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ARTICLE

Ukraine and the EU Enlargement: What Is the Law and Which Is the Way Forward?

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Abstract

The future of Ukraine depends on its relations with the EU. What is the law governing accessions? What are the main challenges facing Ukraine on the path towards EU membership? Going through the pre-accession scrutiny in times of war, Ukraine sets a unique precedent, where more experimentation could be possible to mitigate a huge risk that the EU repeats and amplifies the same mistakes it made in the Western Balkan countries – making the region a hostage of its contradictory and lethargic politics for too long. The evolution of EU enlargement law and the legal-political framework surrounding accessions across the different rounds of EU enlargement demonstrates that EU law is flexible while the practice of its application is volatile and deeply political. Enlargement practice shows that applying pre-accession conditionality may cause significant delays, while not delivering the results expected of it. A new approach to regulating accessions to the EU needs to be tested out before it is too late. This approach should build on Article 49 TEU and seek at least some depoliticisation of the enlargement process to guarantee the rule of law without dubious pre-accession techniques. Such an approach would speed-up accessions while making EU enlargement more predictable, serving the interests of Ukraine and other partners.

Keywords: Article 49 TEU; conditionality; EU enlargement; pre-accession; Ukraine

I. Introduction: pacification through incorporation and the messianic goal of peace

Peace in Europe is said to lie at the core of the Union's self-understanding since the very inception of the European project. This messianic promise comes first; economic unity, the four freedoms, and all the rest of the *acquis* are but the tools to reach this objective.[1] Over and over again the EU has been reminded of this official *raison d'être.* The war in Ukraine is the most recent time. Each such reminder is a sobering awakening. *Pace* the Nobel committee, the EU is not at all famous for cashing its peace dividend.[2] The story repeats itself from the colonial wars in Algeria and further afield, translated into the ongoing war on the former colonials in the Mediterranean with outrageous death-tolls,[3] to the totality of the Union's periphery over time – from the Balkans in the 1990s to Syria, Libya and the

[1] On the "messianic" nature of the Schuman Declaration, see, JHH Weiler, "The Political and Legal Culture of European Integration: An Exploratory Essay" (2011) 9 International Journal of Constitutional Law 678.

[2] A Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge, Cambridge University Press 2010).

[3] O Shatz, *EU's Crimes against Humanity* (JSD dissertation, Yale Law School, 2023); S Ganty and D Kochenov, "EU Lawlessness Law" (2024) 30(1) Columbia Journal of European Law 78–156.

descent into (civil) wars and uncertainty of pretty much all of Barroso's imaginary "circle of friends"[4] of the future that never was – and not always without the EU and its Member States' help, just like in Iraq, Afghanistan and elsewhere. The bizarre taste of the "peace" in Schuman's Europe, which was divided by the iron curtain and placed between the two nuclear superpowers is a difficult achievement to celebrate.[5] Yet, it is undeniable that the fall of the USSR, which has now returned to haunt us in Ukraine,[6] gave a boost of hope that the EU's promise of peace would be realisable. So, in the 1990s, the EU vowed to use enlargements as a transformation tool from the "big-bang" enlargement of 2004 and the accession of Bulgaria and Romania that followed[7] to bringing the Western Balkan countries together "after a shameful decade of failure in the region."[8] That was the time for the imperial ideals like pacification through incorporation, celebrated by Jan Zielonka[9] to be tested in practice. Tony Judt emerged as virtually the solitary sceptic among the cheerleaders.[10] Thus, back in 1999, a membership perspective was offered to the Balkan region within the framework of the Stabilisation and Association process and once the Copenhagen criteria "have been met."[11] The EU did not hide its reasons behind this decision – enlargement has been seen as a means of stabilization, peace sold to its potential beneficiaries almost as a cost-cutting measure.[12]

Yet, after the calming of the Western Balkans, the EU's promises and commitments started to fade. Fast forward to 2025, only Croatia, out of the (then) five Western Balkan countries[13] that were promised EU membership entered the Union. Meanwhile, Montenegro and Kosovo joined the long queue after declaring independence and submitting membership bids. Absorbed by its own business, the EU turned away from its commitments, failing the Western Balkans, where there was now peace.[14] Worse still, it forgot how fragile European peace could be: calm times seemingly diminish the EU's appetite for enlargement and long-term stability, undermining its pacification through an incorporation model. At stake is not solely relaxation after the storm, however: EU conditionality has always been a flawed design, as the rhetorical tool was not connected to consistent and lasting improvement on the ground – a failure.[15] The reasons for that were both political and legal, marking both the capability and the credibility gap lying at the heart of EU's efforts.[16]

[4] D Kochenov and E Basheska, "ENP Values Conditionality from Enlargements to Post-Crimea" in S Poli (ed), *The European Neighbourhood Policy* (London, Routledge 2016) pp 145–66.

[5] G Mallard, *Fallout: Nuclear Diplomacy in an Age of Global Fracture* (Chicago, IL, The University of Chicago Press 2014).

[6] VM Zubkov, *Collapse: The Fall of the Soviet Union* (New Haven, CT, Yale University Press, 2024).

[7] A Ott and K Inglis (eds), *Handbook on European Enlargement* (T.M.C. Asser Press, The Hague 2002).

[8] N Koval and MA Vachudova, "European Union Enlargement and Geopolitical Power in the Face of War" (2024) 62(S1) Journal of Common Market Studies 135–46.

[9] J Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford University Press 2006).

[10] T Judt, *A Grand Illusion* (New York, NY, New York University Press, 1996).

[11] European Commission, "Stabilisation and Association process for countries of South-Eastern Europe" COM (l999) 235 final, 26 May 1999, para. 3. Cf., on the criteria, D Kochenov, "Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law" (2004) 8 (10) European Integration online Papers (EIoP) 1.

[12] European Commission, "Stabilisation and Association process for countries of South-Eastern Europe" COM (l999) 235 final, 26 May 1999.

[13] Ie, Albania, Bosnia and Herzegovina, Croatia, (then) Serbia and Montenegro, and (then) Republic of Macedonia.

[14] Koval and Vachudova, "European Union Enlargement," 3.

[15] D Kochenov, *EU Enlargement and the Failure of Conditionality* (Alphen aan den Rijn, Kluwer Law International, 2008).

[16] N Scicluna and S Auer, "Europe's Constitutional Unsettlement: Testing the Political Limits of Legal Integration" (2023) 99 International Affairs 769–85.

The question is whether this has changed in 2022. The full-scale Russian invasion of Ukraine seemingly caught the EU by surprise, the troubled and violent history of Russia-Ukraine relations notwithstanding.[17] EU's policy of principled pragmatism[18] in place since the illegal annexation of Crimea in 2014 has failed.[19] The EU hardly took Ukraine's membership aspirations seriously before the war, notwithstanding the intensifying export of the *acquis* to the country alongside a handful of other post-Soviet republics[20] and a theoretical potentiality to regard the bilateral Association Agreement as a stepping stone towards membership – what has been done before in the context of the "big-bang" enlargement,[21] but could hardly be regarded as offering any realistic perspective outside of Kyiv.[22] In the words of the Albanian Prime Minister, Edi Rama, "it was Vladimir Putin's hard work to occupy a country to help the EU understand that it lives in a parallel world."[23] Only one year before the invasion, the European Parliament confirmed rather vaguely the "shared ambition of the EU and Ukraine to move towards political association and economic integration."[24] Sadly, it was the start of yet another war in Europe that reminded the EU of expansion as a potential peace tool.

