walking Back Human Rights in Europe?” *ICourts Working Paper Series No. 196*, 2020: 1.

²³⁰ Leyla Şahin v. Turkey (Judgment), Application No. 44774/98 (European Court of Human Rights November 10, 2005). <https://hudoc.echr.coe.int/eng?i=001-70956>

²³¹ S.A.S. v. France (Judgment), Application No. 43835/11 (European Court of Human Rights July 1, 2014). <https://hudoc.echr.coe.int/eng?i=001-145466>

²³² Dakir v. Belgium (Judgment), Application No. 4619/12 (European Court of Human Rights July 11, 2017). <https://hudoc.echr.coe.int/eng?i=001-175660>; Belcacemi and Oussar v. Belgium (Judgment), Application No. 37798/13 (European Court of Human Rights July 11, 2017). <https://hudoc.echr.coe.int/eng?i=001-175141>

²³³ Kalantry, Sital, and Maithili Pradhan. “Veil Bans in the European Court of Human Rights.” *IntLawGrrls* (blog), December 20, 2017. <https://ilg2.org/2017/12/20/veil-bans-in-the-european-court-of-human-rights/>.

²³⁴ Council of Europe. Article 8 § 1, “European Convention on Human Rights.”

²³⁵ Council of Europe. Article 8 § 2, “European Convention on Human Rights.”

Article 9 states that “everyone has the right to freedom of thought, conscience and religion,”²³⁶ including the right “to manifest his religion or belief, in worship, teaching, practice and observance.”²³⁷ The freedom to manifest one’s religion or beliefs can only be limited by the state “in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”²³⁸

In the case of *Leyla Şahin v. Turkey*, the Court argued that the veil ban did not violate Article 9 because the ban was necessary to “protecting the rights and freedoms of others and of protecting public order.”²³⁹ The Court also noted “extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts” and described the veil ban as “tak[ing] a stance against such political movements”²⁴⁰ and a “legitimate aim...to preserve pluralism.”²⁴¹

In the case of *S.A.S v. France*, the Court agreed with the French authorities, that when a woman wears a veil, she is “breaching the right of others to live in a space of socialisation which makes living together easier.”²⁴² According to the Court, the veil ban preserved the French idea of “‘living together’ [and was] an element of the ‘protection of the rights and freedoms of others.’”²⁴³ In their Joint Partly Dissenting Opinion, Judges Nussberger and Jäderblom point out

²³⁶ Council of Europe. Article 9 § 1, “European Convention on Human Rights.”

²³⁷ Council of Europe. Article 9 § 1, “European Convention on Human Rights.”

²³⁸ Council of Europe. Article 9 § 2, “European Convention on Human Rights.”

²³⁹ *Leyla Şahin v. Turkey* (Judgment).

²⁴⁰ *Leyla Şahin v. Turkey* (Judgment).

²⁴¹ *Leyla Şahin v. Turkey* (Judgment).

²⁴² *S.A.S. v. France* (Judgment).

²⁴³ *Leyla Şahin v. Turkey* (Judgment).

that “[t]he very general concept of “living together” does not fall directly under any of the rights and freedoms guaranteed within the Convention [...and] the concept seems far-fetched and vague.”²⁴⁴ They highlight the Court’s task “to protect small minorities against disproportionate interferences”²⁴⁵ despite majority political opinion, and underscore that the “pluralism, tolerance and broadmindedness”²⁴⁶ - the “hallmarks of a democratic society”²⁴⁷ that the Court so values, should justify “the acceptance of such a religious dress-code and the adoption of an integrationist approach,”²⁴⁸ and “the blanket ban could be interpreted as a sign of selective pluralism and restricted tolerance.”²⁴⁹ Susan S. M. Edwards noted how “French society has decided to set aside [tolerance] in favour of an enforced ‘living together’ but in accordance with the dominant norms of French society.”²⁵⁰ She points out that the French enforcement of the ‘living together’ principle upon Muslim women is reminiscent of “France’s colonialist past where the forcible unveiling of Algerian women in a claim to liberate them at the same time allowed the ulterior motive of domination and conquer to burgeon.”²⁵¹ Kalantriy and Pradhan underscore the “wide latitude and deference”²⁵² the Court showed France through generous application of the margin of appreciation doctrine. Margin of appreciation refers to the discretion the Court grants countries regarding their legislation, allowing them flexible interpretation of the Convention. The

²⁴⁴ Leyla Şahin v. Turkey (Judgment).

²⁴⁵ Leyla Şahin v. Turkey (Judgment).

