

General Principles in EU Common Foreign and Security Policy

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1. Introduction: Defining Principles in a CFSP Context

If there is one change in the way legal scholarship has approached the EU's Common Foreign and Security Policy (CFSP) over the past quarter of a century, it would be that it moved from a focus on what differentiates CFSP from other EU policy areas to a search for commonalities.¹ The 2007 Lisbon Treaty, which more or less consolidated the various aspects of EU external action, certainly contributed to this, but one might argue that this Treaty merely highlighted what had been there from the outset.² CFSP as such did not change that much, it is the perceptions of CFSP that changed.

¹ See in particular the many analyses of the Court's new case law (below, note...); as well as for instance P.J. Cardwell, 'On 'Ring-Fencing' the Common Foreign and Security Policy in the Legal Order of the European Union', *Northern Ireland Legal Quarterly*, 64(4), 2015, pp. 443–463; M. Cremona, 'The CFSP-CSDP in the Constitutional Architecture of the EU', in S. Blockmans and P. Koutrakos (eds.), *Research Handbook on EU Common Foreign and Security Policy*, Cheltenham/Northampton: Edward Elgar Publishing, 2018 (forthcoming); and R.A. Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy', in R. Schütze (Ed.), *Governance and Globalization: International and European Perspectives*, Cambridge: Cambridge University Press, 2018 (forthcoming). Yet, see I. Govaere, 'To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon', in Cremona pp. 71-91 (at 79): "[...] the intergovernmental approach still prevails for CFSP measure post-Lisbon, whereby also judicial and democratic control is largely kept at national level, thus outside the autonomous EU legal order".

² From the outset, this author has pointed to the fact that CFSP has always been part and parcel of the Union's legal order and should be interpreted in that light. See for instance already R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*, The Hague: Kluwer Law International, 1999; and later R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation', *European Constitutional Law Review*, 2009, No. 1, pp. 117-142.

While there are many larger studies on principles of EU law,³ a few on the legal aspects of CFSP,⁴ and some on principles in EU external relations law,⁵ no study seems to exist on the role of general principles in CFSP law. The aim of the present Chapter is to analyse to what extent general principles of EU law are applicable to the CFSP area, to what extent CFSP is bound or affected by general principles of EU law and which principles, if any, have been developed or strengthened within the CFSP context. The chapter is not written as a general analysis of the nature and content of CFSP.⁶

Defining ‘principles’ is notoriously difficult, as the introductory Chapters to this Volume underline and no generally accepted definition exists.⁷ For the purpose of the present Chapter, however, we focus on the principles that are established by the EU treaties themselves or are developed in the case law of the Court of Justice of the European Union (CJEU).⁸ In that sense we closely

³ Yet, most of these studies use the term ‘principles’ to indicate something like ‘basic rules’. See recently recently, T. Tridimas and R. Schütze (eds), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford University Press, 2018; as well as the forthcoming Volumes in this series). And, earlier, for instance Arnull, *The General Principles of EEC Law and the Individual* (Leicester University Press, 1990); T. Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press, 2009); Von Bogdandy and Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2009).

⁴ Blockmans and Koutrakos, *op.cit.*; G. Butler, *Constitutional Limits of the EU’s Common Foreign and Security Policy*, University of Copenhagen, 2016; M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination*, Brill|Nijhoff, 2016; P. Koutrakos, *The EU Common Security and Defence Policy*, Oxford: Oxford University Press, 2013; and Wessel, *The European Union’s Foreign and Security Policy*, *op.cit.*

⁵ G. De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008); and recently M. Cremona (ed.), *Structural Principles in EU External Relations Law*, Oxford: Hart Publishing, 2018. Some of the contributions in this book refer to CFSP (see in particular C. Hillion, ‘Conferral, Cooperation and Balance in the Institutional Framework of EU External Action’ pp. 117-174), but no specific chapter is devoted to this policy area.

⁶ See for those analyses Wessel, ‘Integration and Constitutionalisation in EU Foreign and Security Policy’, *op.cit.*; or B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2014, Chapter 11; or in a somewhat ‘lighter’ version: R.A. Wessel, ‘Common Foreign, Security and Defence Policy’, in D. Patterson and A. Södersten (Eds.), *A Companion to European Union Law and International Law*, Oxford/Malden: Wiley-Blackwell, 2016, pp. 394-412; as well as Butler, *op.cit.*

⁷ Cf. C. Semmelmann, ‘General Principles in EU Law between a Compensatory Role and an Intrinsic Value’, *European Law Journal*, Vol. 19, No. 4, July 2013, pp. 457–487, at 460: “Although it appears to be a term of art, there is no generally accepted definition of what is meant by a principle, by its generality and what exactly denotes a general principle of EU law. A generic provision on the category of principles or even general principles within the sense of a legal basis for their recognition or for their mention as a source of EU law does not exist, let alone an authoritative definition of their concept.”

⁸ This implies that we do not see principles as necessarily ‘unwritten’. Cf. Semmelman (*op.cit.*, at 461): “general principles in EU law denote unwritten, judicially driven norms that may subsequently be codified.” On the contrary, we closely follow the principles are presented in the Treaty.

follow Cremona's description of 'structural principles' as "principles which have been drawn from the Treaties and elaborated by the Court to establish [the] institutional space" [...] "within which policy may be formed, in which the different actors understand and work within their respective roles."⁹ According to Cremona, principles under this heading would include the duty of sincere (and close) cooperation, the principles of conferral and institutional balance, mutual solidarity, subsidiarity, and the principle of autonomy. In short, "structural principles are [...] not concerned with the *substantive content* of policy, but rather with *process* and the *relationships* between actors in those processes, and their normative content reflects this."¹⁰ This would, *inter alia*, largely exclude the general principles (read 'foundations') of EU law listed under the heading 'Principles' as Part One of the TFEU. And, although other general principles of EU law would perhaps fit this definition – such as the 'principles' of primacy and direct effect – these are also left out as they have been dealt with in the CFSP context in other studies and are of a different nature.¹¹

While this is a very helpful categorisation, the substantive content of policies is usually what non-legal outsiders would see as the most important aspect of a principles discussion. Here, however, it becomes more difficult to clearly demarcate principles from values, as 'general principles' are generally believed to reflect the values inherent to *the rule of law* (such as legal certainty, legal protection, equality before the law or transparency).¹² Equally complex is the distinction with 'objectives'. As will be further analysed below, the EU

⁹ Cremona, at 5. Cf. also Von Bogdandy, who sees the "*founding* principles or *structuring* principles as *constitutional* principles"; arguing that "A principle is a norm (understood in a broad sense) that shows a certain degree of inherent structural generality in the sense of an indeterminate, abstract, programmatic, non-conclusive or orientative character." (at 460).

¹⁰ Cremona, at 12. Cremona further distinguishes between two types of structural principle: relational and systemic. "Relational principles govern the relationship between actors or legal subjects (not norms)" (at 17). Relational principles cover relations between Member States, between Member States and Institutions and between Institutions. "Systemic principles are concerned with the operation of the system as a whole, with building the EU's identity as a coherent, effective and autonomous actor in the world" (at 18). They work in close cooperation to the relational principles.