As the invasion started, both Ukraine and the EU reacted in the blink of an eye. Ukraine applied for EU membership on 28 February 2022, only four days after it was invaded by Russia. In June 2022 already, the Commission recommended that the country be granted candidate status by the European Council. The European Parliament adopted a resolution six days later calling for the immediate granting of candidate status to Ukraine which happened on the same day.[25] Ukrainian refugees received virtually instant protection from the EU and the Member States following the activation for the first time of the Temporary Protection Directive in a record eight days from the date of the beginning of the war, ensuring that Ukrainian refugees had access to legal residence, right to work and *de facto*

[17] Resolution on Territorial integrity of Ukraine, UNGA Res 68/26 (1 April 2014) UN Doc A/RES/68/262.

[18] F Bossuyt and P Van Elsuwege (eds), *Principled Pragmatism in Practice: The EU's Policy towards Russia after Crimea* (Leiden, Brill/Nijhoff 2021).

[19] MM Bigg, "A History of the Tensions Between Ukraine and Russia," *The New York Times* (26 March 2022), available at <https://www.nytimes.com/2022/03/26/world/europe/ukraine-russia-tensions-timeline.html> (last accessed 5 March 2025).

[20] R Petrov, "All's Well That Ends Well: Short Story of Ukraine's Road towards European Union Membership" (2024) 43 Yearbook of European Law (early view) 10–22; G van der Loo, *The EU-Ukraine Association Agreement* (Leiden, Brill-Nijhoff 2016); R Petrov and P Van Elsuwege (eds), *The Application of EU Law in the Eastern Neighbourhood of the European Union* (London, Routledge 2014). This process has been intensified following the submission of the Ukrainian EU membership application: Cf. A Łazowski and T Komarova, "Pryshvydshennya pravovoho nablyzhennya v Ukraïny pyslia podannya zaiavky na vstup do Jevropeiskoho Soiuzu" (2024) 7 Pravo Ukraïny 23–40; T Komarova and A Łazowski, "Switching Gear: Law Approximation in Ukraine after the Application for EU Membership" (2023) 19 Croatian Yearbook of European Law and Policy 105–32.

[21] K Inglis, "The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation" (2000) 37(5) Common Market Law Review 1173–210.

[22] P Van Elsuwege and G van der Loo, "The EU-Ukraine Association Agreement as a Stepping Stone towards Membership?" (2022) EU Law Live, March 28.

[23] N Si, "Rama at the Bled Forum: Putin Made the EU Realize That It Lives in a Parallel World" *Euronews* (2 September 2024), available at <https://euronews.al/en/rama-at-the-bled-forum-putin-made-the-eu-realize-that-it-lives-in-a-parallel-world/> (last accessed 5 March 2025).

[24] European Parliament, "Resolution of 11 February 2021 on the Implementation of the EU Association Agreement with Ukraine' (2019/2202(INI)), para. 1.

[25] Roman Petrov and Peter Van Elsuwege offer the best up to date longitudinal accounts of Ukraine's accession path in the legal literature: Petrov, "All's Well That Ends Well"; P Van Elsuwege, "Naar een verdere uitbreiding van de Europese Unie: instrumenten voor de gedeeltelijke integratie van kandidaat-lidstaten" (2024) 143 Sociaal-economische wetgeving 465–76. In political science, see N Scicluna and S Auer, "Pushing the EU's Boundaries: Enlargement and Foreign Policy Actorness after the Russian Invasion of Ukraine" (2023) 61 Journal Common Market Studies 45–56; Koval and Vachudova, "European Union Enlargement."

free movement rights.[26] This essentially means that Ukrainians enjoy EU free movement under temporary protection,[27] unlike the citizens of all the other candidate countries and even Member States before the expiration of the transitional periods[28] and unlike the Russian citizens – escaping the Putin regime.[29] In December 2023, the European Council decided to open accession negotiations with the country and the accession negotiations started in June 2024. Simultaneously, support for membership has been growing across Ukraine.[30] Moldova and Georgia followed a similar path, and the progress is similarly uncertain in both divided societies: the Moldovan elites almost lost the unnecessary "EU accession" referendum held before any membership was offered,[31] while the newly-re-elected Georgian government preferred to freeze negotiations itself criticised over possible election fraud and after the EU accession process halted over the Putin-inspired "Foreign Agent" law.[32] These countries fail to harness tangible pro-EU majorities and suffer from the same territorial divisions as Ukraine.

Edi Rama is unquestionably correct: if not for Putin's aggression, Ukraine would have never emerged as a candidate country.[33] To agree also with Koval and Vachudova, just as with the Western Balkans, the EU once again "reached for enlargement in response to the war in its neighbourhood (. . .) [a]nd in both cases, the membership perspective came after grave missteps by the EU."[34] Worse still, such perspective de facto ended up on ice, once the tensions subsided. Just as with the Western Balkans, the EU's slogans are open about

[26] Council Implementing Decision (EU) 2022/382 establishing the existence of mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71/1 (4 March 2022).

[27] V Lazarenko and M Rabinovych, "Collective Protection for Ukrainians in the EU: Laws, Practices, and Implications for EU and Ukrainian Policies," in M Rabinovych and A Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Cham, Palgrave Macmilan 2024) 93–122; D Thym, "Temporary Protection for Ukrainians: The Unexpected Renaissance of 'Free Choice'," *Verfassungsblog* (5 March 2022), available at <https://verfassungsblog.de/temporary-protection-for-ukrainians/> (last accessed 5 March 2025).

[28] D Kochenov, "European Integration and the Gift of the Second Class Citizenship" (2006) 13 Murdoch University Electronic Journal of Law 209. See also Van Elsuwege, "Revisiting the EU-Ukraine Association Agreement," 80–2.

[29] S Ganty et al., "Unlawful Nationality-Based Bans from the Schengen Zone" (2023) 48 Yale Journal of International Law Online, 1.

[30] Even if lagging behind the NATO membership ideal: KMIS, "Znachennya chlenstva v YeS dlya ukraïntziv, priorytetnist' vstupu do ES chy NATO i spryynyattya Rossiï yak chastyny Yevropy," (18 October 2023), available at <https://kiis.com.ua/?lang=ukr&cat=reports&id=1303&page=1> (last accessed 6 March 2025).

[31] See, eg, O Popescu-Zamfir, "Moldova Won the Battle, Not the War," Carnegie Europe (22 October 2024), <https://carnegieendowment.org/europe/strategic-europe/2024/10/moldova-won-the-battle-not-the-war?lang=en> (last accessed 5 March 2025).

[32] See "Twists and Turns: Georgian Dream Rhetoric on the EU," *EUvsDisinfo* (23 October 2024), available at <https://euvsdisinfo.eu/twists-and-turns-georgian-dream-rhetoric-on-the-eu/> (last accessed 5 March 2025), regarding the Georgian saga from the time of its EU application until the shift away of the ruling party from the pro-EU stance. On the allegations of election fraud, see, R Dixon and M Ilyushina, "Opposition Protests as Pro-Russia Party in Georgia Appears to Win Elections," *The Washington Post* (28 October 2024), available at <https://www.washingtonpost.com/world/2024/10/28/georgia-election-dream-russia-fraud/> (last accessed 5 March 2025). See also European Commission, "Georgia 2024 Report," SWD (2024) 697 final.

[33] Cf. R Petrov, "Bumpy Road of Ukraine Towards the EU Membership in Time of War: 'Accession through War' v 'Gradual Integration'" (2023) 8 European Papers 1057–65; P Van Elsuwege, "Revisiting the EU-Ukraine Association Agreement: A Crucial Instrument on the Road to Membership" in M Rabinovych and A Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Cham, Palgrave Macmillan 2024) 67–90.

