

Bart M.J. Szewczyk\* ■

## ENLARGEMENT AND LEGITIMACY OF THE EUROPEAN UNION

### Abstract

*This article is part of a larger project on contemporary sources of legitimacy of the European Union. My prior inquiry into this subject argued that the primary legitimacy problem within the EU is not the so-called “democratic deficit” or the EU’s failure to produce certain outputs, but is instead the EU’s ability to enact laws against a national government’s will and dissent through Qualified-Majority Voting (“QMV”) in the Council of Ministers. Based on an analysis of the EU’s internal transformation through four successive treaties, that article argued that the EU can be legitimated based on two primary sources, national democracy and European citizenship, such that QMV decision-making could be justified based on promotion or protection of European citizenship, even against a national democracy’s will. From this internal transformation of the EU, this article turns to the EU’s external transformation through enlargement across Central and Eastern Europe. By examining the process of enlargement, the article argues that this practice also reflects the hypothesized dual legitimacy structure based on European citizenship and national democracy. In particular, the EU’s primary focus during the enlargement process on the Copenhagen political criteria (rather than the economic or *acquis* criteria)—and in particular, ensuring the candidate countries’ commitment to EU fundamental rights—was justified in light of the concurrent shift in EU decision-making from *de facto* unanimity to QMV. Since an EU democracy could now be outvoted in the Council and an EU decision could be taken against a nation’s democratic will, the old EU Member States wanted to ensure that the new Member States would share their core political values, such that all*

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\*Bart M.J. Szewczyk (PhD, expected 2011) is a senior associate at Wilmer Cutler Pickering Hale & Dorr LLP in Washington, DC and an adjunct professor of international law at George Washington University Law School. All views expressed in this article are those of the author and do not necessarily represent the views of his institutional affiliations.

*Member States would be expected to pursue the same basic shared interests and could thus credibly claim to act on behalf of European citizens. Even as a pre-condition of accession negotiations, the EU required candidate countries to meet stringent political criteria reflecting the EU's new orientation around fundamental rights and excluded those countries that failed to do so, particularly based on human rights grounds; in contrast, it extended membership to countries even if they did not fully meet the economic or *acquis* criteria. In conclusion, the article proposes to formalize this consensus through a "Strasbourg Compromise," mirroring the Luxembourg Compromise that underpinned the European Communities, but orienting it around European citizenship rather than the national veto.*

## INTRODUCTION

This article is part of a larger project on contemporary sources of legitimacy of the European Union. Adopting the general theory of legitimacy developed by Harold Lasswell and Myres McDougal, my prior inquiry into this subject argued that empirical legitimacy means "stable expectations of right behavior"<sup>1</sup> and is achieved by serving common interests of effective actors within an authorized process; normatively, the theory prescribes that such process should be shaped to maximize values of human dignity.<sup>2</sup> From this perspective, the primary legitimacy problem within the EU is not the so-called "democratic deficit"<sup>3</sup> or the EU's failure to produce certain outputs,<sup>4</sup> but is instead the EU's ability to enact laws against a national government's will and dissent through Qualified-Majority

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<sup>1</sup> W.M. Reisman, *Assessing Claims to Revise the Laws of War*, 97 *American Journal of International Law* 82 (2003), p. 82.

<sup>2</sup> B.M.J. Szewczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, 17 *Columbia Journal of European Law* 151 (2011).

<sup>3</sup> See, e.g., B. Kohler-Koch and B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union*, Rowman & Littlefield Publishers, Lanham: 2007; Ch. Lord, *A Democratic Audit of the European Union*, Palgrave Macmillan, London: 2004; Ph. Schmitter, *Democracy in Europe and Europe's Democratization*, 14(4) *Journal of Democracy* 71 (2003); David Held, *The transformation of political community: rethinking democracy in the context of globalization*, in I. Shapiro and C. Hacker-Cordón (eds.), *Democracy's Edges*, Cambridge University Press, Cambridge: 1999; D. Beetham and Ch. Lord, *Legitimacy and the European Union*, Longman, London: 1998.

<sup>4</sup> See, e.g., P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford University Press, New York: 2010; G. Majone, *Europe as the Would-be World Power: The EU at Fifty*, Cambridge University Press, Cambridge: 2009; F. W. Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford University Press, Oxford: 1999.

Voting (“QMV”) in the Council of Ministers. With QMV, the EU can reach decisions that are not in the interest of particular EU states as perceived by the dissenting governments. Given the waning into desuetude of the Luxembourg Compromise, under which states in the European Communities (“EC”) maintained a *de facto* veto in cases of vital national interests,<sup>5</sup> QMV has thus given the EU an autonomous source of power, i.e., not contingent on the consent of each EU national democracy. As a union of twenty-seven (or more, in the future) heterogeneous states, the EU cannot effectively operate on the basis of consensus-based decision-making that guided the relatively homogenous EC, yet it lacks a theory that legitimates QMV decisions in an empirically realistic and normatively attractive manner.

To identify the common interests underpinning the EU, one needs to study the widely-accepted practice of the EU when stable expectations of right behavior become established, since doing often comes before hearkening (or practice before principle).<sup>6</sup> The necessary methodology is a comprehensive assessment of the core principles uniting the EU’s political decisions and public deliberations through an analysis of its foundational documents and developments.

There are two primary foundational processes within the EU, which reflect what binds the EU together and constitutes its organizing principles: (1) establishment of the EU through four successive treaties from Maastricht to Lisbon; and (2) enlargement across Central and Eastern Europe. Focusing on the EU’s treaties, my prior inquiry into sources of EU legitimacy argued that the EU can be legitimated based on two primary sources, national democracy and European citizenship. Thus, that article argued, QMV decision-making could be justified based on promotion or protection of European citizenship, even against a national democracy’s will. This article, in turn, explores the EU’s second foundational process.

As constitutive of the EU as the treaties, enlargement of the EU across Central and Eastern Europe dramatically transformed the EU and is therefore similarly crucial to an understanding of the contemporary sources of EU legitimacy. Jan Zielonka aptly emphasized the inherently-different nature of the European

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<sup>5</sup> *Ibidem*, p. 173. (“A comprehensive review of news articles since 1995 revealed no instances in which a veto pursuant to the Luxembourg Compromise was used, and very few times in which it was even contemplated (twice by the UK regarding financial reform in 2009-2010 and art sales in 1999, and by Poland regarding sugar reform in 2006). This data clearly shows that the Luxembourg Compromise does not perform any active function in EU decision-making.”) (internal citations omitted).

<sup>6</sup> See J.H.H. Weiler, *The Constitution of Europe*, Cambridge University Press, Cambridge: 1999, p. 5.

Union after enlargement as contrasted with its Western-oriented predecessor.<sup>7</sup> Similarly, Joseph Weiler observed that:

The enlargement decision was the single most important constitutional decision taken in the last decade, and arguably longer. For good or for bad, the change in number of Member States, in the size of Europe's population, in its geography and topography, and in its cultural and political mix are all on a scale of magnitude which will make the new Europe a very, very different polity, independently of any constitutional structure adopted.<sup>8</sup>

The significance of enlargement for the EU was also palpable among the actors involved in this process. For example, in its 1997 report to the Council on enlargement, the European Commission pointed out that:

[T]he sheer number of applicants and the very large differences in economic and social development which they will bring with them, will present the Union with institutional and political challenges far greater than ever before. The Union population will potentially increase by more than a quarter to nearly 500 million, but total GDP would rise by barely 5%. (...) The enlargement of the European Union will affect not only the destiny of the Europeans, the Member States and the applicant countries. Through its international implications, enlargement will have an impact far beyond the new frontiers of an enlarged Europe because it will increase Europe's weight in the world, give Europe new neighbours and form Europe into an area of unity and stability.<sup>9</sup>

Likewise, European Commission President Romano Prodi argued that “[f]rom the point of view of Europe's powers and duties, and of its potential and ambition, enlargement is the real acid test. It is also Europe's historic duty. (...) It is a process which sees the Union preparing to shoulder responsibilities on the scale of a continent.”<sup>10</sup> The then European Parliament President, Pat Cox, echoed this sentiment, stating: “Enlargement of the European Union is our greatest political priority at this time and a priority which has dominated much of the work of our Parliament and most of the focus of my presidency of Parliament since

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<sup>7</sup> J. Zielonka, *Europe As Empire. The Nature of the Enlarged European Union*, Oxford University Press, Oxford: 2006.

<sup>8</sup> J. H. H. Weiler, *A Constitution for Europe? Some Hard Choices*, in G.A. Bermann and K. Pistor (eds.), *Law and Governance in an Enlarged European Union*, Hart Publishing, Oxford and Portland: 2004, p. 41.

<sup>9</sup> European Commission, *Agenda 2000 for a stronger and wider Union* (15 July 1997).

<sup>10</sup> R. Prodi, Address given to the European Parliament, “The Enlargement,” (13 November 2001).

last January.”<sup>11</sup> In 2002, at the end of negotiations with ten candidate countries, the Danish Prime Minister Anders Rasmussen, whose country held the EU Presidency at the time, observed that:

The Copenhagen Summit also marked the beginning of a new era for the European Union. In Copenhagen, the EU carried out the greatest task in the history of the Community. Following the Copenhagen Summit, the European Union stands as the overall framework around the Europe of the future: cooperation based on shared values of freedom and the market economy, community spirit and social responsibility, democracy and human rights; effective cooperation that respects the national characteristics of our peoples and states. ... A new Europe is born.<sup>12</sup>

Similarly, the UK Prime Minister Tony Blair declared that:

I think it is fair and it is right to say that this is a summit that redefines Europe for the future. This is an extraordinary moment in Europe’s history. There are decisions of enormous importance that we have taken which expand and extend the boundaries of Europe, make Europe into a different institution, make it into indeed a different union altogether for the future.<sup>13</sup>

Since the accession treaties were unanimously approved by all Member States, and were ratified through popular referenda in most of the accession countries, one can conclude that enlargement served the common interests of effective actors in the EU, reflected the values around which the EU is organized, and is consequently relevant to an empirical analysis of EU legitimacy.<sup>14</sup> Notwithstanding initial concerns in Western Europe about uncontrolled migration and competition from cheap labor—and, conversely in Central and Eastern Europe, worries about interference in newly-won sovereignty and wholesale foreign acquisition of land—none of these fears came to pass and no one is seriously calling for a reversal of enlargement, now seven years after the fact. Common understanding

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<sup>11</sup> P. Cox, Opening address to the European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

<sup>12</sup> A.F. Rasmussen, Address to the European Parliament on the Copenhagen European Council (18 December 2002), available at [www2.europarl.eu.int](http://www2.europarl.eu.int).

