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The Limits of Prodemocratic International Law in Europe

Aslı Ü. Bâli*

Abstract

Tom Ginsburg's Democracies and International Law explores the ways in which regional human rights regimes have been designed to promote and protect democracy and the degree of their success in an age of democratic backsliding. In this symposium contribution, I examine the impact of the relationship between the European Union (E.U.) and Turkey on that country's record of democratic backsliding. I argue that European countries' difficulties in managing multi-racial democracy have limited the depth and effectiveness of the E.U.'s pro-democratic commitments in its dealings with Turkey.

* Professor of Law, UCLA School of Law. I would like to thank the symposium participants for their helpful comments and the editors of the journal for their excellent suggestions. I would also like to thank Mariam Abuladze for exceptional research assistance.

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I. INTRODUCTION

Tom Ginsburg's *Democracies and International Law* offers a careful and wonderfully well-documented account of how international law can reinforce or undermine democratic governance within states. At a time when worries about democratic backsliding dominate the growing comparative law literature, Ginsburg—who has been an important contributor to those debates—sets his sights here on the *international* law dimension of these questions. The book provides an excellent starting point for considering what role international institutions might play in combating legal strategies deployed by authoritarians to subvert democracy. In this short Essay, I take up one strand of Ginsburg's argument concerning the specific role played by the European Union (E.U.), which has long understood itself as producing a form of democracy-enhancing international law in its own region. Based on a close examination of the developments in Hungary and Poland, Ginsburg takes the view that the E.U. has been better at laying out norms than enforcing them, proving especially ineffective at confronting democratic backsliding among its member states.¹ I agree with this analysis and explore its implications by examining the course of accession negotiations with Turkey.

Though Ginsburg does not directly address the Turkish case, his book provides a useful complement to his consideration of countries engaging with European institutions while experiencing democratic decay.² This is because E.U. institutions once incentivized significant democratic consolidation in Turkey, but later proved unexpectedly weak when confronted with backsliding. The case mirrors to some extent the E.U.'s limited traction in constraining the autocratic turn in Hungary and Poland.³ Yet, the weakness of E.U. constraints is more surprising in the Turkish case, given that the E.U. should theoretically have more effective carrots and sticks while a country is still pursuing accession. Indeed, Ginsburg observes that the extensive monitoring of candidate countries at the “front end of EU accession” represents the high point of the prodemocratic pressure that Europe can exert.⁴ In the following pages, I argue that Europe's prodemocratic commitments themselves have proven to be self-limiting.

¹ See TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* 153 (2022).

² The phrase “democratic decay” is borrowed from Ginsburg's earlier work with Aziz Huq. See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78, 80 (2018).

³ In his Essay for this Symposium, Ginsburg argues that the Hungarian election of 2022 will be an important test of whether the E.U. has been able to constrain democratic backsliding in that country. Tom Ginsburg, *Democracies and International Law: An Update*, 23 *CHI. J. INT'L. L.* 1, 18–21 (2022). Regrettably, the results confirm the ineffectiveness of European institutions in this regard. See Justyna Pawlak & Krisztina Than, *Orbán Scores Crushing Victory as Ukraine War Solidifies Support*, *REUTERS* (April 3, 2022), <https://www.reuters.com/world/europe/hungarians-vote-orbans-12-year-rule-tight-ballot-overshadowed-by-ukraine-war-2022-04-03/> (last visited May 6, 2022).

⁴ GINSBURG, *supra* note 1, at 160.

Ultimately, when confronted with managing pluralism and the demands of multi-racial democracy, the E.U.'s commitments have faltered.

II. GINSBURG'S DEMOCRACIES AND INTERNATIONAL LAW

In *Democracies and International Law*, Ginsburg makes several important arguments. First, he contends that international law is largely produced and utilized by democratic states, both for their relations with one another and to structure interactions with nondemocracies.⁵ He also finds that the resulting international legal order is prodemocratic in the sense that legal tools are available to shore up new democracies and impose costs on states that violate human rights. Ginsburg categorizes international legal resources to support democratic maintenance as carrots and sticks:⁶ carrots provide public goods that help sustain democratic commitments, while sticks include the imposition of damages against states for misbehavior.⁷ As examples, he notes the incentives provided by the E.U.'s accession protocols for Eastern European countries and, conversely, the ability of the European Court of Human Rights (ECtHR) to issue damage awards where states in the Council of Europe are found to have violated human rights obligations.⁸

Ginsburg then examines the degree to which the E.U. has succeeded in supporting democratic maintenance in its region. He notes that the European Convention on Human Rights (ECHR) was designed to defend democracy on the continent after the Second World War, by tying the hands of member states to prevent the kind of democratic erosion that attended the rise of fascism in the first half of the twentieth century.⁹ He rightly observes, however, that the ECHR and the ECtHR have proven unable to staunch democratic backsliding today, with a massive backlog of cases and difficulty addressing rights abuses in countries like Russia and Turkey.¹⁰ Although these countries are in the Council of Europe, they are at best partially consolidated democracies. In the case of Turkey, Ginsburg notes that the ECtHR has systematically failed to protect the rights of minorities in the country.¹¹ One might add that it has scarcely done better in the last five years at protecting the civil and political rights of any Turkish citizens.¹² Ginsburg

⁵ GINSBURG, *supra* note 1, at 7.

⁶ *See id.* at 114.

⁷ *See id.* at 115–18.

⁸ *See id.* at 115.

⁹ *See id.* at 144–45.

¹⁰ *See id.* at 151.

