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The Impact of the War in Ukraine on the Enlargement of the European Union: ‘Securing the Blessings of Liberty’ and its Challenges

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Abstract

This article examines how the war in Ukraine has had an impact upon the enlargement of the European Union (EU) and transnational cooperation in Europe. It explains how, in response to Russia’s aggression against Ukraine, the EU has relaunched its enlargement process (notably, by opening accession negotiations with Ukraine), promoted the establishment of a new European Political Community and deepened its ties with other regional organisations, like the Council of Europe and the North Atlantic Treaty Organization, and the United Kingdom. It is argued that the return of large-scale warfare to the European continent for the first time since the end of World War II has contributed to reaffirming the role of the EU as a beacon of liberty, peace, security and prosperity, and highlighted the dynamism of the European integration project. Nevertheless, a number of challenges lie ahead, especially regarding enlargement, including both the candidates’ preparation and the EU’s own readiness. The article therefore proceeds to map the debate about EU reform, the ongoing stalemate and the open questions concerning the future of Europe in order to illustrate fully the impact of the war in Ukraine on the enlargement project.

Keywords: European law; public international law; European Union; European Union enlargement; Ukraine War; transnational cooperation

1. Introduction

Wars have transformative consequences.¹ On 28 February 2022, four days after Russia began a large-scale military invasion against Ukraine, the Ukrainian President, Prime Minister and Chairman of Parliament jointly made an application to the European Union (EU) requesting EU membership for Ukraine.² This was quickly followed

¹ This article reflects the state of law and policy as at 30 September 2024.

² Council of the European Union (Council), ‘Application of Ukraine for membership of the European Union – transmission to Member States’ parliaments’ (Communication) CM 2003/22.

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by an application for EU membership from Moldova.³ The war has also revitalised the accession process for other candidate countries in Eastern Europe and the Western Balkans, which had previously stalled. The EU no longer exhibits its previous reluctance in relation to expansion, with European Commission (Commission) President Ursula von der Leyen hailing the prospects of enlarged union as ‘an investment in [EU] security’,⁴ and European Council President Charles Michel indicating his ambition to accelerate the EU’s eastward expansion, completing the entire process by 2030.⁵

The purpose of this article is to examine, from an EU law and policy perspective, the key steps taken by the EU towards enlargement and transnational cooperation more broadly since Russia’s breach of international law.⁶ In particular, the article provides an overview of the start of the EU accession negotiations with Ukraine and Moldova, the grant of candidate status to Georgia and Bosnia and Herzegovina, and the relaunch of the enlargement process with Albania, Kosovo, Montenegro, North Macedonia and Serbia which, together with Türkiye, were already candidate countries on the waiting list to join the EU. The article also describes the EU’s other actions to increase cooperation and connections in the aftermath of Russia’s aggression, including promoting the establishment of a new forum—the European Political Community (EPC)—to cooperate with the wider Europe before the completion of the enlargement process, and deepening its partnerships with other European and transatlantic entities like the Council of Europe (CoE) and the North Atlantic Treaty Organization (NATO), as well as with other European States, including former member: the United Kingdom (UK).

The EU has responded to the first large-scale war on the European continent since the end of World War II by opening a path to EU membership for Ukraine and other Eastern European States, and by setting up or strengthening other organisations for transnational cooperation among like-minded States. In response to the security and independence of Ukraine and other post-Soviet States being threatened by Russia’s military aggression or its destabilisation efforts, the EU has confirmed its attractiveness as a beacon of freedom, democracy, security and prosperity, and the European integration project has demonstrated its ongoing dynamism. The decision by Ukraine to request EU membership within days of the full-scale Russian aggression is a testament to the fact that membership of the EU is widely regarded as the best way to preserve freedom. With words that are world-famous, the preamble of the Constitution of the United States of America speaks of the

³ Republic of Moldova, ‘Republican Constitutional Referendum to be Held in Moldova on 20 October 2024’ (Press Release, 16 May 2024) <https://www.eas.europa.eu/delegations/moldova/republic-moldova-statement-high-representative-behalf-european-union-constitutional-referendum-and_en>.

⁴ European Commission (Commission), ‘Statement by President Ursula von der Leyen on the 2023 enlargement package and the new growth plan for the Western Balkans’ (Statement) 23/5641 <https://ec.europa.eu/commission/presscorner/detail/el/statement_23_5641>.

⁵ Commission, ‘Speech by President Charles Michel’ (Bled Strategic Forum, Bled, 28 August 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/08/28/speech-by-president-charles-michel-at-the-bled-strategic-forum/>>.

⁶ See UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Provisional Measures) [2022] ICJ Rep 211.

goal to 'secure the blessings of liberty' as one of the core functions of government. Borrowing these rhetorical words, it could be argued that the EU treaties perform a similar function in securing the blessings of liberty: through the enlargement process the EU provides a mechanism to achieve that hopeful promise. At the same time, the EU has also promoted the establishment of a new forum—the EPC—to connect with potential candidate countries prior to enlargement, as well as with other European States. Moreover, the EU has fostered closer partnerships with other organisations such as the CoE and NATO, which also pool sovereignty among their Members, albeit with mechanisms which are different from those of the EU.

Nevertheless, the prospect of an EU with 35 or more Member States raises profound internal constitutional challenges, which this article will highlight. To begin with, the experience of prior enlargements has revealed that pre-accession conditionality has not always worked, particularly due to the increasing phenomenon of democratic backsliding in a number of new Member States, such as Hungary and Poland, known as the 'rule of law crisis'.⁷ There is also a concern that future enlargements would further strain the governance structures of the EU, which heavily depend on unanimous decision-making in the Council of the EU (Council) and the European Council. In fact, if making decisions within the EU with 27 Member States has proved difficult—especially in areas related to common foreign and security policy (CFSP) and financial matters—increasing the number of Member States to a possible 35 will only compound these challenges. In this context, there is a growing call for the EU to adjust its institutional structures to be ready for enlargement. However, as a result of national vetoes, the EU has thus far failed to make any meaningful advances along the path of treaty reform, and thus it remains unprepared for these challenges of enlargement.

The article is structured as follows. Section 2 examines the core steps that the EU has taken in response to Russia's war of aggression to support the aspiration for freedom of Ukraine and other States in Eastern Europe and the Western Balkans, including the relaunch of the enlargement process, the establishment of the EPC and the strengthening of partnerships with the CoE, NATO and other European States like the UK. Section 3 discusses the major consequences for EU enlargement policy of the decision to start accession negotiations with Ukraine in response to Russia's aggression and highlights the dynamic nature of the current European governance landscape. Section 4 highlights the constitutional challenges that enlargement poses for the EU, and underlines the limited preparation of both the candidate countries and the EU itself, given its inability to agree to much needed reforms. Section 5 concludes, reflecting on the open questions about the future of Europe.

2. The EU's response to Russian aggression

2.1. The relaunch of the enlargement process

The war in Ukraine has had major consequences for the EU enlargement process. As is well known, following Croatia's accession to the EU in 2013, the enlargement

⁷ See W Sadurski, *Poland's Constitutional Breakdown* (OUP 2019); A Sajo, *Ruling by Cheating* (CUP 2021).

process had stalled. Despite several Western Balkan nations having formally taken steps on the path to join the EU, in 2014 Commission President Jean-Claude Juncker announced that no new State would join the EU during his mandate.⁸ In 2019, the decision to authorise accession talks with Albania and North Macedonia was blocked by France, with the support of Denmark and the Netherlands.⁹ France argued that reform of the accession process was required to better address the challenges faced by these States, with increased political governance.¹⁰ In the absence of the necessary unanimity within the European Council, the issue was referred back to the Commission, which proposed a new methodology for accession negotiations.¹¹ In the end, however, no real progress occurred and no new State was admitted into the EU.

The war in Ukraine profoundly changed the status quo leading to a revitalisation of the enlargement process. On 24 June 2022—just four months after the start of Russia's aggression—the European Council granted Ukraine and Moldova the status of EU candidate countries, while also recognising Georgia's potential to become a candidate country.¹² On 15 December 2022, the European Council granted candidate status to Bosnia and Herzegovina.¹³ The Commission Communication on EU enlargement policy on 8 November 2023 recognised the new momentum in the EU's attitude to enlargement, hailing its benefits for the EU and noting the opportunity for advancing the accession negotiations with the Western Balkan and Eastern European States.¹⁴ On this basis, on 15 December 2023, the European Council decided to open accession negotiations with Ukraine and Moldova,¹⁵ granted candidate status to Georgia¹⁶ and indicated its willingness to open accession talks with Bosnia and Herzegovina¹⁷ as well as to advance such talks with North Macedonia.¹⁸ Only three months later, following a positive assessment by the Commission,¹⁹ the European Council decided to open accession

⁸ J Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (Commission, Strasbourg, 15 July 2014) 12 <https://commission.europa.eu/system/files/2019-09/juncker-political-guidelines-speech_en.pdf>.