<sup>13</sup> Prime Minister’s press conference following the EU Council in Copenhagen (16 December 2002), available at [www.number-10.gov.uk](http://www.number-10.gov.uk).

<sup>14</sup> See, e.g., R. Balfour, *Human Rights Promotion*, in F. Cerutti and S. Lucarelli (eds.), *The Search for a European Identity: Values, Policies, and Legitimacy of the European Union*, Routledge, London: 2008; R. Balfour, *Principles of Democracy and Human Rights: A Review of the European Union’s Strategies Towards Its Neighbours*, in S. Lucarelli and I. Mannes (eds.), *Values and Principles in European Union Foreign Policy*, Routledge, London: 2006.

with regards to what the EU has done and shared expectations about what it can do have stabilized.

Both internal and external processes of establishment and enlargement were intertwined in a self-reinforcing cycle, as can be observed through EU Council pronouncements between 1992 and 2007. First, EU internal reform was driven in part by considerations of enlargement. Then, the emphasis on human rights in the Maastricht Treaty preceded the Copenhagen political and economic criteria required of candidate countries, which in turn became enshrined in greater detail in the Amsterdam Treaty. Enlargement itself was the foremost expression of the new EU order as political criteria drove the accession negotiations and certain candidate countries were delayed based on human rights considerations. And finally, all candidate countries had to reshape their political and legal institutions to comply with EU standards. Indeed, the particular nature of EU enlargement across Central and Eastern Europe clarified and reaffirmed the fundamental principles around which the EU became organized as it compelled existing and potential member states to agree on common values notwithstanding their significant diversity. By examining the process of enlargement, this article argues that this practice also reflects the hypothesized dual legitimacy structure based on European citizenship and national democracy.

The article demonstrates how EU enlargement across Central and Eastern Europe transformed this region along the European organizing principles analyzed in my prior article—further validating its emerging internal legitimacy criteria based broadly-speaking on a dual source of European citizenship and national democracy.<sup>15</sup> The primarily non-economic justification for this enlargement—requiring commitment to EU fundamental rights and stabilizing democratic reforms in Central and Eastern Europe—is paradigmatic of the new areas of common interests that the EU has started serving and through which it can further legitimate itself. In the representative case of Germany, Marcin Zaborowski, the current director of the governmental think-tank Polish Institute of International Relations, observed that “since the late 1990s, the [German] federal government and the states of the federation stopped stressing the economic benefits of enlargement. The prevailing rhetoric was now that enlargement would be worth pursuing

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<sup>15</sup> See, e.g., D. Piana, *Judicial Policies and European Enlargement: Building the Image of a Rule of Law Promoter*, in F. Cerutti and S. Lucarelli (eds.), *The Search for a European Identity: Values, Policies, and Legitimacy of the European Union*, Routledge, London: 2008; H. Grabbe, *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe*, Palgrave Macmillan, London: 2006.

despite its economic costs.”<sup>16</sup> Thus, the EU’s policies in Central and Eastern Europe illustrate broad unexplored areas of non-economic common interests that the EU serves and through which it can enhance further its legitimacy.

In effect, the article constitutes a series of comparable case studies or analytical narratives, whereby the principles articulated in the foundational documents assessed in my prior article can be tested against actual practice at the peak of EU power. In relation to each of the accession countries, the EU had more leverage than in any of its other policies or decisions with respect to prior accession countries or existing Member States. Case studies are generally useful in legitimacy analysis as they provide an opportunity for detailed and comprehensive analysis of decisions to identify the principles or legitimacy criteria that explain or validate them.<sup>17</sup> As David Beetham and Christopher Lord point out, “through a comparative analysis, different legitimating criteria can be shown to validate and underpin the various kinds of political system, together with their respective legitimating institutions and procedures.”<sup>18</sup> Moreover, by observing which countries were delayed in accession or negotiations and on what grounds, and which ones were admitted, one can determine which criteria were driving the accession process. Therefore, the principles emanating from this category of evidence will be highly relevant to EU legitimacy, in general, and to the EU’s primary legitimacy problem of QMV decision-making, in particular.

Mirroring the empirical analysis and methodology used in my prior article, this article analyzes the primary public decisions and documents relevant to enlargement to demonstrate the EU organizing principles expressed by enlargement. The evidence under consideration includes the initial decision to enlarge, Copenhagen Declaration of 1993, EU Council conclusions and European Commission Annual Reports during the negotiation process, other public pronouncements of effective actors during the enlargement process, and finally the Treaty of

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<sup>16</sup> See, e.g., M. Zaborowski, *More Than Simply Expanding Markets: Germany and EU Enlargement*, in H. Sjursen (ed.), *Questioning EU Enlargement: Europe in Search of Identity* (Routledge, London: 2006), p. 111 (emphasis in original).

<sup>17</sup> See, e.g., B.M.J. Szewczyk, *The EU in Bosnia and Herzegovina: powers, decisions, and legitimacy*, EUISS Occasional Paper No. 83 (2010); B.M.J. Szewczyk, *Pre-emption, Deterrence, and Self-Defence: A Legal and Historical Assessment*, 18(1) *Cambridge Review of International Affairs* 119 (2005); W.M. Reisman and A.R. Willard (eds.), *International Incidents: The Law That Counts in World Politics*, Princeton University Press, Princeton: 1988. For a discussion of the utility of case studies, see A.L. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences*, The MIT Press, Cambridge, Mass.: 2005; R.K. Yin, *Applications of Case Study Research*, Sage Publications, London: 1999; R.E. Stake, *The Art of Case Study Research*, Sage Publications, London: 1995.

<sup>18</sup> Beetham & Lord, *supra* note 3, p. 1.

Accession of 2003 (“Accession Treaty”). Particularly important is the set of Annual Reports issued by the European Commission with respect to each accession country, as well as the collective summary reports, as these assessments provide the most comprehensive database on enlargement decision-making.<sup>19</sup> After all, “for diligent scholars, for whom the world is a vast manifold of interrelated events, everything is context.”<sup>20</sup>

## 1. DECISION TO ENLARGE AND SEARCH FOR PRINCIPLES OF ENLARGEMENT: 1989–1992

While in hindsight the decision to enlarge the EU across Central and Eastern Europe appears self-evident, it was far from pre-determined in the beginning stages. Even once the initial decision was made, the principles underlying enlargement—whether the primary accession considerations would be political, economic, or other—were also far from clear. Nonetheless, the background historical context between 1989 and 1992 is necessary to fully understand and appreciate the ultimate choices made during the EU’s enlargement across Central and Eastern Europe.

At first, EC enlargement was not even conceived as an option, let alone the primary force of change, during the events of 1989 in Central and Eastern Europe. Following the free elections in Poland in June 1989—the first of its kind in Central and Eastern Europe since the end of World War II—the Madrid European Council “recognize[d] the importance of the profound changes now taking place in the USSR and Central and Eastern European countries,” “reaffirmed the determination of the Community and its Member States to play an active role in supporting and encouraging positive changes and reform,” and “reaffirme[d] the full validity of the comprehensive approach integrating political, economic, and cooperation aspects which the European Community and its Member States follow in their relation with the USSR and with Central and Eastern European countries.”<sup>21</sup> Most importantly, however, the Council emphasized that the “CSCE [Conference on

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<sup>19</sup> See, e.g., W. Sadurski, *EU Enlargement and Democracy in New Member States*, in W. Sadurski, A. Czarnota and M. Krygier (eds.), *Spreading Democracy and the Rule of Law?: The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*, Springer, Dordrecht: 2006.

<sup>20</sup> M.H. Arsanjani and W.M. Reisman, *Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties*, 104 *American Journal of International Law* 597 (2010), p. 599.

<sup>21</sup> Bull. EC 6-1989, point 1.1.16.

Security and Cooperation in Europe] process provide[d] the appropriate framework to achieving greater progress in all these fields, enabling Europe to look forward to a day when its present divisions become a matter of history.”<sup>22</sup> In July, after a meeting of the major industrial economies within the G-7, the EC also established an aid program, the Poland and Hungary Assistance for the Restructuring of the Economy, but limited it to those two countries. Even after the fall of the Berlin wall in November 1989, the European Communities expressed a commitment to democratic change in the Communist bloc, but not necessarily through enlargement. The Council expressed “solidarity and unity” of the 12 EC Member States in their approach towards the USSR and Central and Eastern Europe, but mainly discussed the role of aid from and trade with the EC, along with numerous other international institutions, in supporting the democratic transformations.<sup>23</sup>

However, by December 1989, the Strasbourg European Council shifted from its previous ambivalence and recognized “the responsibilities weighing on the Community in this crucial period for Europe” and “the attraction which the political and economic model of Community Europe holds for many countries.”<sup>24</sup> Thus, it declared that “its path lies not in withdrawal but in openness and cooperation, particular with the other European States.”<sup>25</sup> Given that the EC was the “entity to which the countries of Central and Eastern Europe now refer[red], seeking to establish close links,” the Council announced that it “will take the necessary decision to strengthen its cooperation with peoples aspiring to freedom, democracy and progress and with States which intend their founding principles to be democracy, pluralism and the rule of law.”<sup>26</sup> Moreover, the Council mentioned “appropriate forms of association with the countries which are pursuing the path of economic and political reform,” foreshadowing the Association Agreements reached subsequently in 1990 and 1991 with countries that eventually led to the Accession Treaty.