¹¹ See for instance Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy', *op.cit.*

¹² See also the reference to the rule of law in the list of *values* in Art. 2 TEU and the list of *principles* in Art. 21 TEU (see further below). The examples of structural principles listed by Azoulai (*op.cit.* at 36) also seem to combine procedural and substantive principles: "principles of non-discrimination, free movement, primacy, *effet utile*, judicial review, institutional balance and loyal cooperation". See also I Vianello, 'The Rule of Law as a Relational Principle Structuring the Union's Action Towards its External Partners', in Cremona, *op.cit.*, pp. 225-240.

Treaties contain quite an extensive number of far-reaching objectives, which are sometimes linked to or presented as ‘principles’.¹³

The principles analysed in this Chapter are thus legal norms,¹⁴ which is not the same as saying they are rules.¹⁵ The question, however, is what their role is in the context of CFSP, an area that is still “subject to specific rules and procedures”.¹⁶ Indeed, ‘specific principles’ are not mentioned in this provision and, more generally there seem to be no arguments not to apply the structural principles in EU law to the CFSP area.¹⁷ On the contrary, perhaps, as the very first provision in the CFSP Chapter clearly refers back to the general Union principles: “The Union’s action on the international scene, pursuant to this Chapter, *shall be guided by the principles*, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1.”¹⁸ While we could easily leave it at that, one might even argue that structural principles are particularly important in the area of CFSP – where Member States, as at least perceived, play a larger role – to live up to the requirement of “consistency, effectiveness and continuity of its policies and actions.”¹⁹ And, indeed, CFSP has always been part of the Union’s constitutionalised order²⁰ and

¹³ See extensively on the wide range of EU objectives: J. Larik, ‘From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union’, 63 ICLQ, October 2014, pp. 935–962. Larik rightfully reminds us that “more objectives do not equal more power” (at 936) and that the EU may not be able to attain all its aims.

¹⁴ Cf. Cremona, *op.cit.* at 12: “These principles are legal norms; they have a legal function and breach of them may result in the illegality of the resulting measure.” See also A. von Bogdandy, ‘Founding Principles of EU Law: A Theoretical and Doctrinal Sketch’, (2010) 16 *European Law Journal* 95, at 100: “Frequently, principles increase the number of arguments which can be employed to debate the legality of a certain act. In this respect, they can be described as legal principles which transcend structural principles. By enlarging the argumentative budget of the legal profession, principles strengthen its autonomy vis-à-vis the legislative political institutions. This happens mostly via a principle-oriented interpretation of a relevant norm, be it of primary or secondary law.”

¹⁵ Cremona, *op.cit.*, at 12-13: “A rule is designed to operate in and to govern a specific set of circumstances. A principle has a more fundamental character; we may say that rules flow from, and should be consistent with, underlying principles.” See also Tridimas, *op.cit.* at 1, referring to general principles expressing a core value.

¹⁶ Art. 24(1) TEU.

¹⁷ Cf. C. Hillion, ‘A Powerless Court:…’, in Cremona and Thies, at 69.

¹⁸ Arr. 23(1) TEU. Emphasis added.

¹⁹ Art. 13 (1) TEU, as well as other provisions, including Art. 21(3) TEU. Cf. also L. Azoulai, ‘Structural Principles in EU Law: Internal and External;’, in Cremona pp.31-45 at 33): “Structural principles are seen as forms of rationalisation of a highly valuable but essential unstable project. To make EU law subject to structural principles is to make it and the EU more resilient”.

²⁰ See Wessel, ‘Integration and Constitutionalisation in EU Foreign and Security Policy’, *op.cit.* and earlier: ‘The Dynamics of the European Union Legal Order’, *op.cit.* Cf. also B. De Witte, ‘Too Much Constitutional Law in the European Union’s Foreign Policy’, in M. Cremona and

of the integration process “that is the *raison d’être* of the EU itself”.²¹ In this constitutionalised order, principles are one of the elements turning it into a coherent whole. One can only agree with Von Bogdandy when he defines founding principles, in the tradition of constitutionalism, as “those norms of primary law having a normative founding function *for the whole of the EU’s legal order*; they determine the relevant legitimacy foundations in view of the need to justify the exercise of public authority.”²²

On top of this, all of this seems to be confirmed by Article 24(2) TEU, which provides that the Union shall conduct, define and implement a common foreign and security policy “[w]ithin the framework of the principles and objectives of its external action.” As has been shown above, and further be dealt with below, the reference to ‘external action’ cannot be read as restricting the list of principles to that particular dimension of the Union’s policies. In fact, Article 21(1) TEU clearly links the principles as applied in the internal context to external action: “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 [...]”.²³

This notion is further strengthened by the requirement of consistency, which is not termed a principle in the treaties,²⁴ but nevertheless guides the EU’s external action more generally and functions as a principle to work towards the attainment of the objectives.²⁵ Both in Article 3(5)²⁶ and in Article 21 TEU on

B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart, 2006, pp. 4-15, debating the constitutional complexity in EU external relations.

²¹ As phrased by the Court in Opinion 2/13, para 172. In this statement no exception is made for CFSP.

²² Cf. Von Bogdandy, *op.cit.*, at 105 (emphasis added). And at the same page: “[P]rinciples are special legal norms relating to the whole of a legal order. Founding principles as a sub-category express an overarching normative frame of reference for all primary law, indeed for the whole of the EU’s legal order.”

²³ Emphasis added. As these principles, the Article mentions: “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

²⁴ Nevertheless, Article 22 TEU refers to “the principles and objectives set out in Article 21”.

²⁵ See also M Estrada Cañamares, “Building Coherent Responses”: Coherence as a Structural Principle in EU External Relations”, in Cremona, *op.cit.*, pp. 244-262, at 256: “Because of its location under Article 7 TFEU, coherence can be considered a ‘Principle’ of ‘General Application’ to the Union.” Cf. Larik, who argues that the EU objectives “provide a sense of purpose as to the exercise of powers through the structures of the constitutionalised legal order”. (‘From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union’, (2014) 63 *International and Comparative Law Quarterly* 936, 962.

²⁶ Art. 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. It shall contribute to peace,

the external objectives of the Union specific references to CFSP are absent. Indeed, the Lisbon Treaty consolidated the Union's external relations objectives and CFSP is just one of the means to attain these objectives. The requirement of consistency in Article 21(3) TEU is meant to prevent a fragmentation of the Union's external action.²⁷ It establishes a legal connection between the different parts and imposes a binding obligation of coherence in EU external relations, illustrating that coherence is not merely an academic notion but a tangible legal principle of EU primary law. Indeed, paragraph 3 of Article 21 TEU can be considered the *lex generalis* coherence obligation in EU external relations. Thus, what this paragraph does is connect the list of policy objectives in 21(2) to each other,²⁸ and to the functioning of pertinent legal principles, by imposing

security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

²⁷ It provides that: “[...] The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.” Cf. also Art. 7 TFEU: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.” The TEU contains four other provisions which pertain to coherence in its material and institutional dimensions. All in their own way, these provisions strengthen the relationship (or in fact, the integration) between CFSP and other external relations policies. See more extensively Van Vooren and Wessel, *op.cit.*, Chapter 1; as well as C. Hillion, ‘Cohérence et action extérieure de l’Union Européenne’, *EUI Working Papers Law*, 202/14.