[34] Koval and Vachudova, "European Union Enlargement."

self-interest: "You are fighting not only for your freedom [...] but for ours too"[35] – proclaimed President, Ursula von der Leyen, in the *Verkhovna rada* of Ukraine. While this undoubtedly sounds pompous, whether the statement is factually correct is a different matter.

It is abundantly clear that Ukraine's accession trajectory depends in all respects on how and how soon the war ends. The example of the Western Balkans is not promising. When submitting the membership bid, President Zelenskyy called for the "immediate accession of Ukraine under a new special procedure."[36] Unsurprisingly, the EU dismissed this atypical offer of importing the war, providing for accelerated pre-accession process instead, attested to by the fast pre-accession progress of Ukraine to this day.[37] That said, the negotiation framework for Ukraine adopted by the EU Council on 21 June 2024, failed to meet the expectations of many supporters of a super-fast pre-accession process. This is notwithstanding the fact, as we will see, that the law is immensely flexible and accessions of many states have been virtually instant in the past – be it through incorporation (think of the German Democratic Republic (GDR),[38] which could be an option for Moldova, too),[39] or through speedy admission followed by lengthy transition periods, as was the case of the UK, in one example.[40] Be it as it may, the on-going war makes such comparisons somewhat beyond the point, while showcasing the potential options for the peaceful times.

So, what are the key legal principles governing accessions? What are the main challenges that Ukraine is facing on the path towards EU membership? Will Ukraine share the ailing fate of the Western Balkan countries, or it will be a successful story that could change the pre-accession process? The paper addresses all these questions one by one. Section II discusses the law governing accessions; Section III addresses the challenges that Ukraine faces on the path of accession.

II. EU law governing accessions

EU enlargements are based on "customary law," as one of us has argued.[41] Indeed, little, if anything is found in the Treaties, silent even on the most essential elements of the accession puzzle. One thing is clear: the law does not provide for a right to join – and ensures absolute discretion of the Member States in deciding on this issue. Drawing on the experience of the past seven enlargement rounds, the regulation of EU enlargements can be structured as a combination of the substantive facet (admissibility criteria and enlargement principles) and the procedural facet (actors participating in the process, their powers and competences, as well as the chronology of the legal steps towards accession).

[35] European Commission (Speech), "Address by President von der Leyen to Members of Verkhovna Rada," Kyiv, 4 November 2023, available at <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_23_5561/SPEECH_23_5561_EN.pdf> accessed 5 March 2025.

[36] "Ukrainian President Appeals for EU Membership and Urges Russian Soldiers to Leave," *Guardian News* (28 February 2022), available at <https://www.youtube.com/watch?v=JNT6ZYkWCcE> (last accessed 7 December 2024).

[37] Council of Europe (News and Events), "EU-Ukraine Integration: Key Chapter 23 Screening Completed" (30 September 2024), available at <https://www.coe.int/en/web/kyiv/-/eu-ukraine-integration-key-chapter-23-screening-completed> (last accessed 5 March 2025).

[38] See H Türk, "European Integration and the Temporary Division of Germany" in M Segers and S Van Hecke (eds), *The Cambridge History of the European Union* (Cambridge, Cambridge University Press 2023) pp 53–77.

[39] See for more detailed clarification "Unification of Moldova and Romania explained" *Explained.Today*, available at <https://everything.explained.today/Unification_of_Moldova_and_Romania/> (last accessed 6 March 2025).

[40] D Kochenov and R Janse, "Admitting Ukraine to the EU" EU Law Live (30 March 2022).

[41] Kochenov, *EU Enlargement and the Failure of Conditionality*, pp 9–64.

1. Admissibility criteria

Article 49 TEU is the main legal provision governing enlargements. The Treaty text lists three basic criteria for the applicant state to satisfy for its application to be admissible:

a) Statehood;
b) Europeanness;
c) "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (Article 2 TEU).

The substance of the criteria has been abundantly clarified in the course of the previous enlargement rounds. The criterion of Statehood does not represent much of a problem for the majority of European states with the exceptions of the Vatican City,[42] which is placed at the service of the Holy See, and also Kosovo, which does not enjoy a universally recognised statehood and requires constant inventiveness of those who assume it.[43] Dismissing the absurd interpretation of the EU General Court that there is a difference between the concepts of "third state" and "third country," the CJEU confirmed on an appeal brought by Spain that Kosovo can be treated as a "third country" in EU law[44] without that affecting the individual position of EU Member States regarding its status. While the normalisation of relations with Serbia could shape the stance of Member States regarding the status of Kosovo and its future progress towards accession, the statehood criterion remains a creature of international law and individual Member States' recognition.[45] That being said, divided states and states under partial occupation are not disqualified under this criterion, as attested by the automatic entry of the former German Democratic Republic (DDR) into the integration project upon the unification of Germany as well as the current state of Cyprus.[46] Ukraine, no matter where the *de facto* boundary of its sovereign authority will lie on the day the war is over, is unquestionably a state under Article 49 TEU.

The meaning of "Europeanness" in the context of enlargements is somewhat trickier. The term is not solely about geography, but also, according to the European Commission, contains socio-cultural understandings[47] going back to the origins of EU law, where only "ethnically and racially European"[48] populations were supposed to benefit from the integration project, effectively establishing what Étienne Balibar characterised as "*apartheid européen*".[49]

[42] ibid, pp 22–7.

[43] Eg, P Van Elsuwege, "Legal Creativity in EU External Relations: The Stabilization and Association Agreement between EU and Kosovo" (2017) 22 European Foreign Affairs Review 393–409.

[44] Case C-632/20 P, *Spain* v *European Commission*, ECLI:EU:C:2023:28, paras. 50–2.

[45] Balkans Policy Research Group, "Kosovo: Unlocking its Euro-Atlantic Path" (2023), available at <https://balkansgroup.org/wp-content/uploads/2023/03/Kosovo-Unlocking-its-Euro-Atlantic-Path-1.pdf> (last accessed 5 March 2025).

[46] N Skoutaris, "The Status of Northern Cyprus under EU Law" in D Kochenov (ed), *EU Law of the Overseas* (Alphen aan den Rijn, Kluwer Law International 2011) pp 401–16; N Skoutaris, *The Cyprus Issue* (Oxford, Hart 2011); S Laulhé Shaelou, *The EU and Cyprus* (Leiden, Brill-Nijhoff 2009).

[47] European Commission, "Europe and the Challenge of Enlargement" Bulletin of the European Communities supplement 3-1992, point 7. See also C Hillion, "Enlargement of the European Union: A Legal Analysis" in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press 2023) pp 401–18, 403.

[48] H Eklund, "Peoples, Inhabitants and Workers" (2023) 34 (4) The European Journal of International Law 831–54, 843; P Hansen and S Jonsson, *Eurafrica* (London, Bloomsbury 2014).

[49] É Balibar, *Nous, citoyens d'Europe: Les frontières, l'État, le peuple* (Paris, La Découverte, 2001) pp 190–191. Cf. Ganty and Kochenov, "EU Lawlessness Law", pp 88–95.

"Europeanness" thus boasts obvious "Eurowhiteness" undertones.[50] On the whole, the question "what is Europe?" for the purposes of EU law has already been answered repeatedly as the EU responded to incoming membership applications. The analogy with other bodies, requiring its members to be European States, like the Council of Europe (CoE), has been also used.[51] Geography pure is not paramount, as the biggest part of the original Eurafrican common market project was located in Africa and a huge chunk of the internal market following the Danish accession and until the entry into force of the Greenland Treaty – in North America.[52] Still now, bits of "Europe" are scattered everywhere from North Atlantic and the Caribbean to the Indian and Pacific Oceans.[53] As a long-standing member of the CoE lying on the European continent Ukraine is unquestionably "European" in the sense of Article 49 TEU.