¹¹ *See id.*

¹² *See, e.g.,* Ali Yildiz, *The ECHR's Priority Policy Is Failing Turkey's Human Rights Victims*, AHVAL NEWS (Nov. 25, 2020), <https://perma.cc/S9MT-WD22> (noting that “Turkey’s political prisoners are being failed not just by the Turkish judicial system, but also by the [ECtHR]”).

concludes that the E.U. has “not been particularly effective at confronting backsliding in its region, being much better at laying out norms than enforcing them.”¹³ Yet, he argues that where the E.U. has been slow to respond to democratic erosion among its members, it has been better able to impose conditions on countries while they are pursuing accession.¹⁴

The Turkish case is precisely one of a country still at the front end of E.U. accession.¹⁵ Turkey thus faces a more effective range of carrots and sticks than what the Union and its human rights machinery have been able to impose on those countries that have already been admitted as members, like Hungary and Poland.¹⁶ In the remainder of this Essay, I will explore why it is that even for a country like Turkey, the E.U.’s legal resources to support democratic maintenance have proven ineffective. To answer this question, I focus on two pivotal moments since negotiations on Turkey’s accession began: first, the 2005 debate about a European Constitution in which Turkish accession became the foil for racialized anxieties about European identity. And second, a decade later, the willingness to strike a bargain with Turkey to stave off a perceived migration crisis. There is no doubt that Turkey has experienced serious internal democratic regression, if not reversal, during this period, but I will argue that challenges internal to the E.U.’s own democratic commitments are also reflected in these two moments. These challenges have played a (perhaps decisive) role in constraining Europe’s ability to challenge Turkey’s authoritarian turn.

III. FROM DEMOCRATIC CONSOLIDATION TO DEMOCRATIC EROSION: TWO PIVOTAL MOMENTS

Turkey first signed a Customs Union agreement with the E.U. in 1995 and was officially recognized as a candidate for full membership in 1999.¹⁷ In the latter half of the 1990s, the prospect of E.U. candidacy led the country to take significant steps towards democratic consolidation. Once it became a candidate country, from 2000 to 2005, Turkey passed a sweeping set of constitutional and legislative

¹³ GINSBURG, *supra* note 1, at 153.

¹⁴ *See id.* at 159–60.

¹⁵ On Turkey’s ongoing—but stalled—accession negotiations with the E.U., see, for example, Ilke Toygür, *A New Way Forward for EU-Turkey Relations*, CARNEGIE EUROPE (Jan. 26, 2022), <https://perma.cc/2WXF-KPML>.

¹⁶ On the challenge posed by Poland and Hungary to E.U. norms on democracy and the rule of law, see, for example, Wojciech Moskwa, Zoltan Simon and Rodney Jefferson, *The EU Bankrolled a Rebellion that Threatens to Tear It Apart*, BLOOMBERG (Nov. 14, 2021), <https://perma.cc/6FEK-ESX7> (arguing that “Poland and Hungary have used the largesse of the European Union to undermine democracy and the rule of law”).

¹⁷ *See, e.g.*, Birol A. Yesilada, *Turkey’s Candidacy for EU Membership*, 56 MIDDLE E.J. 94, 95 (2002).

reforms designed to fulfill the E.U.'s accession criteria.¹⁸ The governing Justice and Development Party (known by its Turkish language acronym, AKP) oversaw many of these reforms and ran repeatedly in national elections by campaigning in favor of greater political liberalization and E.U. accession.¹⁹ Yet after 2005, the reform momentum slowed significantly.²⁰ Later packages of constitutional amendments had an instrumental character, combining liberalizing features with changes to political institutions that inured largely to the benefit of the AKP.²¹

Why was there an inflection point in Turkey's democratic progress after 2005? After all, 2005 was the very year that accession talks began, and the country should have been presented with an even more attractive set of carrots for democratic consolidation. The E.U. served as a powerful engine for much-needed democratizing reforms until 2005, and E.U. accession was popular across most constituencies in Turkey at that point.²² This enabled the AKP to benefit from a broad coalition of support, including among Turkish liberals who might otherwise have been loath to make common cause with an Islamist political party.²³ I have previously argued that the AKP leadership might best be understood as accidental democrats pursuing reforms out of tactical interest convergence, rather than principled commitment,²⁴ but there is an alternative explanation for the slowing reform momentum, which lies with the E.U. rather than the AKP.

A. 2005: The Limits of European Prodemocratic Carrots

Accession talks for Turkey to join the E.U. began in earnest in 2005, after the country made substantial progress towards meeting the criteria that the

¹⁸ See, e.g., Meltem Müftüler Bac, *Turkey's Political Reforms and the Impact of the European Union*, 10 J. SO. EUR. SOC'Y & POL. 16, 21–27 (2005).

¹⁹ Kemal Kirişçi & Amanda Sloat, *The Rise and Fall of Liberal Democracy in Turkey: Implications for the West*, BROOKINGS (Feb. 2019), <https://perma.cc/N8QA-HGUN> (noting that “the democratic and economic achievements of the AKP's early years helped launch membership negotiations with the European Union”).

²⁰ See, e.g., *EU Parliament Slams Turkey's Slow Reform*, EURACTIV NEWS (Nov. 28, 2008), <https://perma.cc/BAT7-WYX8>.

²¹ See, e.g., Gunes Murat Tezcur, *Turkey's Referendum: A Democratic Dynamic*, OPEN DEMOCRACY (Sept. 15, 2010), <https://perma.cc/28AH-VGXB> (noting the mix of liberalizing and controversial amendments in the 2010 constitutional referendum in Turkey).

²² For a discussion of polling data on Turkish support for E.U. accession, see Nesibe Hicret Soy, *Survey: Turkish Support for EU Membership on Decline, Opinion Divided on NATO*, ATLANTIC COUNCIL (Sept. 18, 2013), <https://perma.cc/D77K-7T99> (noting that 63 percent of Turks supported E.U. membership in 2005, with support declining in subsequent years).

