Note

UNITED, WE FALL: EXPPELLING AUTOCRATIC STATES FROM THE EUROPEAN UNION

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ABSTRACT

Since 2010, the Fidesz party has systemically and blatantly undermined Hungary’s democratic institutions. Led by the autocrat Orbán, Fidesz has rigged Hungary’s elections, packed its courts, and violated its citizens’ human rights. So far, it has done so without any real consequence from the European Union. This state cannot stand. The inefficacy of the EU’s current attempts to discipline Hungary suggests that a stronger remedy is necessary: expulsion. This Note argues that allowing expulsion of materially breaching Member States has not been foreclosed by CJEU jurisprudence and, indeed, advances the EU Treaties’ purpose of “ever closer union.” Should Member States retain their sovereign expulsion right, Article 60 VCLT operates as its guiding law. Using this framework, Hungary’s recent autocratic actions have violated the values of democracy, rule of law, and human rights contained in Article 2 TEU, which is an essential provision of “ever closer union.” As such, Hungary has likely materially breached its treaty obligations, and so is liable for expulsion. Whether there is the political will to achieve the required unanimity to effect expulsion remains unclear. What is clear is that keeping autocracies in the Union risks the legitimacy and long-term survival of the EU project.

INTRODUCTION

On July 26, 2014, Hungarian Prime Minister Viktor Orbán decided it was time. After four hard years of gerrymandering the

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electorate, rewriting the constitution, capturing the courts, and silencing the media, it was time—finally—for Hungary’s autocratic coming out.¹ In a speech, Orbán declared: “[The] Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state.”²

By 2014, Orbán and his political party, Fidesz, had largely consolidated their control over Hungary. Orbán and Fidesz hijacked the emerging democracy, “carr[ying] out an autocratic revolution with exquisite legal precision.”³ Along with institutional capture, Fidesz has used demagoguery to stay in power, inflaming public sentiment with attacks on immigrants, Muslims, Jews, and LGBTQ+ individuals.⁴ But Fidesz’s goal was more ambitious than simply undermining democracy; the party seemingly aspired to entrench autocracy, permanently.⁵ And all indicators suggest Fidesz has largely succeeded. Hungary’s Democracy Score from Freedom House⁶ declined from 58/100 in 2017 to 45/100 in 2021,⁷ the “biggest decline ever measured in [Freedom

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¹. See infra Part III.B.
². Viktor Orbán, Prime Minister, Hung., Speech at the XXV Bálványos Free Summer University and Youth Camp (July 26, 2014) (emphasis added).
⁵. See Orbán, supra note 2 (observing that to be internationally competitive, Hungary might have to embrace political “systems that are not Western, not liberal, not liberal democracies, maybe not even democracies . . . [like] Singapore, China, India, Turkey, Russia”); see also infra Part III.B (outlining how Orbán and Fidesz have broken their obligations to the EU and entrenched autocratic rule in Hungary by rigging elections, undermining the rule of law, and violating human rights).
⁶. Freedom House is a nonpartisan, nonprofit organization that researches and reports on “issues related to democracy, political rights and civil liberties” around the world. About Us, FREEDOM HOUSE, https://freedomhouse.org/about-us [https://perma.cc/7A8R-8MGX]. Since 1941, it has operated “as an independent watchdog organization dedicated to the expansion of freedom and democracy.” Id.
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On Sunday, April 3, 2022, Orbán and Fidesz won 83 percent of Hungary’s electoral districts—with only 53 percent of the vote, a testament to how unshakeable Fidesz’s power has become.

Despite this explicit descent into autocracy, the European Union (“EU”) (of which Hungary is a Member State) was sluggish in its approach to the emergence of an autocratic regime in its midst. The EU Commission leveled infringement proceedings against Hungary in response to individual infringements of EU law, but only sporadically and to limited effect. Recently, the Commission has also begun to experiment by withholding EU funds to backsliding states like Hungary, although this mechanism is dependent on “precise case[]” outcomes and is slow-moving. The most powerful tool in the EU governance structure to discipline breaching Member States—

It is substantially lower than consolidated democracies like Slovenia (79), Lithuania (77), and Estonia (83). Countries and Territories, FREEDOM HOUSE, https://freedomhouse.org/countries/nations-transit/scores [https://perma.cc/SN7G-WAPQ].


Kim Lane Scheppele, In Hungary, Orban Wins Again – Because He Has Rigged the System, WASH. POST (Apr. 7, 2022, 9:53 PM) [hereafter Scheppele, In Hungary, Orban Wins Again], https://www.washingtonpost.com/politics/2022/04/06/orban-fidesz-autocratic-hungary-illiberal-democracy [https://perma.cc/XV5M-DSX2]. The thirty-point disparity between Fidesz’s votes received and districts won in the 2022 parliamentary elections was the result of heavy gerrymandering, electorate manipulation, blurred government-party messaging, and popularity from the Ukrainian-Russian war. Id.

Per Articles 258 and 259 of the Treaty on the Functioning of the European Union (“TFEU”), the Commission may launch an infringement proceeding against a Member State that “fail[s] to fulfill an obligation” under EU law. Consolidated Version of the Treaty on the Functioning of the European Union arts. 258–59, July 6, 2016, 2016 O.J. (C 202) 47 [hereinafter TFEU]. The Commission will first submit a request for information to an investigated country, followed by an opinion if it is determined that the Member State is failing its legal obligations under the EU Treaties. Infringement Procedure, EUR. COMM’N, https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en [https://perma.cc/VBJ5-VF3Z]. If the violating Member State refuses to comply with the Commission’s opinion, the Commission may refer the matter to the Court of Justice for the European Union (“CJEU”), which may impose financial penalties on the non-complying Member State. Id.

See infra notes 127–128, 193–198 and accompanying text.

See Edit Inotai, EU Triggers Mechanism To Strip Hungary of Billions Worth of Budget Funds, BALKAN INSIGHT (Apr. 5, 2022, 6:37 PM), https://balkaninsight.com/2022/04/05/eu-triggers-mechanism-to-strip-hungary-of-billions-worth-of-budget-funds [https://perma.cc/G44M-NFAS] (noting that “any suspension of funds – if decided – could not happen before the end of the year” and only if the EU Commission is successful in proving “precise cases where rule-of-law deficiencies directly led to EU budget funds being misused in Hungary”).
Article 7—has been largely kept sheathed. Dubbed the EU’s “nuclear option,” Article 7 of the Treaty on the European Union (“TEU”) allows Member States to suspend a breaching Member’s voting rights in EU institutions. The closest the mechanism ever came to being used occurred on September 12, 2018, when the EU Parliament passed a proposal asking for the Council of the EU to “determine . . . whether Hungary is at risk of breaching the EU’s founding values.” The proposal passed and was sent to the heads of the EU’s twenty-eight member states, where it has so far failed to receive the four-fifths approval necessary to advance it to the next stage. Even if the proposal did pass that high hurdle, Hungary is unlikely to be meaningfully sanctioned because Article 7 TEU sanctions can only be applied with unanimity and Poland, another emerging autocracy, has signaled its willingness to defend Hungary.

Even so, the EU’s inability to substantively discipline Hungary through infringement proceedings or Article 7 TEU does not doom it to inaction. Theoretically, there remains one last tool at Member States’ disposal: expulsion. Although the EU Treaties do not expressly provide for expulsion, Member States retain a right of treaty

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termination (i.e., de facto expulsion) under customary international law ("CIL").

Allowing Member States to expel other (breaching) Member States would advance the purpose of the EU Treaties. The Court of Justice for the European Union ("CJEU") has extensively declared that that primary purpose of the EU Treaties is to create "an ever closer union among the peoples of Europe." This purpose is best served by affirming Member States’ CIL right to expel materially breaching treaty partners. By interpreting “ever closer union” through the lens of Article 2 TEU’s values of democracy, rule of law, and respect for human rights, the Court would better ensure long-term EU unity by allowing for the expulsion of states violating those values.

This Note argues that the EU’s purpose of “ever closer union” is best served by allowing Member States to expel other materially breaching Member States, pursuant to CIL as codified in the Vienna Convention on the Law of Treaties 1969 ("VCLT"). Assuming expulsion is consistent with the EU Treaties’ purpose of “ever closer union.”

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17. Customary international law, a.k.a. “custom” or “CIL,” is a set of rules that forms part of international law. Hester Swift, Researching Customary International Law, 19 LEGAL INFO. MGMT. 169, 169 (2019). Unlike other forms of international law like treaties or soft law, CIL is often unwritten. Id. at 170. Traditionally, a rule of CIL only emerges when two elements are met: states must engage in widespread and consistent action (the ‘state practice’ element) and states must view that action as arising from a legal obligation (the ‘opinio juris’ element). Id. at 169–70. Also, unlike treaties, to which a state must affirmatively agree to be bound, CIL is binding on all states regardless of affirmative consent. HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 63 (2d ed. 2019). The theory is that a state is considered to have tacitly assented to the establishment of a binding rule of CIL, unless it persistently objects to the establishment of the CIL rule (at which point, the state is not considered bound to the emerging CIL rule, even if it binding on other states). Id.

18. See infra Part II.


20. See id. at art. 2 (“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”).

union,” this Note advances a theoretical legal framework by which Member States could expel materially breaching states from the EU via treaty termination. Using this framework, it is clear that Hungary, by its descent into autocratic governance, has materially breached its obligations under Article 1 TEU, and that the nonbreaching Member States, if unanimous, can terminate the EU Treaties in relation to it.

Part I discusses the CJEU’s approach to the purpose of the EU Treaties in its Wightman case and why allowing expulsion in the EU Treaties better supports “ever closer union” among EU Member States. Part II outlines the requirements for CIL treaty termination as codified by Article 60 VCLT. Part III applies these requirements to Hungary. Finally, Part IV analyzes the benefits and consequences expulsion would provide to EU Member States.

I. EXPULSION BETTER SERVES “EVER CLOSER UNION”

CJEU jurisprudence might suggest that the Court would view a retained right of treaty termination (which will, going forward, be shorthanded as expulsion) as incompatible with the EU Treaties’ purpose of “ever closer union.” However, a closer analysis of the Court’s most recent, leading case on the subject, Wightman v. Secretary of State for Exiting the European Union,22 offers some hope that expulsion has not been entirely foreclosed as a remedy. Indeed, construing the EU Treaties to allow for expulsion of autocratic Member States better ensures long-term EU unity and, therefore, better serves the EU Treaties’ purpose of “ever closer union.” An approach that does not allow expulsion would encourage the continued violation of the EU’s foundational values and wrongly prioritize short-term unity, ultimately endangering the long-term survival of the EU project.

A. The CJEU’s Wightman Decision Should Be Read To Allow Expulsion

Skeptics of the idea that Member States retain a right of expulsion will point to the CJEU’s recent decision in Wightman as having prohibited expulsion because of its incompatibility with the EU

Treaties’ purpose of “ever closer union.”23 This reading of Wightman is far too expansive. The Court’s decision, at most, can be read to preclude “forced withdrawals” because of their incompatibility with “ever closer union,” but it cannot, and should not, be read to have reached the same conclusion for expulsion of Member States.24

It must be initially acknowledged that the EU Treaties have no express expulsion provision.25 This means that any expulsion right, if it exists at all, must exist by retention. Put another way, if nothing in the Treaties, including their underlying purpose of “ever closer union,” precludes the right of expulsion of materially breaching treaty partners, the Member States retain it. This derives from the notion that states may contract around their traditionally sovereign CIL rights by entering treaties that expressly preclude those rights, and if they have not expressly precluded those rights, then states retain them.26 Whether there is such a retained right of expulsion by EU and European Monetary Union (“EMU”) Member States has divided commentators.27


24. See infra notes 41–46 and accompanying text.


26. THIRLWAY, supra note 17, at 153 (observing that “a rule, or an obligation, derived from a specific treaty excludes, as between the parties to that treaty, the operation of any inconsistent customary rule that would otherwise govern the matter” and that, indeed, the whole notion of jus cogens, which “cannot be contracted out of by treaty, is built on the assumption that all other obligations of customary law can be so ousted”). Thirlway outlines that even if different sources of international law operate on states simultaneously, these different sources “operate . . . independently of each other.” Id. at 147. As such, just because a state enters into a treaty silent on a particular CIL obligation, does not mean that obligation vanishes into the ether: “The background of customary law is relevant to any question on which the treaty does not speak, and may well be of service in the interpretation of the treaty . . . the customary rule remains invisible, but alive and present.” Id. at 159.