The EC’s engagement with Central and Eastern Europe was economic through trade and other agreements. In April 1990, the Dublin European Council at a special meeting outlined a more detailed and pro-active strategy of the EC with respect to Central and Eastern Europe: “prompt completion of the Community’s network of first-generation trade and cooperation agreements; as soon as the necessary political and economic conditions are in place, negotiation of a new

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<sup>22</sup> *Ibidem.*

<sup>23</sup> Bull. EC 11-1989, point 2.2.15.

<sup>24</sup> Bull. EC 12-1989, point 1.1.2.

<sup>25</sup> *Ibidem.*

<sup>26</sup> *Ibidem*, point 1.1.14.

generation of association agreements providing an institutional framework for political dialogue, without in any way adversely affecting the quite separate right of accession of the countries concerned....”<sup>27</sup> It further noted that the EC “will work to complete association negotiations with these countries as soon as possible on the understanding that the basic conditions with regard to democratic principles and transition towards a market economy are fulfilled.”<sup>28</sup> At subsequent summits, the European Council continued to call for “the swift conclusion of the first set of European Agreements”<sup>29</sup> and aimed to conclude negotiations by the end of 1991.<sup>30</sup>

Also focused on economics, the Europe Agreements establishing an association with the European Communities and their Member States were signed by Poland and Hungary in 1991, the Czech Republic, Slovakia, Bulgaria, and Romania in 1993, Estonia, Latvia, and Lithuania in 1995, and Slovenia in 1996, with the treaties entering into force between 1994 and 1999. The objectives of these agreements were:

to provide an appropriate framework for the political dialogue, allowing the development of close political relations between the parties[;]

to promote the expansion of trade and the harmonious economic relations between the parties and so to foster the dynamic economic development and prosperity in [the associated country;]

to provide a basis for the Community’s financial and technical assistance to [the associated country; and]

to provide an appropriate framework for [the associated country’s] gradual integration into the Community.<sup>31</sup>

The extensive catalogue of policy areas addressed by the Europe Agreements—free movement of goods; movement of workers, establishment, and supply of services; payments, capital, competition and other economic provisions, and approximation of laws; economic cooperation; financial cooperation; and institutional, general, and final provisions—mirrored the expansion of issues within the Maastricht Treaty, but did not yet fully match the full set of competencies within the newly-founded European Union.

<sup>27</sup> Bull. EC 4-1990, point I.1.

<sup>28</sup> *Ibidem*, point I.8.

<sup>29</sup> Bull. EC 12-1990, point I.1.

<sup>30</sup> Bull. EC 2-1991.

<sup>31</sup> See, e.g., Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, L 348 (31/12/1993), entered into force February 1, 1994.

While the first Europe Agreements were being finalized with Poland and Hungary, the European Council at its Maastricht summit in December 1991 addressed for the first time the issue of enlargement and began to shift its emphasis onto political considerations, stating:

The European Council recalls that the Treaty on European Union which the Heads of State or Government have now agreed provides that *any European States whose systems of government are founded on the principle of democracy may apply to become members of the Union.*

The European Council notes that negotiations on accession to the European Union on the basis of the Treaty now agreed can start as soon as the Community has terminated its negotiations on own resources and related issues in 1992.

A number of European countries have submitted applications or announced their intention of seeking membership of the Union.<sup>32</sup>

Thus, the Council indicated that enlargement across Central and Eastern Europe would be available on the basis of certain conditions and, in particular, stressed the need for democracy in the candidate countries. In addition, the Council requested the Commission to study the implications of enlargement on the EU.

In its report responding to the Council's request, titled "Europe and the Challenge of Enlargement," the Commission focused on the political guidelines for admission of new countries into the EU. It stressed that the "*essential characteristics of the Union*, referred to in Article F of the Maastricht Treaty, *are the principles of democracy and the respect of fundamental human rights*," such that a "State which applies for membership must therefore satisfy the three basic conditions of European identity, democratic status, and respect of human rights."<sup>33</sup> In contrast, it deemphasized the importance of European identity, noting that, while the EU is open for membership only to European States, the term "European" had not been officially defined and merely "combines geographical, historical and cultural elements which all contribute to the European identity."<sup>34</sup> Moreover, it pointed out that the "shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is subject to review by each succeeding generation" such that the EU "contours will be shaped over many years to come."<sup>35</sup> However, this guideline can have little practical effect on a country's policies, as a country is unlikely to be able to gain or lose European identity in the

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<sup>32</sup> Bull. EC 12-1991, point I.4 (emphasis added).

<sup>33</sup> *Ibidem*, point 8 (emphases added).

<sup>34</sup> Bull. EC 3-1992, supplement, point 7.

<sup>35</sup> *Ibidem*.

medium term. Given that the European identity criterion is subject to review by each succeeding generation, the remaining principles as foundations for the EU are democracy and fundamental rights, according to the Commission's report.

The Commission also noted the need for institutional reform in candidate countries, as well as the EU. It recommended that the candidate countries strengthen their capacity to implement the *acquis communautaire* and EU common foreign and security policy. In turn, it also foreshadowed the need for EU institutional reform in light of enlargement, since "[e]ach new accession [would] magnify the risk of overload and paralysis, because of the increased number of participants and the greater diversity of issues."<sup>36</sup> It further observed that "enlargement reinforces the need for a more rigorous application by each of the institutions of the principle of subsidiarity" and surmised that "[a]nother precondition for the effective functioning of an enlarged Union with more citizens is more solid democratic basis."<sup>37</sup> Thus, it argued that the EU's democratic deficit should be reduced through a strengthened role of the European Parliament.

In the end, the Commission strongly recommended further enlargement across Central and Eastern Europe. It stated:

Enlargement is a challenge which the Community cannot refuse. The other countries of Europe are looking to us for guarantees of stability, peace and prosperity, and for the opportunity to play their part with us in the integration of Europe. For the new democracies, Europe remains a powerful idea, signifying the fundamental values and aspirations which their peoples kept alive during long years of oppression. To consolidate their newfound liberty, and stabilize their development, *is not only in their interest, but also in ours.*<sup>38</sup>

At its meeting in June 1992, the Lisbon European Council reached "broad consensus" endorsing the Commission's report, called for accession negotiations with European Free Trade Association countries (Austria, Finland, Sweden, and Switzerland), an assessment of applications submitted by Turkey, Cyprus, and Malta, and further dialogue with Central and Eastern European countries pursuant to the Europe Agreements to assist them in preparation for accession to the EU.<sup>39</sup> Moreover, it "expresse[d] its full support for the processes aimed at consolidating democratic institutions in the countries of Central and Eastern Europe, thereby guaranteeing the rule of law and respect for human rights," including

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<sup>36</sup> *Ibidem*, point 21.

<sup>37</sup> *Ibidem*, point 22.

<sup>38</sup> *Ibidem*, point 40 (emphasis added).

<sup>39</sup> Bull. EC 6-1992, point I.1.

“the principles governing the rights of minorities, and inviolability of borders, which can be altered only by peaceful means and through agreement.”<sup>40</sup>

At the same time the EC was enlarging the scope of its competence internally from economic to political issues between 1989 and 1992, it began to project a broad vision of its interests externally towards Central and Eastern Europe. Thus, the EC’s focus on economic engagement with Central and Eastern Europe turned to the EU’s political enlargement premised on the principles of national democracy and fundamental rights. As with the EU treaties, this was only the beginning of the process of identifying the EU’s common interests and clarifying bases of the EU’s legitimacy. The next phase occurred in Copenhagen, where the EU Member States delineated the basic criteria that accession countries would need to meet in order to gain membership.

## 2. COPENHAGEN CRITERIA AND INTERNAL REFORM: 1993–1996

Shortly after ratification of the Maastricht Treaty, the European Council at its June 1993 summit announced that it would require certain political and economic criteria specifically of the Central and Eastern European candidate countries in order for them to accede to the EU:

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities [“political criteria”], the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union [“economic criteria”]. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union [“*acquis* criteria”].<sup>41</sup>

The Council’s conclusions largely reflected the European Commission’s recommendations set out in its report titled “Towards a closer association with

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<sup>40</sup> *Ibidem*, point I.17. Notably, the criteria were included in the section on “Relations with the Countries of Central and Eastern Europe” and thus would not be expressly applied to Austria, Finland, Norway, or Sweden, with which accession negotiations were taking place. While this approach could be interpreted as applying double standards to different candidate countries, it could have been perceived as unfair for the EU to introduce new accession criteria for countries near the end of the negotiations process with those countries.

<sup>41</sup> European Council, Conclusions of the Presidency – Copenhagen, 21-22 June 1993, p. 13.

the countries of Central and Eastern Europe.”<sup>42</sup> The Commission argued that the “task of stabilising Central and Eastern Europe and of consolidating democracy and the market economy is far from complete” and that it “is in the Community’s interest to respond positively to [the] expectations” of Central and Eastern European countries to be able to accede to the Union.<sup>43</sup>

Though the Copenhagen Council also noted economic and *acquis* criteria for accession, along with political criteria, the importance of EU fundamental values to the enlargement process became entrenched from the beginning and would become more so over time, as discussed below. The eventual expression of the political criteria in Article 7 TEU with the Amsterdam Treaty shows that the same standards eventually became equally applicable for all EU Member States, even if not explicitly during the accession process. Moreover, monitoring countries’ compliance with the Copenhagen criteria became an ongoing process even before the start of formal negotiations. For instance, the Corfu European Council noted “with concern the adoption by the Latvian Parliament of a citizenship law incompatible with [its] recommendations and hope[d] that the draft law will be reconsidered.”<sup>44</sup> The law in question was viewed as exclusionary, nationalistic, and discriminatory towards the Russian minority living in Latvia, and thus inconsistent with the Copenhagen criteria. Similarly, the Essen European Council expressed “its concern that freely elected Members of Parliament had been sentenced to imprisonment in Turkey and urg[ed] respect for human rights.”<sup>45</sup>

The Copenhagen Council also noted that the EU would need to reform internally to prepare for enlargement, stating that the “Union’s capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.”<sup>46</sup> Thus, enlargement in fact meant that significant adjustments had to occur within both the EU and the Central and Eastern European countries. However, with the overall “objective of membership [having] been established,” the Council recommended a structured relationship with the candidate countries “within the framework of a reinforced and extended multilateral dialogue and concentration on matters of common interest,”<sup>47</sup> expanded trade, increased budg-

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<sup>42</sup> SEC(93) 648 (18 May 1993).