²⁸ “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:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance.”

Based on the history of these objectives, AG Bot argued that the first three would be the CFSP objectives, but the current Treaty does not seem to make this distinction. See Case C-130/10 *European Parliament v Council*, EU:C:2012:50, Opinion of AG Bot, para 63. Yet, see the clear disagreement on this among scholars, all making different choices: P. Eeckhout, *EU External*

a legally binding obligation of coherence between all EU internal and external policies which must pursue them. Specifically through the case-law of the Court of Justice the obligation of loyalty (see below) has become directly connected to the objective of “ensur[ing] the coherence and consistency of the action and its [the Union’s] international representation”.²⁹

An easy answer to the question of whether the principles in the Treaties are always *legal* principles (or rather political aspirations) is that they are legal by definition as they are part of a legal instrument. This is not different for principles in CFSP.³⁰ Irrespective of the fact that they may refer to political cooperation (e.g. Art. 24(3) TEU: “mutual political solidarity”) the principles themselves are legal. In this section, we follow the order of the Treaty and subsequently analyse the function of principles of international law; the principles of cooperation and representative unity; the principles of conferral, subsidiarity and proportionality; and the principles of consistency in the context of CFSP. As the scope of this chapter does not allow for an extensive analysis of the content of these principles, we refer to the abundant literature on that topic.³¹

2. Principles of International Law

With respect to principles in CFSP, the Treaties indeed provide clear guidance. While the Preamble to the TEU already mentions some principles,³² it is interesting to note that the Treaty text starts with referring to external principles first: “the principles of the United Nations Charter” (Art. 3(5) TEU). As this reference is part of the provision on the Union’s “relations with the wider

Relations Law (Oxford: OUP 2013), at 169 (c belongs to CFSP); P. Van Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency’ 47 *CMLRev.* (2010), p. 987, at 1006 (a and c belong to CFSP); and P. Koutrakos, *EU International Relations Law* (Oxford: Hart 2015), at 420 (economic and social objectives are not related to CFSP).

²⁹ Case C-266/03, *Commission v Luxembourg*, [2005] ECR I-4805, para 60, and Case C-476/98, *Commission v Germany*, [2002] ECR I-9855, para 66.

³⁰ Along similar lines: Larik, in Cremona, at 184: “Terms such as sincere cooperation, solidarity and unity encompass the same idea and represent legally binding norms in EU law, regardless of where they are placed in the Treaties.”

³¹ Among the many studies on these principles, see recently K. Lenaerts and J.A. Gutiérrez-Fons, ‘A Constitutional Perspective’, in Schütze, *op.cit.*, pp. 103-141. See also some references below and the Chapters by [...] elsewhere in this Volume.

³² Albeit in a somewhat random fashion: “the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”, “the principle of sustainable development”, and “the principle of subsidiarity”.

world”, the relevance for CFSP is obvious. At the same time, it is difficult to find CFSP output in which the UN principles are expressly mentioned.³³ Also in scholarly work, the function of international law principles on CFSP (or on EU external relations in general) seems largely neglected.³⁴ Yet, this reference is not without meaning as Art. 3(5) TEU is phrased in quite mandatory terms: the Union “*shall* contribute to [...] the development of international law”, including the mentioned principles.³⁵ A similar reference may be found in relation to the Common Security and Defence Policy (CSDP), which is “an integral part of the common foreign and security policy,” and which is also to be realised “in accordance with the principles of the United Nations Charter.”³⁶

It goes beyond the scope of this Chapter to analyse the extent to which the EU has been successful in living up to these obligations and if and how international principles have indeed guided the Union’s external actions.³⁷ Given the Union’s own intentions on the international plane – which do not seem contradictory to the UN Charter or international law more broadly – it is not to be expected that these references in the TEU will have a separate restraining effect on the Unions’ external action under CFSP.³⁸

Finally, it is worthwhile to note that also other international agreements may contain principles that would or could be applicable to CFSP actions. These would be agreements the Union is a party to and would hence limit the options of the EU to decide or act.³⁹ A very concrete example can be found in Article

³³ Nevertheless, more general references to the United Nations can be found in CFSP Decisions related to or implementing UN Decisions in relation to restrictive measures or other areas. Cf. Council Decision 2011/428/CFSP of 18 July 2011 in support of United Nations Office for Disarmament Affairs activities to implement the United Nations Programme of Actions to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, *OJ EU L* 188/37, 19.7.2011.

³⁴ It is, indeed, about time to update and expand my own 20 years old thinking on the relevance of international principles like good faith in the context of CFSP. See Wessel, *The European Union’s Foreign and Security Policy, op.cit.*, Chapter 5.

³⁵ Emphasis added.

³⁶ Art. 42(2) TEU.

³⁷ See more extensively R.A. Wessel, ‘Flipping the Question: The Reception of EU Law in the International Legal Order’, *Oxford Yearbook of European Law*, 2016, pp. 533-561; as well as the reference there to the many studies on ‘the EU as a normative actor’.

³⁸ One hypothetical situation may occur when, for instance, the mandate of EU military missions, would result in a violation of rules in the UN Charter.

³⁹ Of the many publications on the effects of international law on the EU legal order, see for instance the special section on ‘EU Law and Public International Law: Co-Implication, Embeddedness and Interdependency’ edited by V. Morena-Lax and P. Gragl in *Yearbook of European Law*, 2016; as well as E. Cannizzaro, P. Palchetti and R.A. Wessel (Eds.), *International Law as Law of the European Union*, Boston/Leiden: Martinus Nijhoff Publishers, 2011.

6(3) TEU: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, *shall constitute general principles of the Union’s law.*”⁴⁰

3. Principles of Cooperation

The Treaty then follows on with “the principle of sincere cooperation” (Art. 4(3)) on the basis of which “the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”.⁴¹ This ‘vertical’ principle aims at cooperation between the EU and its members and has proven its value in the CFSP context, in particular in restraining member states to act externally in areas in which the Union is active.⁴² In fact, there are no reasons not to apply the entire body of case law on the interpretation of the principle of sincere cooperation to CFSP.⁴³ The fact that CFSP has ‘its own’ loyalty principle does not seem to deny this. Article 24(3) provides:

“The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council and the High Representative shall ensure compliance with these principles.”

⁴⁰ Emphasis added.

⁴¹ More concretely, the provision refers to the following obligations: “The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.” This was confirmed by the Court in, for instance, Case C-518/11 *UPC Nederland BV*, EU:C:2013:709 (para. 59 and the case law cited there). See more extensively on the obligations of the actors on the basis of this principle, Larik, ‘Pars Pro Toto’, *op.cit.*; as well as B. Guastaferrero, ‘Sincere Cooperation and Respect for National Identities’, in Schütze, *op.cit.* pp. 350-382.

