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EU Enlargement, Extra-Territorial Application of EU Law and the International Dimension

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I. Introduction

The EU enlargement policy entails several forms of 'extra-territorial application' of EU law – understood here as the application of EU norms beyond the Union's territory[1] – involving distinct interplays between Union law and international law. Thus the *acquis* which candidates for membership must adopt and apply prior to their integration into the Union's legal order does not only comprise EU law *stricto sensu*¸ it also includes several norms of international law whose compliance the EU requires prior to accession.[2] The specific combination of EU and international norms that the Union thereby projects in the pre-accession context, contrasts with the way in which EU and international norms traditionally interact in EU law, given the entrenched principle of autonomy of the EU legal order.[3] In effect, the EU enlargement policy is deeply embedded in, and potentially contributes to strengthening substantive international law.

[1] On the more general notion of extra-territoriality of EU Law, see eg, J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 1, 87; J Scott, 'The New EU "Extraterritoriality"' (2014) 51 *Common Market Law Review* 5, 1343.

[2] Further, see eg, R Petrov, *Exporting the Acquis Communautaire through European Union External Agreements* (Baden-Baden, Nomos, 2011).

[3] See the seminal decision Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66 and, more recently, Case C-402/05 *Kadi and Al Barakaat International Foundation* ECLI:EU:C:2008:461. Further on the principle of autonomy, see M Klammert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) 42 *European Law Review* 6, 815; B de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford, Hart Publishing, 2014) 33; D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 74; N Nic Shuibhne, 'What is the Autonomy of EU Law and Why Does that Matter?' (2018) *Nordic Journal of International Law* (forthcoming).

That the EU should project its norms, including international law elements, towards a candidate for membership is legally unsurprising. EU law requires it, at least to a certain extent. Yet, this chapter also suggests that several shortcomings impede the effectiveness of this legal mandate, which lay bare inconsistencies in the way the EU relates to international norms.

The chapter is structured as follows: the first part maps out the various expressions of the specific extra-territorial application of EU law in the context of the Union's enlargement. The second part discusses its possible legal and normative underpinnings. In its final part, the chapter points to some of the shortcomings hampering the *raison d'être* of that legal phenomenon.

II. Forms of 'Extra-Territorial Application' of EU Law in the Enlargement Context

The EU enlargement context displays various forms of extra-territorial application of EU law, which this first section outlines. For the purpose of this discussion, the notion of *extra-territorial application* is understood broadly to signify that the EU acquis which candidates have to apply to accede is substantively and normatively more significant than the acquis applicable to the Member States.

A. Projection of EU Acquis beyond EU Territory

The first expression of extra-territorial application of EU law is rather unexceptional and unsurprising. The conditions for accession to the EU, as broadly defined in the so-called Copenhagen criteria, comprise 'the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union'.[4] Moreover, the *negotiating frameworks* which the Member States set out at the start of accession negotiations typically underline that 'accession implies the timely and effective implementation of the acquis'.[5] The candidate thus progressively adapts its own norms to EU legal requirements to be able to operate in the Union legal order from the moment of

[4] See European Council, Copenhagen, Conclusions of the Presidency (1993) 13: 'Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.'

[5] See, eg, *Negotiating Framework for Serbia*, 2013 Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union (Brussels, 21 January 2014) CONF-RS 1/14, para 31.

its accession. States aspiring to EU membership must therefore adopt and apply EU law before entry.[6]

Two out of the 35 chapters of the accession negotiations[7] deal specifically with the EU external action acquis: namely, Chapter 30 on external relations and Chapter 31 on foreign, security and defence policy. Both chapters require the candidates' compliance with the relevant binding EU legislation, international agreements and political documents. Any candidate country must commit itself to denounce its own international agreements in areas of EU competence and in turn accept the international commitments of the EU, covering both 'international agreements concluded by the Union, by the Union jointly with its Member States, and those concluded by the MS among themselves with regard to Union activities'.[8]

Any applicant country is also

> required to progressively align its policies towards third countries and its positions within international organisations with the policies and positions adopted by the Union and its Member States[9] […], to progressively align with EU statements, and to apply sanctions and restrictive measures when and where required.[10]

While a potential source of friction for Member States, the obligation to conform to the EU external action acquis may pose a particular challenge for candidate countries whose priorities, prior to their accession, may differ from those of the EU, sometimes even quite significantly.