The matters are more complicated in relation to democracy and the rule of law. The fact that an applicant country should be a democratic state follows from the history of EU enlargements and the relations of the (then) Communities with the associated states. The Association Agreement with Greece, for example, was frozen by the Communities after the coup d'État of the colonels.[54] When Franco's Spain applied to join the Communities, the bid was left unanswered.[55] On one occasion the Commission expressly stated that Article 237 EEC – the predecessor of Article 49 TEU – "permits the accession of a state only if [. . .] its constitution guarantees, on the one hand, the existence and continuance of a pluralistic democracy and, on the other hand, effective protection of human rights."[56] Thus, EU values, which are now codified in Article 2 TEU have always been among the necessary conditions for accession.[57] Moreover, just like the Copenhagen political criteria, Article 2 TEU explicitly refers to the rights of persons belonging to minorities – a reference obviously underpinned by the enlargement practice.[58] The lack of any coherent internal minority policy did not prevent the Union from requesting protection for and promotion of minority rights in its enlargement policy.[59] This makes Ukraine a suitable country to

[50] H Kundnani, *Eurowhiteness. Culture, Empire and Race in the European Project* (London, Hurst 2023). See also H Kundani, "Ukraine Means Enlargement Is Again the EU's Priority – But Not for the Reasons It Claims' (Expert Comment), Chatham House" (19 February 2024), available at <https://www.chathamhouse.org/2024/02/ukraine-means-enlargement-again-eus-priority-not-reasons-it-claims> (last accessed 5 March 202) p 5.

[51] F Hoffmeister, "Changing Requirements for Membership" in A Ott and K Inglis (eds), *Handbook on European Enlargement* (The Hague, T.M.C. Asser Press 2002) pp 90–102.

[52] D Kochenov, "Part Four. Association of the Overseas Countries and Territories" in M Kellerbauer et al (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2nd ed., Vol. 2, Oxford, Oxford University Press 2024) pp 2057–73.

[53] D Kochenov and W Geursen, "EU Law of the Overseas" in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law* (Vol. 2, Oxford, Oxford University Press 2024).

[54] G Contogeorgis, "The Greek View of the Community and Greece's Approach to Membership" in W Wallace and I Herreman (eds), *A Community of Twelve? The Impact of Further Enlargement on the European Communities* (Bruges, College of Europe 1978) pp 22–31, 23.

[55] JA Carrillo Salcedo, "L'impact de l'adhésion sur les institutions et le droit des pays candidats: Espagne" in W Wallace and H Herreman (eds), *A Community of Twelve?* (Bruges, College of Europe 1978) pp 167–76, 170.

[56] Commission's submissions in Case 93/78 *Mattheus* v *Doego* [1978] ECLI:EU:C:1978:2206, at 2208.

[57] R Rose and C Haerpfer, "Democracy and Enlarging the European Union Eastwards" (1995) 33 (3) Journal of Common Market Studies 427–50, 428; M Klamert and D Kochenov, "Article 2 TEU" in M Kellerbauer et al (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* Vol. 1 (2nd edn, Oxford, Oxford University Press 2024) pp 22–30. Cf. T Komarova, "Tsinnosti Jevropeyskoho Soyuzu yak opiyentyr dlya pravovoï systemy Ukraïny" (2024) *Problemy zakonnosti* (spetsvypusk) 61–82 (for a Ukrainian perspective).

[58] See, eg, C Hillion, "EU Enlargement" in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford, Oxford University Press 2011) pp 187–216, 196–7.

[59] See C Hillion, "Enlargement of the European Union – the Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities" (2004) 27 Fordham International Law Journal 715–40; G Sasse, "The Politics of EU Conditionality: The Norm of Minority Protection During and Beyond EU Accession" (2008) 15 (6) Journal of European Public Policy 842–60.

apply for and acquire EU membership, assuming that pluralist democracy with regular elections returns, and strict adherence to the rule of law and human rights is established after the war is over. Protection of minorities could be thorny issue, as robust legal frameworks to protect Hungarian, Russian, and other minorities and languages,[60] religious freedom,[61] as well as the clampdown on neo-Nazi and anti-Semitic groups should be required,[62] even though the practice of the previous enlargements has been particularly inconsistent on these counts.[63]

A significant element that has developed through EU enlargement practice is the good neighbourliness criterion, which is articulated through the requirement to settle all the bilateral disputes of the state in question prior to accession.[64] The good neighbourliness criterion was introduced in response to EU security considerations with respect to the unresolved issues of the applicant states and candidate countries, which included border issues and questions related to the protection of minorities.[65] The 1994 Essen European Council emphasised the need for enhancing the intraregional cooperation between the associated states and their immediate neighbours for the purpose of good neighbourly relations.[66] The nearest it came to applying conditionality to the settlement of a bilateral dispute before the fifth enlargement took place was in the case of Cyprus. After that, Croatia was the first to be tested against the principle in settling its bilateral dispute with Slovenia.[67] The prospective EU enlargement with the Western Balkans, and possibly Ukraine, largely depends on the fulfilment of the good neighbourliness criterion – the interpretation and application of which, however, has been far from consistent in the past.[68] EU law rests on the fine balance of guaranteeing *own* security and securing economic benefits: no Enlargement is an altruist exercise, which makes import of burning conflicts into the EU impossible.

2. *Principles of EU enlargement*

Unlike the application criteria, *not a single* principle of EU enlargement can be found in the text of Article 49 TEU. This potentially opens the door to significant flexibility, even if the story of the previous EU enlargements is the one of growing rigidity, potentially out of tune with the Treaty text. Ukraine could break this trend under specific circumstances.

The enlargement principles came to life during the preparation of the first enlargement: the accession of Denmark, Ireland and the UK (as well as the first Norwegian accession

[60] Van Elsuwege, "Revisiting the EU-Ukraine Association Agreement," pp 83–5. Both EU *acquis and* the likely peace agreement point in this direction. On the latter, see, R Petrov, "EU Solidarity in Time of War in Ukraine" (2024) Solidarität in Europa – Europäische Solidarität 151–64, 156.

[61] Cf. R Petrov, "Christian Orthodoxy between Geopolitics and International Law. How the War in Ukraine Divided the Orthodox Church" (2024) 84 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 421–36, 429–34.

[62] O Bělíček, "How Ukraine's Far Right Pushed Its Myths about World War II" (an interview with Marta Havryshko), The Jacobin (31 December 2024).

[63] D Kochenov, "The Summary of Contradictions: Outline of the EU's Numerous Approaches to Minority Protection (2008) 31 Boston College International and Comparative Law Review 1; V Poleshchuk and V Stepanov (eds.), *Ètnopolitika v stranakh Baltii* (Moscow, Nauka, 2013).

[64] P Van Elsuwege, "Good Neighbourliness as a Condition of Accession to the European Union: Finding a Balance between Law and Politics" in D Kochenov and E Basheska (eds), *Good Neighbourliness in the European Legal Context* (Leiden, Brill-Nijhoff 2015) 217–34.

[65] European Commission, "Agenda 2000: For a Stronger and Wider Union" (Communication) COM (1997) 2000 final, 51. Cf. E Basheska, *The Principle of Good Neighbourliness in International Law and EU Law* (Oxford, Hart Publishing 2026 (forthcoming)).

[66] Essen European Council (9, 10 December 1994) Presidency Conclusions.

[67] Basheska, "EU Enlargement in Disregard of the Rule of Law."