⁹ European Council Conclusions EUCO 23/19 of 18 October 2019, para 5.

¹⁰ See Government of France, 'Reforming the European Union Accession Process' (November 2019) <<https://www.politico.eu/wp-content/uploads/2019/11/Enlargement-nonpaper.pdf>>.

¹¹ Commission, 'Enhancing the accession process – a credible EU perspective for the Western Balkans' (Communication) COM (2020) 57 final, 2–3.

¹² European Council Conclusions EUCO 24/22 of 24 June 2022, para 10.

¹³ European Council Conclusions EUCO 34/22 of 15 December 2022, para 30.

¹⁴ Commission, '2023 communication on EU enlargement policy' (Communication) COM (2023) 690 final.

¹⁵ European Council Conclusions EUCO 20/23 of 15 December 2023, para 15.

¹⁶ *ibid* para 16.

¹⁷ *ibid* para 17.

¹⁸ *ibid* para 18.

¹⁹ Commission, 'Commission Proposes to Open EU Accession Negotiations with Bosnia and Herzegovina and Updates on Progress Made by Ukraine and Moldova' (Press Release, 12 March 2024) <https://neighbourhood-enlargement.ec.europa.eu/news/commission-proposes-open-eu-accession-negotiations-bosnia-and-herzegovina-and-updates-progress-made-2024-03-12_en>.

negotiations with Bosnia and Herzegovina,²⁰ suggesting that the expedited process for Ukraine's candidacy may have had a knock-on effect on the speed of developments for other candidate countries.

The official accession negotiations with Ukraine and Moldova began on 25 June 2024 at the first intergovernmental conference on enlargement.²¹ On the same day, the EU also published its general position, including its negotiating framework, which was formally approved by the Council on 21 June 2024.²² The EU general position hailed the 'historic moment ... which marks a milestone in [the EU–Ukraine] relationship'²³ and emphasised how the accession of Ukraine to the EU had particular significance in light 'of Russia's unjustified and unprovoked war of aggression'.²⁴ It affirmed that accession talks would be based on the Copenhagen criteria on the eligibility for EU membership and the new accession methodology,²⁵ thereby clarifying that the discussion would begin with the fundamental aspects relating to democracy, the rule of law and human rights, and that continuing respect of these standards will 'determine the overall pace of the negotiations'.²⁶ The negotiating framework further specified the principles, procedures and substance of the negotiations, stating that their pace 'will depend on Ukraine's progress in meeting the requirements for membership',²⁷ but that the EU remained open to forms of 'accelerated integration and "phasing in" to individual EU policies'.²⁸ The negotiating framework also made explicit that the Commission retained the power to suspend negotiations, subject to a reverse qualified majority vote in the Council, in the event 'of a serious and persistent breach by Ukraine of the values on which the [EU] is founded',²⁹ while reaffirming the role of the Council, acting by unanimity, in deciding 'on the provisional closure of'³⁰ each of the 32 negotiating chapters.³¹

2.2. *The Establishment of the European Political Community*

Cognisant of the fact that despite good intentions and renewed efforts the enlargement process might take years, the EU also decided to establish a new forum in response to the war in Ukraine: the EPC. French President Emmanuel

²⁰ European Council Conclusions EUCO 7/24 of 22 March 2024, para 30.

²¹ Council and European Council, 'EU Opens Accession Negotiations with Ukraine' (Press Release, 25 June 2024) <<https://www.consilium.europa.eu/en/press/press-releases/2024/06/25/eu-opens-accession-negotiations-with-ukraine/>>.

²² See Council and European Council, 'General EU Position' (Intergovernmental Conference on the Accession of Ukraine to the European Union, Doc AD 9/24, Luxembourg, 21 June 2024) <<https://www.consilium.europa.eu/media/hzmfw1ji/public-ad00009en24.pdf>>.

²³ *ibid* para 2.

²⁴ *ibid* para 3.

²⁵ *ibid* para 8.

²⁶ *ibid* para 12.

²⁷ See Council and European Council (n 22) Negotiating Framework, para 2.

²⁸ *ibid* para 13.

²⁹ *ibid* para 16.

³⁰ *ibid* para 49.

³¹ *ibid* annex II.

Macron launched the idea to create it on 9 May 2022³² at the concluding event of the Conference on the Future of Europe.³³ According to President Macron:

Cette organisation européenne nouvelle permettrait aux nations européennes démocratiques adhérant à notre socle de valeurs de trouver un nouvel espace de coopération politique, de sécurité, de coopération en matière énergétique, de transport, d'investissements, d'infrastructures, de circulation des personnes et en particulier de nos jeunes.³⁴

The EPC would serve as a larger forum connecting the EU to States which, like Ukraine, seek to join it, but also States like the UK, which are no longer members. As President Macron stated, joining the EPC ‘ne préjugerait pas d’adhésions futures à l’Union européenne, forcément, comme elle ne serait pas non plus fermée à ceux qui ont quitté cette dernière’.³⁵

The European Council was swift to endorse the EPC project on 23–24 June 2022, at the same meeting at which it granted Ukraine candidate status for EU membership, and the EU played a lead role in organising this new forum. The first meeting of the EPC was held in Prague, Czech Republic—the EU Member State then holding the rotating presidency of the Council—on 6 October 2022. The second meeting of the EPC occurred in Chisinau, Moldova, on 1 June 2023. The third meeting took place in Granada, Spain, in October 2023, again under the aegis of the rotating presidency of the Council. The fourth meeting was hosted by the UK, a former EU Member State, in July 2024, with a fifth meeting in Budapest, Hungary, in November 2024. In all, 44 European States participated in the first EPC meeting in October 2022³⁶—including all 27 EU Member States and the leaders of the EU institutions, plus the UK, Ukraine and 15 other European States, and subsequent meetings have been attended by 45 States (Andorra and Monaco joining, but Türkiye absent).³⁷ Essentially, the Member States of the EPC mirror almost exactly the Member States of the CoE, with minor exceptions such as Kosovo, which is part of the EPC but not the CoE, and San Marino, which is part of the CoE but not the EPC. Since in the absence of a founding document, attendance of meetings is essentially the sole determinant of membership to the EPC, there is some ambiguity with respect to Türkiye’s membership, as it attended the first EPC meeting but not the subsequent ones.

³² See E Macron, ‘Closing Event: Speech by Emmanuel Macron, President of the French Republic’ (Conference on the Future of Europe, Strasbourg, 9 May 2022) <https://multimedia.europarl.europa.eu/en/video/conference-on-the-future-of-europe-closing-event-speech-by-emmanuel-macron-president-of-the-french-republic_I224701>.

³³ See Section 4.3.

³⁴ See Macron (n 32) (author’s translation: ‘This new European organisation would allow European democratic nations abiding by our core set of values to find a new space for cooperation on political affairs, security, in the field of energy, transport, investment, infrastructure, movement of persons, and in particular of our youth.’).

³⁵ *ibid* (author’s translation: ‘would not foreclose future accession to the European Union, necessarily, as it would not be closed to those who have left the latter’).

³⁶ See Council and European Council, ‘Meeting of the European Political Community’ (6 October 2022) <<https://www.consilium.europa.eu/en/meetings/international-summit/2022/10/06/>>.

³⁷ See Council and European Council, ‘Meeting of the European Political Community’ (1 June 2023) <<https://www.consilium.europa.eu/en/meetings/international-summit/2023/06/01/>>.

At this stage, the EPC remains fairly underdeveloped, and is more a forum than an organisation.³⁸ As Bruno de Witte has pointed out, the EPC founding summit ‘did not adopt any formal written document apart from press releases by various participants, nor did it create a secretariat or other organ for the EPC’.³⁹ From this point of view, ‘the EPC is not an organisation, nor a structure, nor even a process’.⁴⁰ However, the use of the term ‘Community’ to define the EPC is not meaningless: the EU emerged out of the European Coal and Steel Community and European Economic Community, and indeed a European Political Community was negotiated in 1954 in conjunction with the European Defence Community, which did not enter into force at that time. As such, while the concrete achievements of the EPC are limited thus far, the forum has potential. It could serve not only as an antechamber for EU membership—admittedly the primary driver for this initiative, born out of the awareness that EU enlargement will take some time⁴¹—but it could also become a platform to increase cooperation between the EU and the wider Europe, from the UK to Ukraine.

2.3. The renewal of EU partnerships with the CoE, NATO and other States

Finally, the war in Ukraine has led the EU to strengthen its partnerships with other regional organisations, including the CoE and NATO, and to deepen bilateral cooperation with like-minded European States, including the UK, Switzerland⁴² and Norway.⁴³

First, the EU strengthened its partnership with the CoE. Originally established in 1949, the CoE was the first post-World War II forum for pan-European cooperation. It focuses on the protection of fundamental rights, the promotion of democracy and the rule of law, and provides the institutional framework for the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁴⁴ and its Court, the European Court of Human Rights (ECtHR), which since the approval

³⁸ See also L. Lonardo, ‘The European Political Community: A Nebulous Answer to the Strategic Question of How to Unite Europe’ (2023) 8 *EurPapers* 755.