Serbia is a case in point. Although firmly engaged on the path of EU integration, this country still enjoys a close relationship with the Russian Federation,[11] and does not appear ready to renounce such ties against the promise of EU membership, for instance by joining the current regime of EU sanctions against Russia.[12] 'Clearly, neither the acceleration of EU accession talks, nor the escalating crisis in Ukraine (including Crimea) or the failure of the proposed South Stream pipeline has succeeded in derailing relations between Serbia and Russia.'[13] This political standpoint has been strongly reiterated by Serbia's President since.[14]

[6] This particular form of extra-territorial application of the EU acquis is in principle transitional: it is no longer extra-territorial the moment the candidate becomes a Member State.

[7] To be found at https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en.

[8] Negotiating Framework for Serbia (n 5) para 31.

[9] Chapter 30 of the acquis.

[10] Chapter 31 of the acquis.

[11] 'Perhaps most importantly from the point of view of Belgrade, Russia has offered political support for Serbia to take a hard position on Kosovo, a stance which Serbia has reciprocated somewhat by refusing to join in with EU sanctions against the Kremlin as a reaction to Russian interference in Ukraine.' European Parliament, *Serbia's Cooperation with China, the European Union, Russia and the United States of America* (Directorate-General for External Policies, 2017) 6.

[12] See Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1–11.

[13] European Parliament (n 11) 6.

[14] G Filipovic and M Savic, 'EU Membership Won't Change Serbian-Russian Ties, Vucic Says' (Bloomberg, 2018), accessed at www.bloomberg.com/news/articles/2018-02-21/eu-membership-won-t-change-serbia-s-ties-with-russia-vucic-says.

The extra-territorial application of EU law in the enlargement context has also taken place on the basis of association agreements such as the Stabilisation and Association Agreements,[15] and the earlier Europe Agreements.[16] These contractual arrangements serve as vehicles to foster the associate state's alignment with the EU acquis, for instance in the field of competition and state aid rules. In the same vein, the Energy Community Treaty and the Transport Community Treaty, negotiated between the EU and the candidates from South-East Europe, envisage the latter's adoption and application of some aspects of the related acquis, prior to accession.[17]

B. Projection of the Acquis beyond the Scope of Application of EU Law

Outside the standard adoption of the acquis by the applicants for membership, enlargement involves a second form of extra-territorial application of EU law, namely the application of EU norms to the candidates *beyond* their scope of application to the Member States, and/or *beyond* their intended normative effects. Two particular examples typify the phenomenon.

First, EU fundamental rights appear to have a broader legal force in the enlargement context than internally vis-à-vis the Member States. Respect for fundamental rights is both an eligibility condition for membership, as expressed by the first Copenhagen criterion[18] and Article 49(1) of the Treaty on European Union (TEU),[19] and an integral part of the EU acquis, contained in a specific chapter on 'judiciary and fundamental rights'[20] which the candidate country

[15] See for instance Title VI of the Stabilisation and Association Agreement between the EU and Serbia: *Stabilisation and Association Agreement between the European Communities and their Member States of the one and the Republic of Serbia*.

[16] See for instance Title V of the Europe Agreement between the then Community and Poland: *Europe Agreement Establishing an Association between the European Communities and their Member States and the Republic of Poland*, and the analysis in M Maresceau and E Lannon (eds), *The EUs Enlargement and Mediterranean Strategies A Comparative Analysis* (New York, Palgrave in association with European Institute, University of Ghent, 2001).

[17] Treaty establishing the Energy Community and Treaty establishing the Transport Community.

[18] 'Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities', European Council (n 4).

[19] Article 49(1) TEU stipulates that 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.' Article 2 TEU provides: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

[20] Chapter 23 of the acquis.

must embrace, as a matter of priority.[21] In assessing whether candidates respect the values of Article 2 TEU, including human rights, the Charter of Fundamental Rights of the European Union (CFR) constitutes both a source and yardstick to assess *all* conduct of the candidate. In other words, the Charter is given a wider application in the enlargement context than inside the EU where its applicability to the Member States is limited to situations where the latter implement Union law, in line with Article 51 CFR.[22] While the Court has understood the scope of application of the Charter broadly,[23] this however does not amount to an application extended to all Member States' conduct as in the case of candidate countries.[24]

Second, EU foreign policy appears more developed in the context of enlargement, and more constraining as a result for candidates than for Member States. For example, the EU and its Member States expect Serbia to 'normalise' its relations with Kosovo as a prerequisite for a successful accession negotiation, in a way that comes close, albeit implicitly, to a de facto recognition,[25] even if several Member States have specifically refrained from such a recognition.[26] Thus Serbia's progress towards accession is measured against its