<sup>43</sup> *Ibidem*. Separately, the Commission recommended accession negotiations with Cyprus and Malta, which had signed association agreements already in 1970 and 1972, respectively.

<sup>44</sup> European Council, Conclusions of the Presidency – Corfu, 24-25 June 1994.

<sup>45</sup> European Council, Conclusions of the Presidency – Essen, 9-10 December 1994.

<sup>46</sup> *Ibidem*.

<sup>47</sup> *Ibidem*, p. 13, 14.

etary resources to finance transportation and infrastructure projects, and the need for approximation of laws to comply with EU standards.

In order to set the necessary “institutional conditions” for enlargement, the EU observed the need to enact internal reforms, which “must take place before accession negotiations begin.”<sup>48</sup> These institutional changes eventually occurred through the Treaties of Amsterdam and Nice. Prior to this internal reform, the multilateral structured relationship outlined at the Copenhagen Council and the bilateral Europe Agreements signed with individual candidate countries between 1991 and 1996 served as stepping-stones towards further integration across Europe. The primary purpose of this strategy was essentially to “encourage mutual trust and ... provide a framework for addressing topics of common interest.”<sup>49</sup> In particular, Annex IV to the Essen European Council conclusions outlined a detailed road map to prepare for accession of the Central and Eastern European countries “through the development of infra-structure, cooperation in the framework of the trans-European networks, the promotion of intra-regional cooperation, environmental cooperation, as well as the Common Foreign and Security Policy, cooperation in the areas of judicial and home affairs, and in culture, education and training.”

With the accession criteria clarified, the European Council at its next summit in Cannes in June 1995 met for the first time jointly with the Central and Eastern European accession countries, whose presence at the Council summit was viewed as “confirmation that they are destined to join the Union.”<sup>50</sup> The Council also announced that negotiation talks would commence with Malta and Cyprus six months after the conclusion of the 1996 Intergovernmental Conference. The Madrid European Council emphasized that “[e]nlargement is both a political necessity and a historic opportunity for Europe” as it “will ensure the stability and security of the continent and will thus offer both the applicant States and the current members of the Union new prospects for economic growth and general well-being.”<sup>51</sup> It also requested, for the first time and subsequently repeated at the Florence European Council, that the Commission expedite preparations of its opinions on the Central and Eastern European countries’ candidacies for accession, such that their negotiations could start at the same time as those of Malta and Cyprus. Following the conclusion of the Treaty of Amsterdam, the “way [wa]s

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<sup>48</sup> European Council, Conclusions of the Presidency – Corfu, 24-25 June 1994.

<sup>49</sup> European Council, Conclusions of the Presidency – Essen, 9-10 December 1994.

<sup>50</sup> European Council, Conclusions of the Presidency – Cannes, 26-27 June 1995.

<sup>51</sup> European Council, Conclusions of the Presidency – Madrid, 15-16 December 1995.

now open for launching the enlargement process in accordance with the conclusions of the Madrid European Council.”<sup>52</sup>

Though the Copenhagen criteria combined political and economic standards, as European Commission President Jacques Santer stated in a speech to the European Parliament, “enlargement [wa]s fundamentally a political rather than an economic and technical problem.”<sup>53</sup> As codified in the Copenhagen criteria (and subsequently enshrined with the Amsterdam Treaty and the Charter of Fundamental Rights), as well as implemented during the accession negotiations, human rights constituted the critical standard upon which new Member States entered the Union. Articulated at an earlier time, by different people, and in different languages and historical context, EU fundamental rights proved timeless and universal as they have been repeatedly reaffirmed each time a new state gained membership through votes of new peoples who had no role in creating these norms but recognized the universality of these fundamental rights. This recognition was reflected not merely in EU Council statements and public declarations, but more importantly in the political decisions of candidate countries to change their structures and policies according to the demands of EU fundamental rights, as discussed in the next section. Notably, certain countries such as Slovakia and Turkey were initially excluded from accession negotiations on human rights grounds. Much in terms of political decision-making would remain at the level of national democracies, but the legitimate exercise of such power became circumscribed by the human rights principles articulated at the EU level.

### 3. NEGOTIATIONS AND ACCESSION: 1997–2007

By the time internal EU reform was negotiated with a draft Amsterdam Treaty, all ten Central and Eastern European countries had applied for EU membership along with Malta and Cyprus. Hungary and Poland were first to apply for EU membership in March and April 1994, respectively, followed by Romania and Slovakia in June 1995, Latvia in October 1995, Estonia in November 1995, Lithuania and Bulgaria in December 1995, the Czech Republic in January 1996, and Slovenia in June 1996. Shortly after the Amsterdam summit, the European Commission submitted (pursuant to the Council’s request) its report titled “Agenda 2000: For a Stronger and Wider Union,” which contained opinions on the applications of each of the Central and Eastern European countries’ candidacies.

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<sup>52</sup> European Council, Conclusions of the Presidency – Amsterdam, 16-17 June 1997.

<sup>53</sup> J. Santer, *Relations with the countries of Central and Eastern Europe*, Statement made to the European Parliament on EU enlargement (2 March 1995).

The Commission engaged in a comprehensive and detailed methodology to assess the preparedness of each candidate country for EU membership. In light of the criteria set forth by the Copenhagen European Council—"particularly with respect to the political criteria"<sup>54</sup>—it evaluated each country's responses to questionnaires, examined information gained from bilateral meetings, the European Parliament's reports and resolutions, and the work of various international institutions and non-governmental bodies. Most importantly, it held that political criteria had to be met in the present for EU membership, whereas economic and *acquis* criteria could be met on a forward-looking basis based on a more flexible standard.

With regards to the political criteria, the Commission stated that it "[w]ent beyond a formal description of political institutions, and the relations among them, to assess how democracy actually works in practice, in terms of a series of detailed criteria" and "examined how various rights and freedoms, such as the freedom of expression, are exercised, through, for example, the role of political parties, non-governmental organisations and the media."<sup>55</sup> In general, it concluded that the candidate countries had the appropriate constitutions guaranteeing democratic freedoms and had held free and fair elections. However, it found that some countries did not have stability of institutions enabling public authorities to function properly due to a lack of qualified and independent judges and inadequate police forces. For instance, Romania had too much government interference in the media and the judicial system—and thus, it failed the EU's political criteria such as democratic government and rule of law. Furthermore, several countries had issues with protecting the rights of their minority populations, particularly the Roma, such that if these problems remained unresolved, they could affect democratic stability or give rise to disputes with neighboring countries. Thus, the Commission also concluded that progress still had to be "made in a number of applicant countries as regards actually practicing democracy and protecting minorities."<sup>56</sup>

The Commission singled out two countries for failing to meet the political criteria. In Slovakia, it held that there was a "gap between the letter of constitutional texts and political practice[, ] the respective rights and obligations of institutions such as the presidency, the constitutional court or the central referendum commission can be put into question by the government itself and ... the legitimate role of the opposition in parliamentary committees is not accepted."<sup>57</sup> Similarly, it held that "Turkey's record on upholding the rights of the individual and freedom

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<sup>54</sup> European Commission, *Agenda 2000 for a stronger and wider Union* (15 July 1997).

<sup>55</sup> *Ibidem*.

<sup>56</sup> *Ibidem*.

<sup>57</sup> *Ibidem*.

of expression falls well short of standards in the EU. ... Persistent cases of torture, disappearances and extra-judicial executions, notwithstanding repeated official statements of the government's commitment to ending such practices, put into question the extent to which the authorities are able to monitor and control the activities of the security forces."<sup>58</sup> Furthermore, it was unclear to the Commission whether there was civilian control of the military in Turkey.

With respect to the economic criteria, the Commission assessed whether certain conditions were met to demonstrate the existence of a functioning market economy: equilibrium between demand and supply established by the free interplay of market forces; liberalization of prices and trade; no significant barriers to market entry or exit; legal enforceability of contracts and property rights; macroeconomic stability; and effective channeling of savings towards productive investment through the financial sector. It also examined the ability of countries to withstand competitive pressure and market forces within the EU, though acknowledged that it was more difficult to apply this standard. The Commission observed that the candidate countries made significant progress in transitioning to a market economy, through privatization and liberalization, but that they still had to enact extensive structural reforms, especially in the financial systems and large state-owned industries. Overall, it concluded that "[n]one of the applicants fully meets the two economic conditions of Copenhagen ..., although some should be able to do so a few years from now."<sup>59</sup> In particular, it held that Hungary, Poland, the Czech Republic, Estonia, and Slovenia had functioning market economies, with Slovakia close to meeting the standard, and that Hungary and Poland should satisfy the competitiveness criterion in the medium term.

With regards to the *acquis* criteria (the ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union, through the adoption, implementation and enforcement of the *acquis communautaire*), the Commission observed that all countries accepted the objectives of the EU; Hungary, Poland, and the Czech Republic should be able to have the administrative structure to apply the *acquis* in the medium term; and Slovakia, Slovenia, Estonia, Latvia, and Lithuania over a longer term.

Based on these assessments, the Commission recommended opening negotiations with five countries—Hungary, Poland, Estonia, the Czech Republic, and Slovenia—in addition to Cyprus, with respect to which the Council had already made a decision to do so.