27. Compare Phoebus Athanassiou, Withdrawal and Expulsion from the EU and EMU: Some Reflections 35 (Eur. Cent. Bank, Legal Working Paper No. 10, 2009), https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf [https://perma.cc/Y2KB-FQYM] (“[N]ot only is a collective right of expulsion not provided for in the text of the treaties, but . . . the legitimacy of its assertion or introduction would be highly questionable, both legally and conceptually.”), and Lowrey, supra note 23 (noting that Europe cannot kick Greece out of the EU as “EU bylaws provide no mechanism for expelling a member state”), and Melissa Gutierrez, Flying Too Close to the Sun: How an EMU Expulsion Provision Will Prevent the European Sovereign Debt Crisis...
The CJEU utilizes a teleological, or purpose-driven, approach in its jurisprudence. Teleological jurisprudence is a form of legal reasoning “which seeks to interpret a rule by taking into account the purpose, aim and objective it pursues.”\(^\text{28}\) CJEU caselaw is replete with this method of reasoning,\(^\text{29}\) and the Court has concluded that “every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole.”\(^\text{30}\) Using this reasoning, the CJEU consistently has found that the EU Treaties’ purpose is reflected in Article 1 TEU, which declares: “This Treaty marks a new stage in the process of creating an ever closer...
union among the peoples of Europe.” The Treaties’ text and academic scholarship also support “ever closer union” as the primary purpose of the EU Treaties.

On its surface, the CJEU’s decision in Wightman might suggest that the CJEU would consider a right of expulsion by Member States as incompatible with this purpose and thus not retained. In Wightman, the Court faced the question of whether a Member State could unilaterally revoke an Article 50 TEU withdrawal notice. Textually, Article 50 TEU makes no mention of whether this is possible. Nonetheless, the CJEU found that a notice of withdrawal could be

31. TEU, supra note 19 (emphasis added); see, e.g., Case 26/62, Van Gend en Loos v. Neth. Inland Revenue Admin., 1963 E.C.R. 1, 12 (“The objective of the [European Economic Community] Treaty . . . is to establish a [c]ommon [m]arket.”); Case 1/91, Opinion of the Court, 1991 E.C.R. I-6099, ¶ 17 (“Article 1 of the Single European Act makes it clear moreover that the objective of all the Community treaties is to contribute together to making concrete progress toward[] European unity.”); Wightman, ECLI:EU:C:2018:999, ¶ 61 (holding that the Treaties “have as their purpose the creation of an ever closer union among the peoples of Europe”). For a comprehensive list of CJEU caselaw invoking “ever closer union” as the Treaties’ purpose up to 2015, see generally Vaughne Miller, “Ever Closer Union” in the EU Treaties and Court of Justice Case Law (House of Commons Libr., Briefing Paper No. 07230, 2015), https://researchbriefings.files.parliament.uk/documents/CBP-7230/CBP-7230.pdf [https://perma.cc/3UKY-LKVC].

32. The first declaratory clause of the TFEU preamble states that the Member States are “DETERMINED to lay the foundations of an ever closer union among the peoples of Europe.” TFEU, supra note 10, at pmbl. (emphasis added). The next clause reinforces the first by committing EU Member States “to eliminate the barriers which divide Europe.” Id. The TUE similarly emphasizes this purpose. Article 1 TEU declares that the TEU “marks a new stage in the process of creating an ever closer union among the peoples of Europe,” as does the nearly-identical clause in its preamble. TEU, supra note 19, at art. 1, pmbl. (emphasis added). The first, third, and sixth declaratory clauses in the TEU Preamble follow suit. Id. at pmbl.

33. Gunnar Beck, The Court of Justice of the EU and the Vienna Convention on the Law of Treaties, 35 Y.B. EUR. L. 484, 494 (2016) (“In important [CJEU] cases, however, the idea of ever further integration is almost always implicit, as it is inseparable from the principles of the uniform application of Union law as well as the effectiveness of Union law.”); see also Dagtoplou, supra note 29, at 260 (“Integration is certainly a process and a goal at the same time and could as such be described as a constitutional principle of the Community.”).

34. Seeinfra notes 38–40 and accompanying text.

35. Wightman, ECLI:EU:C:2018:999, ¶ 16. The Court had an eye firmly trained on the U.K., which was then in the middle of negotiating a Brexit deal with the EU and, indeed, this was the context in which the question was raised. See Giuseppe Martinico & Marta Simoncini, Wightman and the Perils of Britain’s Withdrawal, 21 GERMAN L.J. 799, 801 (2020) (noting that it was “[i]n the conundrum of Brexit negotiations” that members of the Scottish, U.K., and European Parliaments “felt a responsibility to explore all the potential consequences of Article 50 TEU”).

36. See generally TEU, supra note 19, at art. 50 (including no reference to whether a state can revoke its withdrawal notice).
unilaterally revoked.\textsuperscript{37} It reasoned that because, “[A] state cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will.”\textsuperscript{38} The Court was concerned a Member State might, after submitting its withdrawal notice, change its mind and still be forced to leave.\textsuperscript{39} Such a result, the Court warned, “would be inconsistent with the Treaties’ purpose of creating an ever closer union.”\textsuperscript{40} Such logic might, at first glance, suggest the Court would also interpret “ever closer union” as precluding a retained right of Member States to expel other Member States. Expulsion would terminate EU relations between Member States without the expelled states’ consent and likely interfere with the states’ will to remain within the treaty.

However, a closer reading of the \textit{Wightman} judgement suggests that the CJEU’s reasoning should be limited to only “forced withdrawals” and that it should not be extended to preclude a retained expulsion right. A forced withdrawal is not the same as expulsion; they differ in where the legal entitlement lies. In a forced withdrawal, an innocent State, legally entitled to remain within the treaty relationship, might be coerced or bullied extralegally by its treaty partners to take an affirmative, nonconsensual act. Such a state might itself take steps to end the treaty relationship because of political, security, or other nonlegal pressures by its treaty partners.\textsuperscript{41} In an expulsion, however, a

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\item \textsuperscript{37} Wightman, ECLI:EU:C:2018:999, ¶ 69.
\item \textsuperscript{38} Id. ¶ 65.
\item \textsuperscript{39} See id. ¶ 66 (noting that “if the notification of the intention to withdraw were to lead inevitably to the withdrawal of the Member State . . . that Member State could be forced to leave the European Union despite its wish . . . to reverse its decision to withdraw and, accordingly, to remain a Member of the European Union”).
\item \textsuperscript{40} Id. ¶ 67.
\item \textsuperscript{41} Take, for example, the pressure campaign leveled against South Africa by members of the International Labor Organization (“ILO”) during apartheid. In 1961, the International Labor Conference adopted a resolution, spearheaded by Nigeria, requesting that South Africa voluntarily withdraw from the ILO “until such time as it abandoned the policy of apartheid.” Louis B. Sohn, \textit{Expulsion or Forced Withdrawal from an International Organization}, 77 HARV. L. REV. 1381, 1412 (1964). South Africa refused, and because there was no expulsion provision in the ILO constitution, it legally could not be forced out. \textit{See id.} at 1412–13 (noting that because “there was no provision for expulsion provision in the ILO constitution, South Africa was instead invited to withdraw”). The legal entitlement of membership laid with South Africa. \textit{See generally id.} at 1412–16 (documenting that, because there was no expulsion provision in the ILO, South Africa could not be denied membership or forced to withdraw against its consent). This did not stop other members of the ILO from attempting to pressure it to withdraw. \textit{Id.} The country’s credentials were challenged in 1962, unsuccessfully. \textit{Id.} Its representatives’ right to speak at the 1963 International Labor Conference were challenged, again unsuccessfully, and African and
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state has lost its entitlement to the treaty relationship because of its treaty breach.\textsuperscript{42} It is not forced to take any nonconsensual act, but its treaty partners also no longer have to extend the treaty relationship toward it. It becomes a passive recipient of the consequences of its breach.

Alternatively, it is possible CJEU used the words “withdraw” and “leave” to refer to Article 50 TEU specifically, leaving general questions of withdrawal or expulsion untouched. It certainly held that no Member State can be forced to use the withdrawal mechanism of Article 50 TEU,\textsuperscript{43} but it is unclear whether this principle is equally applicable to retained CIL rights of withdrawal or expulsion generally. The Court surely knew how to address questions of expulsion had it wanted to.\textsuperscript{44} It did not, restricting its judgement to situations of forced withdrawal. Indeed, only once did the Court mention the word “expulsion” in its Judgement and only tangentially in its discussion on Article 50 TEU,\textsuperscript{45} adopting a concern raised by the Advocate General that an irrevocable withdrawal notice would convert Article 50 TEU “into a means of expelling a Member State.”\textsuperscript{46} The Court’s narrow

\textsuperscript{42} See, e.g., id. at 1396 (noting that when the U.S.S.R. was expelled from the League of Nations because of its invasion of Finland, it “lost all the rights and privileges of membership, and all the reciprocal obligations between it and other members of the League came to an end”).


\textsuperscript{44} See infra note 45 and accompanying text.

\textsuperscript{45} See Wightman, ECLI:EU:C:2018:999, ¶ 68 (“[D]uring the drafting of [the withdrawal] clause, amendments had been proposed to allow the expulsion of a Member State . . . .” (emphasis added)). The court found that the non-adoption of an expulsion provision by the Lisbon Treaty drafters supported “an interpretation of [the withdrawal] provision as meaning that a Member State is entitled to revoke unilaterally the notification of its intention to withdraw from the European Union.” Id.

\textsuperscript{46} Opinion of Advocate General Campos Sánchez-Bordona, Case C-621/18, Wightman, ECLI:EU:C:2018:978, ¶ 112 (Dec. 4, 2018). The Advocate General noted “nothing in Article 50 TEU suggests that the withdrawal procedure may be converted into a means of expelling a Member State” and that the drafters of the Lisbon Treaty “did not agree an amendment [sic] which proposed supplementing the Member States’ voluntary right of withdrawal with a right of
focus on the question of forced withdrawals should be read exactly that way, narrowly, and should not be interpreted to address a retained right of expulsion.

B. Construing the Treaties To Allow Expulsion Better Serves “Ever Closer Union”

A closer analysis of Wightman reveals that the CJEU did not foreclose expulsion. More importantly, though, construing the EU Treaties to allow for expulsion of autocratic Member States better ensures long-term EU unity and, therefore, better serves the EU Treaties’ purpose of “ever closer union.” A jurisprudence that does not allow for expulsion would encourage the continued violation of the EU’s foundational values and wrongly prioritize short-term unity, ultimately endangering the long-term survival of the EU project.

The CJEU’s use of teleological reasoning means that many cases are decided on how well they enhance the purpose of the EU Treaties, “ever closer union.”47 Neither the Treaties nor caselaw defines “ever closer union,” so the meaning of this purpose must be found elsewhere. That substance can be found in Article 2 TEU. Article 2 TEU advances certain “common” values that the EU Member States themselves considered foundational to “ever closer union.”48 The foundational nature of these values to EU Member States is evidenced in several ways, most notably in their role as legal requirements for newly acceding Member States.49 The central role these values, including the three specific values this Note will focus on, democracy, the rule of law, and respect for human rights, played in the creation of the modern EU indicate they should also be considered central to the purpose of the EU’s, “ever closer union.” Autocracies that violate these foundational

expulsion from the European Union with regard to Member States that persistently infringed the Union’s values.” Id.