⁴² See more extensively C. Hillion and R.A. Wessel, ‘Restraining External Competences of EU Member States under CFSP’, in Cremona and De Witte, *op.cit.* pp. 79-121.

⁴³ Cf. Larik (in Cremona, at 187) with regard to principles of sincere cooperation and solidarity: “They are overarching principles in the relation between the Union and its Member States and apply to all matters of foreign policy, including the realms covered by the CFSP and CSDP”.

Indeed, and despite the fact that this provision is located in a Title that is not subject to the Court's jurisdiction,⁴⁴ the inclusion of 'shall' makes Member States' loyalty and cooperation clearly mandatory, while suffering little exception, as suggested by the expressions 'actively' and 'unreservedly'. As argued earlier,⁴⁵ the Court's interpretation of the principle of sincere cooperation could entail far-reaching obligations for the Member States, particularly with respect to their power to conclude international agreements in the field of CFSP. Although not prevented from acting, Member States are expected under Article 23(3) TEU to inform and consult the EU institutions in areas where there is the start of a concerted Union CFSP action at international level. Indeed, given that each CFSP instrument in principle expresses a concerted action of the Union at the international level, the procedural obligations linked to the CFSP principle of loyal cooperation would not only apply in situations where negotiations of an agreement are envisaged, it could also apply where the start of a concerted action leads notably to a CFSP position or action on the basis of either a formal Decision or another instrument. Thus, Member States should inform and consult EU institutions, even prior to the adoption of a CFSP autonomous act or the conclusion of an EU agreement, as soon as an EU concerted action at EU level emerges.

In relation to the loyalty principle, one element is often seen as a separate principle: effectiveness. Indeed, as we have seen, Article 24(3) TEU refers to the Member States' obligation to "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations." The principle of effectiveness has thus been presented as a separate principle that has its own function in external relations law,⁴⁶ and in that sense should also be taken into account in the CFSP context, whenever CFSP instruments are being adopted or implemented.

The specific solidarity clause related to terrorist attacks or disasters is laid down in Article 222 TFEU and hence at a certain distance from the CFSP provisions.⁴⁷ On the basis of a special Decision all EU institutions have been

⁴⁴ See Art. 24(1): "The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [...]". See further below.

⁴⁵ See Hillion and Wessel, *op.cit.*

⁴⁶ See Cremona, in Cremona, *op.cit.* as well as quite extensively A. Thies, 'The Search for Effectiveness and the Need for Loyalty in EU External Action', in Cremona, pp. 263-290.

⁴⁷ Art. 222 TFEU, inter alia, provides: "The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States. [...] Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member

provided with specific roles for the implementation.⁴⁸ The clear relation with the more military oriented solidarity clause in Article 42(7), however, argues in favour of a relevance of this provision in the context of CFSP. In fact, Article 42(7) TEU partly addresses similar issues,⁴⁹ and a combination of the two provisions in the CFSP Title would have made sense.

While the ‘solidarity clause’ thus already underlines the need for both Union and Member States cooperation, a clear ‘horizontal’ variant of the principle of cooperation is to be found in Article 13(2) TEU: “[...] The institutions shall practice mutual sincere cooperation.” Article 13(1) TEU established a single institutional framework for the entire Union.⁵⁰ Furthermore, Article 13 is in Title III TEU (‘Provisions on the Institutions’), and there are no indications that this Title is limited to the policies in the TFEU.⁵¹ And, other provisions in this Title, like Article 14 (on the role of the European Parliament) or Article 16 (on the role of the Council) are also to be applied across the board.⁵²

Relevant for the CFSP context is also that the Court sees an application of Article 13(2) on the interinstitutional principle of cooperation also in case of ‘hybrid acts’ taken “by both the Council and the Representatives of the Governments of the member States meeting within the Council”.⁵³ The view of

States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.”

⁴⁸ See Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause [2014] OJ L192/53, Art. 5(1).

⁴⁹ Article 42(7) TEU: “If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.”

⁵⁰ The reference to the ‘single institutional framework has been in the Preamble from the outset. See already Wessel, *The European Union’s Foreign and Security Policy, op.cit.*, Chapter 4. This idea has not changed and, if anything, has only been strengthened with the disappearance of the pillar structure.

⁵¹ On the contrary. This provision seems to strengthen the unity of the institutional framework: “The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.”

⁵² With regard to the role of the EP, the Court confirmed this is the *Mauritius and Tanzania* cases. In *Tanzania*, the Court held that the information requirement was there “inter alia, to ensure that the Parliament is in a position to exercise democratic control over the European Union’s external action, and more specifically, to verify that the choice made of the legal basis for a decision on the conclusion of an agreement was made with due regard to the powers of the Parliament”; Case C-263/14 Parliament v Council (*Tanzania*), EU:C:2016:435. See also C. Hillion, ‘Conferral, Cooperation and Balance in the Institutional Framework of EU External Action’ in Cremona pp. 117-174, at 128.

⁵³ See Case 28/12 Commission v Council (*Air Transport Agreement*), EU:C:2015:282, paras. 6 and 53.

the Court that this is about inter-institutional loyalty is interesting, given the fact that meetings ‘in the framework of the Council’ are held because of a lack of Union competences in a certain area. This again seems to underline that – also in a CFSP context – Member States are not merely bound by the vertical cooperation principle, but also by the horizontal version, the moment the Institutions are used, even if just as a ‘meeting place’. And, as in other Union policies, Member States are generally bound by the obligations that flow from EU membership, which includes adherence to the principles and limits their freedom to opt in or out from using the EU whenever they like.⁵⁴

In the CFSP context, the principle of cooperation has a clear link with the choice for the correct legal basis. Article 40 TEU indicates that “implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences [in the TFEU]”, but at the same time the implementation of the TFEU policies “shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under [CFSP]”. This seems to underline the idea that the procedures and competences laid down in the two treaties for the different policy areas should not affect the functioning of any of those policy areas.⁵⁵ Furthermore, as will be shown below, the choice for the correct (CFSP or non-CFSP) legal basis is closely linked to the principle of conferral.⁵⁶

And, just like the principle of conferral, the loyalty principles are more generally applicable and also apply in cases where the Council uses other instruments than the formal CFSP ‘Decisions’, despite the difficulties to have the Court control the application of the principles. Indeed, “The institutions shall practice mutual sincere cooperation.”,⁵⁷ in general and not just when legal instruments are being adopted. There is some support for this in the Court’s case law. In the *Memorandum of Understanding* case the Court held that “The decision concerning the signing of an agreement with a third country covering

⁵⁴ As was already established pre-CFSP in Case C-124/95, *Centro-Com*, EU:C:1997:8.. See also C. Hillion and R.A. Wessel, ‘Restraining External Competences of EU Member States under CFSP’, in M. Cremona and B. De Witte (Eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart Publishing, 2008, pp. 79-121.

⁵⁵ Along similar lines see Hillion, *op.cit.* at 163.