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<sup>58</sup> *Ibidem.*

<sup>59</sup> *Ibidem.*

The Parliamentary Assembly of the Council of Europe weighed in on the Commission's assessment of countries that did not meet the political criteria. It considered that "membership of the Council of Europe should constitute *prima facie* evidence of compliance with the political criteria for EU membership" and that "a final assessment of such compliance by the EU institutions should take into account the results of Council of Europe procedures—both of the Committee of Ministers and of the Assembly—for monitoring respect for obligations resulting from membership and the commitments entered into upon accession."<sup>60</sup> Moreover, it viewed that:

absence of conflicts with neighbouring states, and signature and ratification of the European Convention on Human Rights, the European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the European Charter of Local Self-Government, as well as of binding Council of Europe legal instruments for the protections of minorities, should be significant argument in favour of admission to the European Union.<sup>61</sup>

The Luxembourg European Council, however, rejected the Council of Europe's opinion and did not consider a country's membership in the Council of Europe and ratification of certain human rights treaties as sufficient evidence that the country met the EU's political criteria. In Slovakia, for instance, the Commission found that there was a "gap between the letter of constitutional texts and political practice."<sup>62</sup> Requiring more concrete demonstrations of a country's compliance in practice, the EU Council adopted the Commission's recommendations and decided to open bilateral accession negotiations only with the six countries identified by the Commission (Cyprus, Hungary, Poland, Estonia, the Czech Republic, and Slovenia), while maintaining an overall enlargement process with all twelve candidate countries (including Romania, Slovakia, Latvia, Lithuania, and Bulgaria).

In particular, the Council noted that "[c]ompliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations" whereas "[e]conomic criteria and the ability to fulfil the obligations arising from membership have been and must be assessed in a forward-looking, dynamic way."<sup>63</sup> This hierarchy of criteria also was re-emphasized at the Helsinki European

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<sup>60</sup> Council of Europe Parliamentary Assembly, Recommendation 1347 on enlargement of the European Union (7 November 1997).

<sup>61</sup> *Ibidem*.

<sup>62</sup> European Commission, *Agenda 2000 for a stronger and wider Union* (15 July 1997).

<sup>63</sup> European Council, Conclusions of the Presidency – Luxembourg, 12-13 December 1997.

Council.<sup>64</sup> Echoing this sentiment in an interview following the Luxembourg summit, the late Polish Foreign Minister Bronisław Geremek emphasized that “the EU is more than just an economic arrangement.”<sup>65</sup> Similarly, the Commission in its 1998 report noted the Copenhagen political criteria were codified into the EU constitutive framework with the Treaty of Amsterdam, which “enshrined a constitutional principle that ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.’”<sup>66</sup> Notably, there was no similar codification of economic criteria as foundational principles of the EU. Thus, as argued previously by the Commission President Santer, political criteria were primary and inviolable, while the economic standards were more flexible and assessed prospectively.

Following the launch of negotiations, the Commission monitored progress of each candidate country according to the Copenhagen criteria and issued summary reports on the preparedness of each country for accession. Confirming the previous year’s assessment, the Commission concluded that all the candidate countries, except for Slovakia and Turkey, met the political criteria “even if a number of them still had to make progress concerning the actual practice of democracy and protection human rights and minorities.”<sup>67</sup> In particular, it noted that free and fair elections had taken place at parliamentary and presidential levels in Poland, the Czech Republic, Lithuania and Latvia over the previous eighteen months. On the other hand, it observed that all the candidate countries (and particularly Poland, the Czech Republic, Slovenia, and Estonia) had problems with their judicial institutions, with insufficiently trained judges and excessive procedural delays. In Slovakia, there was also an even more fundamental issue regarding the independence of the judiciary. Moreover, some countries had significant human rights and minority issues. Romania had to improve the protection of the nearly 100,000 abandoned children in state orphanages. While Latvia’s referendum on the citizenship law would facilitate the naturalisation of non-citizens and their stateless children, Estonia had not yet adopted amendments to the Citizenship law to allow stateless children to become citizens. In several countries, the Roma

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<sup>64</sup> European Council, Conclusions of the Presidency – Helsinki, 10-11 December 1999 (recalling “that compliance with the political criteria laid down at the Copenhagen European Council is a prerequisite for the opening of accession negotiations and that compliance with all the Copenhagen criteria is the basis for accession to the Union”).

<sup>65</sup> A. Riche, *Interview with Bronisław Geremek*, Le Soir (15 December 1997), available at [www.ena.lu](http://www.ena.lu).

<sup>66</sup> European Commission, *Composite Paper – Reports on progress towards accession by each of the candidate countries* (1998).

<sup>67</sup> *Ibidem*.

were insufficiently integrated and suffered discrimination and social exclusion. In addition, the Hungarian minority in Slovakia faced various problems. Thus, the Commission concluded that:

In general terms, it appears that while there are no new problems or setbacks to the democratic functioning of the political and legal systems in the candidate countries, very little has been accomplished in the past eighteen months although further efforts are still needed in this area. Overall, the problem of minorities continues to raise concerns in the perspective of enlargement.<sup>68</sup>

At its summit in Vienna, the European Council “welcome[d] the substantial progress made by candidate countries in their preparations for membership” and “noted that although progress in the adoption of the *acquis* varies considerably between countries and between sectors, the difference between those with whom negotiations have begun and the other candidates has generally narrowed.”<sup>69</sup> With respect to countries with which negotiations had not yet begun, such as Latvia, Lithuania, and Slovakia, it acknowledged progress in improving their compliance with the Copenhagen political criteria and announced the prospect of opening accession negotiations pending further gains. For instance, it observed that “the new situation in Slovakia following the elections [which ousted Meciar’s authoritarian government] allow for the prospect of opening negotiations on condition that the regular stable and democratic functioning of its institutions is confirmed.”<sup>70</sup>

In its 1999 report, the Commission reemphasized the political importance of enlargement to the EU, arguing that enlargement is the best way “to achieve peace and security, democracy and the rule of law, growth and the foundations of prosperity throughout Europe” such that there “is now a greater awareness of the strategic dimension to enlargement.”<sup>71</sup> As a prime example of these beneficial effects, the Commission pointed to Slovakia, which previously was found not to have fulfilled the political criteria, but which had since then held free and fair elections, enacted significant political reforms, enabled participation of the opposition in parliamentary committees and oversight bodies, and strengthened the independence of the judiciary. Similarly, there were substantial improvements in the protection of minorities (apart from the issue of discrimination against the Roma, which remained unresolved) in the several countries that previously had

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<sup>68</sup> *Ibidem*.

<sup>69</sup> European Council, Conclusions of the Presidency – Vienna, 11-12 December 1998, Annex III (General Affairs Council Conclusions on European Union Enlargement).

<sup>70</sup> *Ibidem*.

<sup>71</sup> European Commission, *Composite Paper – Reports on progress towards accession by each of the candidate countries* (1999).

problems. Overall, the Commission thus found that the remaining five Central and Eastern European candidate countries (Romania, Slovakia, Latvia, Lithuania, and Bulgaria), as well as Malta, fulfilled the political criteria. In contrast, only two countries (Cyprus and Malta) were found to fully fulfill the economic criteria, with some relatively close to compliance (Hungary, Poland, Slovenia, Estonia, Czech Republic, and Latvia), and the rest far from compliance (Slovakia, Lithuania, Bulgaria, and Romania). Likewise, there was a mixed record of candidate countries' preparedness to take on other obligations of EU membership (including adherence to the aims of political, economic, and monetary union).

Nonetheless, the Commission gave priority to the political criteria, and recommended opening negotiations with all countries that fulfilled these criteria even if they did not meet the economic and *acquis* criteria. It recognized that the "enlargement process is vital to securing political stability, democracy and respect for human rights on the European continent as a whole."<sup>72</sup> In turn, the Helsinki European Council endorsed this approach and announced that it would commence accession negotiations with the remaining six Central and Eastern European candidate countries. The only country that became left out was Turkey, which, as discussed further in the next section, was found to continue to have shortcomings in terms of respect for human rights, rights of minorities, and civilian control of the military.<sup>73</sup> The Commission's decision reflected the underlying trend within the EU towards greater emphasis on fundamental rights: the Copenhagen political criteria—already enshrined in EU law with the Treaty of Amsterdam—were re-emphasized in the Charter of Fundamental Rights, proclaimed at the Nice European Council in December 2000.<sup>74</sup>

In its 2000 report, the Commission continued to highlight the primarily political benefits of enlargement. It observed that:

Stable democracies have emerged in Central and Eastern Europe. Systemically, they are already so robust that there need be no risk of a relapse into authoritarianism. The credit for this success belongs mainly to the people of those countries themselves. ... But undoubtedly the process was helped and encouraged by the prospect of European integration. The direction of political and economic reforms and the determination with which they are being

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<sup>72</sup> *Ibidem*.

<sup>73</sup> European Council, Conclusions of the Presidency – Helsinki, 10-11 December 1999 (recalling "that compliance with the political criteria laid down at the Copenhagen European Council is a prerequisite for the opening of accession negotiations and that compliance with all the Copenhagen criteria is the basis for accession to the Union").

<sup>74</sup> European Commission, *Enlargement Strategy Paper – Report on progress towards accession by each of the candidate countries* (2000).

pursued reflect the need to meet the EU membership criteria laid down by the Copenhagen European Council in 1993.

Events have amply validated these criteria. The political stability in the Central and East European candidate countries is rooted in common European values – democracy, the rule of law, respect for human rights and the protection of minorities – and that is precisely why it is set to last.<sup>75</sup>

However, the Commission also pointed out that these political benefits are not necessarily self-evident and require an effective communications strategy in order to persuade concerned citizens of the candidate countries, as well as of the Member States, that enlargement will serve their mutual interests: “This goes beyond satisfying the right of the people concerned to be correctly informed of what enlargement will mean for them. It is the democratic legitimisation of the process itself.”<sup>76</sup> Thus, the Commission recommended that its “proposed communication strategy should be implemented as a matter of priority in order to allay fears of enlargement, to inform about its benefits and to win over citizens’ support.”<sup>77</sup>

Overall, the 2000 report concluded that the Commission’s “regular assessment of progress achieved in meeting [the political criteria], have led to positive developments in all candidate countries. The overall record in strengthening democratic institutions, in respecting the rule of law and in protecting human rights ha[d] improved since last year.”<sup>78</sup> However, discrimination against the Roma continued to exist in several Central and Eastern European countries, notwithstanding the allocation of EU and national resources to address this issue. With respect to the economic and *acquis* criteria, the record continued to be mixed among the candidate countries. In addition, the Commission continued to underscore Turkey’s failure to meet the political criteria, notwithstanding certain positive steps such as the Turkish government’s adoption of several priority objectives for reforms to comply with the criteria, signing of two major human rights conventions, and an improved internal debate in Turkey on conditions for Turkey’s accession to the EU. The Nice European Council endorsed the Commission’s findings and recommendations on all these counts.<sup>79</sup>

In its 2001 report, the Commission noted that twelve candidate countries continued to meet the political criteria, and that, in contrast, Turkey maintained

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<sup>75</sup> *Ibidem.*

<sup>76</sup> *Ibidem.* See also European Commission, *Communications Strategy for Enlargement* (2000).