²³ See, e.g., Sabrina Tavernise, *Turkey's Liberals Speaking Out as Reform Stalls*, N.Y. TIMES (Nov. 24, 2008), <https://perma.cc/MK68-CU99> (noting that Turkey's liberals supported Erdogan's reform agenda and bid for E.U. accession in his first term).

²⁴ Aslı Ü. Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235, 316 (2011) (noting that the AKP may be “accidental democrats”).

European Council adopted in 1993 for any new members.²⁵ Those criteria—including stable institutions guaranteeing democracy, the rule of law, human rights, and protection of minorities within candidate countries²⁶—exerted palpable prodemocratic influence on Turkish political actors over the prior decade.²⁷ On December 17, 2004, the E.U. decided that Turkey had made sufficient progress to be admitted to consideration for membership,²⁸ but that determination coincided with a number of adverse developments on the European side related to what would soon become a failed effort to adopt an E.U. Constitutional Treaty.²⁹

Turkish accession raised a prospect absent from earlier E.U. enlargement discussions concerning new member states from Central and Eastern Europe. The fact of possible E.U. membership for a Muslim-majority country triggered anxieties amongst the domestic publics of major European states including France, Austria, Germany, and the Netherlands. Public statements by leading political figures in Europe, including current and former presidents,³⁰ prime ministers,³¹ and chancellors,³² indicated that they shared these concerns. A once tacit recognition became increasingly explicit: the E.U. is a Christian club,³³ and allowing Turkish accession might amount, in the words of the former president of France, Valerie Giscard d'Estaing, to the “end of Europe.”³⁴

²⁵ See Kivanc Ulusoy, *Turkey's Reform Effort Reconsidered, 1987-2004*, 14 DEMOCRATIZATION 472, 473 (2007) (detailing Turkish reforms leading to its consideration for E.U. membership).

²⁶ See *Copenhagen Criteria*, ORG. ECON. CO-OPERATION DEV. (June 11, 2013), <https://perma.cc/4MMX-G54B>.

²⁷ See, e.g., MICHAEL EMERSON, CTR. EUR. POL'Y STUD., HAS TURKEY FULFILLED THE COPENHAGEN POLITICAL CRITERIA? CEPS POLICY BRIEF NO. 48, 2–3 (2004), <https://perma.cc/EM9Q-NXQX>.

²⁸ See Kemal Kirişçi, *The December 2004 European Council Decision on Turkey: Is it an Historic Turning Point?*, 6(4) INSIGHT TURKEY 101, 101 (2004).

²⁹ On the crisis over the Constitutional Treaty, see MAI'A K. DAVIS CROSS, THE POLITICS OF CRISIS IN EUROPE 108–59 (2017).

³⁰ See Elaine Sciolino, *Ex-French President Snubs Turks on Union Bid*, N.Y. TIMES (Nov. 9, 2002), <https://perma.cc/M42M-8D89>; Honor Mahony, *Chirac Says Turkey Needs 'Major Cultural Revolution' to Join EU*, EU OBSERVER (Oct. 5, 2005), <https://perma.cc/G8RL-VUN5> (noting that then-president of France, Jacques Chirac, expressed doubt “about whether the huge, mainly Muslim country would ever become a member of the bloc” in public comments).

³¹ For instance, then French Prime Minister Jean Marie Raffarin asked publicly in discussing Turkish accession: “Do we want the river of Islam to enter the riverbed of secularism?” See *Raffarin Demurs on Turkey's EU Bid*, WALL ST. J. (Sept. 23, 2005), at A13.

³² The Austrian Chancellor at the time, Wolfgang Schüssel, opposed Turkish accession citing public skepticism. See Graham Bowley, *Turkey: Austrians Just Say No*, N.Y. TIMES (Oct. 3, 2005), <https://perma.cc/BN9H-9EBW>.

³³ See Joseph Liu, *Does 'Muslim' Turkey Belong in 'Christian' Europe?*, PEW RSCH. CTR. (Jan. 13, 2005), <https://perma.cc/3XGC-3RZB>.

³⁴ Valerie Giscard d'Estaing stated publicly that Turkey is not a European country but from “another culture, another way of life” and that its integration in the E.U. would constitute “the end of

The first occasion to test whether accession was a serious political possibility came indirectly, with referenda across Europe on a draft E.U. constitution that served as an unexpected proxy for public views about Turkish membership. Opponents of the constitution campaigned against the treaty, which would have streamlined decision-making in the bloc, by mobilizing around the alleged risks of Turkish accession.³⁵ When referenda on the constitutional project failed in France and the Netherlands in early summer 2005, analysts noted that a major factor motivating voters had been cultural fears about Turkish membership.³⁶ The character of the racially charged campaigns against the E.U. constitution hardly escaped notice in Turkey, eroding support for E.U. membership.³⁷ In addition, key analysts drew the conclusion that the prospect of “Turkey becoming a full member of the E.U. is virtually dead” after the failed referenda.³⁸

Contemporaneous analyses of European anxieties about Turkish accession included a host of issues, with cultural identity being perhaps most salient. In the words of one scholar writing in 2005:

... the very prospect of Turkish membership ... is a heated topic of discussion in Europe, with many politicians and national publics skeptical about the wisdom of offering membership to Turkey. Many of Turkey’s supposed shortcomings are well-known: it is too big, too poor, too agricultural, too authoritarian and, perhaps above all, too Muslim.³⁹

Turkish citizens, in turn, became frustrated and pessimistic about prospects for full membership when they perceived European publics as rejecting the

Europe.” Senem Aydin Düzgit, *Constructing Europe through Turkey: French Perceptions of Turkey’s Accession to the European Union*, 3 POLITIQUE EUROPÉENNE 47, 49 (2009).