³⁹ B. De Witte, ‘The European Political Community and the Future of the EU’ (forthcoming, on file with author) 1.

⁴⁰ *ibid.*

⁴¹ See also R. Petrov and C. Hillion, ‘“Accession through War” – Ukraine’s Road to the EU’ (2022) 59 *CMLRev* 1289.

⁴² See, e.g. Council, ‘EU–Switzerland: Council Adopts Mandate for Negotiations on Future Relationship’ (Press Release, 12 March 2024) <<https://www.consilium.europa.eu/en/press/press-releases/2024/03/12-eu-switzerland-council-adopts-mandate-for-negotiations-on-future-relationship/>>; Mission of Switzerland to the EU, ‘Federal Council Approves Parameters for EU Negotiating Mandate’ (Press Release, 21 June 2023) <<https://www.eda.admin.ch/missions/mission-eu-brussels/en/home/news/news.html/content/eda/en/meta/news/2023/6/21/9591>> (calling for a reopening of negotiations with the EU for an institutional framework agreement).

⁴³ See, e.g. EU External Action Service, ‘Security and Defence: EU and Norway Sign New Partnership’ (Press Release, 28 May 2024) <https://www.eeas.europa.eu/eeas/security-and-defence-eu-and-norway-sign-new-partnership_en>.

⁴⁴ See European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as amended by Protocol Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR). See also S. Schmahl and M. Breuer (eds), *The Council of Europe: Its Law and Policies* (OUP 2017).

of Protocol No 11 to the ECHR in 1998 acts as the court of last instance for judicial review of human rights claims raised against any of the State Parties.⁴⁵ The CoE has the widest membership on the European continent with 46 Member States: all 27 EU Member States, as well as 19 others. Russia was also a Member, but after its aggression against Ukraine the CoE decided to expel it.⁴⁶ Withdrawal by a Member State had only occurred once before, when Greece temporarily exited the CoE and the ECHR in the 1960s during a period of military dictatorship following the 1967 coup, but it rejoined in 1974 with a return to democracy.⁴⁷

Given the similarities and partial overlap between the EU and the CoE, since the 1990s multiple efforts have been made institutionally to link these organisations and to increase the coherence of the European system of human rights protection.⁴⁸ Article 6(2) of the Treaty on European Union (TEU), as modified by the Treaty of Lisbon, entered into force in 2009 and states that the EU ‘shall accede to the [ECHR],’⁴⁹ while Article 59 ECHR, as modified by Protocol No 14 to the ECHR, which entered into force in 2010, states that ‘the [EU] may accede to this Convention’.⁵⁰ However, the EU’s attempts at accession have failed: first in 1996⁵¹ and, more recently, in 2013, the European Court of Justice (ECJ) invalidated a draft treaty negotiated by the EU to accede to the ECHR.⁵² In the much-discussed Opinion 2/13,⁵³ the ECJ held inter alia that the draft accession agreement negatively interfered with the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union and gave to the ECtHR greater jurisdiction on foreign affairs than that the ECJ has under Article 24 TEU—a stance that seemed to close the door to EU accession to the ECHR. With Russia’s aggression against Ukraine, however, in January 2023 the EU reaffirmed its support for ‘the [CoE], the [ECtHR] and the Human Rights Convention system as the principal instruments for upholding

⁴⁵ See F Fabbrini, *Fundamental Rights in Europe* (OUP 2014).

⁴⁶ Council of Europe (CoE), ‘The Russian Federation is Excluded from the Council of Europe’ *Council of Europe Newsroom* (Strasbourg, 16 March 2022) <<https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>>.

⁴⁷ See F Cowell, ‘Council of Europe Expulsion and the European Convention on Human Rights: The Foundations of Involuntary Treaty Withdrawal’ (2025) 74 ICLQ, doi:10.1017/S0020589325000077 (this issue).

⁴⁸ See also F Fabbrini and J Larik, ‘The Past, Present and Future of the Relations between the European Court of Justice and the European Court of Human Rights’ (2016) 35 YEL 1.

⁴⁹ Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU).

⁵⁰ ECHR (n 44).

⁵¹ Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:1996:140.

⁵² Opinion 2/13 *Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement with the EU and FEU Treaties* ECLI:EU:C:2014:2454.

⁵³ *ibid.* See also Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 267, and V Kosta, N Skoutaris and V Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014).

human rights in Europe'⁵⁴ and intensified its efforts to secure the EU's accession to the ECHR.⁵⁵

Second, the EU also strengthened its cooperation with NATO. As a defensive military alliance set up by the United States of America (US), Canada and ten Western European States in 1949 in the aftermath of World War II, NATO progressively expanded during the Cold War, incorporating West Germany in 1955, and eventually including most of Central and Eastern Europe after the fall of the Berlin wall.⁵⁶ Following Russia's aggression against Ukraine, in 2022 Finland and Sweden—two EU Member States who had historically embraced the principle of neutrality—applied together to join NATO and were admitted to the alliance in 2023 and 2024, respectively.⁵⁷ The accession of Finland and Sweden is highly significant, not only because it increased the number of NATO Member States to 32, but also because it reduced the number of EU Member States who are not NATO Member States to just four relatively small States, namely Austria, Cyprus, the Republic of Ireland and Malta.

Building on this reality, the EU itself has upgraded its institutional partnership with NATO, which, as explicitly recognised in Article 42(7) TEU, remains 'for those States which are members of it, ... the foundation for their collective defense and the forum for its application'.⁵⁸ In January 2023, the leaders of the two organisations released a joint declaration on EU–NATO cooperation—the third ever in their history⁵⁹—in which they reaffirmed their 'strategic partnership'⁶⁰ and committed to take it 'to the next level'⁶¹ with cooperation on 'growing geo-strategic competition, resilience issues, protection of critical infrastructure, emerging and disruptive technologies, space, the security implications of climate change, as well

⁵⁴ See Council, 'Conclusions on EU Priorities for Cooperation with the Council of Europe 2023–2024' (Press Release, 30 January 2023) para 16 <<https://www.consilium.europa.eu/en/press/press-releases/2023/01/30/conclusions-on-eu-priorities-for-cooperation-with-the-council-of-europe-2023-2024/>>.

⁵⁵ See also EU External Action Service, 'Major Progress on the Path to EU Accession to the ECHR: Negotiations Concluded at Technical Level in Strasbourg' (Press Release, 31 March 2023) <https://www.eeas.europa.eu/delegations/council-europe/major-progress-path-eu-accession-echr-negotiations-concluded-technical-level-strasbourg_en?s=51>.

⁵⁶ See W Jacoby, *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe* (CUP 2004).

⁵⁷ See C Bildt, 'NATO's Nordic Expansion' (*Foreign Affairs*, 26 April 2022) <<https://www.foreignaffairs.com/articles/europe/2022-04-26/natos-nordic-expansion>>.

⁵⁸ TEU (n 49).

⁵⁹ See 'Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary-General of the North Atlantic Treaty Organization' (Warsaw, 8 July 2016) <<https://www.europarl.europa.eu/delegations/en/dnat/documents/eu-texts>>; 'Joint Declaration on EU–NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary-General of the North Atlantic Treaty Organization' (Brussels, 10 July 2018) <<https://www.consilium.europa.eu/en/press/press-releases/2018/07/10/eu-nato-joint-declaration/>>.

⁶⁰ See Council and European Council, 'Joint Declaration on EU–NATO Cooperation' (Press Release, 10 January 2023) para 9 <<https://www.consilium.europa.eu/en/press/press-releases/2023/01/10/eu-nato-joint-declaration-10-january-2023/>>.