[68] Ibid.; Cf. Kochenov and Basheska (eds), *Good Neighbourliness in the European Legal Context*.

attempt), and have not changed much since. The Council President, Mr. Harmel, stated back then that the future members have to subscribe to the principles set out in point 13 of The Hague European Council communiqué of 1 and 2 December 1969[69]:

> [t]he negotiations can only begin in so far as the applicant States accept the Treaties and their political aims, the decisions taken since the entry into force of the Treaties and the options adopted in the sphere of development.[70]

The applicants accepted these conditions immediately and the first successful enlargement was launched, articulating a triad of milestone principles of EU enlargement law:

1. Enlargement consists of joining an existing entity, not the creation of a new one.
2. The *acquis* should be accepted in full.
3. The transitional periods should be strictly limited and cannot contain serious derogations from EU law.

None of this follows directly from the text of Article 49 TEU. Yet, the formulation of these principles marked a huge step forward compared to the preceding failed enlargement attempt.[71] Each and every EU enlargement ever since followed the same framework, and it would be unrealistic to expect any significant derogations from it to accommodate the specific situation of Ukraine. Accepting EU law in full is not negotiable.

During the preparation of the fifth – "big bang" – EU enlargement one more principle emerged: conditionality, which equally goes unmentioned as such in the Treaty text despite the post-Lisbon reference to the eligibility criteria as defined by the European Council. That enlargement was special due to the number of applicants and because of the nature of the majority of the newcomers, most of them being ex-communist states which the EU trusted less than the former capitalist dictatorships, such as Greece, Portugal, or Spain. The Institutions considered that the best way to ensure the success of political and economic reforms was to control their progress from Brussels, which was done through the newly introduced pre-accession strategy concept.[72] In the light of this control idea, the Union announced that it intended to establish a link between the achievement of certain standards in the development of economy, public administration, human rights protection and in other spheres on the one hand and the benefits the applicants could get from the Union on the other. Among those were various types of aid and assistance[73] and the ultimate prize of EU accession.

[69] Speech of the Council President in office Mr. Harmel, opening the negotiations between the Communities and the UK, Ireland, Denmark and Norway in June 1970, Bulletin of the European Communities supplement 8-1970, 24.

[70] The wording of the communiqué is substantially based on the Commission's opinion of 1 October 1969, concerning the applications of the UK, Ireland, Denmark and Norway, Bulletin of the European Communities supplement 1-1970, 16.

[71] The first enlargement attempt made by the United Kingdom was vetoed by General de Gaulle precisely because the United Kingdom was not ready to accept the *acquis*, trying to renegotiate the Common Agricultural Policy (CAP) and some other issues. See G Le Tallec, "Les instruments de l'adhésion de l'Agleterre, du Danemark, de la Norvège et de l'Irlande aux Communautés" (1972) 152 Revue du marché commun 229–35, esp. p 232, for a reference to the willingness of the United Kingdom to renegotiate the CAP.

[72] Hillion, "Enlargement of the European Union," p 414; L Beurdeley, *L'élargissement de l'Union européenne aux pays d'Europe centrale et orientale et aux îles du bassin méditerranéen* (Paris/Montreal, L'Harmattan 2003) p 43; M Maresceau and E Lannon (eds), *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis* (Basingstoke, Palgrave 2001).

[73] On pre-accession assistance see, *inter alia*, M Maresceau, "Pre-Accession" in M Cremona (ed), *The Enlargement of the European Union* (Oxford, Oxford University Press 2003) pp 9–42, 12.

Conditionality presupposes that the applicants agree with the Union's scrutiny of all spheres of their legal, political and economic reforms and agree to fulfil all the demands of the Union. After *Repubblika* it is clear that conditionality potentially does not stop at accession.[74] Crucially, the demands of the Union concerning all aspects of national reform are *not* counterbalanced with the right of the applicant countries to accede. Moreover, the principle of conditionality applies throughout the whole duration of the accession process, different groups of conditions are developed by the Union to distinguish if the applicants are ready for moving forward with the accession. And finally, the conditionality principle allows the Union to exercise an "impartial assessment" of the applicants' progress towards accession beyond the scope of Union's competences. As a result, theoretically, only the most prepared candidates get a chance to join the Union. In practice, however, conditionality did not make accession more predictable and clearer.[75] Neither did it ensure the entrenchment of the promoted reforms.[76] The application of the principle turned out to be a short-sighted and haphazard exercise in window-dressing, which lacked internal consistency.[77]

As the main legal basis for this principle, the Union applied the "Copenhagen criteria" and later on, the good neighbourliness condition. The application of the principle of conditionality to the latter has shown to be particularly problematic as the pre-accession process gives the EU Member State that is involved in a bilateral dispute with a candidate country a significant leverage to use their membership powers to abuse the candidate country's weak position.[78]

Opening the door to potential overreach by the Commission, conditionality is not regulated by the Treaty. In fact, its application starts before the moment identified by Article 49 TEU as a starting point for enlargement, ie, before the submission of a formal application for EU membership. Discussing this principle, it is possible to see in it a continuation and further articulation of the three initial principles of enlargement process: conditionality is there to provide the Union with guarantees that the obligations assumed by the Member States and stemming from the three "traditional criteria" be met. At the same time, this principle undoubtedly weakened the position of the candidate countries vis-à-vis the Union, leaving them no room for manœuvre[79] and made the regulation of enlargements more rigid thereby potentially eroding the negotiating power of the Member States, while at the same time failing to showcase demonstrable results.[80]

Conditionality also allows the Union to choose the most successful applicants and only embrace those who "are ready," while no connection at all might demonstrably exist between the establishment of such readiness and the actual progress towards accession, as we have seen, *inter* many *alia*, also in the Western Balkans.[81] This is due to the cardinal

[74] M Leloup et al, "Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? (2021) 46 European Law Review 692–703. This is notwithstanding the termination of the CVM, which used to apply to Bulgaria and Romania: A Dimitrovs and D Kochenov, "Of Jupiters and Bulls: CVM as a Redundant Special Regime of the Rule of Law – Romanian Judges" (2021) *EU Law Live* (June 5).

[75] Kochenov, *EU Enlargement and the Failure of Conditionality*.

[76] R Janse, "Is the European Commission a Credible Guardian of the Values?" 17 International Journal of Constitutional Law (2019) 43–65.

[77] D Kochenov, "Overestimating Conditionality" in I Govaere et al (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden, Koninglijke Brill 2014) p 541; E De Ridder and D Kochenov, "Democratic Conditionality in Eastern Enlargement: Ambitious Window-Dressing" (2011) 16 (5) European Foreign Affairs Review 589–605.

[78] E Basheska, "The Position of the Good Neighbourliness Principle in International and EU Law" in D Kochenov and E Basheska (eds), *The Principle of Good Neighbourliness in the European Legal Context* (Leiden, Brill-Nijhoff, 2015) pp 24–56.

[79] K Engelbrekt, "Multiple Asymmetries: The European Union's Neo-Byzantine Approach to Eastern Enlargement" (2002) 39 International Politics 37–52 43, 44.

[80] Kochenov and Janse, "Admitting Ukraine to the EU".

[81] Basheska, "EU Enlargement in Disregard of the Rule of Law."

design flaw of conditionality as a "legal" principle: while the Commission can recommend anything it wants, it is the Member States, not the Commission, that take the decisions on the candidates' progress. History has shown that the Member States are prone to ignore the Commission's findings and are thus ready, constantly, to undermine the conditionality's core message, robbing EU enlargement process of credibility.[82] When discussing EU enlargement law it is thus indispensable to keep in mind that the core feature of conditionality is still with us and is unlikely to go away: when Ukraine encounters praise by the EU Institutions it will soon discover that although the absence of such praise could have detrimental effects on progress, what actually counts are the positions of Rome, Budapest and other capitals, as it is the Member States of the EU – not the European Commission – hold the key to giving conditionality any practical effects. This particularly concerns the rewarding of good performace.