> continued engagement […] towards a visible and sustainable improvement in relations with Kosovo [emphasising that] [t]his process shall ensure that *both can continue on their respective European paths*, while avoiding that either can block the other in these efforts and should gradually lead to the comprehensive normalisation of relations between Serbia and Kosovo, in the form of a legally binding agreement by the end of Serbia's accession negotiations, *with the prospect of both being able to fully exercise their rights and fulfil their responsibilities*.[27]

Not only is the scope of application of EU projected norms broader than internally, related enforcement mechanisms may also be activated more swiftly in the accession process than inside the Union. Hence a candidate's serious and persistent breach of the values contained in Article 2 TEU may lead to the suspension

[21] C Hillion, 'Enlarging the European Union and its Fundamental Rights Protection' in I Govaere et al (eds), *The European Union in the World: Essays in Honour of Professor Marc Maresceau* (Leiden, Martinus Nijhoff, 2014) 562.

[22] According to Article 51(1) of the Charter of Fundamental Rights of the European Union: 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

[23] See, eg, Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105.

[24] On the application of the Charter of Fundamental Rights to candidate states, see E Tanchev, 'Impact of the EU Charter of Fundamental Rights on the Candidate Countries' in A Kellermann, JW de Zwaan and J Czuczai (eds), *EU Enlargement: The Constitutional Impact at EU and National Level* (The Hague, TMC Asser Press, 2001).

[25] C Hillion, 'Adaptation for Autonomy? Candidates for EU Membership and the CFSP' (2017) *Global Affairs* 5.

[26] Namely Romania, Greece, Slovakia, Cyprus and Spain.

[27] Negotiating Framework for Serbia (n 5) para 5 (emphasis added).

of the accession process on a proposal of the Commission and a decision of the Council using qualified majority voting.[28] This procedural arrangement strikingly contrasts with the taxing procedure applicable to Member States pursuant to Article 7(2) TEU, according to which 'the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 [TEU]' has to be determined by the European Council acting by unanimity.[29]

C. Projection of the Acquis beyond EU Law *stricto sensu*

Enlargement entails a third type of extra-territorial application of EU law, involving original interplays with international norms. Thus, the EU invokes and promotes rules that do not pertain to Union law *stricto sensu*, though presented as acquis for the purpose of the pre-accession process. EU accession conditionality typically requires that candidates comply with, and or accede to international conventions to which the EU itself, or even some of its Member States, are not a party.

A case in point is the area of minority protection. The accession conditions enshrined in the Copenhagen criteria, and partly in Article 2 TEU since the Treaty of Lisbon, require that any candidate respect and protect minorities.[30] This has been particularly important in the accession process of Central and Eastern European countries and is still a salient issue for the region of the Western Balkans.[31] Given the limited EU competence in the field, and consequently its limited acquis,[32] the Union has assessed the candidate's fulfilment of the 'minority' criterion by reference to international norms, such as the Framework Convention for the Protection of National Minorities.[33] The candidates' accession to, and compliance with this Convention would thus play a part in fulfilling the condition,[34] although the Convention does not formally belong to

[28] Para 4 of the Negotiation Framework for Serbia (n 5) stipulates: 'In the case of a serious and persistent breach by Serbia of the values on which the Union is founded, the Commission will, on its own initiative or on the request of one third of the Member States, recommend the suspension of negotiations and propose the conditions for eventual resumption. The Council will decide by qualified majority on such a recommendation, after having heard Serbia, whether to suspend the negotiations and on the conditions for their resumption.'

[29] Hungary has thus repeatedly expressed its intention to veto any use of Article 7(2) TEU against Poland in the present row over the latter's alleged breach of the rule of law.

[30] The Copenhagen criteria talks about 'respect for and protection of minorities', while Article 2 TEU sets as a value of the Union the 'respect for human rights, including the rights of persons belonging to minorities'.

[31] See Ministerial meeting opening the Intergovernmental Conference on the Accession, 'EU Opening Statement for Accession Negotiations' (2014) para 14.

[32] See, eg, 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* 726–31.

[33] This Convention is a multilateral treaty of the Council of Europe and counts 39 Member States to date: *Framework Convention for the Protection of National Minorities*.

[34] Further, see eg, C Hillion, 'The Framework Convention for the Protection of National Minorities and the European Union', Conference enhancing the impact of the Framework Convention, 2008, Strasbourg, 4.