47. See supra notes 28–31 and accompanying text.

48. Article 2 TEU reads in full:
The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

TEU, supra note 19, at art. 2 (emphasis added).

49. These values were written into the text of Article 49 TEU, which governs accession of new Member States; included in the Copenhagen criteria, additional accession requirements; and given force by EU Member States in practice. See infra Part III.A.
values, like Hungary or Poland, jeopardize the source of unity that initially incentivized and currently binds EU Member States.

A jurisprudence that allows autocracies to remain in the EU implicitly divorces “ever closer union” from the values articulated in Article 2 TEU, disrupting Member State reliance interests by violating the purpose for which those Members entered “ever closer union.” EU unity and cooperation are based on the intertwined assumptions that Member States adhere to Article 2 TEU’s values and that Member States can rely on their fellow States to uphold those values. Autocracies, however, hold values inherently incompatible with Article 2 TEU; some, like Hungary, have both refused to uphold these values and blatantly denounced them. By allowing autocracies that reject Article 2 TEU’s values to remain Member States, the CJEU divorces those values from the EU’s purpose of “ever closer union,” disrupting those initial reliance interests.

Consider just the recent disruptions caused by Hungary. At the time of this writing, Hungary has delayed the EU’s COVID-19 pandemic recovery plan and a “sanctions regime to target human-rights offenders”; it has blocked the transit of weapons through its territory to Ukraine during the Russian invasion; and it has refused to agree to an EU ban on Russian oil, effectively vetoing the measure. Orbán himself has also actively stoked discord between Hungary and rest of the EU, denouncing “Brussels bureaucrats” as Hungary’s “opponents.” Not only have seeds of the short-term disharmony flowered between the EU and Hungary, but serious long-term conflict has begun to propagate as Hungary repudiates the values that Member States required and relied on when it joined the EU. Indeed, commentators have warned that conflict would inevitably result from

50. See supra note 2 and accompanying text.
this value disharmony,\textsuperscript{53} concerns that have proven prophetic.\textsuperscript{54} This internal division not only has tangible real-world impacts but also weakens EU institutional legitimacy,\textsuperscript{55} especially as the “EU’s own claim to democratic legitimacy rests on the robust democratic governments of its Member States.”\textsuperscript{56}

A CJEU jurisprudence that uses the values in Article 2 TEU to inform the Treaties’ purpose and affirms Member States’ right of expulsion would better serve “ever closer union” by reducing this kind of inter-EU conflict. Expulsion offers a way of ensuring value conformity in the EU, thus preserving the values undergirding “ever closer union.” Excluding autocracies would restore Member States’ reliance interests by revoking the benefits of EU membership. It would also likely minimize greater down-the-road conflict between autocratic and democratic states, which, as noted, has already been seen brewing between Hungary and other Member States. In the face of EU autocracies like Hungary, the CJEU can no longer act as a blind “engine of integration.”\textsuperscript{57} Expulsion allows an out, literally, for those states threatening the long-term viability of the EU project.

II. THE TERMINATION ARTICLE: ARTICLE 60 VCLT

Having established that the EU Treaties’ purpose is best served by allowing the expulsion of states violating Article 2 TEU values, we

\textsuperscript{53} Professor Dagtoglou cautioned that “the admission of certain countries with authoritarian governments” would result in “dangerous friction in [the EU’s] machinery” and “would sooner or later tear the Community apart.” Dagtoglou, supra note 29, at 266. Other authors have seconded this view, proffering that one of the only instances that might justify the withdrawal of an EU Member State was if a government that fundamentally and openly rejected the EU came to power. \textit{E.g.}, John A. Hill, \textit{The European Economic Community: The Right of Member State Withdrawal}, 12 GA. J. INT’L & COMPAR. L. 335, 355 (1982). In that case, Hill (a pro-integrationist scholar) conceded that “it probably would be preferable to permit that nation to withdraw” rather than frustrate the Community’s purpose. \textit{Id.}

\textsuperscript{54} See infra Part IV.A.

\textsuperscript{55} See Gráinne de Búrca, \textit{The European Court of Justice and the International Legal Order After Kadi}, 51 HARV. INT’L L.J. 1, 11 (2010) (“From another perspective, however, [the EU] is an internally divided and externally weak global actor whose latest failed foray into constitution-making has further undermined its attempt to bootstrap its popular and political legitimacy.”).


must now understand the law surrounding how that expulsion could be effected. For that, we turn to the VCLT and, specifically, Article 60.58

No provision of the VCLT expressly permits the _expulsion_ of states from treaties.59 Instead, any “expulsion” right is implicit in articles dealing with the termination or suspension of treaties.60 One of these is Article 60.61

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58. Also potentially relevant are the Articles on Responsibility of States for Internationally Wrongful Acts and their commentaries, written by the ILC. However, as noted by the ILC, “[c]ountermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the [VCLT].” Draft Articles on Responsibility of States for Internationally Wrongful Acts, ch. II, para. 4, in Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter Articles on Responsibility of States]. Because the suspension or termination of a treaty does not “involve conduct taken in derogation from a subsisting treaty obligation,” neither act qualifies as a “countermeasure” under the purview of Articles. Id.

59. See generally VCLT, supra note 21.

60. This is a subtle, but significant distinction. “True” expulsion is a power grounded in an international organization that cannot be exercised unless expressly granted by the charter of the organization. See NAGENDRA SINGH, TERMINATION OF MEMBERSHIP OF INTERNATIONAL ORGANISATIONS 75 (1958) (stating that expulsion cannot be exercised unless “expressly conferred on the organisation”). Termination of a treaty by mutual consent, however, is a state power that “need not be specifically provided in the constituent instrument and would be available to the member-State in the absence of express abrogation: the members being sovereign are thus in a stronger position than the organisation.” Id. at 76. It should be noted Singh wrote in 1958, over ten years prior to VCLT’s signing in 1969. The VCLT introduced an avenue wholly unconsidered by Singh: de facto expulsion via the unanimous termination of the treaty in relation to a materially breaching party. VCLT, supra note 21, at art. 60.

61. VCLT, supra note 21, at art. 60. It reads in full:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:
   
   (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
       
       (i) in the relations between themselves and the defaulting State; or
       
       (ii) as between all the parties;

   (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

   (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:
   
   (a) a repudiation of the treaty not sanctioned by the present Convention; or

   (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
Article 60 VCLT outlines the conditions necessary for the termination or suspension of a treaty as a consequence of its breach.62 The article tries to strike a balance between preserving the international principle of *pacta sunt servanda*, i.e. that agreements must be kept,63 and preserving the rights of injured state parties vis-à-vis their breaching partners.64 This balancing results from the nature of international law, where the absence of international enforcement mechanisms means that “the protection and enforcement of rights is to a large degree left to self-help mechanisms to be employed by the individual international actors.”65 Those self-help mechanisms are

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4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Id.

It should be noted that commentators debate whether Article 60 VCLT fully constitutes CIL; however, the ICJ has consistently supported the Article 60 as codifying CIL. In its *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, for example, the court found that the rules relating to treaty termination in the VCLT “may in many respects be considered as a codification of existing customary law on the subject.” *Legal Consequences for States of Continued Presence of South Africa in Namibia* (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 94 (June 21). The Court also twice noted in its *Gab ţikovo-Nagymaros* decision that Article 60 was declaratory of CIL. *Gab ţikovo-Nagymaros* Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶¶ 46, 99 (Sept. 25).

62. This includes treaties that form international organizations. *Vienna Convention on the Law of Treaties: A Commentary* 1038 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) [hereinafter Dörr & Schmalenbach] (“[Article 60] could be used to expel Member States from international organizations for having committed a material breach of the constituent instrument, where that instrument contains neither express nor implied rules regulating that matter.”); *see also* MOHAMMED M. GOMAA, SUSPENSION OR TERMINATION OF TREATIES ON GROUNDS OF BREACH 125 (1996) (noting that “[c]onstituent instruments of international organizations” must adhere to Vienna Convention rules “unless they expressly provide different rules”).

63. *See Pacta Sunt Servanda*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[Latin ‘agreements must be kept’] (1847) The rule that agreements and stipulations, esp. those contained in treaties, must be observed.”); *see also* MARK E. VILLAGER, COMMENTARY ON THE 1969 *VIENNA CONVENTION ON THE LAW OF TREATIES* 363 (2009) (describing *pacta sunt servanda* as “the cornerstone of international relations”).

64. *See Dörr & Schmalenbach, supra* note 62, at 1023–24 (describing how Article 60 attempts to find a balance between keeping agreements and protecting injured parties from negative consequences of treaty breaches).

65. *Id.* at 1023; *see also* GOMAA, *supra* note 62, at 118 (“The faculty to terminate or suspend the operation of a treaty is not a legal consequence of material breach. It is a form of non-violent self-help taken as a lawful response for such breach.”); SHABTAI ROSENNE, BREACH OF TREATY 107 (1985) (“Historically international law is self-policing.”).
highly restrained to ensure that states do not use alleged breaches as a pretext to shirk their obligations.66

This Note will focus on Article 60 paragraph 2(a), which provides for the suspension or termination of a multilateral treaty by unanimous agreement of the nonbreaching parties.67 Two primary elements bear discussion: (1) material breach and (2) unanimity.68

66. V ILLIGER, supra note 63, at 739; see also Dörr & Schmalenbach, supra note 62, at 1023 (noting that “it should not be too easy for States to turn a perhaps fictitious treaty violation into a pretext for terminating treaties that they no longer approve”).

67. See VCLT, supra note 21, at art. 60(2)(a) (stating that nonbreaching parties may unanimously "suspend the operation of the treaty in whole or in part or . . . terminate it either: (i) in the relations between themselves and the defaulting State; or (ii) as between all the parties"). As the EU Treaties are by no definition bilateral, paragraph 1 is of no use here. See id. at art. 60(1) (referring only to “material breach of a bilateral treaty”). Nor is there reason to believe that material breaches by Hungary would specially affect another Member State per paragraph 2(b) or change Member States’ obligations to it radically enough to trigger paragraph 2(c). See id. at art. 60(2)(b)–(c) (stating that paragraph 2(b) applies only to “a party specially affected by the breach” and paragraph 2(c) applies only to situations where a breach “radically changes the position of every party with respect to the further performance of its obligations under the treaty”).

68. It should be noted that generally all countermeasures in international law are subject to the principle of proportionality, under which no countermeasure can be disproportionate to the breach committed. See Articles on Responsibility of States, supra note 58, at art. 35 (outlining that per Article 35(b), a state that has breached has an obligation to make restitution provided that restitution “[d]oes not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”); see also Thomas M. Franck, On Proportionality of Countermeasures in International Law, 102 AM J. INT’L L. 715, 738 (discussing proportionality in the context of nonmilitary countermeasures). It is disputed whether the principle of proportionality should be considered as “prebuilt in” to Article 60 VCLT or whether an additional, separate proportionality analysis is required. Compare GOMAA, supra note 62, at 120 (arguing that the principle of proportionality “does not need to be observed”), and THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 1373–75 (Olivier Corten & Pierre Klein eds., 2011) [hereinafter Corten & Klein] (distinguishing between Article 60’s regime and other reprisals, countermeasures, or responses to violations of a treaty, which are subject to proportionality), with Dörr & Schmalenbach, supra note 62, at 1037 (arguing the structure of Article 60 paragraph 2 suggests it is subject to proportionality), and VILLIGER, supra note 63, at 740 (noting that suspension must be utilized before termination pursuant to the principle of proportionality). This author views the expulsion of Hungary from the EU as satisfying proportionality, regardless of which approach is correct. This is due to the severity and prolonged, intentional duration of Hungary’s violations of Article 2 TEU. There exist few other peaceful violations that would so deeply violate the root of the EU Treaties as the transformation of a democratic Member State into an autocratic one. Moreover, Hungary’s awareness of its violations and refusal to remedy them, even after extensive warnings from the EU since at least 2011, display a conscious commitment to those breaches. See, e.g., European Parliament Resolution of 5 July 2011 on the Revised Hungarian Constitution, EUR. PARL. DOC. P7_TA(2011)0315; infra notes 162–163.
A. Material Breach

Per paragraph 1, Article 60 VCLT requires that a breach rise to the level of a “material breach” before it can be grounds for the suspension or termination of a treaty by the injured parties. Article 60, paragraph 3 VCLT defines “material breach” as either “a repudiation of the treaty not sanctioned by the . . . Convention” or “the violation of a provision essential to the accomplishment of the object or purpose of the treaty.” This Note will focus on the latter definition.