3. Actors participating in the enlargement process and their powers

Article 49 TEU established that, alongside the applicant country and the Member States, there are three participants in the process: the Council (ruling on the application and taking a unanimous decision concerning enlargement), the Commission (which should be consulted) and the European Parliament (to give assent with an absolute majority of its members). The European Council is mentioned in the context that the agreed conditions of eligibility shall be taken into account). The Treaty provision does not reflect fully the role of three out four institutions involved in the process. Only the role played by the European Parliament in the enlargement process is reflected fully in the Treaty text, pointing to a significant discrepancy between the Treaty language and the established practice of regulating accessions to the European Union.[83]

The role of the Council is underestimated in the Article: in realty it does not only accept an application and decides to enlarge, but also empowers the Commission to play a key role in the process.[84] The Council enjoys very broad powers, as it does not only steer the progress of pre-accession, including by deciding on the opening and closing of clusters of negotiations with the candidate country – it is also empowered to change the rules of the game, as the case of making accession prospects dependent on the fulfilment of the Copenhagen criteria and settlement of bilateral disputes testify. Moreover, the unanimity voting in the Council necessarily connects this Institution with the Member States which hold a veto power throughout the process as a matter of established convention.[85]

In principle, the negotiating parties are constrained by the principles and criteria of enlargement law, both customary and stemming from the Treaty text. Should the breach of either customary or Treaty-based enlargement law occur, however, no enforcement is in sight as evidenced through the case of the Western Balkan countries.[86] Let us call it the pre-accession political question doctrine. Notwithstanding the fact that Article 49 TEU is formally subject to the ECJ's jurisdiction according to Article 46(f), the Court has amply demonstrated its reluctance to rule on the issues related to the regulation of enlargements,

[82] ibid.

[83] In 1988 the European Parliament passed a resolution stating that no accessions of new Member States would be approved until the European democratic deficit is reduced. This threat has never been used by the European Parliament. See Resolution of 15 September 1988, OJ C262, 1988; S Weatherill and P Beaumont, *EU Law* (3rd edn, London, Penguin Books 1999) p 144.

[84] K Inglis and A Ott, "EU-uitbreiding en toetredingsverdrag: verzoening van droom en werkelijkheid" (2004) Sociaal-economische wetgeving 146–62.

[85] W Zweers, "Unblocking Decision-Making in EU Enlargement. Qualified Majority as a Way Forward?" (2024) Clingendael Policy Brief (June); D Kochenov, "EU Enlargement Law: Treaty–Custom Concubinage?" (2005) 9 (6) European Integration online Papers 1–34.

[86] Basheska, "EU Enlargement in Disregard of the Rule of Law."

deeming them too political. In *Mattheus v. Doego*, referring to the negotiations' element contained in Article 237 EEC (now Article 49 TEU), it found that "the legal conditions for accession remain to be defined in the context of that [Article 237 EEC] procedure without its being possible to determine the content judicially in advance."[87] In other words, the Court respects the position of the Member States and is unwilling to intervene. Unwilling to restrict the Member States in their negotiating powers, the ECJ permits a very flexible interpretation of the Treaty and is unlikely to put any constraints on the application of the customary enlargement law, including conditionality, which could otherwise be viewed as a misapplication, if not abuse, of Article 49 TEU. Whether the ECJ would be willing to stand for the customary enlargement law in case the outcome of accession negotiations led to a serious breach of the enlargement customary law and resulted, for example, in important permanent derogations from the *acquis* for the new Member State, remains unclear.[88]

Upon submission of an application and once such application has been forwarded from the Council to the Commission, the latter draws an Opinion on the country's preparedness in the light of the membership criteria which it then presents to the Council. If the country meets the criteria, the Commission would recommend the granting of a candidate status to the applicant country, and if it does not meet the criteria, it will specify in the Opinion the needed reforms, ie, the "key priorities" which should be taken by the applicant country in order for the latter to move forward. The speedy grant of the candidate country status to Ukraine is an illustration of how politically sensitive the thresholds are. Having benefited Ukraine this time, one could imagine a situation where the same political nature of the assessment could harm a better prepared country on a different occasion.

The role of the Commission in the enlargement process goes way beyond issuing an Opinion, which is mentioned in Article 49 TEU. In fact, EU enlargement law *is* the Commission's game, which some would even find *ultra vires*.[89] Such harsh judgement is not entirely justified. Acting on the mandate of the Council and the European Council, the Commission prepares a whole range of documents related to the assessment of the progress made by the candidates. Once the candidate country satisfies the Commission concerning the political criteria, the Commission can recommend the opening of the accession negotiations with that country. The case of Ukraine demonstrates that even a country at war, where the elections are suspended and the compliance with other Article 2 TEU values is at best coherent only given the war-time conditions, once again, showcases the political power of this Institution.

Most importantly, it is the Commission that prepares the draft negotiating framework – albeit upon the decision by the Council. The framework establishes the guidelines and principles for the accession negotiations with each candidate country. These consist of three parts: (1) principles governing the accession negotiations; (2) substance of the negotiations; and (3) procedure. Once the negotiations are completed, the Commission issues an Opinion on the preparedness of the country to become a Member State. The Commission thus plays the key role in the process. That said, however, the Council frequently fails to follow the Commission's opinions and recommendations with regard to the progress of candidate countries.[90]

[87] *Mattheus v Doego*.

[88] This applies to the new Member States and the EU itself alike: C Hillion, "Negotiating Turkey's Membership of the European Union. Can the Member States Do as They Please?" (2007) 3 European Constitutional Law Review 269–84.

[89] Beurdeley, *L'élargissement de l'Union européenne*, p 42.

[90] Most recently, for instance, the EU Member States failed to reach consensus regarding the opening of the third cluster (Competitiveness and Inclusive Growth) for Serbia despite the recommendation of the European Commission to that effect. The situation of (now) North Macedonia is yet another example where the recommendations of the Commission for the opening of negotiations have been ignored for many years.

Finally, the role of the European Council has been significantly downplayed in Article 49 TEU. In addition to setting the eligibility conditions, the European Council has the ultimate power to take key decisions in the sphere of EU enlargements, taking the principled decision to enlarge.[91] It is involved in the enlargement process from the beginning by agreeing on the membership perspective of the country even before the latter formally submits its membership application to the Council. It may further grant candidate status to the applicant country upon reviewing the Commission's Opinion. It also decides on the opening of the accession negotiations with the candidate country; and may comment on the progress of the accession process. All in all, however, the power to make enlargement a reality lies with the Member States and the acession country, following their national constitutional requirements at the moment of the ratification of the Treaty of Accession, offering the ultimate veto point to all the parties concerned irrespetive of the outcome of the negotiations.