EU law: the Union is not a signatory, while some Member States are not even party to it.[35] In other words, the EU accession acquis in this field is broader than what is applicable to Member States: it consists of a body of international norms instrumentalised for the purpose of determining whether a state is fulfilling accession conditions.

The rule of law, and more generally the values of Article 2 TEU and the 'political' Copenhagen criteria, offer other illustrations of the same phenomenon. As was previously mentioned, the relevant part of the acquis is now contained in a specific Chapter 23 on 'judiciary and fundamental rights'. When examining the substance of what is negotiated in the context of that chapter, one finds international conventions and various instruments, eg of the Council of Europe, including non-binding documents which the candidate must nevertheless incorporate in its laws, or at the very least in its practices, for the purpose of meeting the EU accession conditions.

In the case of Serbia, the Commission's screening report on Chapter 23 assesses its situation regarding fundamental rights against several instruments of international law.[36] The instruments mentioned include the European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[37] or the recommendations of the UN Committee on the Elimination of all Forms of Racial Discrimination.[38] In the same vein, the 2013 Commission's Explanatory Screening for Serbia[39] refers as 'legal instruments for reference' regarding the judiciary to recommendations of the Council of Europe[40] or of the UN Human Rights Commission.[41] In doing so, the EU not only broadens the acquis with which candidates are supposed to comply in order to become a Member State, but arguably gives these instruments a stronger normative effect than they normally would have, commensurate to the reward of acceding the EU.

Similarly, association agreements concluded with candidates often 'legalise' extra-EU documents, which then become part of the legal underpinnings of the relation, and thus a condition to accede even though they are not legally binding on the Member States as a matter of EU law.[42]

[35] Belgium, Greece and Luxembourg are signatory states, France has neither signed nor ratified the Convention.

[36] European Commission, 'Screening Report Serbia Chapter 23 – Judiciary and Fundamental Rights' (2014).

[37] ibid 11.

[38] ibid 19.

[39] European Commission, Negotiating Accession to EU, MD 177/13; 24 September 2013.

[40] See, eg, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities.

[41] See, eg, 'Bangalore Principles of Judicial Conduct', UN Human Rights Commission, 23 April 2005.

[42] Reference can be made here to Article 2 of the Association Agreements between the EU and Serbia, and with Montenegro, respectively. Similarly drafted, the provision foresees that: 'Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the

III. Foundations of Extra-Territorial Application of EU Law in the Enlargement Context

Having identified expressions of the extra-territorial application of EU law in the enlargement context, involving specific interactions between the acquis and international law, the discussion now turns to possible legal explanations underpinning such practices. A glance at the EU Treaties suggests at least three such explanations: first, the EU accession procedure itself (Article 49 TEU), second, the EU foreign and neighbourhood policy objectives (Articles 3(5), 8 and 21 TEU), and third, and more generally, the constitutional mandate of the Union (Articles 3(1) and 13 TEU). Arguably, these are solid, if incomplete, grounds for the active extra-territorial application of EU rules in the context of enlargement.

A. The Accession Rationale

Article 49 TEU requires that the applicant respect and promote the founding values of the EU, as enshrined in Article 2 TEU. Preliminary compliance and commitment to promote these values amounts to an admissibility condition. In addition, the EU accession clause foresees that '[t]he conditions of eligibility agreed upon by the European Council shall be taken into account',[43] thus underscoring the significance of the Copenhagen criteria which, as mentioned earlier, refer to the candidate's ability to take on the EU acquis as a whole. This very notion is a consolidation of a founding principle of EU enlargement: ever since they decided to accept new members in 1969,[44] the founding Member States' position has consistently been that accession presupposes the full acceptance of the acquis.

Seen in this light, a candidate's gradual adoption of the EU acquis *prior* to its accession is uncontroversial. It is fully in line with the Treaty-based procedure, codifying long practice, and which stems from a functional argument: namely to ascertain that the new Member State fully operates in the EU legal order *upon* accession. EU norms are not imposed on those states; their far-reaching normative effect stems from a state's intention to become a member of the EU, and thus to comply with its rules.

Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, *shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement*' (emphasis added).

[43] Article 49(1) TEU.

[44] At the Hague Summit of 1969, the Heads of State or Government of the Member States decided to open negotiations with four applicant countries: Denmark, Ireland, Norway and the United Kingdom.

B. The EU External Action Mandate

The extra-territorial application of EU law towards candidates also corresponds to the mandate with which the EU has been endowed vis-à-vis the rest of the world in general, and in relation to neighbouring states, in particular. There is a EU foreign policy rationale behind the extra-territorial application of EU law vis-à-vis candidates for membership, as third states and as neighbours of the EU.