²⁴⁶ Leyla Şahin v. Turkey (Judgment).

²⁴⁷ Leyla Şahin v. Turkey (Judgment).

²⁴⁸ Leyla Şahin v. Turkey (Judgment).

²⁴⁹ Leyla Şahin v. Turkey (Judgment).

²⁵⁰ Edwards, Susan S. M. “No Burqas We’re French! The Wide Margin of Appreciation and the ECtHR Burqa Ruling Case Commentary.” *Denning Law Journal* 26 (2014): 257.

²⁵¹ Edwards, “No Burqas We’re French!” 257.

²⁵² Kalantriy and Pradhan, “Veil Bans.”

Court's ruling in *S.A.S v. France* was quite problematic - now that the Court has established that a woman covering her face makes it less easy for others to interact with her and is a violation of the rights of others that justifies a veil ban, what next? By August 2016 (two years after the Court's ruling), over 30 French towns imposed burkini bans.²⁵³ In June 2022, the French Council of State, the highest administrative court, upheld the burkini ban on grounds that it violated the French principle of "secularism."²⁵⁴

In the twin cases of *Dakir v. Belgium* and *Belcacemi and Oussar v. Belgium*, the Court reiterated the same reasoning in *S.A.S v. France* and allowed the same wide margin of appreciation: Belgium's veil ban did not violate Article 8 or 9 of the Convention and is proportionate to "the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others.'"²⁵⁵ Kalantry and Pradhan point out the Court failed to address the disproportionality between the French and Belgium veil bans: the French law includes a fine of EUR 150, but the Belgium law includes a fine up to EUR 200 and permits imprisonment.²⁵⁶ They add that the Court "failed to use the opportunity to clarify or otherwise elaborate upon the vague standard of "living together" that it articulated in *S.A.S.*"²⁵⁷

²⁵³ Burkini are a type of swimwear that cover the body from head to toe, exposing one's face, hands, and feet. Mortensen, Antonia, and Angela Dewan. "French Towns Maintain Burkini Bans despite Court Rulings." CNN, August 31, 2016. <https://www.cnn.com/2016/08/31/europe/france-burkini-ban/index.html>.

²⁵⁴ France 24. "Top French Court Upholds Ban on 'burkini' Swimsuits in Grenoble's Public Pools," June 21, 2022, sec. france. <https://www.france24.com/en/france/20220621-top-french-court-upholds-ban-on-burkini-swimsuits-in-grenoble-s-public-pools>.; Ataman, Joseph, and Tara Subramaniam. "French Court Confirms Ban on 'burkinis' in Grenoble Swimming Pools - CNN." CNN, June 21, 2022. <https://www.cnn.com/2022/06/21/europe/grenoble-france-burkini-ban-pools-upheld-intl/index.html>.

²⁵⁵ *Dakir v. Belgium* (Judgment); *Belcacemi and Oussar v. Belgium* (Judgment).

²⁵⁶ Kalantry and Pradhan, "Veil Bans."; *Dakir v. Belgium* (Judgment); *Belcacemi and Oussar v. Belgium* (Judgment).

²⁵⁷ Kalantry and Pradhan, "Veil Bans."

Recommendations

While a study on alternatives to the CoE's piecemeal and deferential approach warrants another full research project, I might suggest some initial recommendations. Broadly speaking, the CoE should improve clarity and transparency of defence of NGOs against unnecessary legal and administrative restrictions. First, the Court ought to come to a consensus on the application of Article 18 - to date, the Grand Chamber has only ever found 18 violations of Article 18. As aforementioned, scholars have discussed the untapped potential of Article 18 in cases where governments misuse legal and administrative tools to restrict human rights and the rule of law.²⁵⁸ Second, the Council of Europe needs to clarify the scope of the fight against NGO restriction and closing civic space. Brechenmacher and Carothers suggest clarifying connections between closing civic space and "other pressing security, geopolitical, and economic challenges around the world,"²⁵⁹ and framing the issue as a "central element of a stable and secure world"²⁶⁰ rather than a "niche human rights concern"²⁶¹ to scale up attention and priority on foreign policy agendas. CoE publications still reference the CoE's 2007 Recommendation on the Legal Status of Non-Governmental Organisations in Europe, which needs to be updated to fit contemporary models of legal and administrative NGO restriction. I also recommend increased transparency of CoE discussions on the issue, such as an extension of the two annual sessions held by the Conference of INGOs - such as a comprehensive report on what is discussed during the sessions and what goals they set to achieve. Increased transparency and up-to-date clarity will help

²⁵⁸ Tan, "The Dawn of Article 18 ECHR," 109–41.