⁶¹ *ibid* para 12.

as foreign information manipulation and interference'.⁶² Indeed, the EU is increasingly a key institutional partner to NATO on a plurality of war-related and post-conflict tasks.⁶³

Third, in response to the war in Ukraine, the EU rebuilt its relationship with the UK. Following the Brexit referendum of June 2016⁶⁴ and complex negotiations, the UK withdrew from the EU in January 2020 in accordance with the terms of a Withdrawal Agreement (WA).⁶⁵ Subsequently, the EU and the UK negotiated a Trade and Cooperation Agreement (TCA) regulating their new bilateral relationship, which entered into force provisionally in January 2021, and fully in May 2021.⁶⁶ At the insistence of the UK Government led by Prime Minister Boris Johnson, however, the TCA established only a bare-bones free trade agreement between the parties, with limited free movement of goods, minimal cooperation in justice and home affairs and no partnership in defence and security. Indeed, the UK pursued a 'sovereignty first' Brexit, and its 'preoccupation with sovereignty, which dominated its discourse, demands and action, dramatically narrowed what the UK could agree to and what the EU could offer'.⁶⁷

Following Russia's invasion of Ukraine, however, a major rapprochement between the EU and the UK occurred, which was, in part, due to changes in UK Government leadership. In particular, in the autumn of 2022 the UK asked to join the EU's Permanent Structured Cooperation (PESCO) Project on Military Mobility as a third country, which the Council readily accepted.⁶⁸ Moreover, in February 2023, then Prime Minister Rishi Sunak brokered a deal with the EU to adjust the Protocol on Ireland/Northern Ireland (Protocol), which is attached to the WA,⁶⁹ leading to the approval of the Windsor Framework.⁷⁰ By establishing a border in the Irish Sea the Protocol had caused much tension in Northern Ireland.⁷¹ Through technical changes aimed at reducing the bureaucratic impact of custom checks on the movement of goods across the Irish Sea, the Windsor

⁶² *ibid.*

⁶³ See P Mariani and D Genini, 'EU and NATO: The Legal Foundation of an Extraordinary Partnership' (2023) 4 *EurojusRiv* 187.

⁶⁴ See F Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017).

⁶⁵ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7. See also F Fabbrini (ed), *The Law & Politics of Brexit, Vol II: The Withdrawal Agreement* (OUP 2020).

⁶⁶ F Fabbrini (ed), *The Law & Politics of Brexit, Vol IV: The Protocol on Ireland/Northern Ireland* (OUP 2024).

⁶⁷ B Laffan, 'Sovereignty' in F Fabbrini (ed), *The Law & Politics of Brexit, Vol III: The Framework of New EU–UK Relations* (OUP 2021) 240, 250; see also P Syrpis and C Gammage, 'Sovereignty Fictions in the United Kingdom's Trade Agenda' (2022) 71 *ICLQ* 563.

⁶⁸ Council, 'PESCO: The UK Will Be Invited to Participate in Military Mobility Project' (Press Release, 15 November 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/11/15/pesco-the-uk-will-be-invited-to-participate-in-military-mobility-project/>>.

⁶⁹ Protocol on Ireland / Northern Ireland [2020] OJ L29/102. See also Fabbrini (n 66).

⁷⁰ Commission and Government of the United Kingdom (UK Government), 'Windsor Political Declaration by the European Commission and the Government of the United Kingdom' (Windsor, 27 February 2023) <https://commission.europa.eu/publications/windsor-political-declaration-european-commission-and-government-united-kingdom_en>.

⁷¹ See D Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' in Fabbrini (n 67) 49.

Framework contributed to rebuilding trust between the EU and the UK,⁷² and the dividends of a more positive EU–UK relationship quickly spilled over into other areas, resulting in agreements on financial services,⁷³ research and space⁷⁴ and trade, among others.⁷⁵ Furthermore, following the landslide victory of the Labour Party in the UK general election on 4 July 2024, discussions have been opened on using the five-year review of the TCA’s implementation in 2026 to expand EU–UK cooperation into new sectors—such as via an ad hoc security treaty—on the understanding that democracies based on the rule of law have to work together to face the return of war on the European continent.⁷⁶

3. The consequences of the EU’s response

The EU’s response to the war in Ukraine in the field of enlargement and external relations reveals the dynamism of the European integration project. Most significantly, the EU’s relaunch of its enlargement policy ‘as a geo-strategic investment’⁷⁷ confirms EU membership as a key facilitator of freedom, peace, security and prosperity. As such, one of the most important consequences of Russia’s aggression against Ukraine has been to open the doors of the EU to up to nine new States from the Western Balkans and Eastern Europe, thereby setting the stage for a much larger EU. As Ukraine Foreign Minister Dmytro Kuleba pointed out, ‘Ukraine acted as a true European integration locomotive for Moldova, Georgia, and the Western Balkan countries, as well as a catalyst for the historic process of the European Union expanding to Europe’s natural political borders’.⁷⁸ When the Brexit vote occurred in 2016, many were concerned that this would be the end of European integration and that other Member States would follow the UK in leaving the EU. Instead, eight years later, the EU is as alive as ever and gearing towards a new eastward expansion—in many ways

⁷² See also European Affairs Committee and Sub-Committee on the Protocol on Ireland/Northern Ireland, *The Windsor Framework* (HL 2022–23, 237).

⁷³ See Commission and UK Government, ‘Draft Memorandum of Understanding Establishing a Framework for Financial Services Regulatory Cooperation between the European Union and the United Kingdom of Great Britain and Northern Ireland’ (17 May 2023) <https://finance.ec.europa.eu/document/download/7410cb0a-8cab-4009-9a55-3975bd026752_en?filename=230627-memorandum-understanding-financial-services-eu-uk_en.pdf>.

⁷⁴ Commission, ‘EU–UK Relations: Commission and UK Reach Political Agreement on UK Participation in Horizon Europe and Copernicus’ (Press Release, 7 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4374>.

⁷⁵ Commission, ‘Commission Proposes One-off Extension of the Current Rules of Origin for Electric Vehicles and Batteries under the Trade & Cooperation Agreement with the UK’ (Press Release, 6 December 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6369>.

⁷⁶ See further F Fabbrini, ‘Review and Reform Options for Deepening EU–UK Cooperation in a Renewing Europe’ in F Fabbrini (ed), *The Law & Politics of Brexit, Vol V: The Trade and Cooperation Agreement* (OUP 2024) 235.

⁷⁷ European Council, ‘The Granada Declaration’ (Press Release, 6 October 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/10/06/granada-declaration/>>.

⁷⁸ D Kuleba, ‘Ukraine’s EU Accession Brings Added Value and Serves Historic Justice’ (Fondation Robert Schuman, Newsletter No 1073, 24 June 2024) <<https://www.robert-schuman.eu/en/the-letter/1073>>.

more significant than the 2004 enlargement in which ten new countries joined the EU.⁷⁹

In particular, the start of the accession process for Ukraine, with the grant of candidate status in June 2022, and the official start of accession negotiations in June 2024, is a momentous historical development. Ukraine is a country at war, and there is no precedent for such a situation in any of the prior seven rounds of EU enlargement (1973, 1981, 1984, 1995, 2004, 2007 and 2013). The only possible example may be Cyprus, an island which has been divided since 1974, with the Northern part of its territory under illegal occupation by the Turkish military and forming a State which is only recognised internationally by Türkiye itself. However, the Cypriot conflict has been frozen for decades, and although the United Nations Secretary-General Kofi Annan successfully brokered a plan to reunite the island in 2004, it was rejected by a majority in the Republic of Cyprus, despite being supported by residents of the Turkish Republic of Northern Cyprus. Cyprus thus joined the EU in 2004 divided, with the effects of EU law suspended for its territory over the Green Line, i.e. under Turkish control.⁸⁰ Yet, unlike in Ukraine, there has been no active conflict in Cyprus for decades. Moreover, Cyprus poses geographical and geostrategic challenges which are of a different order of magnitude to those posed by Ukraine. Accordingly, the EU's decision to offer membership to Ukraine and to start accession negotiations reveals the EU institutions' ambition to leverage enlargement as a prime geopolitical tool.

At the same time, in the aftermath of Russia's aggression against Ukraine, the EU's integrationist dynamic has coexisted with a phase of institutional experimentalism in the broader European governance landscape. The EU has promoted the establishment of the EPC, designed to bring together the EU27 with the other countries of wider Europe. While this forum remains under-institutionalised, it holds potential both to assist candidate countries during the process of EU accession, and to connect the EU with other European States. In addition to creating the EPC, the EU has deepened its cooperation with other regional and transatlantic organisations such as the CoE and NATO. The CoE and NATO have themselves been revitalised by the war, suggesting that Russia's aggression has contributed to strengthening the bonds that tie all European States and has reminded everyone that *l'union fait la force*, i.e. union makes strength.

Prior to the invasion of Ukraine, the CoE was experiencing difficulties. During the 2010s, States such as Russia and the UK criticised the ECtHR for overstepping national sovereignty by imposing judgments that were seen as infringing on States' domestic affairs. As such, several diplomatic efforts were made to limit the powers of the ECtHR,⁸¹ a process which started with the Brighton Declaration and concluded with the approval of Protocol Nos 15 and 16 to the ECHR, which enshrined the principle of subsidiarity and the margin of appreciation in the

⁷⁹ See M Cremona (ed), *The Enlargement of the European Union* (OUP 2003).

⁸⁰ See N Skoutaris, 'The Application of the *acquis communautaire* in the Areas Not under the Effective Control of the Republic of Cyprus: The Green Line Regulation' (2008) 45 CMLRev 727.

⁸¹ See J Christoffersen and MR Madsen (eds), *The European Court of Human Rights between Law & Politics* (OUP 2011).