<sup>77</sup> See *ibidem.*

<sup>78</sup> See *ibidem.*

<sup>79</sup> European Council, Conclusions of the Presidency – Nice European Council, 7-9 December 2000.

“restrictions on the exercise of fundamental freedoms.”<sup>80</sup> Also, discrimination against the Roma continued unabated in several Central and Eastern European countries. As before, with respect to the economic and *acquis* criteria, the compliance of countries varied, but had positive medium-term trends. Nonetheless, the Commission stated that it would be able to assess countries’ preparedness for accession on the basis of the 2002 reports, with an expected entry date of 2004. The Laeken European Council fully endorsed the Commission’s recommendations and described enlargement as “now irreversible.”<sup>81</sup> The Council concluded “that, if the present rate of progress of the negotiations and reforms in the candidate States is maintained, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, the Czech Republic and Slovenia could be ready.”<sup>82</sup> However, it decided that Bulgaria and Romania did not meet the economic and *acquis* criteria such that accession could only take place at a later date.<sup>83</sup>

On October 9, 2002, the European Commission announced that ten candidate countries were ready to join the European Union in 2004. The 2002 Commission report confirmed that twelve candidate countries continued to meet the political criteria. In addition, in “all countries with considerable Roma communities, progress ha[d] been made with the implementation of national action plans to improve the difficult situation the members of these communities are facing.”<sup>84</sup> The report also concluded that, except for Bulgaria, Romania, and Turkey, the candidate countries *should* be able to meet the economic criteria by the time of accession in 2004. Given this uncertainty regarding the overall preparedness of countries for accession, the Commission recommended a monitoring mechanism, whereby countries would be observed with respect to their progress, a general economic safeguard clause to authorize protective measures for situations where “difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area,” and an internal market safeguard clause to authorize any necessary measures to protect the internal market.<sup>85</sup>

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<sup>80</sup> European Commission, *Making a success of enlargement. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (2001).

<sup>81</sup> European Council, Conclusions of the Presidency – Laeken European Council, 14-15 December 2001.

<sup>82</sup> *Ibidem*.

<sup>83</sup> See also European Council, Conclusions of the Presidency – Gothenburg European Council, 21-22 June 2002.

<sup>84</sup> European Commission, *Towards the Enlarged Union. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (2002).

<sup>85</sup> *Ibidem*.

At the first such gathering before an enlargement, parliamentarians from the EU and accession countries in Strasbourg expressed what this process meant for their respective countries and for the Union as a whole. The European Parliament President Pat Cox emphasized the need for effective communication, not by the Commission but by national leaders:

As parliamentarians we are challenged to give leadership, to win the calculus of public consent in the Member States and the Accession States alike. There is no public relations or information campaign substitute for real politics based on conviction and reason. Now is the time for politicians to repossess the enlargement agenda from the experts who have prepared the way. ... We parliamentarians are the ones with direct contact to our constituents. We know the aspirations and anxieties of our peoples. We must take possession of the enlargement agenda and communicate it to our citizens. We must bring vision and give leadership. We are the indispensable democratic link between our constituents, our regions, our countries and the European idea.<sup>86</sup>

Cox also pointed out that the foundations for EU legitimacy rested on European values and national democracy:

[B]y signing up to the unique democratic experiment that is the European Union and by sharing the community of values that it represents—the values of pluralist democracy, respect for the rule of law, the promotion of human rights, market economy, cultural diversity, solidarity and sustainability [–] [t]ogether we can build a continent wide European Union that for the first time in millennia unites us through a Europe of common values, not at the point of a sword, not from the barrel of an ideological gun, but by the free will of free and sovereign peoples.”<sup>87</sup>

One parliamentarian underscored that the common values rested on those standards embedded in the Copenhagen political criteria, as well as the Treaty of the European Union and the Charter of Fundamental Rights. Thus, he clarified that “Europe is not a Christian club and as soon as Turkey meets the political criteria we should open negotiations with a view to Turkish accession.”<sup>88</sup> Another parliamentarian argued that he wanted greater legitimacy of the EU through democracy and common interests.<sup>89</sup> Recognizing the transformed nature of the

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<sup>86</sup> P. Cox, Opening address to the European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

<sup>87</sup> *Ibidem*.

<sup>88</sup> G. Watson, European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

<sup>89</sup> J. Oleksy, European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

European Union, another parliamentarian noted that “[s]overeignty in contemporary times has changed its meaning. ... [EU] [c]ountries have given up their symbols of sovereignty for the common good, common future.”<sup>90</sup> Summing up this unprecedented gathering and debate among future fellow EU parliamentarians, another delegate declared:

Look at where we are today: 27 countries—I wish it were 28—together in this Chamber, with a shared belief in democracy, freedom and peaceful cooperation. We are all willing to share our national sovereignty for our mutual benefit. We must not forget just how far we have come in what is, in historical terms, a short period of time.<sup>91</sup>

Returning to the place where the process began nine years before, the Copenhagen European Council endorsed the Commission’s findings and recommendations regarding accession of the ten Central and Eastern European countries.<sup>92</sup> It described the enlargement as “an unprecedented and historic milestone” in overcoming “the legacy of conflict and division in Europe.”<sup>93</sup> Emphasizing the transformative nature of enlargement, as well as the basis of common values for EU legitimacy, Danish Prime Minister Anders Fogh Rasmussen declared that:

The Copenhagen Summit marked a high point in the history of European cooperation: a triumph for freedom and democracy and a gateway to a better future for all of our peoples. ... Following the Copenhagen Summit, the European Union stands as the overall framework around the Europe of the future: cooperation based on shared values of freedom and the market economy, community spirit and social responsibility, democracy and human rights; effective cooperation that respects the national characteristics of our peoples and states.<sup>94</sup>

On 16 April 2003 in Athens, the final Treaty and Act of Accession was signed and proclaimed that “accession is a new contract between our peoples and not merely a treaty between our states.”<sup>95</sup> Within just two months, the Accession

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<sup>90</sup> A. Aumiller, European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

<sup>91</sup> G. Titley, European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

<sup>92</sup> European Council, Conclusions of the Presidency – Copenhagen European Council, 12-13 December 2002.

<sup>93</sup> *Ibidem*.

<sup>94</sup> A.F. Rasmussen, Address to the European Parliament on the Copenhagen European Council (18 December 2002), available at [www2.europarl.eu.int](http://www2.europarl.eu.int).

<sup>95</sup> Treaty and Act of Accession (2003).

Treaty was ratified by referendums in Malta, Slovenia, Hungary, Lithuania, Slovakia, Poland and the Czech Republic,<sup>96</sup> and eventually ratified in the remaining three countries with entry into force on 1 May 2004. Looking towards the future of a new EU, the Brussels European Council noted that “[i]ntegrating the new Member States into the European family will fulfil the aspirations of European citizens throughout our continent.”<sup>97</sup>

Three years later, Bulgaria and Romania also joined the EU. During this period, their accession was for the most part foreordained, as the European Council committed itself as early as 2002 to “the inclusive and irreversible nature of the enlargement process” and “expresse[d] its support for Bulgaria and Romania in their efforts to achieve the objective of membership in 2007.”<sup>98</sup> These commitments were consistently reiterated throughout the negotiations.<sup>99</sup>

However, one innovation with respect to these two countries involved the possibility of suspending negotiations in “the case of a serious and persistent breach in a candidate State of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded.”<sup>100</sup> On its own initiative or on the request of one third of the Member States, the Commission could recommend the suspension of negotiations and propose the conditions for eventual resumption. The Council would then decide by qualified majority on such a recommendation, after having heard the candidate State, whether to suspend the negotiations and on the conditions for their resumption. The Member States would act in an intergovernmental conference (“IGC”) in accordance with the Council decision, without prejudice to the general requirement for unanimity in the IGC, and the European Parliament would be informed.<sup>101</sup> While this suspension provision was never utilized, it again reflected the EU’s primary concern regarding the ability of candidate countries to meet

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<sup>96</sup> European Council, Conclusions of the Presidency – Thessaloniki European Council, 19-20 June 2003.

<sup>97</sup> European Council, Conclusions of the Presidency – Brussels European Council, 12-13 December 2003.

<sup>98</sup> European Council, Conclusions of the Presidency – Brussels European Council, 24-25 October 2002.

<sup>99</sup> See European Council, Conclusions of the Presidency – Copenhagen European Council, 12-13 December 2002; European Council, Conclusions of the Presidency – Thessaloniki European Council, 19-20 June 2003; European Council, Conclusions of the Presidency – Brussels European Council, 12-13 December 2003; European Council, Conclusions of the Presidency – Brussels European Council, 17-18 June 2004.

<sup>100</sup> European Council, Conclusions of the Presidency – Brussels European Council, 16-17 December 2004.

<sup>101</sup> *Ibidem*.

the Copenhagen political criteria as there were no similar clauses for the economic or *acquis* criteria.

On the eve of accession of Bulgaria and Romania, the European Council held an in-depth debate on enlargement and expressed its consensus on the principles driving accession:

[T]he enlargement strategy based on consolidation, conditionality and communication, combined with the EU's capacity to integrate new members, forms the basis for a renewed consensus on enlargement. The EU keeps its commitments towards the countries that are in the enlargement process. Enlargement has been a success story for the European Union and Europe as a whole. It has helped to overcome the division of Europe and contributed to peace and stability throughout the continent. It has inspired reforms and has consolidated common principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law as well as the market economy. The wider internal market and economic cooperation have increased prosperity and competitiveness, enabling the enlarged Union to respond better to the challenges of globalisation. Enlargement has also enhanced the EU's weight in the world and made it a stronger international partner.<sup>102</sup>

Since Turkey was the only country that was excluded from accession during these two unprecedented and transformative rounds of enlargement, it is worth inquiring whether this decision indeed reflected wider principles of EU legitimacy, or was merely an arbitrary and capricious choice inconsistent with EU principles. The next section turns to this issue.