³⁵ The question of Turkish accession was not a part of the constitutional referendum in any of these countries. But because the E.U. constitution was designed to improve decision-making in an enlarged bloc following accession by Central and Eastern European countries, it was seen as related to enlargement by many constituencies. See Nicolas de Boisgrollier, *Will the EU Constitution Survive a Referendum in France?*, BROOKINGS (Mar. 1, 2005), <https://perma.cc/6EVM-5WGH> (noting that “Turkey’s possible future entry in the European Union has largely overshadowed—if not hijacked—the constitutional debate”).

³⁶ See, e.g., *Dutch Say ‘Devastating No’ to EU Constitution*, GUARDIAN (June 2, 2005), <https://perma.cc/3PFA-Z6LE> (noting that “Anti-Muslim sentiment, opposition to EU membership for Turkey and fears over losing control over immigration policy all contributed to the French and Dutch votes”); see also Sara Binzer Hobolt & Sylvain Brouard, *Contesting the European Union? Why the Dutch and the French Rejected the European Constitution*, 64 POL. RSCH. Q. 309, 315 (2011) (including Turkish accession as one of the dimensions motivating French and Dutch “no” voters).

³⁷ See *Many in Turkey Fear Defeat Could Hurt Application for EU Membership*, N.Y. TIMES (May 31, 2005), <https://perma.cc/9KJW-RKQD> (noting that Turks “were dismayed by some of the anti-Turkey rhetoric used in the campaign”).

³⁸ *Id.*

³⁹ Paul Kubicek, *Turkish Accession to the European Union: Challenges and Opportunities*, 168 WORLD AFFS. 67, 67 (2005).

prospect of admitting a Muslim-majority country.⁴⁰ As additional reform criteria were applied to Turkey beyond those required for accession of Eastern European states, even liberal Turks who once served as the core constituency supporting E.U. membership raised questions about double standards.⁴¹ From the beginning of accession talks, European leaders in France and Germany openly discussed alternatives to full membership for Turkey,⁴² and within two years talks had stalled.⁴³ Turks viewed these proposals as a form of “second-class” membership reserved for their country.⁴⁴

While there are many explanations for the course of negotiations between the E.U. and Turkey, these prominent political campaigns against Turkish membership just as talks were beginning significantly depreciated the value of the prodemocratic “carrot” of accession. Growing skepticism among the Turkish public over prospects for accession reduced the momentum behind reform initiatives that had been presented as part of a broader strategy of integration with Europe. Beyond reducing incentives for reform, the anti-Turkish animus expressed in those political campaigns points to a deeper problem with the character of the E.U.’s prodemocratic commitments.⁴⁵ At bottom, the referendum campaigns expressed public anxiety over preserving European culture and civilization from the pressures of greater diversity. The admission of a Muslim-majority country to full membership in Europe would have offered freedom of movement to Turkish citizens to settle and work in E.U. countries. But the reality in 2005—and nearly two decades later—is that European countries have struggled to maintain their democratic commitments in governing multi-racial, multi-religious societies.⁴⁶ The depreciation in the value of the “carrot” of

⁴⁰ See, e.g., Fuat Canan, *Main Costs and Benefits of Turkish Access to the European Union*, 9 INSIGHT TURKEY 7, 17–18 (2007) (noting that the “lack of clear and consistent EU strategy and commitment towards Turkey . . . has made Turkish public opinion suspicious and anxious in their journey and in turn has given teeth to opponents to EU accession”).

⁴¹ *Id.* at 18 (describing the additional criteria and criticism from Turkey’s leading liberal think tank that these amounted to “double standards” in the E.U.’s treatment of the country).

⁴² See Luke Harding & Nicholas Watt, *Turkey’s EU Dream Dealt Double Blow as Chirac and Merkel Raise Doubts*, GUARDIAN (Aug. 26, 2005), <https://perma.cc/PX8A-3YMP>.

⁴³ Dan Bilefsky, *As EU Talks Stall, Turks Question pro-West Policy - Europe - International Herald Tribune* N.Y. TIMES (Nov. 8, 2006), <https://perma.cc/2T69-MTDC> (quoting a Turkish interviewee reporting that “many Turks feel like we are just wasting our time with the EU that will never accept a Muslim country”).

⁴⁴ See, e.g., Serkan Demirtaş, *Turkey Says ‘No’ to Second Class EU Membership*, HURRIYET DAILY NEWS (Nov. 30, 2016), <https://perma.cc/GAJ2-A5F5>.

⁴⁵ For a contemporaneous account of “mounting anti-Turkish sentiment” across Europe in 2005, see Ian Black, *The Tip of the Anti-Turkish Iceberg*, GUARDIAN (Sept. 9, 2005), <https://perma.cc/H2YX-DVQJ>.

⁴⁶ See, e.g., Leila Hadj-Abdou, *Racism in Europe: A Challenge for Democracy?*, in CHALLENGES OF DEMOCRACY IN THE EUROPEAN UNION AND ITS NEIGHBORS 25–42 (Aylin Ünver Noi & Sasha Toperich eds., 2016).

accession is not just a story about weak international institutions, then. Rather, it is a problem related to internal tensions within the European democratic project that offer an important complement to Ginsburg's account of the prodemocratic regional capacities of E.U. institutions.