ECHR's preamble and included a preliminary reference system enabling national courts to request advisory opinions from the ECtHR. Despite this difficult period, following Russia's breach of international law, the members of the CoE have rallied around the organisation, reinforcing its aim to promote democracy, human rights and the rule of law. In particular, at a major summit held in Reykjavik on 16 and 17 May 2023, the heads of State and government of the 46 Member States of the CoE reaffirmed their unity around the common values of freedom and democracy.⁸² In what constituted only the fourth summit of heads of State and government since the establishment of the CoE, the Contracting Parties to the ECHR also adopted a declaration expressing unwavering support for liberal constitutional principles and 'recommitting to the Convention system as the cornerstone of the Council of Europe's protection of human rights'.⁸³

Similarly, NATO had been under increasing scrutiny in recent years. It had played a role in the so-called 'war on terror', with its core provision, Article V, which enshrines a mutual defence pledge by all members, triggered for the first time ever following the events of 11 September 2001. Yet, due to recurrent disagreements among its members,⁸⁴ in 2019 President Macron famously declared the alliance 'brain-dead',⁸⁵ and despite diplomatic attempts to redefine its purpose,⁸⁶ its role had become less clear at a time when Russia seemed more a partner than a threat. Russia's aggression against Ukraine, however, represented a turning point. The return of war to the European continent has revitalised NATO, which quickly became the main institutional framework to coordinate military assistance to Ukraine, including war materiel and intelligence. Moreover, the Russian invasion, which was often presented in the regime's propaganda as an attempt to prevent NATO encircling Russia through expansion, produced exactly the opposite effect, prompting Finland and Sweden's accession to the alliance.⁸⁷

The strengthening of transnational cooperation in Europe through multiple fora has generated interplays amongst these efforts, for instance between NATO expansion and EU enlargement. In particular, while the EU has granted Ukraine candidate status for EU membership, at the NATO summit in Vilnius on 11 July 2023, NATO also stated that Ukraine's future is in the alliance—'when Allies agree and conditions are met'.⁸⁸ At the same meeting, Türkiye agreed to remove its veto on Sweden's accession to NATO, thanks to political reassurances offered by

⁸² CoE, 'Reykjavik Declaration' (Reykjavik Summit, 16–17 May 2023) <<https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1>>.

⁸³ *ibid* appendix IV.

⁸⁴ See F Fazio, 'Collective Defence in NATO: A Legal and Strategic Analysis of Article 5 in Light of the War in Ukraine' (2024) Dublin European Law Institute Working Paper 2/2024.

⁸⁵ See 'Emmanuel Macron Warns Europe: NATO is Becoming Brain-Dead' *The Economist* (London, 7 November 2019) <<https://www.economist.com/europe/2019/11/07/emmanuel-macron-warns-europe-nato-is-becoming-brain-dead>>.

⁸⁶ See NATO, 'NATO 2030: United for a New Era', Analysis and Recommendations of the Reflection Group Appointed by the NATO Secretary General (25 November 2020) <https://www.nato.int/nato_static_fl2014/assets/pdf/2020/12/pdf/201201-reflection-group-final-report-uni.pdf>.

⁸⁷ See Bildt (n 57).

⁸⁸ NATO, 'Vilnius Summit Communiqué' (Press Release, 11 July 2023) para 11 <https://www.nato.int/cps/en/natohq/official_texts_217320.htm>.

European Council President Charles Michel that the EU would reenergise its ties with Türkiye, whose EU membership application has been pending since 1987.⁸⁹ Consequently, in November 2023, the Commission and the EU High Representative for Foreign Affairs published a joint communication on EU–Türkiye political, economic and trade relations, a key suggestion of which was a pathway to upgrading the EU–Türkiye customs union.⁹⁰ As such, it appears that the war in Ukraine has had profound consequences for transnational cooperation across the continent, through different forms of sovereignty pooling.

4. The challenges for EU enlargement

Nevertheless, the prospects of European transnational cooperation generally, and of EU enlargement specifically, face a number of major obstacles. It cannot be downplayed that, even in the face of increased cooperation, not only was the entry of Sweden into NATO unnecessarily delayed for idiosyncratic reasons by Türkiye and Hungary, but even the opening of accession negotiations with Ukraine in December 2023 became theatrical politicking—since Hungary opposed this decision, and technically had a right to veto it, the European Council could only agree to open accession negotiations with Ukraine⁹¹ after Hungary’s Prime Minister Viktor Orbán conveniently left the meeting room at the time of voting, allowing the other 26 heads of State and government to greenlight the process.⁹² According to the EU enlargement rules, progress in the negotiations of each accession chapter requires unanimity among the EU27—which must also unanimously approve a final accession treaty—meaning that, ultimately, from a political point of view, the accession of a new Member State to the EU ‘is by no means certain’.⁹³ Furthermore, from a legal point of view, there are a number of challenges that surround enlargement, including the candidate countries’ preparation, the EU’s preparation and the stalemate in EU reforms.

4.1. Candidate countries’ preparation

Article 49 TEU proclaims that: ‘Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the [EU]’.⁹⁴ The values indicated in Article 2 TEU are ‘respect for

⁸⁹ See M Stevis-Gridneff, ‘Will Turkey Become a Member of the EU Now?’ *The New York Times* (New York, 11 July 2023) <<https://www.nytimes.com/2023/07/11/world/europe/turkey-eu-membership.html>>.

⁹⁰ Commission and EU High Representative for Foreign Affairs and Security Policy, ‘Joint communication to the European Council: State of play of EU–Türkiye political, economic and trade relations’ (Communication) JOIN (2023) 0050 final.

⁹¹ European Council Conclusions EUCO 20/23 (n 15) para 15.

⁹² See P Jacqué, V Malingre and P Ricard, ‘Accession Talks with Ukraine: How the EU Managed to Avoid a Hungarian Veto’ *Le Monde* (Paris, 15 December 2023) <https://www.lemonde.fr/en/international/article/2023/12/15/the-european-union-opens-accession-talks-with-ukraine_6346150_4.html>.

⁹³ S Fabbrini, ‘From Multi-Speed to Multi-Tier: Making Europe Fit for Herself’ in G von Sydow and V Krelinger (eds), *Fit for 35? Reforming the Politics and Institutions of the EU for an Enlarged Union* (Swedish Institute for European Political Studies 2023) 69, 76 <https://www.sieps.se/globalassets/publikationer/2023/sieps-2023_2op-eng-webb.pdf>.

⁹⁴ TEU (n 49) art 49.

human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.⁹⁵ Since the Copenhagen European Council meeting in 1993, accession of new Member States to the EU has been governed by the Copenhagen criteria:

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, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership.⁹⁶

In summary, there are three criteria that a candidate State must meet: first, respect for the rule of law and stable democratic institutions ensuring the protection of fundamental values; second, a functioning market economy; and third, compliance with the EU *acquis* (being the common rights and obligations that constitute the body of EU law). A fourth criterion also exists which requires that the EU has the internal ability to absorb new Member States (which is discussed in Section 4.2 below).

As things currently stand—and leaving aside the fact that support for EU membership is low in most candidate countries—no candidate country, at present, meets the Copenhagen criteria and is ready to join the EU.⁹⁷ By way of example, North Macedonia is experiencing a nationalist turn and has refused to amend its constitution to recognise the Bulgarian minority, as the EU has requested;⁹⁸ Serbia has not aligned with any of the EU CFSP measures, instead nurturing relations with China and Russia; and Georgia has recently passed a law, inspired by Russia and opposed by the EU and the US, that requires any organisation receiving foreign funding to register as a foreign agent and be subject to pervasive governmental controls.⁹⁹ Most importantly, Ukraine faces major challenges in its preparation for moving towards EU membership.¹⁰⁰ It suffers from systemic corruption, as evidenced by the arrest for bribery of the President of the Supreme Court;¹⁰¹ it only ratified the Rome Statute of the International Criminal Court in the summer of 2024; martial law introduced in response to Russia's war of aggression has led to the indefinite suspension of elections, the most basic form of

⁹⁵ *ibid* art 2.

⁹⁶ European Council, 'Presidency Conclusions: 7. Relations with the Countries of Central and Eastern Europe' (Copenhagen, 21–22 June 1993) para A(iii).

⁹⁷ D Bechev, 'Can EU Enlargement Work?' (*Carnegie Europe*, 20 June 2024) <<https://carnegieendowment.org/research/2024/06/can-eu-enlargement-work?lang=en>>.

⁹⁸ K Kolozova, 'Freins nationalistes et impensés géopolitiques: le cas spécifique de la Macédoine du Nord' (Fondation Robert Schuman, Schuman Papers No 748, 6 May 2024) <<https://www.robert-schuman.eu/questions-d-europe/748-freins-nationalistes-et-impenses-geopolitiques-le-cas-specifique-de-la-macedoine-du-nord>>.

⁹⁹ I Nechepurenko, 'Georgia's Ruling Party Secures a Contentious Law on Foreign Influence' *The New York Times* (New York, 28 May 2024) <<https://www.nytimes.com/2024/05/28/world/europe/georgia-foreign-agents-law-passes.html>>.