Two aspects of material breaches bear mentioning. First, a material breach must violate a “provision essential to the accomplishment of the object or purpose of the treaty.” An “essential” provision in the context of paragraph 3(b) is one that goes to the root of the treaty or that induced a party to enter into the treaty initially.

Second, a material breach must violate a provision essential to the “object or purpose of the treaty.” This phrase refers to “the reasons for which [the treaty] was concluded.” “Any object or purpose” is eligible. The International Court of Justice (“ICJ”) has been unwilling to allow the object or purpose of a treaty to be defined too abstractly, though. In Military and Paramilitary Activities in and against Nicaragua, it distinguished between “the broad category of unfriendly acts” that did not defeat the treaty’s object or purpose, and “the narrower category of acts” that did. The ICJ refused to grant wholesale that all “unfriendly acts” taken by the United States against Nicaragua violated the Treaty of Friendship, Commerce and Navigation between them.
In the case of the EU Treaties, then, an essential provision must be some provision that induces current EU Member States to integrate with potential EU Member States in furtherance of the object and purpose of the EU Treaties, namely “ever closer union.”

B. Unanimity

Paragraph 2(a) of Article 60 declares that a multilateral treaty may be suspended or terminated in whole or in part “by unanimous agreement” of the other parties.79 Upon that unanimous agreement, the nonbreaching states may either suspend or terminate the treaty amongst all parties (effectively ending the treaty) or uniformly terminate the treaty relations between themselves and the breaching state, while still keeping treaty relations amongst each other alive (effectively expelling the breaching state).80

Unanimous agreement of the “other parties” does not require agreement by the breaching state itself.81 The breaching state “is precluded from taking any part in the decision on the consequences of its breach.”82 Even so, unanimity stands as the largest hurdle toward achieving expulsion of Hungary from the EU because of the immense political will required to meet it.83

Therefore, to legally invoke the expulsion mechanism of Article 60 VCLT paragraph 2(a), the EU must demonstrate and agree that (a) Hungary materially breached its obligations under the EU Treaties by (b) violating a provision essential to (c) the object or purpose of the Treaties, and (d) the agreement by EU Member States must be unanimous.

79. VCLT, supra note 21, at art. 60(2)(a) (emphasis added).

80. Id.; see also GOMAA, supra note 62, at 101 (noting that “when all the parties find themselves in the same situation vis-à-vis the defaulting one,” they can “decide to adopt a uniform position which applies to the relations of each of them individually towards the wrong-doing party, but still keeping the treaty alive”); Dörr & Schmalenbach, supra note 62 (“The fate of the treaty as a whole as well as the defaulting State’s position as a party are left to the discretion of the other members of the treaty community: they are free even . . . to expel the defaulting State.”) (emphasis omitted).

81. GOMAA, supra note 62, at 102; see also VILLIGER, supra note 63, at 744 (noting the innocent parties can, by unanimous agreement, “suspend the operation of the treaty in whole or in part” and that “[u]nnanimity does not include the defaulting State”).

82. GOMAA, supra note 62, at 102.

83. See infra Part IV.C.
III. EXPPELLING ORBÁN’S HUNGARY

Having outlined the relevant law, this Part applies that law to Hungary. It has already been established that the EU Treaties’ purpose is “ever closer union.” This Part will first demonstrate that Article 2 TEU is a provision essential to the accomplishment of that purpose. Second, it will argue that Hungary has violated Article 2 TEU, and therefore that Hungary should be expelled from the EU. And finally, it will ask if the expulsion of Hungary can be accomplished if Poland opposes it, given Article 60 VCLT’s unanimity requirement.

A. Provision Essential: EU Values in Article 2 TEU

Three indicators suggest that Article 2 TEU and its values represent a provision essential to the Treaties’ purpose of “ever closer union”: Article 49 TEU, its associated Copenhagen criteria for Member State accession, and EU state practice. First, Article 49 TEU textually links the Article 2 TEU values to “ever closer union.” Article 49 TEU, which outlines the process and requirements of acceding to the EU, begins: “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.” The article’s first sentence demonstrates the Member States’ intent to link Article 2 TEU’s values to EU membership; to be part of the EU’s “ever closer union” entails respecting and promoting those values. This kind of mechanism empowers Article 2 TEU’s values as not just political objectives, but legal restraints on EU action.

Second, the Copenhagen criteria further confirm the essential nature of the Article 2 TEU values. At the 1993 Copenhagen European Council, the EU Member States codified new “essential conditions” for accession, colloquially called the Copenhagen criteria. The first of these criteria requires many of the same foundational values found in Article 2 TEU: “Membership requires that the

84. TEU, supra note 19, at art. 49 (emphasis added).
85. It should be noted that the Treaty of Amsterdam, which entered into force in 1999, required in its amendment to Article O much the same as its eventual successor Article 49 TEU. Article O required that acceding Member States respect the principles found in Article F(1), which contained most of the same values as would eventually be articulated in Article 2 TEU. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 1, ¶ 15, Oct. 2, 1997, 1997 O.J. (C 340) 1.
candidate country has . . . achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities . . . .”87 Though Article 49 TEU makes no mention of the Copenhagen criteria as such, the requirements have been read into it.88 The redundancy of explicit guarantees in the Copenhagen criteria and implicit guarantees in Article 49 TEU is a product of not only the EU's constitutional evolution over time,89 but also the Member States’ determined intent to center EU membership with those values. Respect for those values seems to be a core inducement to EU Member States when admitting new states.90 Accordingly, a violation of Article 2 TEU is one that goes to the heart of treaty relationships amongst EU Member States and severely infringes their ability to effect “ever closer union.”

Finally, EU state practice also suggests Member States view Article 2 TEU values as essential to the EU Treaties’ purpose. The accessions of Greece, Spain and Portugal were all conditioned on the acceptance of democratic institutions.91 In fact, Greece’s accession process was suspended when a coup in 1967 brought a junta to power, and Spain’s first attempt to enter the EEC while under the rule of Francisco Franco was declined.92 Recent expansions of the EU into

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87. Presidency Conclusions, Copenhagen European Council, at 13 (June 21–22, 1993); see also Accession Criteria, supra note 86 (describing the Copenhagen criteria as “essential conditions all candidate countries must satisfy to become a member state”).
88. EU EXTERNAL RELATIONS LAW: TEXT, CASES AND MATERIALS 468 (Ramses A. Wessel & Joris Larik eds., 2d ed. 2020) [hereinafter Wessel & Larik].
89. The Copenhagen criteria were established in 1993 and included in the 1999 Treaty of Amsterdam (Article O) and the 2007 Treaty of Lisbon (Article 49 TEU). Accession Criteria, supra note 86. The Copenhagen criteria were eventually explicitly constitutionalized through Articles O and 49 and yet still function as an implicit guarantee of those values. The Treaty of Amsterdam amended then-Article F (the predecessor of Article 2 TEU) and Article O (the predecessor of Article 49 TEU). Treaty of Amsterdam art. 1, ¶¶ 8, 15. Article F(1) was amended to explicitly enunciate the founding values of the EU and reads: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Id. at art. 1, ¶ 8. Article O was amended to read: “Any European State which respects the principles set out in Article F(1) may apply to become a member of the Union.” Id. at art. 1, ¶ 15.
90. For example, EU Member States have displayed historic resistance to admitting states that did not ascribe to those Article 2 values. See infra notes 91–93 and accompanying text.
Romania and Bulgaria have also included both pre and postaccession mechanisms to ensure the entrenchment of these values. This practical fealty to the values in Article 2 TEU indicates that Member States view them as actually indispensable parts of their treaty relationships and essential to “ever closer union.”

B. Hungary’s Material Breaches

Having established that Article 2 TEU values are essential to the purpose of forming an “ever closer union,” our analysis must now address whether Hungary has breached these values. This Note will focus on three of Article 2 TEU’s most important values: “democracy,” “rule of law,” and “respect for human rights, including the rights of persons belonging to minorities.” Defining these obligations with precision is problematic. Jurisprudence from the CJEU to make concrete these abstract terms is sparse, so this Note will rely on the work of the Council of Europe and the European Court of Human Rights (“ECHR”) to define these obligations. Three areas of Hungarian action evidence its breaches of its democracy, rule of law, and respect for human rights obligations, respectively: (1) election control and media consolidation; (2) judiciary capture; and (3) attacks on minority groups.

1. Breaches of Democracy: Hungary’s Election Control and Media Consolidation

Given that Hungary has an obligation to uphold “democracy” per Article 2 TEU, what might a “democracy” obligation mean? Article 3 of the Protocol to the European Convention on Human Rights declares that a “democracy” must “hold free elections at reasonable intervals by secret ballot, under conditions which will

93. See Wessel & Larik, supra note 88, at 476–77 (describing, for example, one provision “giving the Council the possibility to postpone the envisaged date of accession by twelve months should the acceding countries fail to fulfil their commitments” and another establishing a “Cooperation and Verification Mechanism” to assess countries’ progress postaccession).

94. TEU, supra note 19, at art. 2.

95. The Council of Europe is “the continent’s leading human rights organisation” and boasts 47 member states, 27 of which are also part of the EU (including Hungary). Who We Are, COUNCIL OF EUR., https://www.coe.int/en/web/about-us/who-we-are [https://perma.cc/79X9-9Y9S]; Values, COUNCIL OF EUR., https://www.coe.int/en/web/about-us/values [https://perma.cc/5FPG-VH27] (“The Council of Europe advocates freedom of expression and of the media, freedom of assembly, equality and the protection of minorities.”). A subgroup of constitutional experts in the Council, called the Venice Commission, also evaluates constitutional structures in member states and offers advice to better safeguard democratic institutions. Id.
ensure the free expression of the opinion of the people in the choice of the legislature.” 96 This skeleton has been given flesh in subsequent Council reports; “[s]table democrac[y]” now requires free and fair elections, strong checks on majoritarian power, legislative branches that are able to shape legislation, opposition parties that are able to meaningfully participate in government, and the protection of the rule of law. 97 Fidesz’s subversion and control of Hungarian elections via gerrymandering, electoral changes, and government consolidation of the media have violated these core tenets of “democracy” and therefore Hungary’s obligations under Article 2 TEU.