B. 2015: Assessing European Sticks to Prevent Democratic Erosion

Between 2005 and 2015, Turkey underwent a period of marked democratic backsliding. While several additional constitutional and political reforms were passed in this period, their democratizing and liberalizing credentials were more ambiguous than those of earlier reforms.⁴⁷ In the meantime, E.U. accession talks remained largely stalled.⁴⁸ The erstwhile prime minister of Turkey, Recep Tayyip Erdoğan, became the first directly elected president in August 2014, and his government presided over an alarming deterioration in the country's human rights record and democratic pedigree.⁴⁹ While he was prime minister, Erdoğan's government violently quashed nationwide protests in 2013 against the government's increasing authoritarianism.⁵⁰ A corruption probe against Erdoğan's regime resulted in purges of judges and prosecutors in a full-scale assault on the rule of law beginning the following year.⁵¹ As Ginsburg notes, European institutions have fashioned not only prodemocratic carrots, but also "sticks" designed to punish rights abuses, abrogation of the rule of law, and democratic erosion.⁵² If European carrots were depreciated by anti-Turkish political campaigns in 2005, have any of the "sticks" fared better in constraining misbehavior by the Turkish government?

⁴⁷ Reforms in this period included a 2007 constitutional amendment that allowed for direct elections for president and a package of constitutional amendments in 2010 that combined liberalizing provisions on individual rights with a restructuring of the judiciary that led some analysts to worry about separation of powers. *See, e.g.,* Haldun Güralp, *The Battle for Turkey's Constitution*, GUARDIAN (Sept. 4, 2010), <https://perma.cc/KH7L-SL2H>. In the end, those worries were later realized by separate moves by the government to purge the judiciary beginning in 2014. *See* Oya Yegen, *Turkey Rolling Back the 2010 Reforms?*, INT'L. J. CONST. L. BLOG (Oct. 24, 2014), <https://perma.cc/R565-PGAS>.

⁴⁸ *See* William Chislett, *Turkey's 10 Years of EU Accession Negotiations: No End in Sight*, ELCANO ROYAL INST. (Oct. 5, 2015), <https://perma.cc/KV8C-KC5N>.

⁴⁹ *See, e.g.,* WORLD REPORT 2015: TURKEY, HUM. RTS. WATCH (2015), <https://perma.cc/2J69-GL9W> (finding that Erdoğan's government was "undermining the gains of the past decade with steps that erode human rights and the rule of law in Turkey").

⁵⁰ *See* AMNESTY INT'L, GEZI PROTESTS: BRUTAL DENIAL OF THE RIGHT TO PEACEFUL ASSEMBLY IN TURKEY 5–6 (2013), <https://perma.cc/58F4-YKCM>.

⁵¹ *See* Daren Butler & Nick Tattersall, *Turkish Judicial Purge Brings Corruption Investigation to a Halt*, REUTERS (Jan. 22, 2014), <https://perma.cc/PMY6-LKQ9>.

⁵² *See* Section II.

In assessing the capacity of E.U. institutions to disincentivize rights violations and democratic erosion in Turkey, it is first worth noting that the ECtHR has had a positive influence on the country's human rights record during some periods, and the court's decisions have shaped aspects of domestic jurisprudence on rights questions.⁵³ At a time when E.U. accession was being pursued in earnest, domestic institutions ranging from the parliament, to the courts, to Turkish human rights organizations took note of adverse decisions by the Strasbourg court, and the requirements of the ECHR influenced constitutional reforms.⁵⁴ However, as the E.U. faced a new crisis in grappling with pluralism, bilateral priorities in the relationship with Turkey shifted away from human rights in ways that eroded the capacity of regional institutions to constrain rights abuses. In 2015, the then-four-year-old war in Syria, which had produced millions of refugees absorbed by neighboring countries including Turkey, suddenly topped the European agenda.⁵⁵ After years of failed commitments to fund United Nations relief efforts to assist Syrian civilians,⁵⁶ the arrival of hundreds of thousands of refugees crossing land borders in the Balkans and arriving on Europe's shores in Greece was deemed a "migration crisis."⁵⁷

The reception of refugees varied dramatically across the E.U., with the region's shared asylum policy unraveling as a consequence of political backlash and nativist policies in several countries.⁵⁸ By the end of 2015, Germany had absorbed the largest proportion of arriving refugees—almost one million—but the government's decision to receive this population was engendering opposition.⁵⁹ Even Germany's reception of refugees paled in comparison to the

⁵³ See, e.g., Başak Çalı, *Turkey's Relationship with the European Court of Human Rights Shows that Human Rights Courts Play a Vital Role, but One that Can Often Be Vastly Improved*, LSE BLOG (Mar. 14, 2012), <https://perma.cc/RHC4-2P8R>.

⁵⁴ Ergun Özbudun & Füsün Türkmen, *Impact of the ECtHR Rulings on Turkey's Democratization: An Evaluation*, 35 HUM. RTS. Q. 985 (2013). See also *Individual Application Has Led to a Revolutionary Change in the Turkish Legal Order*, CONST. CT. REP. TURKEY (Sept. 23, 2019), <https://perma.cc/R95D-QRDY> (noting that the "ECtHR's case-law has had a determining impact on the progress of the constitutional and legal system of Turkey").

⁵⁵ See, e.g., Somini Sengupta, *Refugee Crisis in Europe Prompts Western Engagement in Syria*, N.Y. TIMES (Sept. 30, 2015), <https://perma.cc/MD7J-N7J6>.

⁵⁶ See HIGH-LEVEL PANEL ON HUMANITARIAN FINANCING REPORT TO THE UNITED NATIONS SECRETARY GENERAL, TOO IMPORTANT TO FAIL—ADDRESSING THE HUMANITARIAN FUNDING GAP 1 (2016), <https://perma.cc/Z3RD-KTE2> (noting that in 2015 "1.6 million Syrian refugees had their food rations cut and 750,000 Syrian children could not attend school" due to failure to secure relief funds).

⁵⁷ Jeanne Park, *Europe's Migration Crisis*, COUNCIL ON FOREIGN RELATIONS (Sept. 23, 2015), <https://perma.cc/H9AV-HQM9>.