¹⁰⁰ R Petrov, 'Bumpy Road of Ukraine towards the EU Membership in Time of War: "Accession through War" v "Gradual Integration"' (2023) 8 *EurPapers* 1057.

¹⁰¹ See D Victor, 'The Chief of Ukraine's Supreme Court Has Been Detained and Accused of Taking a \$2.7 Million Bribe' *The New York Times* (New York, 16 May 2023) <<https://www.nytimes.com/2023/05/16/world/europe/ukraine-supreme-court-chief-bribery.html>>.

democratic accountability;¹⁰² and there are questions as to whether a hyper-nationalist country emerging from a life-or-death struggle can fit into the EU, a supranational organisation which has been designed to tame nationalism.¹⁰³

The Commission has openly acknowledged these problems. In its November 2023 Communication on enlargement it reported the systemic problems faced by candidate countries¹⁰⁴—from ‘political instability, tensions, the weak functioning of democratic and judicial institutions’ in Montenegro,¹⁰⁵ arguably the most advanced candidate State—to ‘the complete disagreement with the EU approach of Turkey’,¹⁰⁶ a State with which negotiations are ‘at a standstill’.¹⁰⁷ In fact, the example of Türkiye provides a cautionary tale about enlargement, as the country has been a candidate to join the EU for decades, but little progress has been made on the accession negotiations. While internal political developments in Türkiye—particularly the rise of authoritarian governance since 2016—have for all practical purposes closed the door on accession, the EU has not addressed the matter, instead simply opting to freeze the negotiations. This state of uncertainty has not led to any improvement; indeed, it has resulted only in increased frustration in Türkiye.

Despite this awareness, the lessons, particularly of Türkiye’s failed accession, have apparently not been learned. In fact, in the latest enlargement package, the Commission’s actions do not align with its earlier statements. Despite acknowledging their structural problems, the Commission has recommended advancing enlargement and opening the accession negotiations with Ukraine and Moldova, provided that they continue their reform efforts,¹⁰⁸ and in relation to Georgia, ‘on the understanding that’ the country will take several further steps.¹⁰⁹ Despite official proclamations that enlargement will be based on the candidate country’s ‘own merits’,¹¹⁰ this decision to open negotiations before the candidate countries have fully met the criteria for doing so sends the wrong signal that accession is largely driven by political priorities.

Furthermore, the Commission has also weakened the internal EU mechanisms of rule of law enforcement and conditionality that could have assisted in the enlargement process. In particular, in September 2023, the Commission terminated the post-accession Cooperation and Verification Mechanism (CVM) with Romania and Bulgaria,¹¹¹ a special process of enhanced surveillance which had been put in place for the two Member States that joined the EU in 2007 which still suffer from severe problems of corruption. This abrupt decision was not motivated by any real

¹⁰² See ‘Volodymyr Zelensky’s Presidential Term Expires on May 20th’ *The Economist* (16 May 2024) <<https://www.economist.com/leaders/2024/05/16/volodymyr-zelenskys-presidential-term-expires-on-may-20th>>.

¹⁰³ See SA Bellezza, *Identità ucraina. Storia del movimento nazionale dal 1800 a oggi* (Laterza 2024).

¹⁰⁴ Commission (n 14).

¹⁰⁵ *ibid* 17.

¹⁰⁶ *ibid* 22.

¹⁰⁷ *ibid* 21.

¹⁰⁸ Commission (n 14) para 14 (Ukraine) and para 15 (Moldova).

¹⁰⁹ *ibid* para 16.

¹¹⁰ See, e.g. Council and European Council (n 22) para 2.

¹¹¹ Commission, ‘Rule of Law: Commission Formally Closes the Cooperation and Verification Mechanism for Bulgaria and Romania’ (Press Release, 15 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4456>.

improvement in addressing corruption by the two Member States concerned. It was followed in May 2024 by the decision to end the Article 7 TEU procedure—a form of sanction for persistent breach of EU values—against Poland,¹¹² which began in 2017 following Polish judicial reforms which were detrimental to the independence of the judiciary.¹¹³ Yet again, no real legal change had occurred in Poland, save for the election of a pro-EU government. While the new government did attempt to undo the actions of its predecessor, it was blocked by the Polish President and courts.

Thus, in addition to weakening the EU's internal rule-of-law enforcement mechanisms,¹¹⁴ the Commission also appears to have conveniently disregarded egregious failures in the preparation of candidate countries, which does not bode well for either accession negotiations or the future of the EU.

4.2. The EU's preparation

In addition to the candidate countries' preparation for accession, following the Copenhagen criteria a fourth factor that should influence enlargement is the EU's own preparation: '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.'¹¹⁵ At the time of the 2004 enlargement, the Commission had already recognised that a critical factor in managing the accession of new Member States was the EU's 'absorption capacity, or rather integration capacity'.¹¹⁶ The Commission defined this 'functional concept'¹¹⁷ as the EU's capacity to 'take in new members at a given moment or in a given period, without jeopardizing the political and policy objectives established by the Treaties'.¹¹⁸ The Commission connected this absorption capacity to the functioning of the EU institutions, the delivery of EU policies and the operation of the EU budget, while also emphasising the importance of maintaining public support for the enlargement process.

By this standard, the prospect of enlargement by admitting up to nine new Member States raises major challenges for the EU. In particular, Ukraine's potential accession poses a puzzle. The country is currently at war, with a fifth of its territory under enemy occupation. It had a pre-war population of about 41 million people and thus would become the fifth most populous EU Member State, yet with a relatively low gross domestic product (GDP) per capita of about

¹¹² Commission, 'Commission Intends to Close Article 7(1) TEU Procedure for Poland' (Press Release, 6 May 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2461>.

¹¹³ Commission, 'Reasoned proposal in accordance with Article 7(1) Treaty on European Union regarding the rule of law in Poland: Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' (Communication) COM (2017) 835 final.

¹¹⁴ See KL Scheppele, 'The Treaties without a Guardian: The European Commission and the Rule of Law' (2023) 29 ColumJEurL 93.

¹¹⁵ European Council (n 96) para A(iii).

¹¹⁶ Commission, 'Enlargement strategy and main challenges 2006–2007, including annexed special report on the EU's capacity to integrate new members' (Communication) COM (2006) 649 final, 17.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

US\$4,500¹¹⁹ it would become the primary beneficiary of structural and agriculture funds, and its accession would have a major impact on the functioning of the EU.¹²⁰ In fact, when also considering the potential cost of post-war reconstruction, early estimates have concluded that Ukraine's accession to the EU would have significant budgetary consequences for the EU and, while some analysts have called these costs 'manageable',¹²¹ others have highlighted that adding nine new EU Member States would turn most current members into net contributors to the EU budget.¹²²

In March 2024, the Commission published a communication on pre-enlargement reforms and policy review,¹²³ where it explored 'the implications of a larger EU in four main areas: values, policies, budget and governance'.¹²⁴ In this document, which also indicated the possibility of partial integration of candidate countries in EU policies before their accession, the Commission clearly reaffirmed the importance of safeguarding the values of democracy and respect for the rule of law in the enlargement process,¹²⁵ and openly outlined the consequence of enlargement for the EU's functioning and funding. The Commission acknowledged that the accession of new, poorer Member States 'will put pressure on the future long-term EU budget',¹²⁶ and consequently stated that 'future EU spending programmes should be developed with future enlargement in mind'.¹²⁷ Furthermore, with regards to EU governance, the Commission underlined how 'an enlarged Union of 30+ Member States triggers immediate questions on the composition of the EU institutions'¹²⁸ and will also 'inevitably entail more work for the EU institutions in many areas'.¹²⁹

Nevertheless, the Commission has been very cautious in outlining the institutional and constitutional changes needed to prepare the EU for enlargement.¹³⁰ This also reflects the ambiguities of the European Council: in the October 2023 Granada Declaration—delivered on the occasion of the third EPC summit—the European Council stated that '[l]ooking ahead to the prospect of a further enlarged Union, both the EU and future Member States need to be ready. ... the Union needs to

¹¹⁹ World Bank, 'GDP per Capita (Current US\$) – Ukraine' <<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=UA>>.

¹²⁰ See S Blockmans, 'The Impact of Ukrainian Membership on the EU's Institutions and Internal Balance of Power' (*International Centre for Defence and Security*, 9 November 2023) <<https://icds.ee/en/the-impact-of-ukrainian-membership-on-the-eus-institutions-and-internal-balance-of-power/>>.

¹²¹ M Emerson, 'The Potential Impact of Ukrainian Accession on the EU's Budget – and the Importance of Control Valves' (*International Centre for Defence and Security*, 25 September 2023) <<https://icds.ee/en/the-potential-impact-of-ukrainian-accession-on-the-eus-budget-and-the-importance-of-control-valves/>>.