III. Ukraine on the path of accession

Ukraine was deemed by the Institutions to have fulfilled the criteria of admissibility established by Article 49 TEU when it acquired candidate country status on 23 June 2022. Some developments since that date, including the absence of media pluralism, cancelled elections and the growing pressure on ethnic, religious and linguistic minorities in an atmosphere of draft terror in the streets, which is removed from the ambit of procedural justice by the highest courts, thus amounting to the suspension of *habeas corpus*,[92] sealed borders for Ukrainian men and the growing death-toll could probably be explained by the specificity of the war-time context and have not led to the withdrawal of the candidate country status. The accelerated progress of the country from its membership application to the conferral of a candidate country status and the decision to open accession negotiations was a direct consequence of the war, marking what Roman Petrov has famously characterised as "accession through war."[93] Clearly, granting Ukraine candidate status "would probably *not* have happened in pre-war circumstances"[94] Once the war is over, the assessment of the country is bound to be radically different, as the thresholds of scrutiny will necessarily and expectedly face a significant rise in order to ensure that the war-time decisions tailored to the specific conditions and circumstances of fighting the Russian invasion would not be permitted to sabotage the letter and the spirit of Article 2 TEU *de facto* on the ice in war time[95] and further challenging, what Stefan Auer referred to as "European Disunion,"[96] given the low credibility of successful values enforcement capacity by the EU among the Member States and also in the neighbourhood.[97] Pre-

[91] Presidency Conclusions, 1993 Copenhagen European Council.

[92] Cf. https://supreme.court.gov.ua/supreme/pres-centr/news/1774607/ (accessed on 3 April 2025). The Supreme Court of Ukraine ruled that the proof of the fact that a citizen was drafted into the armed forces with the breach of the law cannot result in that person's discharge from the armed forces given the "irreversible" nature of the (unlawful) act in question (Ruling № 160/2592/23).

[93] R Petrov, "Applying for EU Membership in Time of War: 'Accession through War' of Ukraine" (2023) IAI Papers 23-09; R Petrov and C Hillion, "'Accession through War' – Ukraine's Road to the EU" (2022) 59 Common Market Law Review 1289–300 (guest editorial).

[94] Petrov and Hillion, "Accession through War," p 1290.

[95] Similar soul-seeking will be bound to happen on the EU's side too: P Bárd and D Kochenov, "War as a Pretext to Wave the Rule of Law Goodbye?" (2022) 27 European Law Journal 39–49.

[96] S Auer, *European Disunion: Democracy, Sovereignty and the Politics of Emergency* (London, Hurst 2022).

[97] D Kochenov, "Restoring the Dialogical Rule of Law in the EU: Janus in the Mirror" (2024) Cambridge Yearbook of European Legal Studies (early view). For a global overview of the on-going Rule of Law crisis of the Union, see, eg, A Jakab and L Kirchmair, *Saving the European Union from Its Illiberal Member States* (Oxford, Oxford University Press, 2025).

accession conditionality is about the facts on the ground, not the intentions expressed in political statements. All in all, the Ukrainian example could thus resemble the fate of the Western Balkans: the initial positive EU response faded away with the end of the bloody wars in the region and following a scrtict facts-based assessment of the situation on the ground.

1. The ongoing war as a major obstacle

While the Russian invasion of Ukraine is the main reason for the accelerated – read any – progress as well as the membership application itself; the war is simultaneously the main challenge. It has been clear from the day of launching the membership bid that *any* perspective of Ukraine's EU membership imperatively presupposes the end of hostilities.[98] This is not about "victory," however this term is defined.[99] Following EU values' rationale, *peace* is the main objective and the logic "peace equals more war" does not work. This is especially so in the context where the actual capacity of the EU to emerge as a credible guarantor of peace is questionable.[100] Given that importing the war into the EU is not an option, any extra day without peace negotiations is a direct assault on the country's membership prospects. Likewise, it is an assault on "victory" prospects too. Stephen Kotkin has convincingly argued that EU membership could be considered as an indispensable part of what "victory" should mean in these particular circumstances.[101] President Zelenskyy's auto-ban on negotiations with Russia could thus be viewed as counterproductive for Ukraine's future, as it delays any serious prospects of EU accession. The same applies to NATO membership of course: Jens Stoltenberg is right "When there is a will, there are ways to find the solution. But you need a line which defines where Article 5 is invoked, and Ukraine has to control all the territory until that border".[102] To draw such a line amidst a war with no prospect of "winning" anytime soon, negotiations are vital. What is worse, however, given the prominent role played by opposing NATO's enlargement in the Russian foreign policy, the focus on joining NATO could make ending the war difficult and, thus, Ukrainian accession impossible.[103] Be it as it may, the longer the war is on-going, the lesser the prospect of Ukrainian accession and hence the more difficult any talk of "victory."

2. Complex negotiating framework

The second challenge that Ukraine faces is the complex negotiation framework that the EU recently adopted for Ukraine, setting the country for a long run.[104] Indeed, the

[98] Petrov and Hillion, "Accession through War," p 1294; Kochenov and Janse, "Admitting Ukraine to the EU"; Petrov, "EU Solidarity in Time of War in Ukraine."

[99] Roman Petrov offers a number of possible scenarios: Petrov, "EU Solidarity in Time of War in Ukraine," pp 154–8.

[100] S Auer, "Carl Schmitt in Brussels: The Russian War against Ukraine and the Return of Geopolitics" in A Leist and R Zimmermann (eds), *After the War?: How the Ukraine War Challenges Political Theories* (Berlin, De Gruyter 2024) pp 215–40. On the limited EU's actorness capacity: Scicluna and Auer, "Pushing the EU's Boundaries."

[101] D Remnick, "'How the War in Ukraine Ends' (An Interview with Stephen Kotkin)," *New Yorker* (17 February 2023), available at <https://www.newyorker.com/news/the-new-yorker-interview/how-the-war-in-ukraine-ends> (last accessed 5 March 2025).

[102] H Foy, "Former Nato Chief Jens Stoltenberg: 'So Far, We Have Called Putin's Bluff'," *Financial Times* (4 October 2024), available at <https://www.ft.com/content/5b63bdc1-9e74-4464-92df-a5aa83c5b221> (last accessed 5 March 2025).

[103] Eg J Sachs, "The Geopolitics of Peace – Speech to the European Parliament, 19 February 2025 (edited transcript)," *Brave New Europe* (28 February 2025), available at <https://braveneweurope.com/jeffrey-sachs-the-geopolitics-of-peace-speech-to-the-european-parliament> (last accessed 5 March 2025).

[104] Ministerial meeting opening the Intergovernmental Conference on the Accession of Ukraine to the European Union (Luxembourg, 25 June 2024) (Intergovernmental Conference on the EU Accession of Ukraine).

negotiation framework for Ukraine largely resembles the experience of other candidate countries rather than rethinking and simplifying the process one of us has been advocating.[105] The screening and negotiations will take place in six thematic clusters that consist of thirty-three chapters, which aim at implementation of the *acquis*. In line with the new methodology, which also applies to other candidate countries, the first cluster ("Fundamentals") covering issues such as the judiciary and fundamental rights, democracy, fight against corruption, is most important and will be opened first and closed last, affecting the progress with the decision for the opening and closing of the remaining chapters. The procedures along the way are far from easy and the unanimity vote in the Council is one of the major challenges in the pre-accession process. This is not only because of the divides among the EU Member States on the prospective EU accession of Ukraine, but also because the pre-accession process has been increasingly used by Member States as a convenient platform for winning bilateral disputes. The negotiating framework specifies that "good neighbourly relations with EU Member States and other enlargement partners remain essential."[106] While the 2024 Progress Report on Ukraine mentions only efforts to strengthen minority rights in relation to Hungary and challenges over imports of Ukrainian grain and the licences of Ukrainian drivers leading to delays at the border crossing points,[107] politics on the ground are more disappointing. Hungary may block the progress of Ukraine due to a language law in Ukraine which establishes, *inter alia*, that minorities, including Hungarian minorities in the country should receive at least 70 per cent of their education in the Ukrainian language,[108] as well as intolerant citizenship legislation targeting dual nationals belonging to minorities.[109] More outstanding issues could easily arise. So, the Polish Defence Minister, Władysław Kosiniak-Kamysz, called for blocking Ukraine's EU accession until the country solves the issue of exhuming the victims of the Volhynia massacre.[110] On the whole, the EU has missed the opportunity to ease the enlargement procedure, risking to fail again by repeating the mistakes it made with the Western Balkan countries.