⁵⁸ See Lillian M. Langford, Note, *The Other Euro Crisis: Rights Violations under the Common European Asylum System and the Unraveling of EU Solidarity*, 26 HARV. HUM. RIGHTS J. 217, 217 (2013).

⁵⁹ *Migrant Crisis: Germany Heads for 1m Asylum-seekers in 2015*, BBC (Dec. 7, 2015), <https://perma.cc/N8QJ-M6HN>.

efforts that had already been made at that point by Turkey and other neighboring countries, such as Lebanon and Jordan, with far smaller economies than those of their European counterparts.⁶⁰ The size of the E.U.'s territory, population, and economy should have enabled the region to easily manage refugee flows on the scale reaching the bloc in 2015,⁶¹ but the ethnic and religious identity of the new arrivals triggered similar anxieties to those that had been voiced over Turkish accession a decade earlier.⁶²

The European experience of migration as a crisis produced a new political imperative in the region: striking deals with neighbors outside E.U. borders to prevent migrants and refugees from crossing into Europe. At a time when Turkey's human rights record had been raising serious alarms in Europe—from the authoritarian turn of Erdoğan's government to renewed violence against the country's Kurdish minority—the imperatives of migration control rehabilitated the E.U.'s willingness to enter into a tactical partnership with Turkey.⁶³ German Chancellor Angela Merkel was widely seen as the driving force behind a new E.U.-Turkey “refugee deal” in 2016.⁶⁴ Turkey agreed that Greece could “return” migrants deemed ineligible for asylum in the E.U. in exchange for funding to help support the nearly four million Syrian refugees in Turkey and promises of visa-free travel to Europe for Turkish citizens.⁶⁵ The agreement was widely denounced by human rights advocates as a betrayal of the E.U.'s humanitarian values and an outsourcing of its migration policies to Turkey.⁶⁶ The Turkish public viewed the

⁶⁰ Indeed, Lebanon—a country with a population under four million and a GDP of \$74 billion—was hosting as many Syrian refugees as Germany, which has a GDP of \$4 trillion and a population of over 80 million. See Leo Dobbs, *The Number of Syrian Refugees in Lebanon Passes the 1 Million Mark*, U.N. HIGH COMM'R REFUGEES (Apr. 3, 2014), <https://perma.cc/K5RF-V9HG>. By 2015, Turkey was hosting nearly 2 million Syrian refugees. UNHCR: *Total Number of Syria Refugees Exceeds Four Million for First Time*, U.N. HIGH COMM'R REFUGEES (July 9, 2015), <https://perma.cc/J3P4-79B8>.

⁶¹ For comparison, more than three times as many Ukrainian refugees were welcomed into Europe in a matter of weeks in 2022, without triggering comparable backlash or divergences among European host states. The contrast was widely noted. See, e.g., Deena Zaru, *Europe's Unified Welcome of Ukrainian Refugees Exposes 'Double Standard' for Nonwhite Asylum Seekers: Experts*, ABC NEWS (Mar. 8, 2022), <https://perma.cc/J5EQ-H3MS>.

⁶² See, e.g., Ernesto F.L. Amaral et al., *Europe's Great Challenge: Integrating Syrian Refugees*, RAND BLOG (Apr. 20, 2018), <https://perma.cc/PY7L-6PWW> (noting that a majority of respondents in Italy and Greece had stated that “their countries would be a worse place to live in if an increasing number of people from different races, ethnic groups and nationalities lived there”).

⁶³ Editorial page criticisms explicitly called out the absence of European criticism of Turkey in the context of talks over a migration deal. See, e.g., *The Observer View on the EU's Wrong-headed Wooing of Turkey*, GUARDIAN (Oct. 17, 2015), <https://perma.cc/9MSJ-DN5E>.

⁶⁴ Barbara Wesel, *Turkey Migration Seal a 'Stain on EU Rights Record'*, DEUTSCHE WELLE (Mar. 17, 2021), <https://perma.cc/NM36-VKNX> (describing the terms of the refugee deal).

⁶⁵ *Id.*

⁶⁶ *Id.* See also EU: *Turkey Mass-Return Deal Threatens Rights*, HUM. RTS. WATCH (Mar. 15, 2016), <https://perma.cc/45DU-KM24>; Nils Muiznieks, *Stop Your Backsliding, Europe*, N.Y. TIMES (Mar. 14,

deal as evidence of the shallow commitment to human rights and humanitarianism in Europe.⁶⁷ Moreover, a critical aspect of the deal—the promise of visa-free travel for Turkish citizens to Europe—never materialized, leading to further resentment.⁶⁸ But for the Turkish government, the deal marked the end of credible European pressure on the country over its human rights record.⁶⁹

The aftermath of an attempted coup in Turkey accelerated the Erdoğan government's slide into authoritarianism,⁷⁰ but the European Union was widely perceived as muting its criticism in service of striking and maintaining a deal to stem the flow of migrants.⁷¹ This combination of events left the Turkish government almost entirely impervious to European “sticks.”⁷² The ECtHR also proved incapable of addressing its substantial docket of Turkish applicants seeking redress from widespread human rights violations in the aftermath of the 2016 coup attempt.⁷³ The following year, a constitutional amendment package passed under the cover of a state of emergency introduced an overtly anti-democratic set of reforms that reversed whatever progress had been achieved in pursuit of accession. Yet, despite repeated high-level European engagement with Turkey on a range of issues, democracy and human rights rarely topped the agenda.⁷⁴ Annual calls from European parliamentarians to suspend Turkish accession talks over the country's ever-deteriorating human rights record have fallen on deaf ears in Brussels and Ankara alike since the 2016 migration deal.⁷⁵

2016), <https://perma.cc/Y8RZ-M34H> (denunciation of the human rights implications of the deal by the Council of Europe's commissioner for human rights)

⁶⁷ See Vince Chadwick, *Erdogan Slams 'Hypocritical' EU over Human Rights Criticism*, POLITICO (Mar. 21, 2016), <https://perma.cc/7QYF-EGUP>.