⁵⁶ Cf. also Govaere, who sees Art. 40 TEU as the best reflection of the principle of conferral. I. Govaere, ‘To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon’, in Cremona pp. 71-91, at 79. See also Case C-130/10 *European Parliament v Council (Financial Sanctions)* EU:C:2012:472.

⁵⁷ Art. 13(2) TEU.

an area for which the Union is competent – irrespective of whether or not that agreement is binding – requires an assessment to be made, in compliance with [...] the principles and objectives of the Union’s external action laid down in Article 21(1) and (2) TEU [...]”.⁵⁸ A more difficult situation arises when the Council circumvents existing competences and procedures, as for instance exemplified by the conclusion of the 2016 ‘EU-Turkey Statement’, which is not based on Article 218 TFEU.⁵⁹ Here, however, it should be clear that even by taking an issue outside the Union’s legal order, the (European) Council or the Member States cannot evade the Union’s structural principles.⁶⁰ While, as such, “Member States are entitled, in areas which do not fall under the exclusive competence of the Union to entrust tasks to the institutions, outside the framework of the Union”, the Court also made clear that “those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties”.⁶¹ To CFSP, as a non-exclusive policy area in the TEU, this statement is applicable and the ‘powers conferred on the institutions’ should be respected. This does indeed limit the freedom Member States have under CFSP wherever concrete tasks have been assigned to the Institutions.⁶²

⁵⁸ Case C-660/13, *Council v. Commission*; ECLI:EU:C:2016:616, paras 38-40. See more extensively R.A. Wessel, “‘Soft’ International Agreements in EU External Relations: Pragmatism over Principles?”, paper presented at the ECPR SGEU Conference, Panel Hard and Soft Law in the European Union, Paris 13-15 June 2018.

⁵⁹ See for the debate for instance: T. Spijkerboer, ‘Minimalist Reflections on Europe, Refugees and Law’, in *European Papers*, 2016, Vol. 1, No 2, p. 533 et seq.; G. Fernández Arribas, ‘The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem’, in *European Papers*, 2016, Vol. 1, No 3, p. 1097 et seq.; J. Poon, ‘EU-Turkey Deal: Violation of, or Consistency with, International Law?’, in *European Papers*, 2016, Vol. 1, No 3, p. 1195 et seq.; E. Cannizzaro, ‘Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council’, in *European Papers – European Forum*, Insight of 15 March 2017, p. 1 et seq.; S. Peers, ‘The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?’, in *EU Law Analysis*, 16 March 2016; E. Cannizzaro, ‘Disintegration Through Law?’, in *European Papers*, Vol. 1, No 1, 2016, p. 3 et seq.

⁶⁰ Cf. Case C-370/2 *Pringle*, EU:C:2012:756. B. De Witte and T. Beukers, ‘The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*’, 50 *CMLR*, 2013, p. 805; P. García Andrade, ‘The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments’, *European Papers*, Vol. 1, 2016, No 1, *European Forum*, Insight of 16 April 2016, pp. 115-125, at 115; as well as P. García Andrade, ‘The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries’, in J. Santos Vara and S.R. Sánchez-Tabernero (Eds.), *The Democratization of EU International Relations Through EU Law*, Routledge, 2018 (forthcoming); and R.A. Wessel, “‘Soft’ International Agreements in EU External Relations”, *op.cit.*

⁶¹ *Pringle* case, para 158.

⁶² Examples include Article 26(1) TEU: “The European Council shall identify the Union’s strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the

Throughout Title V, Chapter 2 of the TEU, Institutions have been given very concrete tasks that are often formulated in a mandatory fashion. The principles in Article 13 TEU limit the freedom of Member States to ignore these tasks assigned to the Institutions or to simply add new tasks.⁶³ At the same time, CFSP tasks have not only been assigned to the formal EU Institutions, but also to other actors, including in particular the High Representative.⁶⁴ The latter even has a special task in this regard: “The Council and the High Representative shall ensure compliance with [the principles of loyalty and mutual solidarity]”.⁶⁵ Despite the place of Article 13(2) TEU in the Title on ‘Provisions on Institutions’, it is difficult to read this provision in isolation, and given the many tasks assigned to the High Representative it could be seen as forming part of the Union’s institutional framework.⁶⁶

This also brings us to a principle that is related to – or one might argue: part of – the principle of sincere cooperation: the so-called ‘principle of the unity in the international representation of the Union’,⁶⁷ which has provided its relevance in relation to mixed agreements in particular.⁶⁸ The Court clearly referred to this requirement as a ‘principle’.⁶⁹ Nevertheless, it has been doubted

necessary decisions.” But also Article 26(2) TEU: “The Council shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council.”

⁶³ More in general on these issues, see Hillion, at 166-167.

⁶⁴ Thus Article 27(2) TEU, for instance, provides: “The High Representative shall represent the Union for matters relating to the common foreign and security policy.” And, Article 22(2): “The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.” And, Article 24(1): “The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy [...]”. And, finally, Article 218(3) TFEU: “[...] the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council”.

⁶⁵ Article 24(3) TEU.

⁶⁶ See also Case ETS, para 62, referring to “a balance of power between the institutions” in relation to Art. 218 TFEU. Along similar lines: Hillion, at 169. Hillion (at 170) also points to the Tanzania case (para 73), in which the Court implicitly seemed to argue that it for both the Council and the High Representative to uphold the obligation to inform the European Parliament.

⁶⁷ This principle was referred to in Opinion 2/19, EU:C:1993:106 as originally coming from the European Atomic Energy Community (EAEC) Treaty.

⁶⁸ See P. van Elsuwege and H. Merket, ‘The Role of the Court of Justice in Ensuring the Unity of the EU’s External Representation’, in S. Blockmans and R.A. Wessel (eds.), *Principles and Practices of EU External Representation*, CLEER Working Paper 2012/5, 37 at 43.

⁶⁹ See Case C-246/07, *Commission v Sweden (PFOS)*, EU:C:2010:203, para. 104. See A. Thies, ‘Shared Competence and the EU Member States’ Obligations to Refrain from Unilateral External Action: *PFOS* and Beyond’, in J. Diez-Hochleitner et al. (eds.), *Recent Trends in the*

whether in this case we are dealing with a self-standing principle, as “the Court has never made recourse to it in its own right, but always in combination with the duty of cooperation”.⁷⁰ Be that as it may, it is clear that in the CFSP context this ‘principle’ or at least ‘requirement’ may serve to make the duty of cooperation more concrete, given the frequent struggles between the EU and its Member States on representation issues.⁷¹

Yet, the application of the principle of cooperation in CFSP does not seem to be unlimited. Article 4(2) TEU refers to what may perhaps be called the ‘principle of equality of Member states’ and the ‘principle of respect of national identities and essential state functions’.⁷² At the same time, Member States made sure to underline that the provisions of CFSP, including those on mutual political solidarity “do not affect the responsibilities of the member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organizations”. This provision in Declaration No 13 also includes a reference to the obligations member States have under the Charter of the United Nations. Declaration 14 adds “that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament”. Indeed, some essential state functions and international obligations seem to be preserved on the basis of the Declarations, which, of course should never be used to set aside clear obligations contained in the Treaties, but could be used in interpreting the general principles in the specific context of CFSP.