²⁵⁹ Brechenmacher and Carothers, "Defending Civic Space," 22.

²⁶⁰ Brechenmacher and Carothers, "Defending Civic Space," 22.

²⁶¹ Brechenmacher and Carothers, "Defending Civic Space," 22.

present a positive model and clear parameters on what NGO legislation contravenes the Convention and what does not, rather than putting out fires.

7 - Conclusion

The Council of Europe was founded in 1949 to develop “common and democratic principles”²⁶² in accordance with the European Convention on Human Rights. Its goals include the protection of “human rights, pluralist democracy and the rule of law.”²⁶³ In light of growing judicial and administrative restrictions on NGO activity, regional human rights systems such as the CoE must adjust to address this “fourth critical juncture moment,” as states successfully suppress civil society by applying democratic tools and “rule by law tactics.”²⁶⁴ While the CoE bodies have developed reports, public opinions, resolutions, policies, and case law in response to increased state restriction of NGOs, they have yet to develop a cohesive, unified strategy and are still limited by their piecemeal and deferential response.

The study of regional IO responses to shrinking civic space raises further potential areas of study. Further research could compare different European regional IOs (mainly including EU bodies as a comparative case study to CoE), as well as studying how they work in tandem. For example, the international response to the Hungarian Law LXXVI of 2017 eventually led Hungary to begin the process to appeal the law in 2021. In addition to fierce protests from local NGOs, the law raised international attention. The Venice Commission sent a delegation to Hungary in 2017 to consult “both the authorities and affected CSOs”²⁶⁵ and issued multiple opinions criticizing the law on grounds that it will “cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the

²⁶² Council of Europe. “Objectives and Mission,” n.d. <https://www.coe.int/en/web/sarajevo/objectives-mission>.

²⁶³ Council of Europe. “Objectives and Mission.”

²⁶⁴ Alter, “Critical Junctures,” 21.

²⁶⁵ Buyse, “Squeezing Civic Space,” 979.

prohibition of discrimination.”²⁶⁶ The issue reached EU bodies, and the European Commission launched infringement proceedings against Hungary, which led to the Court of Justice of the European Union (CJEU) to issue a judgment stating the law “introduced discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations, in breach of [...the Charter of Fundamental Rights of the European Union.]”²⁶⁷ Hungary finally began proceedings to repeal the law in 2021.²⁶⁸

The Council of Europe human rights system remains an “institutional model for the Inter-American and African Human Rights Systems,”²⁶⁹ according to Heidi Nichols Haddad. Regarding the ECtHR, Rachel Cichowski notes that “comparatively speaking, no other international court possesses such a rich history of engagement with and reliance on civil society and public interest representatives.”²⁷⁰ The Council of Europe human rights system is among the most assertive and strategic of human-rights promoting IOs, and the increased interaction between social activists and the CoE and the ECtHR has “expanded both rights protection and the accessibility of Convention institutions.”²⁷¹

Expanding this study to a cross-regional scope (especially comparing the Council of Europe, EU, Inter-American, and African systems of human rights) would produce a very

²⁶⁶ “Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad,” 17.

²⁶⁷ European Commission v. Hungary (Transparency of Associations) (Judgment), Case No. C-78/18 (Court of Justice of the European Union June 18, 2020). <https://curia.europa.eu/juris/liste.jsf?num=C-78/18>

²⁶⁸ Gall, Lydia. “Hungary’s Scrapping of NGO Law Insufficient to Protect Civil Society.” *Human Rights Watch* (blog), April 23, 2021. <https://www.hrw.org/news/2021/04/23/hungarys-scrapping-ngo-law-insufficient-protect-civil-society>.

²⁶⁹ Haddad, *The Hidden Hands of Justice*, 49.

²⁷⁰ Cichowski, Rachel A. “Civil Society and the European Court of Human Rights.” In *The European Court of Human Rights between Law and Politics*, edited by Jonas Christofferson and Mikael Rask Madsen, 77–97, 2011: 95. <https://academic.oup.com/book/7439/chapter/152328719>.

²⁷¹ Cichowski, “Civil Society,” 96.

informative picture of state relationships with ICs and how different regional human rights systems are defending against increasing restrictions of NGOs.