⁶⁸ *Turkey Slams 'Hypocritical' EU Report on Accession Talks*, REUTERS (June 27, 2018), <https://perma.cc/L8HW-Y4Y4> (noting that promises of visa-free travel were not kept).

⁶⁹ Chadwick, *supra* note 67.

⁷⁰ See, e.g., *Turkey's Failed Coup Accelerates Erdogan's Authoritarian Slide*, WORLD POLITICS REV. (July 28, 2016), <https://perma.cc/9T8H-AAVV>; *Turkey Attempted Coup: EU Says Measures 'Unacceptable'*, BBC (July 21, 2016), <https://perma.cc/KR2S-AWUN>.

⁷¹ See Patrick Cockburn, *Refugee Crisis: EU Report on Turkey's Membership Contains Muted Criticism as It Seeks Nation's Cooperation with Influx*, INDEPENDENT (Nov. 10, 2015), <https://perma.cc/5LVY-BLAB>.

⁷² See, e.g., *Turkey Flouts European Court Judgments*, HUM. RTS. WATCH (Mar. 30, 2021), <https://perma.cc/8YE8-9Q7M>.

⁷³ Leighann Spencer, *The ECtHR and Post-coup Turkey: Losing Ground or Losing Credibility?*, VERFASSUNGSBLOG (July 17, 2018), <https://perma.cc/B6EN-MCAT>.

⁷⁴ See, e.g., William Gourlay, *EU Engagement Gives Turkey a Free Pass on Human Rights Violations*, STRATEGIST (Apr. 20, 2021), <https://perma.cc/DK4X-XGJF>.

⁷⁵ The absence of a meaningful response on either side to the perennial calls for suspension of accession talks from the European Parliament is striking. See, e.g., *Kati Piri: 'You cannot sit and wait while the situation in Turkey is deteriorating.'* EUR. PARLIAMENT NEWS (July 5, 2017), <https://perma.cc/B3J3-WDWY>; *Parliament Wants to Suspend EU Accession Negotiations with Turkey*, EUR. PARLIAMENT NEWS (Mar. 13, 2019), <https://perma.cc/9XXR-3AYH>; *European Parliament*

The E.U. may have been even more adept at disabling the “sticks” to penalize democratic backsliding than it had been in depreciating the prodemocratic “carrot” of accession. Once again, the underlying reason was tied to a crisis in Europe’s own democratic commitments when faced with the challenge of honoring the human rights of refugees and grappling with the prospect of governing a multiracial society.⁷⁶

IV. EUROPE’S AUTHORITARIAN INTERNATIONAL LAW?

The question of how Western democracies cope with the challenge of diversity has gained increasing urgency in the last five years, particularly following the election of Donald Trump in the U.S. and the rise of populist leaders in Europe. In his widely read foreword in the *Harvard Law Review*, Michael Klarman examined “the role of demographic change, immigration, and increasing racial resentment in seeding disaffection with democracy.”⁷⁷ Klarman observed that the world “has almost no experience with true multiracial democracy” and that democracy only succeeded in Europe after “ethnic heterogeneity had been eliminated by two world wars.”⁷⁸ One of the enduring challenges in post-war Europe has been managing the integration of racial minorities from former colonies and immigrants originally invited as temporary guest workers into their polities.⁷⁹ The result has been mixed at best, with profound issues of racial discrimination, xenophobia, and even paroxysms of ultra-nationalist violence in countries like France and Germany.⁸⁰ Problems of racism and discrimination in Europe are especially acute in the context of migration,⁸¹ which offers an important lens on the self-limiting quality of prodemocratic European

Calls for Suspension of Turkey Accession Talks, AL-MONITOR (May 20, 2021), <https://perma.cc/5ZZW-6BKJ>.

⁷⁶ Emre Peker, *EU Stumbles Over Its Own Values with Turkey*, WALL ST. J. (Oct. 26, 2017), <https://perma.cc/DV7B-BBNL> (noting that competing priorities over migration and other issues prevent the EU from punishing Turkey for its deteriorating human rights record).

⁷⁷ Michael Klarman, *Foreword: The Degradation of American Democracy and the Court*, 134 HARV. L. REV. 1, 9 (2019).

⁷⁸ *Id.* at 107.

⁷⁹ See, e.g., Elena Ball, Melanie C. Steffens & Claudia Niedlich, *Racism in Europe: Characteristics and Intersections with Other Social Categories*, FRONTIERS PSYCH. (Mar. 22, 2022), <https://perma.cc/UGF3-EZBX> (noting that the “prevalent understanding of European racism is connected to migration from the former colonies to the European metropolises and the post-Second-World-War immigration of ‘guest workers’”).

⁸⁰ Natalie Colarossi, *Germany Sees 72 Percent Increase in Anti-Immigrant Crimes*, NEWSWEEK (May 4, 2021), <https://perma.cc/QLZ7-GBBH>; *Discriminations des Personnes Musulmanes: Les Autorités Françaises Devient Réagir!* (Discrimination Against Muslims: The State Must React!), AMNESTY INT’L (Nov. 7, 2019), <https://perma.cc/6FZH-MW6Q>.