¹²² L O'Carroll, 'Adding Nine Countries to EU to Cost Existing Members More than €250 Billion' *The Guardian* (London, 4 October 2023) <<https://www.theguardian.com/world/2023/oct/04/adding-nine-countries-eu-cost-existing-members>>.

¹²³ Commission, 'Pre-enlargement reforms and policy reviews' (Communication) COM (2024) 146 final.

¹²⁴ *ibid.* 2.

¹²⁵ *ibid.* 4.

¹²⁶ *ibid.* 18.

¹²⁷ *ibid.*

¹²⁸ *ibid.* 20.

¹²⁹ *ibid.*

¹³⁰ Commission, 'Commission Prepares for Pre-Enlargement Reforms and Policy Reviews' (Press Release, 20 March 2024) <https://neighbourhood-enlargement.ec.europa.eu/news/commission-prepares-pre-enlargement-reforms-and-policy-reviews-2024-03-20_en>.

lay the necessary internal groundwork and reforms',¹³¹ a statement repeated verbatim in the December 2023 conclusions.¹³² However, the European Council only referred generally to the EU's 'capacity to act' without clarifying which reforms to the functioning and funding of the EU would be needed to achieve this objective and, in March 2024, it merely recalled 'that work on both tracks needs to advance in parallel to ensure that both future Member States and the EU are ready at the time of accession'.¹³³ In June 2024, the Belgian Presidency of the Council published a progress report on the Future of Europe,¹³⁴ which condensed the state of the discussions on EU reforms at Member State level, and restated the objective to work on four priority areas—namely, values, policies, budget and governance—with a tentative roadmap.¹³⁵

However, in its conclusions of 27 June 2024 the European Council once again largely skirted around the issue of EU reforms,¹³⁶ instead focusing on new appointments to key roles—Antonio Costa as European Council President, Ursula von der Leyen as Commission President and Kaja Kallas as the EU High Representative¹³⁷—and approving the new EU Strategic Agenda 2024–29,¹³⁸ which called for a free and democratic, strong and secure as well as prosperous and competitive Europe. At the summit, the European Council once more underlined 'the need to lay the necessary internal groundwork and reforms to fulfil the Union's long-term ambitions and address key questions related to its priorities and policies as well as its capacity to act',¹³⁹ and repeated that work on reforms 'should advance in parallel with the enlargement process'.¹⁴⁰ In terms of substance, however, the European Council simply restated the four areas on which reforms should focus—once again, values, policies, budget and governance¹⁴¹—indicating that 'it will review progress [in a year's time] in June 2025 and give further guidance as needed'.¹⁴²

This state of affairs is highly problematic. As Sylvie Goulard has pointed out, enlarging the EU without profoundly reforming it risks compromising the entire integration project as the Union would grow to the point of 'exploding'.¹⁴³ In fact, as the war in Ukraine has highlighted, the EU's constitutional framework suffers from several substantive and institutional shortcomings, which ultimately prevent it from rising to the geopolitical challenges of the moment. As things stand, the EU alone cannot secure the blessings of liberty to Ukraine, guaranteeing its security against Russia, as it lacks the fiscal capacity and military capability to deter a foreign aggression. If Ukraine and possibly eight other countries from Eastern

¹³¹ European Council (n 77).

¹³² European Council Conclusions EUCO 20/23 (n 15) para 13.

¹³³ European Council Conclusions EUCO 7/24 (n 20) para 29.

¹³⁴ Council, 'Future of Europe: Presidency progress report', Doc 10411/24, 10 June 2024.

¹³⁵ *ibid* annex.

¹³⁶ European Council Conclusions EUCO 15/24 of 27 June 2024.

¹³⁷ *ibid* section VI.

¹³⁸ *ibid* annex.

¹³⁹ *ibid* para 48.

¹⁴⁰ *ibid* para 49.

¹⁴¹ *ibid* para 50.

¹⁴² *ibid* para 51.

¹⁴³ S Goulard, *L'Europe enfle si bien qu'elle creva: de 27 à 36 États?* (Tallandier 2024).

Europe and the Western Balkans were to join the EU *à traité constant*, the ability of an EU with 35 Member States to provide security and prosperity would further decrease, given the burden of unanimous decision-making. Hence, constitutional reforms of the EU system of government are needed to avoid making EU membership an empty promise, and to properly prepare the EU for enlargement.

4.3. The stagnation of EU constitutional reforms

The debate on EU constitutional reforms has been ongoing for several years, at least since the Brexit referendum.¹⁴⁴ A strong driver has been the Conference on the Future of Europe (Conference), which was originally envisaged by French President Macron in March 2019 as a way to relaunch the project of European integration after the UK withdrawal.¹⁴⁵ After delays due to the COVID-19 pandemic, the Conference began on 9 May 2021, and came to a close a year later on 9 May 2022, when the war in Ukraine was already in full force.¹⁴⁶ The Conference was organised as a citizen-focused, bottom-up exercise designed to gain input from European citizens on the key questions facing the EU. This innovative participatory process unfolded through a multi-layered structure. The core of the Conference was represented by 4 panels, each comprising 200 European citizen participants, selected randomly to reflect the sociodemographic reality of the EU, who met both in person and remotely over several months. The input from these citizen panels, together with that resulting from analogous national processes, was then reported to the Plenary of the Conference for discussion. Ultimately, the Plenary endorsed 49 proposals with a list of 326 detailed recommendations, which were submitted to the Executive Board and released in a final report published on Europe Day 2022.¹⁴⁷

The Conference's final report explicitly identified a number of shortcomings in the current EU constitutional structure and made the case for several substantive amendments to the EU treaties as well as institutional reforms. The Conference called, in particular, for a strengthening of EU powers, with the expansion of EU competences in the fields of health, energy, digital technology, migration and foreign affairs, among others. Moreover, the Conference requested an overhaul of the EU decision-making system, including overcoming the obstacle of the unanimity rule, particularly in the fields of foreign affairs and defence, and a clarification of the roles of the EU institutions. Finally, the Conference also underlined the importance of endowing the EU with the financial means to back up its actions, including by reproducing the 'Next Generation EU' (NGEU) funding model beyond the COVID-19 pandemic. At the same time, the Conference called for 'reopening the discussion about the [EU] constitution'¹⁴⁸ on

¹⁴⁴ F Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reforms* (OUP 2020).

¹⁴⁵ E Macron, 'Pour une Renaissance européenne' (*Élysée*, 4 March 2019) <<https://www.elysee.fr/emmanuel-macron/2019/03/04/pour-une-renaissance-europeenne>>.

¹⁴⁶ See also *Conference on the Future of Europe* <<https://futureu.europa.eu/>>.

¹⁴⁷ Conference on the Future of Europe, 'Report on the Final Outcome' (9 May 2022) 93 <<https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf>>.

¹⁴⁸ *ibid* proposal 39, recommendation 7.

the understanding that a constitution would make rules ‘more precise as well as involve citizens and agree on the rules of the decision-making process’.¹⁴⁹ The outcome of the Conference was therefore a call for a stronger and more united EU.

A number of policymakers immediately embraced the ambitious outcome of the Conference. Both President Macron and then Italian Prime Minister Mario Draghi endorsed the idea of amending the EU treaties,¹⁵⁰ and Commission President Ursula von der Leyen voiced support for this prospect.¹⁵¹ Most importantly, the European Parliament (EP) called for a comprehensive follow up to the Conference, including treaty changes.¹⁵² In a resolution approved in November 2023, the EP proposed a detailed list of amendments to the EU treaties, dealing both with substantive competences and institutional mechanisms of decision-making, and called for the convening of a convention under Article 48(3) TEU to examine them.¹⁵³ Furthermore, in another resolution adopted in February 2024, the EP called for a deepening of EU integration in view of future enlargements,¹⁵⁴ stating that ‘widening and deepening the EU must go in parallel’,¹⁵⁵ but clarifying that ‘pre-enlargement reforms are needed to guarantee the efficient functioning of the enlarged EU and its capacity to absorb new members’.¹⁵⁶

Nevertheless, the enthusiasm for constitutional change generated by the Conference was met with equally resolute opposition in other quarters. In a joint non-paper released on the day of the Conference’s conclusion, 13 Member States from Northern and Eastern Europe clearly indicated that they did ‘not support unconsidered and premature attempts to launch a process towards Treaty change’.¹⁵⁷ Visions of the EU as a polity, which requires greater federalisation, are politically and institutionally contested by competing visions of the EU as a market, or an autocracy, which push in very different directions.¹⁵⁸ In particular, Hungarian Prime Minister Viktor Orban, who recently established a new far-right parliamentary group in the EP named Patriots for Europe—now the third largest faction in the EP following the 2024 European Parliament elections—has consistently called for a renationalisation of EU competences. As a result, the implementation of the Conference’s outcome has stalled: two years later, its most

¹⁴⁹ *ibid.*

¹⁵⁰ M Draghi, ‘Speech at the European Parliament’ (Strasbourg, 3 May 2022) <<https://www.governo.it/en/articolo/prime-minister-mario-draghi-s-address-european-parliament/19748>>. Official English translation.