The suspension of the negotiations is not excluded in case of serious breach of the EU values, while transitional measures requested by Ukraine should be "limited in time and scope, and accompanied by a plan with clearly defined stages for application of the acquis."[111] In particular, regulatory measures related to the extension of the internal market should be implemented quickly, while "where considerable adaptations are necessary requiring substantial effort including large financial outlays, appropriate transitional arrangements can be envisaged as part of an ongoing, detailed and budgeted plan for alignment."[112] Transitional arrangements may not amend the EU rules and policies, disrupt their functioning or lead to significant distortions of competition.[113] The text of the negotiation framework does not *per se* exclude lengthy transitional periods which

[105] See, eg, Kochenov and Janse, "Admitting Ukraine to the EU"; D Kochenov, "Take Down the Wall And Make Russia Pay for It," VerfBlog (21 March 2022).

[106] Intergovernmental Conference on the EU Accession of Ukraine, para. 13.

[107] European Commission, "Ukraine 2024 Report" (2024) 699 SWD final, p 63.

[108] Ukrainian World Congress, "Two Countries Can Hinder Ukraine's Accession to EU" (8 November 2023), available at <https://www.ukrainianworldcongress.org/two-countries-can-hinder-ukraines-accession-to-eu/> (last accessed 5 March 2025).

[109] O Shevel, "Country Report: Ukraine," EUDO Citizenship Observatory (EUI 2010) p 1.

[110] I Balachuk and K Bondarieva, "Ukraine Not to Join EU Until Volyn Tragedy Issue Resolved – Polish Defence Minister" *Ukrainska Pravda* (4 October 2024), available at <https://www.pravda.com.ua/eng/news/2024/10/4/7478078/> (last accessed 5 March 2025).

[111] Intergovernmental Conference on the EU Accession of Ukraine, para. 29.

[112] ibid.

[113] ibid.

may be applied upon Ukraine's request, but these should be "limited in time and scope, and accompanied by a plan with clearly defined stages for application of the acquis."[114]

3. The situation in Ukraine

The third challenge is the situation in Ukraine at wartime. The ongoing war significantly affects the country's reform capacity. The absence of elections[115] and freedom of speech and mass human rights violations aside,[116] even the continuation of the judicial reform, which is at the core of the "Fundamentals" cluster, is largely affected by the war. In particular:

> There were 142 premises of courts, bodies, and institutions of the judicial system destroyed to varying degrees, up to the destruction and theft of property, due to the hostilities. Representatives of the judiciary, namely 54 judges and 389 court employees, have also come to the state's defence. Since the introduction of martial law in Ukraine, 4 judges and 15 court employees have been killed as a result of armed aggression, and 165 courts have changed their territorial jurisdiction.[117]

Equally important is the need for reconstruction of Ukraine once the war is over. The country will need something akin to a Marshall plan to ensure speedy reconstruction. A rebuilt prosperous Ukraine in the European family is what the values of the Union unquestionably require: appalling Yugoslav failures throwing a shadow on the Union's mission of peace in Europe cannot be repeated again.

A new approach to regulating accession to the EU needs to be tested to avoid the failures from the past and improve the enlargement process before it's too late. This approach should be closely connected to both the text of Article 49 TEU and depoliticised enlargement process guaranteeing the rule of law. A good start to such an approach would be the easing of the unanimity vote in the Council, decoupling bilateral disputes from the accession process and setting lengthy post-accession transitional periods for requirements beyond the country's commitments to democracy and rule of law. Such an approach would speed up the accession procedure serving the interests of Ukraine, as well as that of other candidate countries, and the EU in the best possible way. Gradual integration, primarily into the Single Market – which has been recently proposed by the Commission – could strengthen the prospect of accession and make the negotiation process more dynamic.[118] Such integration, however, should go hand in hand and be conditional upon the requirements for reforms and readiness for the Single Market.[119] These should necessarily be coupled with a deeply upgraded system of enforcement mechanisms to guarantee lasting and rigorous compliance with EU law and

[114] ibid.

[115] See on this matter, A Romandash, "Ukraine Can't Hold Elections During the War. Does It Matter?" (2024) Journal of Democracy (Online exclusive).

[116] See, eg, BBC, "Ukraine Is Struggling to Recruit Soldiers to the Frontline" (22 June 2024), available at <https://www.bbc.co.uk/sounds/play/m0020h6w> (last accessed 5 March 2025); see also T Gibbons-Neff, "Ukraine Military Recruiters Use Harsh Tactics to Fill Ranks," *The New York Times* (15 December 2023), available at <https://www.nytimes.com/2023/12/15/world/europe/ukraine-military-recruitment.html> (last accessed 5 March 2025).

[117] O Garner, "Reforming Ukraine's Judiciary – EU Accession, Democracy, and the Rule of Law: In Conversation with Tetyana Antsupova and Sergii Koziakov" (2024) The Review of Democracy.

[118] Cf. Van Elsuwege, "Naar een verdere uitbreiding van de Europese Unie," pp 470–5; Petrov, "Bumpy Road of Ukraine towards the EU Membership in Time of War: 'Accession through War' v 'Gradual Integration'."

[119] P Becker and B Lippert, "Acceding Countries' Gradual Integration into the EU Single Market: Prerequisites, Opportunities and Hurdles" (2024) Stiftung Wissenschaft und Politik Comment No. 42.

values, drawing lessons from the failures of the "big bang" enlargement and EU's inability to deal with the grave derailments of democracy and the rule of law in Poland and Hungary.

IV. Conclusion

EU enlargement law is not what it seems: the Treaty is silent on the key principles and procedural aspects of the process.

Article 49 TEU, which is the main Treaty provision regulating EU enlargements, lists three basic criteria for the applicant state to satisfy for its application to be admissible: (a) Statehood; (b) Europeanness; (c) "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (Article 2 TEU). Additionally, the main enlargement provision refers to eligibility criteria that are defined by the European Council. These include the Copenhagen criteria, but also the good neighbourliness criterion, all of which have developed steadily throughout the EU enlargement practice. The principles guiding the substance of the EU enlargement process are omitted from Article 49 TEU entirely. These refer to the conceptualisation of EU enlargements as joining a pre-existing entity with all its laws and principles, the non-negotiable imperative to accept the *acquis* in full, and to limit transitional periods while prohibiting permanent derogations from EU law. Further to these, the principle of conditionality emerged during the preparation of the fifth enlargement and, later on, the good neighbourliness condition. More importantly, Article 49 TEU does not promise membership to the countries that fulfil the admissibility criteria. The question of whether a country will be admitted to the Union lies within the discretion of the Union and its Member States.

Moreover, having walked the reader through the key aspects of this system of regulation, we have argued that the EU enlargement law showcases significant flexibility and malleability, which has however been significantly underutilised. The special position of Ukraine as a candidate country at war could offer an impetus for departing from the established approaches to how EU enlargements should operate, which failed the Western Balkans and have not been particularly Rule of Law-based, while stripping conditionality of cridibility and offering no lasting protection against significant values backsliding upon accession. Seizing this chance will be in the interest of all the parties concerned, including the EU, Ukraine and all the other candidate countries queuing to join. Decoupling bilateral issues from the accession process, eventually easing the Council's unanimity vote, establishing protracted post-accession transitory periods for criteria beyond the country's obligations to democracy, the protection of human rights including the rights of minorities and the respect for the rule of law, as well as gradual integration of the country into the Single Market would be excellent places to start with a new much needed approach.

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