Antidemocratic measures designed to lock out opposition parties and lock in Fidesz rule were a top priority for Orbán and Fidesz after they swept into power in April 2010. 98 That election saw the Fidesz-Christian Democracy Party coalition win 68 percent of the seats in the Hungarian parliament, 99 giving them just over two-thirds of the parliament’s seats—the critical threshold needed to amend the constitution. 100 It quickly constitutionalized new, heavily gerrymandered election districts 101 and cracked opposition-friendly districts, diluting opposition party power by merging opposition


100. Bánkuti et al., supra note 99.

101. Scheppele, Hungary, Part 2, supra note 98. The Venice Commission defines “gerrymandering” as a “negative and manipulative act of politicians to redraw the legislative/electoral district boundaries to deprive the representation that another group or party would enjoy.” EUR. Comm’n for Democracy Through L. (Venice Comm’n), Council of Eur., Report on Constituency Delineation and Seat Allocation 22 (2017) [hereinafter Venice Comm’n]. It “distorts the democratic electoral process, undermines democratic and universal election principles, and renders legislative elections a meaningless exercise.” Id. Some of the smallest districts had a 50 percent deviation from the largest districts. Scheppele, Hungary, Part 2, supra note 98. For reference, the Venice Commission recommends that districts deviate no more than 10 percent from each other. Venice Comm’n, supra, at 12 n.95.
districts with Fidesz-friendly districts. These efforts have made it substantially harder for opposition parties to win seats in parliament; to win a simple party majority, opposition parties have to receive 6 to 8 percent more votes than Fidesz.\footnote{Zack Beauchamp, \textit{It Happened There: How Democracy Died in Hungary}, VOX (Sept. 13, 2018, 9:30 AM) [hereinafter Beauchamp, \textit{It Happened There}], https://www.vox.com/policy-and-politics/2018/9/13/17823488/hungary-democracy-authoritarianism-trump [https://perma.cc/HL6Q-ACBN] (noting that “[p]arliamentary districts were redrawn and gerrymandered to give Fidesz a leg up” and “[l]iberal bastions, principally large cities like Budapest and Szeged in the south, were divided so that large numbers of people were packed into a handful of parliamentary districts”).}

Arcane new election laws enacted by Fidesz to push out opposition parties also made fair elections impossible. Fidesz replaced Hungary’s traditional two-round electoral system with a one-round system;\footnote{Kim Lane Scheppel, \textit{Hungary, an Election in Question, Part 3}, N.Y. TIMES (Feb. 28, 2014, 8:33 AM), https://archive.nytimes.com/krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-3 [https://perma.cc/6XYB-X87M].} shortened the period for collecting signatures for candidacy, burdening less organized and less national parties; and, critically, gave a greater allocation of votes to the dominant party, Fidesz.\footnote{This Fidesz-passed “reform” replaced Hungary’s traditional two-round run-off system with a single-round, first-past-the-post system for parliamentary elections. \textit{See} Scheppel, \textit{Hungary, Part 2, supra} note 98. Under this new electoral system, Fidesz could (and would) win their newly-created, heavily-gerrymandered districts with only a plurality of a district’s vote. \textit{Id.} The prior two-round run-off system required Fidesz, or any candidate, to receive at least fifty percent (a majority) of a district’s vote; otherwise, a run-off is held between the highest vote-getters. \textit{Id.}} In 2020, the threshold for minority parties to be eligible for election to the parliament’s open party-list seats was drastically tightened, requiring minority parties to field a candidate in at least seventy-one districts (instead of the twenty-seven previously required).\footnote{\textit{Id.}} This constricts the ability of minority parties in Hungary to win any of the party-list seats unless they operate on a nationwide scale, something not feasible for many, and allows Fidesz to pick up the empty seats.

Erosion of opposition parties’ ability to compete fairly in elections has also occurred via an overhaul of the Hungarian media landscape by Fidesz. Attacks began in 2010 when Fidesz passed a law restructuring the country’s Media Authority and “created a five-member independent Media Council with powers to levy hefty
fines.”107 All seats were packed with Fidesz loyalists.108 Control of the Council bore fruit during the 2014 parliamentary elections, where the OSCE concluded that Fidesz “enjoyed an undue advantage because of restrictive campaign regulations, biased media coverage and campaign activities that blurred the separation between political party and the State.”109

The decline of pro-opposition media and the concentration of the media market in the hands of pro-Fidesz figures has continued since via “legal changes, media acquisitions, and political pressure.”110 The government has “taken” over the public service media provider (including the national television and radio service and the national news agency) and turned it into a government propaganda machine, buying up private media companies and starting countless new ones primarily financed by the state.”111 Using its discretion to award public advertising campaigns, the government has given contracts to pro-government media, while pro-opposition media outlets have been driven out of business or sold.112 Media outlets have also continued to overwhelmingly concentrate in the hands of Orbán allies.113 By 2017, it

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107. Bánkuti et al., supra note 99, at 140.
108. Id.
111. Tamás Bodoky, This Is How Fidesz Reintroduced One-Party Rule over the Media System in Hungary, ATLATSZO (Nov. 11, 2019, 10:00 PM), https://english.atlatszo.hu/2019/11/11/this-is-how-fidesz-reintroduced-one-party-rule-over-the-media-system-in-hungary [https://perma.cc/6X3F-AVCU].
112. See Hegedüs, supra note 7 (“Due to the support of the deeply biased public media and important acquisitions in the television, online, and print segment, progovernment outlets have come to dominate the market to an overwhelming degree unimaginable even a year earlier.”); see also OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., ORG. FOR SEC. & COOP. IN EUR., HUNGARY: PARLIAMENTARY ELECTIONS 8 APRIL 2018, ODIHR LIMITED ELECTION OBSERVATION MISSION FINAL REPORT 18 (2018) [hereinafter ODIHR 2018 REPORT] (discussing closures of opposition media outlets).
113. See PARTNER ORGS. TO THE COUNCIL OF EUR. PLATFORM TO PROMOTE THE PROT. OF JOURNALISM & SAFETY OF JOURNALISTS, DEMOCRACY AT RISK: THREATS AND ATTACKS AGAINST MEDIA FREEDOM IN EUROPE 25–26 (2019) (describing the strong influence of the Hungarian government on the media and the challenges that the few remaining independent outlets face); ODIHR 2018 REPORT, supra note 112, at 17 (“Since 2014, most international media groups have left the market, enabling a growing concentration of media ownership in the hands of party-affiliated entrepreneurs at the national and regional levels.”); Filippov, supra note 110
was estimated that over 90 percent of all media in Hungary was controlled by Fidesz and its allies.\textsuperscript{114} Control of the media resulted in a “pervasive influx of government publicity campaigns” in the 2018 election that “was largely indistinguishable from Fidesz campaigning, giving it a clear advantage.”\textsuperscript{115}

The combined effects of Fidesz’s efforts—gerrymandering districts, allocating more votes to itself, raising eligibility requirements for minority parties, and using national media to perpetuate pro-Fidesz messaging—have “effectively rigged the political system to give Fidesz a nigh-insurmountable edge.”\textsuperscript{116} This stands in blatant opposition to the necessary elements of “democracy” per the Council of Europe. Fidesz permanently sidelines minority parties with elections that might be technically free, but are systemically unfair. Indeed, the degree of media control Fidesz has amassed gives it an “unprecedented” advantage over opposition parties, ensuring that any participation of opposition parties is marginal, at best.\textsuperscript{117} By controlling the elections and owning the media, Fidesz has also dismantled all electoral checks on its power to manipulate the Hungarian electorate in the future; its perpetual control of the parliament further ensures that legislation encounters little, if any, scrutiny. In essence, Fidesz has ensured that election outcomes are not competitive; they are inevitable.\textsuperscript{118}


\textsuperscript{115} ODIHR 2018 REPORT, \textit{supra} note 112, at 13, 17 (emphasis omitted). The OSCE also found a “pervasive overlap [of messaging] between the ruling coalition and the government” in the 2022 election. OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., ORG. FOR SEC. & COOP. IN EUR. PARLIAMENTARY ASSEMBLY, INTERNATIONAL ELECTION OBSERVATION MISSION: HUNGARY – PARLIAMENTARY ELECTIONS AND REFERENDUM, 3 APRIL 2022: STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS 1 (2022) [hereinafter ODIHR 2022 PRELIMINARY FINDINGS].

\textsuperscript{116} Beauchamp, \textit{It Happened There}, \textit{supra} note 102.

\textsuperscript{117} See INT’L PRESS INST., EUR. CTR. FOR PRESS & MEDIA FREEDOM, EUR. FED’N OF JOURNALISTS, ART. 19, COMM. TO PROTECT JOURNALISTS, REPS. WITHOUT BORDERS FOR FREEDOM OF INFO. & FREE PRESS UNLIMITED, CONCLUSIONS OF THE JOINT INTERNATIONAL PRESS FREEDOM MISSION TO HUNGARY 1–2 (2019) (“Readers and viewers who do not actively look for alternative sources of news (mainly online) receive a virtually exclusively government narrative given the government’s level of control over the print, radio and television markets.”).

\textsuperscript{118} Beauchamp, \textit{It Happened There}, \textit{supra} note 102 (“Elections there are free, in the sense that the vote counts aren’t nakedly rigged. But they are unfair: The government controls the airwaves and media companies to such a degree that the opposition can’t get a fair hearing.”).
2. Breaches of the “Rule of Law”: Fidesz’s Court Capture. Fidesz’s campaign against, and eventual capture of, the Hungarian judiciary similarly violates the core elements of its “rule of law” obligations under Article 2 TEU. The Council of Europe views the “rule of law” as requiring six elements.119 Of relevance here are “[a]ccess to [j]ustice before independent and impartial courts,” “[r]espect for human rights,” and “[n]on-discrimination and equality before the law.”1120

Fidesz took decisive action early on to neuter the independence of the judiciary and to ensure that the Hungarian court system was controlled by Fidesz. It began with the Hungarian Constitutional Court. Three months after its 2010 win, Fidesz passed a constitutional amendment altering the selection process for court justices to allow it unilateral control over the nomination process.121 Another amendment raised the number of justices on the Constitutional Court from eleven to fifteen, allowing Fidesz to immediately appoint four new justices.122 Fidesz’s passage of the Fourth Amendment “marked the final capture of the Constitutional Court”123: it nullified all case law from the court from 1990 to 2011 and limited the court’s jurisdiction by preventing the court from reviewing the compatibility of constitutional amendments with Hungary’s Fundamental Law.124

The lower courts were not spared either. In 2011, Fidesz lowered the age of compulsory retirement of judges from seventy to sixty-two, which forced between 10 and 15 percent of all Hungarian judges into retirement.125 This disproportionally impacted independent, entrenched senior judges and those in leadership in the courts who

120. Id.
121. Bánkuti et al., supra note 99, at 139. The old system had required “a majority of parliamentary parties to agree to a nomination and then a two-thirds vote of parliament’s members to elect the nominee to the Court.” Id. Fidesz disposed of any requirement of multiparty political consensus, unilaterally allowing its two-thirds to elect justices to the Court. Id.
122. Id. at 140.
123. Kovács & Schepple, supra note 99.
124. Id. This included blocking review of the Fourth Amendment itself. Id.
125. Id. at 192.
might act as pockets of resistance to Fidesz. The EU Commission brought an infringement proceeding against Hungary, citing unjustifiable age discrimination, and subsequently won. However, the remedy was compensation, not reinstatement of the judges to their former positions. The Hungarian government paid the compensation and largely avoided having to restore the judges to their former posts.

As it purged older judges en masse and appointed party loyalists to their seats, Fidesz also worked to maintain that loyalty by instituting a new judicial disciplinary mechanism. It established a newly created National Judicial Office (“NJO”), whose president “has the power to select new judges, to promote and demote any judge, to begin disciplinary proceedings, and to select the leaders of each of the courts.” The president can also reassign cases to courts of their choosing. The president’s “sweeping powers give [them] control over every aspect of a judge’s career,” ensuring that judicial autonomy is inextricably linked to the whims of the president and their party.