Not only does Article 3(5) TEU require that '[i]n its relations with the wider world, the Union *shall uphold and promote its values and interests*',[45] Article 21 TEU goes further when providing that

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[46]

It also states that

> The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: […] (b) *consolidate and support democracy, the rule of law, human rights and the principles of international law*.[47]

Both provisions thereby provide a basis for the Union to *project* its values and principles, and those of international law in relation to applicants for membership. Doing otherwise would be surprising, as candidates aspire to be part of the EU and thus to become themselves active promoters of those principles as a member, in accordance with Article 21 TEU, and in line with their duty of sincere cooperation. The projection of norms through EU external action transcends the scope of EU law to encompass international standards to which the EU subscribes, or is committed to promote.

In relation to the neighbouring states more particularly, Article 8 TEU foresees that the EU is to engage with neighbouring states, thus including those European states that could become members, with a view to establishing an area founded on EU values. Here again, the EU finds mandate to project its values and the international norms associated to it beyond its geographical borders.

In sum, reference to international norms in the context of enlargement does find a legal basis too. Enlargement is not only geared towards preparing a candidate to respect the acquis *stricto sensu*, it transforms third European states into

[45] Article 3(5) TEU (emphasis added).
[46] Article 21(1) TEU (emphasis added).
[47] Article 21(2) TEU (emphasis added).

functioning Member States, able to contribute to fulfil the objectives of the EU on the international stage. Enlargement is an EU foreign policy, underpinned by the particular objectives that the Union pursues on the European and world stages.

C. The Constitutional Mandate

The third, and complementary basis for the extra-territorial application of EU law in the context of enlargement can be located in the *general* mandate of the EU, and of its institutions. Under Article 3(1) TEU, 'The Union's aim is to promote peace, its values and the well-being of its people', while Article 13(1) TEU provides that the Union's institutional framework 'shall aim to promote [the] values [of the Union], advance its objectives, serve its interest those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'. The EU and its institutions are thereby mandated to project the Union's fundamental norms. Article 13(2) TEU bolsters this mandate by establishing an obligation of cooperation among EU institutions, and in turn an obligation to act in conformity with the objectives contained in the Treaties.

Hence EU primary law provides, if only partially, various legal foundations for the different forms of extra-territorial application of EU law. The EU is notably instructed to project its norms and promote international standards vis-à-vis candidates that are destined to become part, as Member States, of that collective promotion effort.

IV. Shortcomings in the Extra-Territorial Application of EU Law Characterising the Enlargement Policy

The extra-territorial application of the EU acquis, as presented earlier, potentially helps the promotion of, and compliance with international norms, in line with EU objectives. Yet such a contribution to hardening international law may be genuine only if the application of EU norms by the candidates is matched by EU backing, and equivalent obligations at the domestic level. In this last part, the chapter briefly sheds light on various deficiencies in these respects.

A. Deficient Interaction between Compliance and Conditionality

Conditionality in the enlargement policy context entails the expectation that once it has adopted and applied the projected EU norms, the candidate may progress

on its path to membership.[48] Negotiating frameworks thus typically provide that '[t]he negotiations will be based on [the candidate]'s own merits and the pace will depend on [its] progress in meeting the requirements for membership'.[49]

On this basis, any EU failure to deliver, in the sense of not appropriately rewarding a candidate's genuine progress in its adoption of the EU acquis, potentially damages the effectiveness and acceptance of the extra-territorial application of Union norms. The incentive for candidates to apply EU law prior to accession will diminish if progress in this regard is not matched with similar progress in the accession process. The situation of Macedonia is a case in point.[50]

Conversely, failure to take actions in the face of plain non-compliance with the EU acquis equally undermines the effectiveness of conditionality and of the extra-territorial application of EU norms which it involves. The current EU approach towards Turkey typifies the tension for the EU between the defence of its values and norms in the context of enlargement, and the pursuit of its strategic interests.[51] Violations of fundamental rights and attacks on the rule of law in the country should justify a reaction of the EU Member States, possibly in the form of a suspension of accession talks, a path which the EU has nevertheless refrained from taking – so far. Turkey remains a key partner in the region, particularly in addressing migration.