#### 4. THE QUESTION OF TURKEY

From the beginning of the accession negotiations with Central and Eastern European countries, Turkey was considered officially by the EU, and considered itself, as a candidate country like any of the other applicants. In 1997, the Luxembourg European Council formally commenced Turkey's enlargement process along with the ten Central and Eastern European countries discussed above. For a long time, however, Turkey's failure to meet the Copenhagen political criteria constituted its main barrier to EU accession. Only in 2004, following extensive reforms in Turkey, did the European Commission and EU Council declare that Turkey met the political criteria and could commence accession negotiations.

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<sup>102</sup> European Council, Conclusions of the Presidency – Brussels European Council, 14-15 December 2006.

The Commission's 1998 report observed that "[o]n the political level a number of anomalies in the way the authorities operate, the persistent violations of human rights and important deficiencies in the treatment of minorities are causes for concern."<sup>103</sup> In addition, there was no clear civilian control of the military. In contrast, Turkey performed relatively well with respect to the economic and *acquis* criteria. Thus, the Vienna European Council "noted the need for particular efforts by Turkey to ensure the rule of law in a democratic society according to the Copenhagen criteria. .... The transposition of the *acquis* is not sufficient in itself but must be followed by effective implementation and enforcement."<sup>104</sup>

Subsequently, there was either no or insufficient progress in Turkey's compliance with the political criteria for several years. The 1999 Commission report concluded that there was "little evolution of the situation in Turkey with regard to the problems highlighted in [the previous] year's report."<sup>105</sup> It recommended a series of specific steps and reforms to address these issues, including *inter alia*, enhancing the EU's political dialogue with Turkey, with particular reference to the issue of human rights; adopting an Accession Partnership combined with a National Programme for the adoption of the *acquis*; establishing mechanisms similar to those which operate under the Europe Agreements to monitor implementation of the Accession Partnership; and with a view to harmonising Turkey's legislation and practice, beginning a process of analytical examination of the *acquis*. The Helsinki European Council endorsed the Commission's findings and confirmed that "Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States."<sup>106</sup>

The 2000 Commission report noted certain political improvements, including the signing of two human rights convention, but continued to be "still concerned about shortcomings as regards respect for human rights and the right of minorities and about the constitutional role that the army plays in political life through the National Security Council."<sup>107</sup> Thus, the Commission concluded that the "the situation on the ground has hardly improved and Turkey still does not

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<sup>103</sup> European Commission, *Composite Paper – Reports on progress towards accession by each of the candidate countries* (1998).

<sup>104</sup> European Council, Conclusions of the Presidency – Vienna, 11-12 December 1998, Annex III (General Affairs Council Conclusions on European Union Enlargement).

<sup>105</sup> European Commission, *Composite Paper – Reports on progress towards accession by each of the candidate countries* (1999).

<sup>106</sup> European Council, Conclusions of the Presidency – Helsinki, 10-11 December 1999.

<sup>107</sup> European Commission, *Enlargement Strategy Paper – Report on progress towards accession by each of the candidate countries* (2000).

meet the political Copenhagen criteria.”<sup>108</sup> Likewise, the Feira European Council encouraged Turkey to make “concrete progress, in particular on human rights, the rule of law and the judiciary.”<sup>109</sup>

In 2001, Turkey adopted a series of constitutional reforms, including *inter alia*, narrowing the grounds for limiting freedom of expression, freedom of the press, and freedom of association, and banning the death penalty except for times of war or terrorist crimes. While the Commission described these changes as “a significant step towards strengthening guarantees in the field of human rights and fundamental freedoms,” it “strongly encourage[d] Turkey to bring about substantial improvements, not only in the constitutional provisions and the laws concerning the protection of human rights, but above all in the human rights situation in practice.”<sup>110</sup> In particular, it noted that Turkey’s human rights compliance will depend in large part of the details of implementing legislation and administrative interpretations and applications of the new laws. Endorsing these findings, the Laeken European Council encouraged Turkey “to continue its progress towards complying with both economic and political criteria, notably with regard to human rights.”<sup>111</sup>

In response to the EU Council’s continued demands, Turkey enacted the following year additional political reforms, including lifting the state of emergency in two of the four provinces where it applied. However, the Commission observed that “the reforms contain a number of significant limitations ... on the full enjoyment of fundamental rights and freedoms.”<sup>112</sup> Moreover, it noted that there were several important remaining problems, including use of torture and ill-treatment, incomplete civilian control of the military, and the situation of persons imprisoned for expressing non-violent opinions.

The Copenhagen European Council, at the same time it announced the historical accession in 2004 of ten candidate countries, concluded that Turkey had still not met the political criteria necessary to even begin accession negotiations. It stated:

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<sup>108</sup> *Ibidem*.

<sup>109</sup> European Council, Conclusions of the Presidency – Feira European Council, 19-20 June 2000.

<sup>110</sup> European Commission, *Making a success of enlargement. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (2001).

<sup>111</sup> European Council, Conclusions of the Presidency – Laeken European Council, 14-15 December 2001.

<sup>112</sup> European Commission, *Towards the Enlarged Union. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (2002).

The Union acknowledges the determination of the new Turkish government to take further steps on the path of reform and urges in particular the government to address swiftly all remaining shortcomings in the field of the political criteria, not only with regard to legislation but also in particular with regard to implementation. The Union recalls that, according to the political criteria decided in Copenhagen in 1993, membership requires that a candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The Union encourages Turkey to pursue energetically its reform process. If the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay.<sup>113</sup>

Remarking on the Council's conclusions, Danish Prime Minister Rasmussen noted that the "issue of Turkey came to be one of the main topics in Copenhagen" and emphasized "that it is still an essential requirement that Turkey meet the political criteria before accession negotiations can be opened. This is the way it has to be. Turkey must be treated in the same way as all the other candidate countries."<sup>114</sup>

Two years later, the Commission finally concluded that Turkey met the political criteria and recommended opening negotiations. It observed that:

Following decades of sporadic progress, there has been substantial legislative and institutional convergence in Turkey towards European standards, in particular after the 2002 elections. The political reforms are mainly contained in two major constitutional reforms in 2001 and 2004 and eight legislative packages adopted by Parliament between February 2002 and July 2004. (...) As regards human rights, Turkey recognises the primacy of international and European law. It has aligned itself to a large extent with international conventions and rulings, such as the complete abolition of the death penalty and the release of people sentenced for expressing non-violent opinion.<sup>115</sup>

As with previous candidate countries, the Commission noted that further progress would need to be made with respect to consolidating these political gains and reforming further as the EU political *acquis* developed. In particular, it concluded that Turkey must enact several pending legislative bills (Law on Associations, a new Penal Code, Law on Intermediate Courts of Appeal, the Code on

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<sup>113</sup> European Council, Conclusions of the Presidency – Copenhagen European Council, 12-13 December 2002.

<sup>114</sup> A.F. Rasmussen, Address to the European Parliament on the Copenhagen European Council (18 December 2002), available at [www2.europarl.eu.int](http://www2.europarl.eu.int).

<sup>115</sup> European Commission, *Recommendation of the European Commission on Turkey's progress towards accession* (2004).

Criminal Procedure, law establishing the judicial police, and law on execution of punishments). It also noted the unique challenges associated with Turkish accession due to the country's size and economy. However, Turkey finally overcame the main hurdle towards accession negotiations by fulfilling the political criteria.

The European Council agreed with the Commission's recommendations. It noted that "[t]o ensure the irreversibility of the political reform process and its full, effective and comprehensive implementation, notably with regard to fundamental freedoms and to full respect of human rights, that process will continue to be closely monitored by the Commission."<sup>116</sup> It further decided that, given Turkey's enactment of the six pieces of legislation as required by the Commission, accession negotiations should be opened with Turkey.<sup>117</sup>

Initially, the negotiations process began as with prior candidate countries. For instance, the European Council in 2006 observed that it "reviewed progress made in the *acquis* screening and welcomes the start of substantive accession negotiations with Turkey. Turkey is expected to share the values, objectives and the legal order set out in the treaties."<sup>118</sup> It further noted that negotiations would progress on the basis of the country's merits in meeting the Copenhagen criteria.

Four years onwards, however, the process has stalled as certain EU Member States have opposed continued negotiations with Turkey based on their own national interests (e.g., Cyprus) rather than EU-wide concerns. While talks preceding the accession of Central and Eastern European countries lasted five years, the discussions with Turkey are far from being at a commensurate stage of completion and there appears to be little political will to make any progress. Moreover, though Turkey's size is often put forth as an argument that it would fundamentally restructure the EU, its population is actually smaller than that of the ten countries that gained EU membership in 2004 and any concerns about disproportionate Turkish influence in the Council or Parliament could be negotiated with maximum levels of seats (just as there are minimum levels for countries like Malta).

Overall, the EU's approach with respect to Turkey appears to be inconsistent with the general principles of enlargement highlighted above, which have focused on the commitment of each national democracy to a set of European values, as declared at the Copenhagen European Council in 1993 and enshrined with the Treaty of Amsterdam and the Charter of Fundamental Rights. Turkey

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<sup>116</sup> European Council, Conclusions of the Presidency – Brussels European Council, 16-17 December 2004.

<sup>117</sup> *Ibidem*.

<sup>118</sup> European Council, Conclusions of the Presidency – Brussels European Council, 15-16 June 2006.

has been found by the Commission to have met the primary commitment regarding the political criteria, and thus its accession negotiations should proceed as with prior countries. The EU's failure to do so risks undermining its credibility by making it less likely that its public statements are taken seriously in the future. Since the EU is a complex political order built around a set of common organizing principles, remaining faithful to these commitments by implementing them in practice is of utmost importance to the continuing effectiveness and legitimacy of the union. Though Turkey is unique from prior candidate countries due to its sheer size, low GDP per capita leading to a concern of uncontrolled migration, and (according to some) cultural differences, the EU has thus far been able to address unique features of other countries through transitional periods and safeguards, and could undoubtedly reach agreeable institutional arrangements with Turkey.