Case Law of the Court of Justice of the European Union (2008-2011), (La Ley, 2012), p. 703 at 721.

⁷⁰ See Larik, in Cremona, at 183. Indeed, this idea is also reflected in the AG’s Opinion in the *PFOS* case: “[t]he unity of international representation of the Community and its Member States does not have an independent value; it is merely an expression of the duty of loyal cooperation [...]” Opinion of AG Poires Maduro in the *PFOS* case; EU:C:2009:589, par. 37.

⁷¹ *Blockmans and Wessel*, *op.cit.*

⁷² Art. 4(2) TEU: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

4. Principles of Conferral, Subsidiarity and Proportionality

One could argue that the principle of conferral should perhaps have been listed first in the TEU. After all, the role and function of the other principles largely depends on the actual existence of a competence and it is key to understanding the principle of institutional balance.⁷³ At the same time, the principle of conferral is also linked to the principle of sincere cooperation. In the words of the Court: “Under Article 13(2) TEU institutions are to practise mutual sincere cooperation. That sincere cooperation, however is exercised within the limits of the powers conferred by the Treaties on each institution. The obligation resulting from Article 13(2) TEU is therefore not such as to change those powers”.⁷⁴ And it has rightfully been underlined that “the general requirement of sincere cooperation cannot in principle alter the allocation of powers [...]”.⁷⁵ This, of course is also relevant in the CFSP context. While, as we have seen, the principle of cooperation is valid, it cannot be used to change the way in which the Treaty allocated competences to the Institutions. In that sense, it is not just relevant in a horizontal context (inter-Institutional), but also in a vertical context (EU-MS). In the words of Hillion, the principle of sincere cooperation “cannot itself be a source of a new power”.⁷⁶ Another reason to have the principle of conferral come first.

Article 5(1) TEU provides in quite general terms that “The limits of Union competences are governed by the principle of conferral. [...]” Again, no exception is made for CFSP. On the contrary, the article refers to “Union competences” and Article 2(4) TFEU in turn clearly refers to CFSP as a Union

⁷³ See also Hillion, in Cremona, at 143: “in inter-institutional cases, a breach of the principle of conferral in itself entails an infringement of the principle of institutional balance [...]”. And, in the words of the Court: “[U]nder Article 13(2) TEU, each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions”. Case C-409/13 Council v Commission (*Macro-Financial Assistance (MFA)*), EU:C:2015:217, para 64. See also Case C-73/14 Council v Commission (*ITLOS*), EU:C:2015:663, par. 61; Case C-425/13 Commission v Council (*ETS*), EU:C:2015:483, par. 69; and Case C-660/13 Council v Commission (*Memorandum of Understanding*), EU:C:2016:616, par. 32.

⁷⁴ ITLOS Case para 84; See also Case 28/12 Commission v Council (*Hybrid Act*), EU:C:2015:282, para 34.

⁷⁵ Hillion, in Cremona, at 149.

⁷⁶ *Ibid*, at 151.

competence.⁷⁷ The formal legal instrument in CFSP is the ‘Decision’ mentioned in Article 28(1) TEU. In practice, however, this instrument is not frequently used, apart from the adoption of restrictive measures, the appointment of new special envoys and the establishment of military and civilian missions. For most substantive policy decisions, the Council uses its minutes, supplemented by less formal instruments, such as strategies, action plans, statements or so-called ‘non-binding’ arrangements such as Memoranda of Understanding.⁷⁸ The principle of conferral, however, is not strictly limited to the adoption of formal legal acts. It simply states that “Each institution shall act within the limits of the powers conferred on it in the Treaties”,⁷⁹ which seems to cover actions in a broader sense.

In fact, on the basis of Article 24(1) TEU the scope of the conferral of competences in CFSP is quite broad and hardly excludes any type of external action from the Unions competence.⁸⁰ It has in fact been argued that “the CFSP attribution in Article 24(1) TEU is so broad that an application of the doctrine of implied powers implying all the competences needed for an effective CFSP would lead to an extensive grant of external action competences going far beyond what the Treaty permits.”⁸¹ But, this is a somewhat peculiar way of reasoning. It is not clear from the Treaty why the principle of conferral (and the inherent or case law extension to implied powers) would not be applicable to CFSP. It is also not clear why the Treaty would not permit this, indeed, given the wide scope of CFSP in the Treaty. It is simply a fact that very far-reaching competences have been attributed to the Union in this area, but also that this is mitigated by the ‘special rules and procedures’ in CFSP, which make it more difficult for the EU to make use of these competences.

Article 5(1) TEU continues by stating that “The use of Union competences is governed by the principles of subsidiarity and proportionality.” Again, we see a general reference to ‘Union competences’, which as we have

⁷⁷ Art. 2(4) TFEU: “The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.”

⁷⁸ See Wessel, “‘Soft’ International Agreements”, *op.cit.*

⁷⁹ in Article 13(2) TEU.

⁸⁰ Art. 24(1) TEU: “The Union’s competence in matters of common foreign and security policy shall cover *all areas of foreign policy* and *all questions relating to the Union’s security*, including the progressive framing of a common defence policy that might lead to a common defence.” (emphasis added).

⁸¹ G. De Baere, ‘Subsidiarity as a Structural Principle Governing the Use of EU External Competences’, in Cremona pp. 93-115. at 103.

seen include those in the CFSP area.⁸² Furthermore, the principle of subsidiarity⁸³ is applicable “in areas which do not fall within [the Union’s] exclusive competence”,⁸⁴ which is clearly the case for CFSP.⁸⁵ This is not contradicted by Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, to which Article 5, paras. 3 and 4 TEU refer. Despite the focus of this Protocol on ‘legislative acts’, Article 1 requires that “Each institution shall ensure *constant respect* for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union.”;⁸⁶ and as we have seen, Article 5 TEU refers to the principle of subsidiarity in general terms. Nevertheless, it has rightfully been argued that it may be more difficult in relation to non-legislative measures (as is the case in CFSP) to notice infringements of the principle of subsidiarity.⁸⁷ After all, on the basis of Article 5 of Protocol No 2 any *legislative* act “should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality”, and this requirement does not return in the case of CFSP Decisions or other CFSP instruments.

In a way, one could perhaps argue that subsidiarity is inherent to the decision-making process in CFSP (and therefore perhaps superfluous), as decisions can only be taken when everyone agrees that the EU level is more appropriate. The unanimity rule would thus guarantee subsidiarity.⁸⁸ In this line of argumentation, however, the question of the appropriate level of decision-taking seems to be confused with the decision-making procedures in the

⁸² Yet see Chiti, *op.cit.*, at 53: “While the principle of subsidiarity applies to the external aspects of the EU policies implementation through EU legislation in the same way as it applies to other legal acts, its application to international agreements and to certain policy fields, such as the CFSP, is far less obvious”.

⁸³ Art. 5(1) TEU: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” On the principle of subsidiarity see recently F. Fabbrini, ‘The Principle of Subsidiarity’ in Schütze, pp. 221-241.