Such a *realpolitik*-inspired approach considerably hampers the value of the EU's projected norms and undermines the EU enlargement methodology in the eyes of other candidates. This situation is even more paradoxical and damaging, if one considers that all recent adjustments and developments of the enlargement policy point towards stronger conditionality, and in turn additional Member States' opportunities to hold up or stop the process in consideration of non-compliance with accession conditions.[52]

B. Inconsistencies

The second noticeable, and related, shortcoming in the extra-territorial application of EU law is the gap between EU norms as applied to and by candidates on the

[48] Further on conditionality, see, eg, M Maresceau, 'Pre-Accession' in M Cremona, *The Enlargement of the European Union* (Oxford, Oxford University Press, 2003).

[49] Negotiating Framework for Serbia (n 5) para 2.

[50] Macedonia, or the Former Yugoslav Republic of Macedonia (FYROM), was granted candidate status by the Council in 2005. Since then, the Commission has repeatedly recommended opening the negotiations with the country, an initiative vetoed by Greece due to the enduring conflict over the use of the term 'Macedonia'. Further, see, eg, E Fouéré, 'Maintaining Momentum in Enlargement' (CEPS Commentary, 26 April 2018).

[51] See in this regard, Article 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote *its values and interests* and contribute to the protection of its citizens', and Article 22 TEU: '*On the basis of the principles and objectives set out in Article 21*, the European Council shall identify *the strategic interests* and objectives of the Union' (emphasis added).

[52] See, eg, C Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (2010) *SIEPS Report* 6.

one hand, and norms as applicable and enforceable within the EU, on the other. As suggested above, the EU acquis for the purpose of accession is broader, and subject to swifter enforcement and sanction mechanisms, compared to the applicable EU internal regime.

This differentiation partly rests on the premise that extra-territorial application of EU norms in the pre-accession phase entails irreversible legal adaptation to the requirements of membership. Once admitted to the Union, based on their fulfilment of accession conditions, new Member States thus benefit from the presumption that they respect the values and norms of the Union, as values common to the Member States. On that basis, the broader acquis and the pre-accession enforcement/sanction mechanisms are deemed no longer relevant.

This premise is quite obviously flawed. The disconnection between the EU acquis as applicable to the Member States and the accession acquis is therefore problematic. Not only because of the well-established *double standard* critic that undermines the effectiveness of the whole projection of EU norms,[53] but also because *backsliding* does happen.[54] As the situation in Hungary and Poland epitomises, pre-accession respect for fundamental EU norms may diminish post-accession. Extra-territorial application (ie prior preparation for membership) and compliance with EU norms by the time of accession does not guarantee irreversibility of adaptation, justifying as a more consistent pre and post enforcement approach.[55]

EU internal norms, enforcement mechanisms and ambitions therefore ought to match EU accession norms and enforcement. This would be in line with the requirements of Article 21(1) TEU and its reference to the EU foreign policy as being guided by the principles that have underpinned the Union's creation and enlargement, among which the respect for international law, as well as consistent with the imperative of coherence established by Article 21(3) TEU. It would indeed remedy the paradoxical situation whereby some international norms are less well-enforced within the EU than in the context of accession. While enlargement boosts the effects of international norms, it may also damage their authority if backsliding occurs post-accession.

V. Conclusion

The extra-territorial application of EU law as defined in the first part of the chapter is an essential element of the EU enlargement process. It aims at ensuring the candidates' capacity to function as fully-fledged Member States upon accession,

[53] See, eg, Editorial Comments, 'Fundamental Rights and EU Membership: Do As I Say Not As I Do!' (2012) 49 *Common Market Law Review* 2, 481.

[54] See, eg, the various contributions in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge, Cambridge University Press, 2016).

[55] Hillion (n 21) 569.

and loyal supporters of the EU's aims and action, including on the international stage. As it has been seen, the acquis that candidates must adopt and apply transcends the strict perimeters of EU law as applied internally. This differentiation reflects a holistic notion of EU membership that requires not only compliance with the EU acquis *stricto sensu* as Member, but also the preliminary respect for a broader array of rules and principles that underpin coexistence and mutual trust among Member States.

The inclusion in this exported acquis of international norms that are not applicable to Member States as a matter of EU law can indeed serve a dual purpose: first, it strengthens the values and principles on which the EU is founded and that all aspirant members must respect and second, it supports the EU's commitment towards international law and multilateralism. While the EU has borrowed and instrumentalised international norms for its own purposes, it has also strengthened their normative effect.

Yet, the recurring inconsistencies between the pre-accession conditions and membership obligations impede the very rationale of extra-territoriality. In effect, the extra-territorial application of EU norms serves its purposes only in so far as substantive and institutional coherence between the internal and the external is secured.