## CONCLUSION

The above analysis demonstrates that the enlargement process was a profound expression of the new EU political and legal order based around national democracy and European citizenship. The transformation of diverse countries with varied political histories based on the Copenhagen political criteria, which were the primary factors driving negotiations and accession, was unprecedented in scope and nature. The reforms that each candidate country enacted to conform to European values shows that there is broad consensus on the EU's organizing principles such that only those democracies that comply with certain criteria can be welcomed as EU Member States. By comparison, if similar criteria were made as conditions of membership or financial assistance by other international institutions, there would immediate charges of illegitimate interference in internal affairs. The lack of such resistance shows that there has been a momentous shift in contemporary sources of legitimacy within the EU—a new set of stable expectations of right behavior has emerged.

In particular, the EU's primary focus during the enlargement process on the Copenhagen political criteria (rather than the economic or *acquis* criteria)—and in particular, ensuring the candidate countries' commitment to EU fundamental rights—was justified in light of the concurrent shift in EU decision-making from *de facto* unanimity to QMV. Since an EU democracy could now be outvoted in the Council and an EU decision could be taken against a nation's democratic will, the old EU Member States wanted to ensure that the new Member States would share their core political values, such that all Member States would be expected to pursue the same basic shared interests and could thus credibly claim to act on

behalf of European citizens. Even as a pre-condition of accession negotiations, the EU required candidate countries to meet stringent political criteria reflecting the EU's new orientation around fundamental rights and excluded those countries that failed to do so, particularly based on human rights grounds; in contrast, it extended membership to countries even if they did not fully meet the economic or *acquis* criteria. Thus, the enlargement process was driven primarily by whether countries shared the EU's organizing principles of national democracy and European citizenship, and could contribute to the political project, rather than economic factors and candidate countries' ability to contribute to the single market.

In addition to requiring certain standards to be met before membership, the EU also provided for the future possibility of suspended membership based on a Member State's failure to meet such standards. As Wojciech Sadurski argued, the prospect of enlargement of the EU across Central and Eastern Europe played a significant part in the emergence of the EU's authority under Article 7 TEU to suspend a Member State's voting and other rights by the EU Council when there is a clear risk of serious breach of the Union's fundamental values listed in Article 2.<sup>119</sup> He observed that:

[T]he prospect of major eastward expansion of the Union prompted European decision-makers, advisors, and analysts to become concerned about further political and legal diversification of the European Union—with a distinct undertone that some of this diversity would not be welcome. ... There is some evidence that the anxiety about the prospects of bringing Central European States into the European Union featured prominently in the birth and revision of Article 7 TEU.<sup>120</sup>

Indeed, the very concept of European citizenship serves to encapsulate the various expressions of fundamental values and human rights articulated by the EU as prerequisite to EU membership. Thus, in addition to the four EU treaties assessed in my prior article, the two enlargements analyzed here further validate the thesis that there is a dual structure of legitimacy in the contemporary EU based on national democracy and European citizenship. Just as the legitimate exercise of power by national democracies became circumscribed by the human rights principles articulated at the EU level, EU power against the will of a national democracy should serve only to protect or promote European citizenship.

How should this new form of governance be described? According to some scholars and practitioners, the EU has become a type of empire. In 2003, Rob-

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<sup>119</sup> W. Sadurski, *Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider*, 16 *Columbia Journal of European Law* 385 (2010).

<sup>120</sup> *Ibidem*, pp. 424-25.

ert Cooper, the Director-General for External and Politico-Military Affairs at the Council of the EU, observed that:

The most far-reaching form of imperial expansion is that of the European Union. In the last few years countries all across central Europe have transformed their constitutions, rewritten their laws, adjusted the rules of their markets, set up anti-corruption bodies and adopted a huge volume of EU legislation—all in the interests of becoming members of the Union. (...) In another age, such changes would have taken place only in the context of a takeover by a colonial power, but today's reforms have been undertaken voluntarily with a view to joining the empire, securing a seat at its table and a voice in its government. This form of empire is likely to last, since its co-operative structure gives it a lasting legitimacy.<sup>121</sup>

Similarly, Jan Zielonka argued more recently that the EU is akin to a medieval form of empire, such as the Holy Roman Empire.<sup>122</sup>

However, if the EU is an empire, who is the emperor? Even more importantly, the EU has completely different bases of power from traditional empires and, crucially, has no independent instrument of violence in the form of a police force, security services, or a military on which all empires have relied. Moreover, which democracy or free society would want submit to formal imperial rule rather than immediately invoke its right of exit? The novelty of this political experiment has resulted in linguistic confusion due to the inadequacy of established political concepts, thus demanding a new theory and understanding.

As the author argued elsewhere, the best concept to encapsulate the EU political project is the idea of liberal international democracy—an order wherein primary political decision-makers are elected by the people they govern (democratic element) and human rights (liberal element) are, as a last resort, protected by international institutions (international element).<sup>123</sup> This organizing principle is evident in EU's foundational documents and enlargement across Central and Eastern Europe, and reflects a dual structure of legitimacy based on European citizenship and national democracy.

Given the legitimating bases of the contemporary EU, national democracy is no longer supreme, but can be overridden at the EU level on grounds of protecting or promoting human rights as delineated in the Charter and EU citizenship. However, this implicit compromise of effective actors within the EU, reflecting

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<sup>121</sup> See, e.g., R. Cooper, *The Breaking of Nations*, Atlantic Monthly Press, New York: 2003, p. 71.

<sup>122</sup> Zielonka, *supra* note 7.

<sup>123</sup> See Szewczyk, *supra* note 17.

their common interests, has not yet been codified. It is an unwritten understanding exemplified in real-world policies and practice, which has worked thus far but should be codified to ensure greater effectiveness of decision-making in the future.

Consider the Luxembourg Compromise that broke through the deadlock within the European Community in 1966 and enabled binding decisions through a *de facto* veto for each Member State in case of self-perceived vital national interests. In its communiqué, the Council stated:

I. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, *very important interests* of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, *to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community*, in accordance with Article 2 of the Treaty.

II. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.

III. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.

IV. The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure.<sup>124</sup>

As noted in the Introduction, the Luxembourg Compromise has fallen into desuetude with the establishment of the EU. Even though it has not been formally renounced, no Member State has been able to effectively use it in the contemporary EU and there are only sparse accounts of any Member State even contemplating to invoke the Luxembourg veto. In short, it does not play an active role in EU decision-making.

However, given that over ninety percent of EU Council decisions are still reached with unanimity, even when authorized under QMV, it appears *as if* consensus is still required based on ambiguity as to the content of potential unwritten (and perhaps even unspoken) rules.<sup>125</sup> Thus, the promise of QMV decision-making is not yet fully realized and calls for a clarification of the underlying bargain among Member States voting in the Council.

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<sup>124</sup> Final Communiqué of the extraordinary session of the Council, Luxembourg (17-18, 28-29 January 1966) (emphases added). For a comprehensive discussion of the history of the Luxembourg Compromise, see J.M. Palayret, H.S. Wallace, P. Winand (eds.), *Visions, Votes, and Vetoes: The Empty Chair Crisis and the Luxembourg Forty Years On*, Peter Lang, Brussels: 2006.

<sup>125</sup> See Szewczyk, *supra* note 2.

In light of the analysis and arguments presented in the dissertation, the EU Council should adopt the following communiqué, modeled after the one that gave rise to the Luxembourg Compromise:

I. In the case of decisions which may be taken by qualified majority vote on a proposal of the Commission, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their common interests and those of the Community.

II. With regard to the preceding paragraph, the Members of the Council consider that EU common interests are encapsulated in the notion of European citizenship.

III. In the event of a failure to reach unanimity in the Council, the Council shall explain how the decision reached by qualified majority promotes or protects rights and privileges of European citizens.

IV. In future extensions of qualified majority voting to a new decision area, the Member States shall explain how the area relates to rights and privileges of European citizens.

Given the centrality of fundamental rights, this new consensus could be dubbed as the Strasbourg Compromise.

In practice, the Strasbourg Compromise would require Member States in the EU Council to justify the use of QMV through explicit reference to the EU Charter and ways in which a QMV decision protects or promotes rights and privileges of EU citizens. Such legitimation should take place during the actual debates within the Council, as well as in the formal documentation of the Council's decision. It would not be reviewable by the European Court of Justice, but its absence could be invoked by the European Parliament as grounds for not voting for a proposal involving co-decision, or by subsequent Councils in reversing a particular QMV decision. Most importantly, it would be subject to review and potential resistance in the court of public opinion, where the effectiveness of QMV decisions would rely on their persuasiveness that they serve common interests of EU citizens. By codifying and implementing the Strasbourg Compromise, the EU can enhance its legitimacy and thus the long-term effectiveness of its decisions and overall political order.

One possible—and highly beneficial—consequence of this approach would be the development of a type of EU Council jurisprudence legitimating QMV decisions, much as constitutional courts have developed case law justifying judicial review. This codified body of knowledge could guide the EU in further extensions of, or limits on, QMV decision-making. Those categories that could be reasonably linked to the EU Charter and promotion and protection of EU citizenship should

fall within QMV; those policy areas that are not reasonably connected to the Charter should probably require unanimous voting of the Member States. The EU Council's jurisprudence could also serve as a model for other international institutions, which face similarly inescapable questions of legitimacy that have been insufficiently addressed in the current literature.

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The implications of this article's argument are potentially very broad and will be delimited by its coherence in implementation. One example illustrating the outlined theory in practice is the EU's governance in Bosnia and Herzegovina.<sup>126</sup> Both constitutive processes of establishment and enlargement should be referenced and studied further, as the EU continues its unique project in political cooperation and sharing of authority. This article, along with the author's prior analyses of EU treaties and EU policy in Bosnia, should serve as useful starting points and guidelines in this endeavor.

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<sup>126</sup> See *ibidem*.