For example, the African Union (AU) is struggling severely with anti-NGO legislation: between 2004 and 2019, 12 AU member states adopted legislation that restricts NGOs: “Sudan, Rwanda, Ethiopia, Zambia, Tunisia, Algeria, South Sudan, Uganda, Sierra Leone, Egypt, Burundi, and Tanzania.”²⁷² Unfortunately, the AU and the African Court of Human and Peoples’ Rights (henceforth, African Court) struggle with member state acceptance of the Court’s competence. Of the AU’s 54 member states, only 33 have ratified the Protocol establishing the African Court. Of these 33 member states, only 10 have ever declared under “Article 34(6) of the African Court’s Protocol accepting the competence of the Court to receive cases from individuals and NGOs.”²⁷³ Moreover, recently Rwanda, Tanzania, Benin, and Côte d’Ivoire have withdrawn their declarations (Rwanda in 2013, Tanzania in 2019, Benin in 2020, and Côte d’Ivoire in 2020), which leaves only 6 member states that currently allow the African Court to receive cases from individuals and NGOs.²⁷⁴ A cross-regional comparison between the CoE and AU may reveal important lessons on defence against anti-NGO legislation while preserving member state acceptance of human rights protection systems.

²⁷² Musila, Godfrey. “The Spread of Anti-NGO Measures in Africa: Freedoms Under Threat.” Freedom House, May 2019: 3. <https://freedomhouse.org/report/special-report/2019/spread-anti-ngo-measures-africa-freedoms-under-threat>.

²⁷³ De Silva, Nicole. “Individual and NGO Access to the African Court on Human and Peoples’ Rights: The Latest Blow from Tanzania.” *EJIL: Talk!* (blog), December 16, 2019. <https://www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/>. See also African Court on Human and Peoples’ Rights. “Basic Information.” African Court on Human and Peoples’ Rights, n.d. <https://www.african-court.org/wpafc/basic-information/>.

²⁷⁴ De Silva, “Individual and NGO Access.”; Davi, Tetevi, and Ezéchiél Amani Cirimwami. “Another One Bites the Dust: Côte d’Ivoire to End Individual and NGO Access to the African Court.” *EJIL: Talk!* (blog), May 19, 2020. <https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/>.

In recent years, Organization of American States (OAS) Member States have also increasingly used the law to restrict NGOs and civic society actors, including Guatemala, Nicaragua, Cuba, El Salvador, Ecuador, Uruguay, Venezuela, Bolivia, and the USA.²⁷⁵ As with the ECtHR, NGOs are extremely active in presenting cases before the Inter-American Court of Human Rights (IACtHR), so a cross comparison of both courts would provide very interesting insights as to the judicial defence of human rights and ruling enforcement.

As more governments learn from each others' autocratic legalist strategies such as legal restriction of NGOs, so must researchers learn from comparing different ways to protect civic space.

Thus, further research may reveal how lessons learned from some systems can be applied to others. A study of institutional defence of NGO restrictions may reveal insights that can be helpful to activists as well, such as: how should human rights defenders and stakeholders of international justice best adjust to shrinking civic space to continue their work? What does the growing leniency of these institutions mean for the integrity of international bodies and their efficacy in rights protection in the future? How will victims of human rights abuses in Russia

²⁷⁵ United Nations. "Guatemala: UN and OAS Experts Sound Alarm about 'Choking' NGO Law." United Nations - Office of the High Commissioner of Human Rights (OHCHR), July 1, 2021. <https://www.ohchr.org/en/press-releases/2021/07/guatemala-un-and-oas-experts-sound-alarm-about-choking-ngo-law>.; Burns, Katie. "Throwing the Book at Civil Society: Antidemocratic Regimes in the Americas Are Using the Law to Narrow Civic Spaces." Freedom House, December 15, 2021. <https://freedomhouse.org/article/throwing-book-civil-society-antidemocratic-regimes-americas-are-using-law-narrow-civic>.; CIVICUS. "Uruguay: Government Push to Repeal Media Law and Reinstate Dictatorship-Era Legislation - CIVICUS - Tracking Conditions for Citizen Action," CIVICUS, August 16, 2022. <https://monitor.civicus.org/updates/2022/08/16/uruguay-government-push-repeal-media-law-and-reinstate-dictatorship-era-legislation/>.; CIVICUS. "Nicaragua: Closure of CSOs, Community Radio Stations, and Television Cable Channel - CIVICUS - Tracking Conditions for Citizen Action." CIVICUS, August 23, 2022. <https://monitor.civicus.org/updates/2022/08/23/nicaragua-closure-csos-community-radio-stations-and-television-cable-channel/>.; Amnesty International. "Laws Designed to Silence," 40.

seek justice for violations made after September 16, 2022? Further study could reveal how member state-IO relationships will affect international human rights advocacy and the legitimacy of international human rights systems.

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