

# General Principles in EU Common Foreign and Security Policy

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## I. 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.<sup>1</sup> 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.<sup>2</sup> CFSP as such did not change that much, it is the perceptions of the CFSP that changed.

While there are many larger studies on principles of EU law,<sup>3</sup> a few on the legal aspects of CFSP,<sup>4</sup> and some on principles in EU external relations law,<sup>5</sup> no study seems to exist on the role of general principles in CFSP law. The aim of this chapter is to analyse to what extent

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<sup>1</sup> See in particular the many analyses of the Court's new case law (below, n 104); as well as for instance Paul J. Cardwell, 'On "Ring-Fencing" the Common Foreign and Security Policy in the Legal Order of the European Union' (2015) 64 *Northern Ireland Legal Quarterly* 443; Marise Cremona, 'The CFSP-CSDP in the Constitutional Architecture of the EU' in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar 2018) 5; and Ramses A. Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy' in Robert Schütze (ed.), *Governance and Globalization: International and European Perspectives* (CUP 2018) 339. Yet, see Inge Govaere, 'To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 71, 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'.

<sup>2</sup> 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 Ramses A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International 1999); and later Ramses A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) 5 *European Constitutional Law Review* 117.

<sup>3</sup> Yet, most of these studies use the term 'principles' to indicate something like 'basic rules'. See recently, Takis Tridimas and Robert Schütze (eds), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (OUP 2018); as well as the forthcoming volumes in this series). And, earlier, for instance Anthony Arnall, *The General Principles of EEC Law and the Individual* (Leicester University Press 1990); Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2009); Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2009).

<sup>4</sup> Blockmans and Koutrakos (n 1); Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Hart 2019); Mauro Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Brill/Nijhoff 2016); Panos Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013); Wessel, *Foreign and Security Policy* (n 2).

<sup>5</sup> Geert De Baere, *Constitutional Principles of EU External Relations* (OUP 2008); and recently Cremona (n 1). Some of the contributions in this book refer to CFSP (see in particular Christophe Hillion, 'Conferral, Cooperation and Balance in the Institutional Framework of EU External Action' in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 117, but no specific chapter is devoted to this policy area).

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.<sup>6</sup> Its main claim is that the ‘normalisation’ of CFSP has been driven by the Court relying on general principles of EU law, mainly out of considerations of coherence, and to underline that CFSP is indeed ‘part and parcel of the EU legal order’, as Advocate General Wahl argued in the *H* case.<sup>7</sup> In that sense, it was assisted by Article 21 TEU, which integrates ‘a set of principles and objectives which govern all external policies’ (see further below).<sup>8</sup>

Defining ‘principles’ is notoriously difficult, as the introductory chapter to this volume underlines and no generally accepted definition exists.<sup>9</sup> 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). In that sense we closely 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’.<sup>10</sup> 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.<sup>11</sup> Summarised, ‘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’.<sup>12</sup> This would, *inter alia*, largely exclude the foundational principles of EU law listed under the heading ‘Principles’ as Part One of the TFEU from our analysis.<sup>13</sup> And,

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<sup>6</sup> For more general analyses of CFSP see Wessel, ‘Integration and Constitutionalisation’ (n 1); Ramses A. Wessel and Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart 2020); or in a somewhat ‘lighter’ version: Ramses A. Wessel, ‘Common Foreign, Security and Defence Policy’, in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley-Blackwell 2016) 394; as well as Butler (n 3).

<sup>7</sup> Opinion of AG Wahl in Case 455/14P *H v Council of the European Union and European Commission* ECLI:EU:C:2016:212.

<sup>8</sup> Cf Panos Koutrakos, ‘Judicial Review in the EU’s Common Foreign and Security Policy’, (2018) 67 *ICLQ* 1.

<sup>9</sup> Cf Constanze Semmelmann, ‘General Principles in EU Law between a Compensatory Role and an Intrinsic Value’ (2013) 19 *European Law Journal* 457, 460: ‘[a]lthough 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.’