The capture of the Hungarian judiciary via court packing, mass firings, and the creation of the disciplinary NJO severely betrays the core rule of law tenets set out by the Council of Europe. Any independence or impartiality the Hungarian judiciary may have had certainly disappeared after Fidesz stacked the judiciary with party loyalists, disciplined by their handpicked NJO president. Fidesz’s efforts, like its age discrimination against lower court judges, seemed aimed at removing independent judges who might oppose its political

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126. See id. (“The vast majority of senior judges – between 10 and 15% of all judges in the country, and disproportionately including judges in the leadership of the courts – were forced to leave the bench almost immediately.”).
127. Id.
128. Id.
129. Id.
130. Id. at 192–93.
131. Bánkuti et al., supra note 99, at 143.
133. Id. at 193. As of this writing, both holders of the NJO presidency have been members of the Fidesz party. Until recently, this post was filled by Tünde Handó, whose husband is a founding member of the Fidesz party. Joshua Rozenberg, Meet Tünde Handó, GUARDIAN (Mar. 20, 2012, 1:16 PM), https://www.theguardian.com/law/2012/mar/20/tunde-hando-hungarian-judges [https://perma.cc/6SN8-T6MW]. In 2019, Fidesz member György Barna Senyei was appointed. Hungarian President Names Budapest Judge To Lead Powerful Judiciary Office, REUTERS (Dec. 2, 2019, 1:20 PM), https://www.reuters.com/article/us-hungary-court-idUSKBN1Y6Z3T [https://perma.cc/P7P2-59SH].
project. Any attempt by the judiciary to push back resulted in ruthless jurisdiction-limiting retaliation, further curtailing judicial independence. Indeed, because of the NJO president’s sweeping disciplinary powers, a Hungarian judge’s career is effectively determined by the Fidesz-controlled executive or legislative branches. By annihilating the judiciary’s independence first, Fidesz also ensured it would have a free hand to manipulate elections, consolidate the media, and attack minorities, eroding “democracy” and human rights protections without judicial resistance.

3. Breaches of Human Rights: Fidesz’s Attacks on Minority and Marginalized Groups. Hungary also has an obligation to “respect . . . human rights, including the rights of persons belonging to minorities” per Article 2 TEU. In its case law, the CJEU has held that human rights treaties that Member States have collaborated on and signed can provide the Court guidance on “human rights.” It has described the European Convention on Human Rights (“the Convention”) as having “special significance” in its human rights jurisprudence. In fact, in a 2018 judgement, the CJEU went so far as to hold that Article 7 of the EU Charter of Fundamental Rights and
Article 8 of the Convention “have the same meaning and the same scope.” Thus, the Convention’s definition of “human rights” can help inform Member States’ obligations under Article 2 TEU’s own obligation. And if Fidesz-passed laws violate Hungary’s Convention obligations, that would provide strong evidence that they similarly violate the CJEU’s understanding of “human rights” under Article 2 TEU.

So, how does the ECHR, which interprets the Convention, define a violation of “human rights,” specifically in the context of LGBTQ+ rights? There is not a single definition of the phrase, but the Convention imposes both negative and positive obligations on its members. Among others, states must enact and enforce measures to prevent individuals from being subjected to ill treatment, and specifically must provide effective domestic justice systems to investigate and punish discrimination-based crimes. States may not exclude same-sex couples from civil unions if civil unions are offered


143. See M.C. v. Romania, App. No. 12060/12, ¶ 109 (Apr. 12, 2016), https://hudoc.echr.coe.int/eng?i=001-161982 [https://perma.cc/S238-GWWC] (holding that states are required “to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals”).

144. See Sabali v. Croatia, App. No. 50231/13, ¶¶ 94–95 (Apr. 14, 2021), https://hudoc.echr.coe.int/eng?i=001-207360 [https://perma.cc/M8B7-ZAZY] (finding that “State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives” and that a State’s “domestic legal system must demonstrate its capacity to enforce criminal law” against discriminatory perpetrators). A failure to do so could result in “indifference . . . tantamount to official acquiescence to . . . hate crimes.” Id. ¶ 95.
by the state, although states may refuse to extend marriage to same-sex couples. States may not ban consensual homosexual sex. The Court has also generally held that states may not discriminate against individuals based on sexual orientation absent a weighty, legitimate justification, as sexual orientation is a protected status under Article 14 of the Convention. Prejudicial bias against an individual’s sexual orientation is per se invalid.

Hungary has violated several of its obligations under the Convention previously, and several of its new anti-LGBTQ+
measures likely similarly violate it. For example, May 2020 saw legislation banning transgender individuals from changing their gender on official documents. The ECHR has long held similar legislation to be a violation of the Convention’s Article 8. In December 2020, a constitutional amendment redefined family as between a man and woman, effectively banning same-sex couples from adopting children, a measure that may run afoul of ECHR jurisprudence mandating that adoptions be administered in a nondiscriminatory manner.

More recently, in June 2021, Hungary’s parliament passed legislation that restricted “showing or ‘popularizing’ homosexuality and content that promotes a gender that diverges from the one


154. See Grant v. United Kingdom, 2006-VII Eur. Ct. H.R. 1, 13 (holding that denying a trans woman “legal recognition of her change of gender” was in violation of Article 8); Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 32 (holding that the government’s mistreatment of a trans woman constituted a “failure to respect her right to private life in breach of Article 8”).


156. See X v. Austria, 2013-II Eur. Ct. H.R. 1, 50 (holding that although an adoption right was not guaranteed by Article 8, if a state chooses to extend a right of adoption to individuals, it must do so non-discriminarily, in conformity with Article 14 of the Convention); see also E.B. v. France, App. No. 43546/02, ¶ 49 (Jan. 22, 2008), https://hudoc.echr.coe.int/eng?i=001-84571 (holding that because French law allows single people to adopt children, discrimination against a single, LGBTQ+ person looking to adopt still “undoubtedly fall[s] within the ambit of Article 8”).
assigned at birth” and also prohibited the teaching of LGBTQ+ issues in schools. This legislation is a clear repudiation of *Bayev and Others v. Russia*, in which the ECHR held that a law banning any exposure of LGBTQ+ materials to minors violated Article 14 and Article 10. Although the ECHR has not issued a decision on the Hungarian law, the Council of Europe’s Venice Commission has found it likely violates several international human rights standards, including Articles 8 and 2 of the Convention. The report inspired the EU Commission to launch infringement proceedings against Hungary because of the legislation in July 2021, Prime Minister Orbán responded by announcing a referendum on the legislation, saying, “[W]e cannot cede ground in this issue.”

Sustained attacks against LGBTQ+ persons, among others, in Hungary display an open disdain for, and consistent violation of, the values in Article 2 TEU. Orbán’s Hungary has repeatedly targeted minority groups for persecution in violation of its treaty obligations.

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160. *Id.* ¶¶ 86–92. The Court found that the legislation was “an example of . . . predisposed bias” against LGBTQ+ individuals, especially as it tried to liken homosexuality and pedophilia. *Id.* ¶ 69. It also highlighted that the law would ultimately likely be “counterproductive” in achieving its desired aims. *Id.* ¶ 83.


The EU and the Council have said as much in reports, infringement proceedings, and resolutions. Hungary has not changed course. In fact, Fidesz’s success in utilizing antiminority messages during elections, the exponential passage of anti-LGBTQ+ legislation in the last two years, and Fidesz’s strategy of reshaping Hungary into an illiberal “democracy” suggest that Hungary will remain in breach of those values going forward.

C. The Intersection of Poland and Hungary: Is ‘Unanimity’ Possible?

Despite clear evidence that Hungary has materially breached its obligations under the EU Treaties, it is unlikely that Poland, a fellow autocracy, would join any attempt at expelling Hungary. This might seem to defeat Article 60 VCLT’s requirement of unanimity. However, using a textual analysis, this Note offers EU members a potential solution: expelling them both.

At first reading, Article 60 paragraph 2(a) VCLT seems to require the consent of all Member States to terminate Hungary’s membership. “[T]he other parties by unanimous agreement” are entitled to terminate a treaty as between themselves and a materially breaching

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164. See MIJATOVI, supra note 142, at 13 (“The Commissioner urges the Hungarian government to repeal the decreed ‘crisis situation’ and review the legislation applicable under regular circumstances to bring it into line with Hungary’s human rights obligations.”).


167. While seemingly extreme, it should be noted that the expulsion of two autocratic states from the EU is no more radical than other alternatives to the Hungary-Poland problem offered by other commentators. For example, the inclusion of Article 50 TEU could legally allow a “mass exit” by like-minded Member States from the EU, leaving only Hungary and Poland in what might be termed “EU 1.0.” See Athanassiou, supra note 27, at 23, 26 (discussing the concern that Article 50 does not “cater for a mass exit” even though, “as currently drafted, the exit clause does not preclude multiple withdrawals”). The then-freed, now-former Member States could then renegotiate and rejoin an “EU 2.0” without Hungary and Poland included. Indeed, commentators have already begun advocating for such an attempt. See Tom Theuns, The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7, RES PUBLICA, Jan. 13, 2022, at 17, https://link.springer.com/content/pdf/10.1007/s11158-021-09537-w.pdf [https://perma.cc/ZD4U-NBA5] (advocating for “refounding a new European Union with stronger democratic and rule of law protections and without recalcitrant members of the current EU” via the collective withdrawal of democratic members, leaving autocratic states “with a useless husk of the former EU”).
state, reads Article 60 paragraph 2(a).168 This alone would be a Herculean task for an organization that only mustered the requisite two-thirds to begin Article 7 TEU proceedings against Hungary in September 2018—eight years after the Fidesz government began dismantling the country’s democracy.169

Adding Poland back into the political mix would further frustrate any chance to expel Hungary as Poland is unlikely to consent to expel Hungary. Poland operates as an emerging sister autocracy in the EU.170 After seeing Fidesz’s success in subverting Hungarian democracy, the Polish Law and Justice party (Prawo i Sprawiedliwosc, or “PiS”) quickly copied the “map drawn by Orbán” when it came to power in 2015.171 When Poland’s increasingly authoritarian measures came under EU criticism, Orbán was quick to defend the country. He declared it would be “pointless” for the EU to start Article 7 TEU proceedings against Poland because Hungary would defeat the required unanimity.172 Polish Prime Minister Mateusz Morawiecki has

168. VCLT, supra note 21, at art. 60(2)(a) (emphasis added).
169. See Parliament Press Release, supra note 14 (announcing that the European Parliament in September 2018 approved a proposal for the Council of the EU to determine “whether Hungary is at risk of breaching the EU’s founding values”).
170. See Anna Wójcik, Freedom House, Nations in Transit 2022: Poland, FREEDOM HOUSE, https://freedomhouse.org/country/poland/nations-transit/2022 [https://perma.cc/6H5X-5W6T] (observing that PiS has continued to “further weaken Poland’s democratic institutions” and that while “national governance remains democratic . . . ruling parties have changed the system to their advantage [by] capturing and instrumentalizing key institutions”). PiS’s most egregious violations of Article 2 TEU’s principles continue to be its weakening of the judiciary’s independence and its manipulation of the captured Polish Constitutional Tribunal to challenge the supremacy of EU law. See id. (giving Poland its lowest score, 3.25 out of 7.00, in the category of Judicial Framework and Independence, and noting that “governing politicians [have] continued to instrumentalize the politically captured Constitutional Tribunal,” which has continually “escalated conflicts over the rule of law with the European Union”).
171. Scheppelle, Autocratic Legalism, supra note 3, at 553; see also Allyson K. Duncan & John Macy, The Collapse of Judicial Independence in Poland: A Cautionary Tale, JUDICATURE, Fall/Winter 2020–21, at 44–45 (quoting Orbán as saying that “the Inquisition offensive against Poland can never succeed because Hungary will use all legal options in the EU to show solidarity with the Poles”).
reciprocated Orbán’s support. This cordial relationship is mutually beneficial. Having an autocratic ally within the EU defeats any chance of sanctions, like Article 7 TEU, that require unanimity to work. Indeed, PiS-led Poland probably has a strong incentive to vote against Hungary’s expulsion as it would essentially be expelling its own insurance policy. And because Article 60 VCLT requires the unanimous consent of “the other parties,” meaning the nonbreaching parties, Poland’s refusal to expel Hungary would leave that element of paragraph 2(a) unsatisfied.