⁸¹ Ojeaku Nwabuzo & Lisa Schraeder, *Racism and Discrimination in the Context of Migration in Europe*, EUR. COMM’N WEBSITE INTEGRATION (Mar. 31, 2017), <https://perma.cc/KU3R-GN3B>.

international institutions. When democratic commitments have clashed with concerns over migration and anxieties about European cultural identity, prodemocratic legal tools have largely been sidelined in favor of expedient compromises.

The failure to grapple with the demands of multiracial democracy has been more damaging than just disabling Europe's pro-democratic carrots and sticks for potential candidates for accession. As Ginsburg ably chronicles in his book—and the update he provides in this Symposium—democratic backsliding has taken root among E.U. member states themselves.⁸² Hungary is perhaps the premier example of a country in which a political entrepreneur has weaponized populist, anti-immigrant politics and established an electoral autocracy internal to the E.U.⁸³ The E.U.'s relationship to Turkey suggests a troubling complement to this story. To manage the perceived threat that migration poses to the European project, some of the most purportedly liberal countries in the E.U. led the charge to enter a partnership with a Turkish government that they viewed as anti-democratic and rights-abusive. Moreover, the migration deal with Turkey was just one of several similar partnerships with abusive authoritarian regimes and even armed militias in the Middle East.⁸⁴ Far from serving prodemocratic ends, Europe's foreign policies with respect to its southern neighbors, driven by migration and security concerns, have often provided implicit and even explicit support for authoritarianism.⁸⁵ In other words, Europe has participated in generating new forms of authoritarian international law, using treaties to subcontract migrant interdiction and rights abuses to autocratic partners at its borders.

The use of international law by the E.U. in ways that lend support to authoritarians and pursue ends that violate human and refugee rights deserves examination in its own right as a threat to the idea of prodemocratic international law. The current war in Ukraine risks further dampening the E.U.'s appetite for penalizing democratic backsliding. With Poland emerging as an important frontline state in the conflict with Russia, earlier criticisms of the Warsaw government's erosion of judicial independence are unlikely to remain salient. New

⁸² Tom Ginsburg, *Democracies and International Law: An Update*, 23 CHI. J. INT'L L. 1, 18 (2022).

⁸³ Indeed, Hungary's Victor Orbán has been working assiduously to support similar populist and illiberal leaders across Europe. See Shaun Walker, *Viktor Orbán Calls for Anti-migration Politicians to Take over EU*, GUARDIAN (Jan. 10, 2019), <https://perma.cc/HNR3-N3DV>.

⁸⁴ On recent developments in the EU's migration deal with Morocco, see Sam Edwards, *Morocco Uses Migrants to Get What It Wants*, POLITICO (May 19, 2021), <https://perma.cc/E8YH-5H22>. I have written with Tendayi Achiume on the arrangements between E.U. countries and armed Libyan militias to prevent migrants from heading to Europe from Libya's coast, resulting in drownings, abuse, and even human trafficking and slavery practices. See E. Tendayi Achiume & Asli Ü. Bâli, *Race and Empire: Legal Theory Within, Through and Across National Borders*, 67 UCLA L. REV. 1386, 1422–29 (2021).

⁸⁵ See James Lynch, *Part of the Problem: A Better European Approach to Human Rights in the Middle East and North Africa*, EUR. COUNCIL FOREIGN RELS. (Nov. 18, 2021), <https://perma.cc/H5C7-BUPK>.

concerns about European security may well displace the region's prioritization of democracy in much the same way that anxieties about migration muted concerns about Turkey's rights record. While Turkey may pursue some of the authoritarian international law strategies identified by Ginsburg—reducing dependence on Western partners and joining alternative authoritarian international arrangements like the Shanghai Cooperation Organization⁸⁶—it may no longer need such a hedge, with the E.U. willing to enter long-term partnerships on authoritarian terms. Ginsburg observes that “prodemocratic law may exist at the same time as authoritarian international law.”⁸⁷ In the case of Europe, increasingly, the two strategies may coexist within the same regional arrangements.

V. CONCLUSION

An examination of the record of Turkey's E.U. accession bid reveals more than a story about how international pressure may fail to prevent democratic regression. Beyond the well-known trajectory of Turkey's authoritarian turn lies a more nuanced account of the compliance pull once exerted by Europe's accession criteria and the E.U.'s diminishing capacity to leverage reforms in light of anxieties about diversity. Political entrepreneurs in Europe have ably deployed fears of Turkish migrants and refugee arrivals to pursue reactionary ends, from the constitutional referenda of 2005 to Brexit in 2016. The Turkish public, in turn, readily appreciated the implications for prospects of E.U. membership. While this represents only one element of the vexed E.U.-Turkey relationship, it is both important and underappreciated.

In the end, when confronted with the challenge of pluralism, the fragility of commitments to core democratic and liberal tenets at the heart of the Western international legal order may be as worrying as the rise of authoritarian international law. This suggests that preventing democratic backsliding will require more than international legal institutions that offer technical cooperation or best practices to combat corruption, and even more than the fairly significant carrots and sticks that E.U. accession once provided. What is needed is renewed effort to grapple with the challenges of democratic governance in multiracial societies. The consolidated democracies of Europe and North America have long depended for their stability on a tacit demographic majority, whether in terms of ethnic, religious, or racial identity. Weaning themselves from a democratic politics of privileged insiders and permanent outsiders is an immense challenge. Unfortunately, the failure to do so provides an invitation to a politics of resentment—one that has become the calling card of populist authoritarians like

⁸⁶ See Natasha Bertrand, *NATO's Second-largest Military Power Is Threatening Dramatic Pivot to Russia and China*, BUS. INSIDER (Nov. 22, 2016), <https://perma.cc/3U78-8APR>.

⁸⁷ GINSBURG, *supra* note 1, at 292.

Orbán or Trump—and helps explain why prodemocratic European international law fell short in the two pivotal moments discussed in this Essay.