⁸⁴ Art. 5(3) TEU. Despite the, perhaps ironic, fact that international agreements in the area of CFSP are always exclusively concluded by the Union and no mixed agreements can be found. See further G. Van der Loo and R.A. Wessel, ‘The Non-Ratification of Mixed Agreements: Legal Consequences and Options’, *Common Market Law Review*, 2017, No. 3, pp. 735–770.

⁸⁵ See also De Baere, in Cremona, at 107.

⁸⁶ Emphasis added.

⁸⁷ De Baere, at 100.

⁸⁸ Cf. De Baere (at 108): “subsidiarity is present in the entire CFSP decision-making process. Reading Article 25 to 29, it seems clear that the entire system is based on the principle that the EU only takes action in CFSP matters when that would represent a clear advantage over Member State action”.

Council.⁸⁹ An awareness of the subsidiarity requirement is needed in a CFSP context as well as anywhere else. After all, the moment decision-making on a certain issue is on the agenda of the Union institutions and decisions are taken, an EU competence is being used, the decision is binding on the Member States and there may be consequences for questions of international responsibility.⁹⁰

As to the principle of proportionality, it was already established that this principle is also to be used ‘Union-wide’, given the general reference to “Union competences” in Article 5(1) TEU and the wording used in Article 1 of Protocol No 2. Article 5(4) TEU adds that this principle applies to “the content and form of Union action”, which “shall not exceed what is necessary to achieve the objectives of the Treaties.”⁹¹ The references to ‘Union action’ and the ‘objectives of the Treaties’ are quite general and do not seem to exclude any policy area.⁹² As noted above, however, the scope of the objectives in external relations – as laid down in Articles 3(5) and 21(3) TEU in particular – is very wide. The idea behind the principle of proportionality is not to go beyond what is needed to reach these objectives. With regard to foreign policy measures, however, it is almost impossible to attain objectives such as the preservation of peace or the integration of all countries into the world economy, let alone that it would be easy to use measures to go beyond these objectives.⁹³ This puts the practical use of the principle of proportionality in the CFSP context into perspective.

⁸⁹ Cf. also G. De Búrca, ‘Reappraising Subsidiarity’s Significance after Amsterdam’, *Harvard Jean Monnet Working Paper 7/1999*: “Of course the fact that the Member State levels of government remain in control does not mean that it is unnecessary to consider whether other levels of government – both above and beyond the Community/Union level as well as levels which are ‘closer to the citizen’ – should be involved in a given policy decision. This seems particularly evident in the context of the Common Foreign and Security Policy [...], given circumstances in which EU may need to work within and alongside other international fora such as the WEU, NATO or the UN.”

⁹⁰ See more extensively on the binding nature of CFSP Decisions: R.A. Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’, *European Foreign Affairs Review*, 2015, pp. 123-146; as well as Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty’s Treasury et al.*, EU:C:2017:236. And, on questions of responsibility R.A. Wessel and L. den Hertogh, ‘EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?’, in M. Evans and P. Koutrakos (Eds.), *International Responsibility: EU and International Perspectives*, Oxford: Hart Publishing, 2013, pp. 339-358.

⁹¹ See on the principle of proportionality recently T. Tridimas, in Schütze and Tridimas, *op.cit.*, ‘The Principle of Proportionality’, pp. 243-264.

⁹² Cf. J. Larik, ‘*Pars Pro Toto*: The Member States’ Obligations of Sincere Cooperation, Solidarity and Unity’, in Cremona, pp. 175-199 at 181: “[t]hese duties are part of overarching provisions in the TEU, and therefore applicable to all of the Union’s external policies”

⁹³ Cf. Art. 21(2) TEU.

5. Substantive principles

While ‘structural’ principles are thus relevant in the CFSP context, the next question is whether and more ‘substantive’ principles are to guide any action taken under CFSP. Article 21(1) TEU provides 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, as we have seen, mentions “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.” The least we can say on the basis of this provision, is that these principles should also guide the Union’s choices in its foreign and security policy.⁹⁴

It is interesting to note that the mentioned principles in this provision should guide ‘the Union’s *action* on the international scene’. Does this imply that they are just meant to relate to the framework of external action, and not to the substantive *content* of the principles?⁹⁵ So, would the principle merely work in relation to the application of administrative functions and procedural rules in for instance (individual) sanctions cases? It is true that, for instance, the rule of law cannot have the same function externally as internally, simply because of the difference influence the Union has over persons in and outside the EU. At the same time, one could argue that, also in a substantive sense, the principles are meant to influence the EU’s external policies and that policies which would clearly infringe on the mentioned principles would violate provisions such as Article 21 TEU (leaving aside the general phrasing of the principles and the difficulties to enforce them; see below).⁹⁶

In some instances, principles have been spelled-out in more detail. Thus, for instance, Article 9 TEU states that: “In *all its activities*, the Union shall

⁹⁴ Cf. also P. Van Elsuwege, ‘The Duty of Sincere Cooperation and its Implications for Autonomous Member State Action in the Field of External Relations’ in M. Varju (ed.), *Between Compliance and Particularism: Member State Interests and European Union Law*, Springer, 2018 (forthcoming); as well as references by the Court to the applicability of the principle of the rules of law in a CFSP context: Case C-455/14 P, *H. v. Council*, EU:C:2016:569 (par. 41) and Case C-72/15, *Rosneft Oil Company* (para. 72).

⁹⁵ As, for instance, argued by Vianello, *op.cit.* Having said that, Vianello has produced a very interesting and extensive analysis of the function of the rule of law in external action.

⁹⁶ Cf. Estrada Cañamares, *op.cit.*, at 260: “[...] regardless of whether the Union responds to an international security concern with a military operation, with CFSP restrictive measure, or with bot, its action should show that it is an international actor that is strongly concerned with the protection of human rights.”

observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies”,⁹⁷ indeed hinting at a Union-wide application and including possible effects of CFSP decisions or actions on EU citizens. In other cases, principles are not called ‘principles’ in the EU treaties, despite having the same effect. A clear example is formed by Article 11 TEU, which calls on the Institutions to “give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action” and to “maintain an open, transparent and regular dialogue with representative associations and civil society.” Indeed, this is often referred to as the principle of transparency,⁹⁸ which indeed is generally believed to apply to CFSP as well.⁹⁹ A general limitation, however, may be found in the fact that ‘legislation’ (or at least the ‘legislative procedure’) is excluded in CFSP,¹⁰⁰ which in turn limits the use of some aspects of the principle.¹⁰¹ A related rule is the one on the protection of personal data as laid down in Article 16(1) TFEU. Cremona, rightfully found that, again, this notion is applicable to CFSP.¹⁰²

⁹⁷ Emphasis added.

⁹⁸ See for instance P. Leino, ‘The Principle of Transparency in EU External Relations Law: Does Diplomatic Secrecy Stand a Chance of Surviving the Age of Twitter?’, in Cremona, pp. 202-223.