A textual analysis of paragraph 2(a), however, suggests this need not be the end of the discussion. As a materially breaching state itself, there is nothing to suggest that Poland could not be expelled alongside Hungary. Paragraph 2(a) reads: “A material breach of a multilateral treaty by one of the parties entitles . . . the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part . . . .” There must be “unanimous agreement” amongst the “other parties”—that is, the nonbreaching treaty members. The phrase


175. At the time of this writing, however, the Polish-Hungarian alliance is in flux, and future Polish cooperation with the EU against a Russia-aligned Hungary may be imaginable. Orbán has increasingly resisted efforts by the EU to punish the Russian invasion of Ukraine, “infuriat[ing] his usual allies in Poland, whose right-wing EU-skeptical governing party is a strong supporter of Ukraine and has long seen Mr. Putin as a threat.” Norman & Walker, supra note 51. With Hungary continuing to block an EU ban of Russian oil and refusing to allow weapons to be transported through Hungarian territory to Ukraine, security differences between Hungary and Poland may deepen fractures between the two autocratic states. See id. (stating that Polish officials “have stopped meeting Hungarian cabinet ministers, citing irreconcilable differences”). Poland’s Deputy Prime Minister Jarosław Kaczyński has gone so far as to say that Poland and Hungary “can’t continue to cooperate as before.” Id.

176. VCLT, supra note 21, at art. 60(2)(a).

177. Id. (emphasis added).
“other parties” is in turn contrasted with the preceding phrase, “one of the parties,” which refers to a materially breaching treaty member. Thus, paragraph 2 sets up a dichotomy: the nonbreaching “other parties” who must be in unanimous agreement to expel “one of the parties” in material breach. The state in material breach is excluded from being considered one of the “other parties” and therefore its consent to expulsion is not required.178

A textual interpretation of the phrase “one of the parties” shows that it should be construed as a floor, not a ceiling, on the number of treaty members that could be expelled. Consider if you were to say, “One person at the party does not like to drink.” This could be interpreted as setting a ceiling: one and only one person at the party does not like to drink. Under this interpretation, the sentence is making a numerical statement of fact. That said, the sentence does not make a logical claim about how others at the party feel about drinking. The sentence’s meaning is ambiguous. But saying “One of the people at the party does not like to drink” clearly sets a floor: at least one person at the party does not like to drink. That statement does not preclude others at the party not liking to drink. Instead, there simply has to be at least one who does not. Article 60 VCLT should be read similarly. By using the phrase “one of the parties,” it allows at least one state, but possibly more, to be in material breach. And since a materially breaching state’s consent is not required for its own expulsion, that state’s objection does not prevent “unanimous agreement.” In this way, the case could be made that both Poland and Hungary should be considered “one of the parties” in material breach and that their agreement (or lack thereof) is not required to satisfy the unanimity requirement of “the other parties.” Under this reading, the nonbreaching Member States could invoke Article 60 VCLT against both.179

178. See supra notes 81–82 and accompanying text.
179. This, of course, raises the same questions discussed in this Note about Poland as it does about Hungary, and Poland would need to similarly breach “ever closer union.” See supra Parts II–III.A. Whether Poland would satisfy the requirements of a material breach is beyond the scope of this Note. However, given the similarities between Hungarian and Polish action, there is good reason to think that Poland may have also materially breached Article 2 TEU. See Kovács & Scheppele, supra note 99, at 194–98 (generally describing how PiS captured Poland’s judiciary and ignored rule of law recommendations from the EU). It should also be noted that this interpretation of Article 60 VCLT’s unanimity requirement could, theoretically, allow for the expulsion of more than just two materially-breaching Member States. Read this way, the text does not offer any obvious limiting principle. This Note does not take a position on how far this
IV. BENEFITS & CONSEQUENCES OF EXPULSION

Part III shows that Hungary, by its Article 2 TEU violations, has materially breached the EU Treaties’ purpose of “ever closer union.” Therefore, it is necessary and appropriate to expel Hungary from the EU. However, expulsion from the EU is unprecedented and would admittedly be an “extreme remedy.”180 This Part will address four responses to expulsion: (1) the normative value of expelling autocratic states; (2) the ability to effect change in Member States; (3) possible preclusion by EU mechanisms; and (4) the precedential value of EU expulsion for international organizations generally.

A. The Normative Importance of Expulsion

The first reason that Hungarian expulsion is appropriate is that the expulsion of autocratic Member States would proclaim the EU’s commitment to its foundational liberal democratic values. By failing to expel Hungary, the EU would implicitly signal a tolerance of Hungary’s authoritarian, illiberal values and risk a loss of its own legitimacy on the world stage.

The late twentieth and early twenty-first centuries have seen the proliferation of autocratic regimes not just in the EU but across the world.181 Autocratic leaders have risen to power and eroded, sometimes entirely, democratic institutions in states across the political spectrum and in every corner of the globe: Hungary, Poland, Russia,182...
Venezuela, Brazil, the Philippines, Myanmar, and Turkey, to name a few. But the EU has done little to curb the autocratic tendencies of its own Member States. Not only have the levers used by the EU failed to halt or reverse democratic backsliding in Hungary and Poland, but its failure to activate mechanisms that might work, like Article 7 TEU, has revealed the internal (often political) disunity between the EU Member States. This is especially problematic because this disunity centers around what (theoretically) should bind the Member States together. An erosion of Article 2 TEU’s values with no response from the EU signals either an impotence or an unwillingness to protect those values. Either option gives autocracies a free pass to continue violating inherently important ideals with no consequence.

Expulsion of autocratic states offers a potential alternative to regain some of the EU’s lost legitimacy and to display a firm, actionable commitment to the EU’s values. Expelling the autocracies from its ranks would send the strongest of signals that the EU views


188. For example, the European People’s Party seemed invested in stalling any attack on Hungary because of Hungary’s membership in (and consistent votes for) the EPP. Pech & Schepple, supra note 16, at 7, 26.
Article 2 TEU’s values as normatively vital and legally actionable in the event of their violation.189

B. Expulsion Would Better Effect Change Than Retaining Hungary

Some might argue that retaining autocratic Member States would allow the EU to better effect democratic change. However, the actual failure of current mechanisms and the likely failure of monetary mechanisms to reverse democratic backsliding suggests that the EU will have greater leverage to effect positive change via expulsion. Consider first the failures of the current regime to stop the emergence and entrenchment of autocracy in Hungary and Poland. Fidesz began its modern reign in Hungary in 2010190 and PiS in 2015.191 Numerous infringement proceedings instituted under Article 258 and Article 259 TEU have failed to reverse autocratic institutions or practices measurably in either country.192 In many cases, despite EU legal success against these states, victory has been at best “Pyrrhic.”193 Hungary’s attack on the Central European University (“CEU”) provides an illustration. Legislation passed in 2017, widely recognized as targeting the CEU, was challenged by the EU under an infringement proceeding.194 The EU’s challenge was successful,195 but by the time the...

189. Melissa Gutierrez made a similar argument in the context of the Greek debt crisis and the EMU, an institution that also does not have an expulsion provision. Gutierrez, supra note 27, at 447–48. There, she argued that an expulsion provision would “act as a deterrent to the sort of overspending and misreporting that launched Greece into the throws [sic] of bankruptcy.” Id. Indeed, she argues, an expulsion “provision would bolster the enforcement arm of the EMU.” Id. at 448.


192. See, e.g., supra note 162 and accompanying text; infra note 195 and accompanying text.


195. Id. ¶ 242–43.
decision came down—three years after the law was enacted—the CEU had already moved its operations to Vienna.196

In fact, even as the EU’s responses to Hungary and Poland have increased in recent years, the autocratic institutions in those states have only expanded, entrenched, and more openly opposed the EU. Neither Hungary nor Poland has offered any signs of a course correction back from autocratic to democratic institutions.197 Hungary has also showed no apparent interest in coming into conformity with EU law. The recent passage of anti-LGBTQ+ laws in the country, and Orbán’s open defiance of EU punishment, demonstrates a continued flouting of EU law and values.198 This shows that internal EU mechanisms have failed to rein in or reverse the democratic backsliding of two of its Member States.

Monetary mechanisms have similarly shown little success at inducing a reversion to democratic norms. The EU has recently attempted to raise pressure on Hungary and Poland by issuing them increasingly heavy fines for noncompliance with EU law,199 a stratagem ruled constitutional by the CJEU in 2022.200 These are effectively internal economic sanctions by the EU on its own Member States. But studies question the effectiveness of sanctions.201 Though the


197. For example, as mentioned earlier, consolidation of media by the Hungarian government has only increased with the government now controlling over 90 percent of all national media outlets. Dragomir, supra note 114. In fact, it was this autocratic election system that ensured Orbán won reelection handily in 2022 during Hungary’s presidential election. Scheppele, In Hungary, Orban Wins Again, supra note 9.

198. Szakacs & Komuves, supra note 163.


200. See Raf Casert, EU Can Withhold Funds from Hungary, Poland, Top Court Rules, AP NEWS (Feb. 16, 2022), https://apnews.com/article/europe-poland-hungary-european-union-46b53e86e8f9f3d054c07c252274117 [https://perma.cc/LJ4J-96JC] (“[T]he European Union’s highest court said...the 27-nation bloc can suspend support payments to member states if they breach rule of law principles.”).

201. Consensus on the effectiveness of economic sanctions is, at best, mixed, and sanctions can have other, non-economic negative externalities. See Do Economic Sanctions Actually Work?, WEEK (Feb. 23, 2022), https://www.theweek.co.uk/88349/fact-check-do-economic-sanctions-actually-work [https://perma.cc/F5YK-RUMF] (“In one of the most comprehensive studies on sanctions to date, academics examined more than 170 case studies spanning a century of economic measures and concluded that sanctions were partially successful only 34% of the
economies of Hungary and Poland might suffer, ultimately everyday Hungarians and Poles would be the most heavily hurt, not the ruling members of Fidesz or PiS. 202 It is highly unlikely that economic sanctions of any degree would pressure an entrenched political party to suddenly vacate all its positions of power, 203 nor is it clear how such a remedy would work in practice. Moreover, there are also concerns that a deprivation of EU funds will have precisely the opposite effect; rather than pressuring Fidesz into compliance with EU values, it will only deepen Fidesz’s anti-EU messaging in Hungary, further dividing the bloc. 204

Additionally, Hungary’s systemic violations of its obligations seem to necessitate the use of ‘systemic remedies,’ or put another way, regime change. But the EU has no police power or standing army to enforce the CJEU’s judgements, and the very mechanisms that might be used to enforce remedies—like Article 7 TEU or fines—have proven ineffective.

time.”); Mark Malloch Brown & Harry Gibson, Do Sanctions Work?, NEWSWEEK (Dec. 22, 2014, 3:45 PM), https://www.newsweek.com/do-sanctions-work-293957 [https://perma.cc/2239-T54E] ("[The sanctions] success rate is heavily influenced by the type of policy change pursued. Where it is modest—the release of a political prisoner, for example—the rate jumps up to half of cases. Regime change or efforts to disrupt a military adventure fare less well."); see also Use and Effect of Unilateral Trade Sanctions: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways & Means, 106th Cong. 102 (1999) (statement of Richard N. Haass, Dir., Foreign Pol’y Stud., Brookings Inst.) (noting that “U.S. sanctions may have made it easier for the Castro regime to maintain control over the Cuban economy and society” and that “[o]ver time, economic sanctions tend to lose their bite.

202. See generally The Ezra Klein Show, Sanctions Against Russia Are a Form of War. It’s Time We Recognize That., N.Y. TIMES (Apr. 1, 2022), https://www.nytimes.com/2022/04/01/opinion/ezra-klein-podcast-nicholas-mulder.html [https://perma.cc/UC9N-KUGN] (interviewing historian Nicholas Mulder and noting that sanctions disproportionately hurt ordinary people, rather than national elites, because of the latter’s access to other avenues of obtaining sanctioned goods or capital).