¹⁵¹ Commission, ‘Speech by President Ursula Von der Leyen at the Closing Event’ (Conference on the Future of Europe, Strasbourg, 9 May 2022) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2944>.

¹⁵² European Parliament Resolution P9_TA (2022) 0141 of 4 May 2022 on the follow-up to the conclusions of the Conference on the Future of Europe.

¹⁵³ European Parliament Resolution P9_TA (2023) 0427 of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, para 1.

¹⁵⁴ European Parliament Resolution P9_TA (2024) 0120 of 29 February 2024 on deepening EU integration in view of future enlargement.

¹⁵⁵ *ibid* para K.

¹⁵⁶ *ibid* para U.

¹⁵⁷ ‘Non-paper by Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, and Sweden on the Outcome of and Follow-up to the Conference on the Future of Europe’ (9 May 2022) <www.movimentoeuropeo.it/images/Documenti/Non_-paper_9.5.2022.pdf>.

¹⁵⁸ Fabbrini (n 144) ch 4.

ground breaking proposals remain on hold, and the EP request to call a convention to revise the treaties has not even been considered by the Council.

Given the obstacles to amending the EU treaties,¹⁵⁹ several alternative constitutional options have recently moved to the centre of debates on how to prepare for an enlarged EU. In particular, the use of *passerelle* clauses to change decision-making rules, notably in CFSP, has been increasingly considered.¹⁶⁰ *Passerelle* clauses allow for a shift from unanimity voting to qualified majority voting (QMV) in the Council without amending the Treaties. Article 48(7) TEU envisages that when the EU treaties provide ‘for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case’.¹⁶¹ Moreover, specific *passerelle* clauses are scattered across the treaties for specific policies.¹⁶² Building on this, on 4 May 2023, nine Member States—Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Spain and Slovenia (all but the latter from Western Europe)—released a joint statement launching the Group of Friends of QMV in CFSP.¹⁶³ This was followed by a supportive resolution of the EP on 11 July 2023, which called for using *passerelle* clauses at the earliest opportunity.¹⁶⁴

Yet, the strategy of leveraging the *passerelle* clause has its hurdles. Triggering a *passerelle* clause would still require unanimity in the European Council, which is not a given, due to the hold-out position of several Member States. Furthermore, Article 48(7) TEU empowers a single national parliament to block the use of a *passerelle* clause, even if approved by heads of State and government in the European Council, within six months. Lastly, the same provision explicitly prohibits applying the *passerelle* clause ‘to decisions with military implications or those in the area of defence’. There is thus no escaping that a *passerelle* clause can achieve only so much. The EU governance structure suffers from a number of shortcomings, and enhancing the legitimacy and effectiveness of the EU requires adjustments which can only be addressed through proper treaty changes. For example, a greater role for the EP in fiscal and budgetary matters is a democratic need, especially after the establishment of the NGEU, but this can only be achieved through revisions of several treaty provisions.¹⁶⁵

¹⁵⁹ See also D Hodson and I Maher, *The Transformation of EU Treaty Making* (CUP 2018).

¹⁶⁰ See R Wessel and V Szép, ‘The Implementation of Article 31 of the TEU and the Use of Qualified Majority Voting’ (European Parliament Constitutional Affairs Committee, 24 November 2022) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2022\)739139](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)739139)>.

¹⁶¹ TEU (n 49).

¹⁶² TFEU (n 53) art 81(3) (measures concerning family law), art 153(2) (measures concerning employment and social security), art 192(2) (measures concerning environmental policy), art 312(2) (measures related to the Multiannual Financial Framework).

¹⁶³ Federal Foreign Office of Germany, ‘Joint Statement of the Foreign Ministries on the Launch of the Group of Friends on Qualified Majority Voting in EU Common Foreign and Security Policy’ (Press Release, 4 May 2023) <<https://www.auswaertiges-amt.de/en/newsroom/news/2595304-2595304>>.

¹⁶⁴ European Parliament Resolution P9_TA (2023) 0269 of 11 July 2023 on the implementation of the *passerelle* clauses in the EU Treaties.

¹⁶⁵ F Fabbrini, *EU Fiscal Capacity: Legal Integration after Covid-19 and the War in Ukraine* (OUP 2022) 141.

Given these challenges, however, policymakers have increasingly looked at alternative options to advance European integration. In particular, in September 2023 a group of experts jointly appointed by the French and German governments proposed a series of recommendations to reform and enlarge the EU for the twenty-first century.¹⁶⁶ Their report outlined six options for reform, including the approval of a supplementary reform treaty between willing Member States if there is deadlock on treaty change.¹⁶⁷ Indeed, there are precedents of groups of vanguard Member States that have concluded inter se separate intergovernmental agreements, and differentiated integration has admittedly become a feature of the contemporary EU.¹⁶⁸ Along these lines, a proposal would be to adopt a Political Compact to advance integration, overcoming the veto of hostile Member States.¹⁶⁹ Otherwise, Article 49 TEU states that institutional adjustments to the EU and its functioning can also be achieved in the framework of new accession treaties: while this provision has traditionally been interpreted to refer only to the minimal changes to the institutions that necessarily result from the entry of a new EU Member State, a more ambitious reading of it would be to tie enlargement and wider reforms into a single agreement.¹⁷⁰ Yet, this avenue would delay EU reforms until enlargement happens and it remains to be seen whether this is feasible, so it cannot be excluded that transnational cooperation through fora like the EPC will turn out to be the main way forward.

5. Conclusion

This article has examined the impact of the war in Ukraine on EU enlargement and transnational cooperation in Europe. It has explained how, in response to Russia's aggression against Ukraine, the EU relaunched its enlargement process—notably, by opening accession negotiations with Ukraine—promoted the establishment of a new EPC and deepened its ties with both other regional organisations, like the CoE and NATO, and other European States. It was argued that the return of large-scale warfare to the European continent for the first time since the end of World War II ultimately contributed to reaffirming the role of the EU as a beacon of freedom, peace, security and prosperity. Ukraine's request to join the EU just days after Russia's invasion demonstrated that non-Member States see EU membership as the best way to secure these goals that, borrowing from the

¹⁶⁶ See 'Report of the Franco-German Working Group on EU Institutional Reform: Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century' (Paris–Berlin, 18 September 2023) <https://www.diplomatie.gouv.fr/IMG/pdf/20230919_group_of_twelve_report_updated14.12.2023_cle88fb88.pdf>.

¹⁶⁷ *ibid* 35ff.

¹⁶⁸ See F Schimmelfenning and T Winzen, *Ever Looser Union? Differentiated European Integration* (OUP 2020).

¹⁶⁹ See further F Fabbrini, 'Possible Avenues towards Further Political Integration: A Political Compact for a More Democratic and Effective Union' (European Parliament Constitutional Affairs Committee, May 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651849/IPOL_STU\(2020\)651849_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651849/IPOL_STU(2020)651849_EN.pdf)>.

¹⁷⁰ See also B de Witte, 'Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible without Constitutional Change' (European Parliament Constitutional Affairs Committee, March 2019) 4 <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL_IDA\(2019\)608872_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL_IDA(2019)608872_EN.pdf)>.

language of the US Constitution, may be termed ‘the blessings of liberty’. Furthermore, beyond the EU, the war in Ukraine served as a trigger to rejuvenate organisations like the CoE and NATO, to launch a new forum (the EPC), and indeed to strengthen the interplay between these entities—all inspired by belief in the benefits of transnational cooperation.

Nevertheless, as the article has pointed out, a number of challenges lie ahead, both for regional integration generally and for EU enlargement specifically. In particular, with regard to EU accession by Ukraine and the eight other countries from the Western Balkans and Eastern Europe, there are issues with both the candidate countries’ preparation and with the EU’s own readiness: while accession countries are currently far from meeting the Copenhagen criteria, the EU itself currently lacks the capacity to absorb and integrate new members. This is a result of the stalemate in constitutional reforms which, despite being called for by multiple institutions, including the Conference and the EP, have thus far been blocked by a number of recalcitrant Member States. It therefore remains uncertain whether the EU can really enlarge to 35 or more members and, if it does, whether it would survive its expansion. Alternative avenues, including the EPC, may thus emerge as necessary to advance regional integration in the short term while also presenting an opportunity for a former member like the UK to reconnect with the EU. In conclusion, if the war in Ukraine has reaffirmed the EU’s ‘messianic’ role,¹⁷¹ and indeed, the dynamism of the European project, creativity may be needed to shape the future of Europe in the years ahead.

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¹⁷¹ JHH Weiler, ‘The Political and Legal Culture of European Integration: An Exploratory Essay’ (2011) 9 ICON 678.