⁹⁹ Ibid. As well E. Chiti, ‘Enforcement of and Compliance with Structural Principles’, in Cremona pp. 47-67, at 55. Currently, the Preamble (para. 7) of Regulation 1049/2001/EC of the European Parliament and of the Council (OJ 2001 L 145/43) already makes it clear that the right of access also applies to documents related to the CFSP as Regulation 1949/2001 applies to “all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union” (Article 2(3)). Council security rules for protection EU classified information also include documents held by the EEAS (Council Decision 2013/488/EU of 23 September 2013; [2013] OJ L274/1. Art. 11 of the EEAS Decision states that Regulation 1049/2001 is also applicable to the EEAS.

In addition, Decision 2011/C 243/08 of the High Representative, OJ 2011 C 243/16, implements access to documents for the EEAS. The Decision provides that the right of access to EEAS documents will operate ‘according to the principles, conditions and limits’ laid down in Regulation 1049/2001. See also, Cremona, ‘The CFSP-CSDP in the Constitutional Architecture of the EU’, *op.cit.*

¹⁰⁰ Art. 31(1) TEU.

¹⁰¹ Cf. Art. 15(2) TFEU: “The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.”

¹⁰² Cremona, ‘The CFSP-CSDP in the Constitutional Architecture of the EU’, *op.cit.* Cremona points to the fact that Article 16(2) establishes the legal basis for adopting rules on data protection, and that these rules are to operate ‘without prejudice’ to the specific rules for the CFSP/CSDP laid down according to the terms of Article 39 TEU a provision which, in turn, does not exempt the CFSP from data protection. See also Article 8, Charter of Fundamental Rights.

6. The enforcement of general principles in CFSP

A final question concerns the enforcement of general principles in a CFSP context. Equal application does not automatically lead to equal enforcement possibilities, and enforcement of principles as such is tricky.¹⁰³ While this is not the place to repeat the extensive analyses of the role of the Court in CFSP,¹⁰⁴ it is important to underline that despite a persistent view in legal doctrine, the CJEU has a clear role in relation to CFSP. In fact, what becomes clear on the basis of the (recent) cases, is that they primarily seem to be about an application of more general rules and principles to a CFSP context. Thus, one could say that the Court (merely) underlines a Union-wide application of, *inter alia*, rules on role of the European Parliament in the procedure to conclude international agreements,¹⁰⁵ legal protection by the different EU and/or national courts,¹⁰⁶ regulations for (seconded) staff to EU bodies and missions,¹⁰⁷ or of rules on public procurement.¹⁰⁸ The conclusion could therefore be that, the moment the Court has jurisdiction, the principles referred to in this Chapter can be applied

¹⁰³ Cf. Von Bogdandy, *op.cit.* at 103: “The qualification as principle as such does not trigger specific legal consequences.”

¹⁰⁴ See, most notably and recently C Hillion, ‘A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy’ in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart Publishing 2014); C Hillion, ‘Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy’ (2016) *European Papers* 55; C Eckes, ‘Common Foreign and Security Policy: The Consequences of the Court’s Extended Jurisdiction’ (2016) *European Law Journal* 492; G. Butler, ‘The Coming of Age of the Court’s Jurisdiction in the Common Foreign and Security Policy’ (2017) *European Constitutional Law Review* 673; M Cremona, ‘Effective Judicial Review is of the Essence of the Rule of Law: Challenging Common Foreign and Security Policy Measures before the Court of Justice’ (2017) *European Papers* 671; P Koutrakos, ‘Judicial Review in the EU’s Common Foreign And Security Policy’ (2018) *International and Comparative Law Quarterly*, 1; C. Hillion and RA Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’, in S. Blockmans and P. Koutrakos (Eds.), *Research Handbook on EU Common Foreign and Security Policy*, Cheltenham/Northampton: Edward Elgar Publishing, 2018; and J Heliskoski, ‘Made in Luxembourg: the Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy’ (2018) *Europe and the World: A Law Review* (forthcoming).

¹⁰⁵ See also C-130/10 Parliament v. Council ; Case C-658/11, European Parliament v. Council (*Mauritius Agreement*); and Case C-263/14, *Tanzania*.

¹⁰⁶ Case 72/15 *Rosneft*: “Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU [...]”

¹⁰⁷ Case C-455/14P, *H v Council*, ECLI:EU:C:2016:569.

¹⁰⁸ Case C-439/13P *Elitaliana*, ECLI:EU:C:2015:753.

and enforced by the Court. At the same time, the still relatively limited role of the Court in CFSP¹⁰⁹ also limits the Court's possibilities as regards the enforcement of EU principles in that context.

However, monitoring and enforcement of principles in CFSP, is not only in the hands of the Court, but also a task of other Institutions.¹¹⁰ Thus, in the light of the *Mauritius* and *Tanzania* cases, it has for instance been argued that “Article 4(3) and 24 TEU can [...] be regarded as establishing a general mandate also for the Parliament to monitor that the Member States, acting through the Council or in their own name, indeed live up to the spirit of loyalty across all the EU's external policies [...]”.¹¹¹ And, more generally, indeed, “As enforcement mechanisms, both administrative control and judicial review may be used to directly enforce a structural principle [...]”.¹¹²

7. Conclusion

It remains difficult to change the image of CFSP as an area where completely different rules apply. It has been argued that there is a ‘tradition of otherness’¹¹³ which continues to keep alive the notion that CFSP is a policy of the joint Member States rather than of the Union. Nevertheless, the consolidation of EU foreign policy – as well its constitutionalisation as part of the Union's legal order – is undeniable and has been documented over the years.

The present chapter underlined this idea by pointing to the Union wide application of EU principles. In that sense – and using the terminology presented in the Introduction to this book – the general principles contribute to more coherence within the different areas of EU law. The above analysis not only reveals that there is a presumption that all structural as well as more substantive principles apply to the CFSP and, moreover, that it would not be easy to rebut this presumption. This conclusion can be drawn on the basis of the Treaty provisions themselves, which are usually phrased in quite general terms, and are not excluding specific policy areas. This holds true for all key EU principles, including the principles of cooperation, the principles of conferral, subsidiarity

¹⁰⁹ Cf. Opinion 2/13: “certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice.” See more extensively on the judicial gaps: Hillion and Wessel, *op.cit.*

¹¹⁰ See Articles...

¹¹¹ Larik, in Cremona, at 188.

¹¹² E. Chiti, ‘Enforcement of and Compliance with Structural Principles’, in Cremona pp. 47-67, at 52.

¹¹³ Cardwell, ‘On “Ring-Fencing”’ (above), 445.

and proportionality, more substantive principles, as well as some general principles of international law referred to in the Treaties.

Nevertheless, it is fair to say that legal enforcement of these principles is more difficult in CFSP than in other policy areas. The exclusion of the legislative procedure in the adoption of CFSP Decisions results in another dynamic between the Institutions. At the same time, over the past few years in particular, whenever it was given a chance, the Court confirmed the Union-wide application of EU principles and despite the ‘specific rules and procedures’ for CFSP confirmed the application of the principles to this policy area. All of this underlines the key importance of the EU principles in EU foreign policy. And, as was already laid-out in Article 23(1) TEU, these principles are to guide the Union’s action on the international scene.