203. This is not to suggest that targeted sanctions may never work to force ruling elites or entrenched parties to concede something for the removal of sanctions. But there is sparse evidence that sanctions have ever had enough impact to coerce ruling elites to negotiate themselves out of power. For example, while sanctions may have operated as a “tangible economic incentive to negotiate” on Supreme Leader Ali Khamenei and the Islamic Revolutionary Guard Corps in Iran, despite their breadth and length, they were only ever able to effect changes to Iran’s specific nuclear program, not the composition of Iran’s ruling elite. See generally Mirko Draca, Jason Garred, Leanne Stickland & Nele Warrinnier, On Target? Sanctions and the Economic Interests of Elite Policymakers in Iran, ECON. J., July 29, 2022 (discussing the effectiveness and effect of economic sanctions on Iran).

204. See Inotai, supra note 12 (“It is likely, therefore, that the EU’s rule-of-law punishment will strengthen Orban’s anti-EU course, especially after the massive political backing the prime minister feels he was given by the electorate at Sunday’s election.”).
This leaves us with treaty termination. In the face of mechanisms that have either failed to be used or have failed in use, the last legal self-help remedy against a materially breaching state by its nonbreaching treaty partners is the termination of treaty relations. Expulsion would empower the EU to deal with Hungary afresh. While economic sanctions might not prove effective, the EU could require compliance with certain standards when entering into agreements with a newly independent Hungary.\textsuperscript{205} Moreover, if Hungary were to eventually reapply for membership, the EU’s leverage to demand the reintroduction of democratic institutions, the divestment of government-owned media, and the removal of checks against political interference in the judiciary would be at its zenith. The EU has been largely successful in promoting the advancement of democracy, the rule of law, judicial independence, and respect for fundamental rights in prospective Member States\textsuperscript{206} because it requires acceding Member States to meet high standards in those areas before joining.\textsuperscript{207} For example, the EU could require reaffirmation of Hungary’s commitment to Article 2 TEU and the Copenhagen criteria and introduce ‘check-in’ mechanisms that would allow for the suspension of the accession process if there were signs of democratic backsliding.\textsuperscript{208}

It should be noted that even if the EU does not expel Hungary, the shadow of expulsion as a viable remedy might prove as effective at inducing compliance as expulsion itself. The IMF’s general counsel observed that the threat of expulsion from the IMF was enough to corral breaching states, like Argentina, back into compliance.\textsuperscript{209} Here too, the mere threat of expulsion if declared viable could discipline states into correcting their breaches.

\textsuperscript{205} And indeed, might have to, based on the substantive requirements that Article 3(5) and 21 TEU impose upon EU international relations. See Wessel & Larik, supra note 88, at 11.

\textsuperscript{206} Id. at 489 (“Before a state can join the EU, it needs to go through the accession procedure to align itself with the EU’s acquis and values. In that sense, its enlargement policy has been one of the EU’s most effective forms of external action causing wide-ranging reforms in outside countries.”).

\textsuperscript{207} See id. at 474–78 (describing EU accession policy).

\textsuperscript{208} See, e.g., id. at 476–78 (discussing that the “European Commission set up a Cooperation and Verification Mechanism (CVM)” to assess Bulgaria and Romania’s progress on “judicial reform, corruption and [...] organised crime”).

\textsuperscript{209} Blocher et al., supra note 27, at 134 & n.28.
C. The Possible Preclusion of CIL by the EU Treaties

Some academics argue that the silence of the EU Treaties on expulsion and the presence of an express disciplining mechanism, Article 7 TEU, preclude expulsion as a remedy against breaching Member States. Not so. The absence of an expulsion provision in the EU Treaties and the narrow scope of their disciplining mechanisms support the proposition that Member States retain their traditional CIL power of expulsion.

As mentioned in Part I, the EU Treaties do not contain an express expulsion provision, and so the question becomes how to interpret their silence. Either the EU Treaties offer a “complete set of rules,” thus prohibiting any reference to underlying CIL, or they operate only as an additional layer of international law and do allow recourse “to the law of treaties [i.e., the VCLT and the codified CIL contained therein] to cover any possible lacunae.” To be sure, states may contract around their traditionally sovereign CIL rights, like expulsion, by entering treaties that preclude those rights as between themselves. Here, the EU Member States, per a provision in the Treaties, could abrogate the CIL right of expulsion by including an article explicitly excluding it. But, as mentioned, there is no such article. Thus, the EU Member States have not contracted around (or out of) their right of expulsion, and so should be read to retain it.

This approach also conforms most faithfully to the long-held “Lotus principle,” which favors the sovereignty and freedom of the state in the absence of express obligations. Because the “rules of law binding upon States . . . emanate from their own free will,” international courts disfavor presumptions restricting state

212. See supra note 26 and accompanying text. Treaty law and CIL are theoretically non-hierarchical sources of law, each of which operates independently on international actors; however, “it is generally accepted that international agreements constitute the primary source of international law.” DELANO VERWEY, THE EUROPEAN COMMUNITY, THE EUROPEAN UNION AND THE INTERNATIONAL LAW OF TREATIES 89 (2004).
213. Blocher et al., supra note 27.
independence. Phrased another way, “that [which] is not prohibited is consequently allowed” under international law. This presumption would suggest that Member States have retained their sovereign right of treaty termination. And indeed, the CJEU itself seemed to follow this principle in its Wightman decision: rather than displacing the traditional CIL right to unilaterally revoke a withdrawal wholesale, the Court read that right into Article 50 TEU, preserving a greater swath of state sovereignty than it necessarily had to.

A related argument against expulsion is that the existence of a specific disciplinary mechanism in the TEU, Article 7 TEU, precludes the possibility of a treaty termination right under CIL. This argument posits that because Article 7 TEU offers a mechanism for the suspension of certain rights of a breaching Member State, including voting rights in EU organs, the Treaties do preempt a retained expulsion right. This criticism would be well founded but for two problems. First, while Article 7 TEU might preempt Article 60 VCLT’s power to suspend the application of treaties, Article 7 TEU does nothing to textually reach Article 60 VCLT’s power to terminate. The housing of two independent powers—the right to suspend a treaty and the right to terminate a treaty—in the same article does not mean that preemption of one power in the article mandates the preemption of the entirely distinct power.

Second, the text of Article 7 TEU allows only for the suspension of “certain of the rights deriving from the application of the Treaties.” One might theorize that this also preempts Article 60 VCLT’s termination power because it could affect a de facto termination via a

216. Naldi & Magliveras, supra note 211, at 47.
218. See Naldi & Magliveras, supra note 211, at 52. The authors note that the Court took “a traditional, voluntarist approach” to the question of whether withdrawal was a unilateral sovereign right, emphasizing that “Member States remain sovereign states with the autonomous right to terminate membership.” Id.
219. Article 60 VCLT gives two related, but independent, powers to injured states: they may terminate or suspend the operation of a bilateral or multilateral treaty. VCLT, supra note 21, at art. 60(1)–(2).
220. TEU, supra note 19, at art. 7(3) (emphasis added).
total suspension of a breaching Member States’ rights. The wording of
the article suggests otherwise. Article 7 TEU allows for the suspension
of “certain” rights, implying the existence of other, unsuspended rights.
Thus, a de facto expulsion cannot be affected. Moreover, Article 7
TEU is clear that “[t]he obligations of the Member State . . . shall in
any case continue to be binding on that State.”221 This foresees a state
still bound to the treaty regime: the breaching State, though it loses
“certain” rights, retains the obligations of the treaty relationship.

D. The precedential value of termination powers in IOs

Finally, there may be concerns that a retained expulsion right
would reduce states’ initial incentives to form international
organizations. Under this theory, states might be hesitant to form
international organizations or join multilateral treaties silent on
expulsion out of fear that they themselves may be one day expelled.
It may be that a state is as interested in the stability, predictability, and
permanence a treaty brings as its substance—characteristics
threatened if members retain their rights to expel fellow treaty
members. Why grant painful concessions to and engage in protracted
negotiations with other states, if you’re liable to be expelled whenever
your fellow members decide they no longer want you in the club?
These fears are accompanied by concerns that member states of
international organizations (“IOs”) could leverage this retained
expulsion power to force coercive bargains on their treaty partners, to
conditionalize continued membership in the IO.222 There are several
responses to these concerns.

First, Article 60 VCLT’s inherent hurdles make it difficult to
invoke. As mentioned, the article was designed to strike the right
balance between the notion of pacta sunt servanda and international
law’s reliance on self-help mechanisms. It did so via a number of
stringent structural requirements, most notably the unanimity
requirement in Article 60(2)(a)223 and its internal proportionality

221. Id.
222. Timothy Meyer, Power, Exit Costs, and Renegotiation in International Law, 51 HARV.
223. See supra Part III.B. Other mechanisms, not discussed here, include the arbitration
mechanisms in Article 65 VCLT, see VCLT Article 65, and the principle of proportionality (either
prebuilt into or layered on top of the application of Article 60 VCLT). For further discussion of
proportionality, see supra note 67 and accompanying text.
requirement. The article’s high demands no doubt inform why there is such little state practice using it. The retention of a termination right would and could do nothing to alter the exacting thresholds laid out by Article 60 VCLT.

State practice in IOs that have explicit expulsion powers affirm that expulsion is rarely used. The League of Nations, the United Nations, and the IMF all have (had) explicit expulsion provisions in their charters. However, between these three institutions there are only two recorded state expulsions: in 1939, the League of Nations expelled the Soviet Union in response to its invasion of Finland, and in 1954, Czechoslovakia was expelled from the IMF for failure to provide required data. Rarely will an IO resort to utilizing its enumerated expulsion powers, and often it will only do so after all other avenues have been exhausted. Combined with the high hurdles inherent to Article 60 VCLT, this historical state practice suggests that it is unlikely member states would be able to muster the political and legal will to use their termination powers to force coercive bargains. Even if Article 60 VCLT were interpreted to allow for the expulsion of multiple members, such an effort would still likely require the consensus of a large number of member states—an effort the cost of which would probably only be warranted in extraordinary circumstances.

Second, there are reasons to suspect that states might be more incentivized to join international organizations when their power of treaty termination is preserved. There is high membership in IOs with explicit expulsion powers, which suggests expulsion does not dissuade members from joining IOs. The United Nations, at current count, has

224. See supra note 68 and accompanying text.
225. Dörr & Schmalenbach, supra note 62, at 1048 (“There is no significant States practice either before or after Art 60 entered into force.”).
226. League of Nations Covenant art. 16.
231. Blagoev, supra note 25, at 192; Blocher et al., supra note 27, at 133–34.
193 members; the IMF, 190. The inclusion of an expulsion provision first in the League of Nations and then in the UN similarly suggests support across time for an expulsion provision. What is clear is that the preservation of a right of treaty termination offers hesitant states greater protections against their potentially breaching treaty partners. There are no enforcement mechanisms in international law; states rely on self-help mechanisms to ensure their partners’ treaty compliance and to protect themselves against breaching states. The right to terminate treaty relations with materially breaching states is an indispensable stick in this bundle of international sanctioning rights. And to shackle a performing state to a breaching partner with no escape except by its own withdrawal not only severely violates the notion of consent, but is also manifestly unjust to the performing state. States might be more willing to risk entering into treaty relations with potentially breaching partners if they knew that treaties silent on termination preserved their right of termination, rather than preempting it.

CONCLUSION

The rise of Fidesz in Hungary and PiS in Poland has forced the EU into nothing less than an existential crisis. Two of its Member States blatantly violate and reject its founding values. In Hungary alone, democracy has eroded, the courts have been captured, opposition media have been silenced, and vulnerable minority groups systemically degraded and attacked. As it stands, the EU is paralyzed, without the legal framework to expel a Member State or the will to see it done. This Note can only provide one of these. Ultimately, it remains up to the Member States themselves to say whether they are willing to defend the values they preach. Divided, the EU might yet stand. But united, its certain fate is to fall.