<sup>10</sup> Marise Cremona, ‘Structural Principles and their Role in EU External Relations Law’, in Marise Cremona (ed.) *Structural Principles in EU External Relations Law* (OUP 2018) 3, 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’. Armin Von Bogdandy (2010) ‘Founding Principles of EU Law: A Theoretical and Doctrinal Sketch’ 16 *European Law Journal* 95, 460.

<sup>11</sup> See in this regard Klamert, Platon, and Moreno-Lax and Ziegler, Chapters 7, 8 and 13 respectively above.

<sup>12</sup> Cremona (n 1) 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.

<sup>13</sup> See Kostadinides, Chapter 16 and Groussot and Lindholm, Chapter 17 (above).

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.<sup>14</sup> In short, the principles that are central in this chapter are mostly found in the treaties and are largely procedural. The question of whether these principles are ‘general principles’ is of a definitional nature. We believe they are, despite the fact that they are not ‘unwritten’.<sup>15</sup> Following Paul Craig’s observations in Chapter 2 above,<sup>16</sup> we see general principles of EU law as being part of the law that should guide the EU Court’s review of all EU actions. They are ‘general’ in the sense that they are not confined to particular treaty articles, and apply across the Union legal order.<sup>17</sup>

Despite our focus on structural and procedural principles, the substantive content of policies is usually what non-legal outsiders would see as the most important aspect of any principles discussion. Indeed, general principles of EU law are often related to fundamental rights and rule of law issues.<sup>18</sup> Here, however, it becomes more difficult to clearly demarcate principles from values, because ‘general principles’ are generally believed to reflect the values inherent to the rule of law (such as legal certainty and legitimate expectations, legal protection, equality before the law, fair hearings or transparency).<sup>19</sup> Equally complex is the distinction with ‘objectives’. As will be further analysed below, the EU Treaties contain quite an extensive number of far-reaching objectives, which are sometimes linked to or presented as ‘principles’.<sup>20</sup>

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<sup>14</sup> See for instance Wessel, ‘Integration and Constitutionalisation’ (n 1).

<sup>15</sup> The ‘unwritten’ nature is often seen as a hallmark of GPs. Cf the work cited in Semmelman (n 9) 461); or Bruno De Witte, ‘Institutional Principles: A Special Category of General Principles of EC Law’ in Ulf Bernitz and Joakim Nergelius (eds), *General Principles of European Community Law* (Kluwer 2000) 143, who sees general principles as ‘unwritten principles, recognised by the European Court of Justice, that have a status of higher law by the fact that they may be invoked as a standard for the review of Community acts’.

<sup>16</sup> Craig, Chapter 2 (above).

<sup>17</sup> See the analysis by Craig, *ibid.*, of the case law in that respect.

<sup>18</sup> Cf Article 6(3) TEU. See also Craig (2020) who underlines the historical focus on fundamental rights and proportionality review.

<sup>19</sup> 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 also seem to combine procedural and substantive principles: ‘principles of non-discrimination, free movement, primacy, *effet utile*, judicial review, institutional balance and loyal cooperation’; Loic Azoulai, ‘Structural Principles in EU Law: Internal and External’, in Marise Cremona (ed.) *Structural Principles in EU External Relations Law* (OUP 2018) 31, 36. See also Ilaria Vianello, ‘The Rule of Law as a Relational Principle Structuring the Union’s Action Towards its External Partners’, in Marise Cremona (ed.) *Structural Principles in EU External Relations Law* (OUP 2018) 225. See also Groussot and Lindholm, Chapter 17 (above).

<sup>20</sup> See extensively on the wide range of EU objectives: Joris Larik, ‘From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union’ (2014) 63 *International & Comparative Law Quarterly* 935. 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.

The principles analysed in this chapter are thus legal norms,<sup>21</sup> which is not the same as saying they are rules.<sup>22</sup> The question, however, is what their role is in the context of CFSP, an area that, according to Article 24(1) TEU, is still ‘subject to specific rules and procedures’. 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.<sup>23</sup> 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.’<sup>24</sup> 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 are at least perceived to play a larger role, such principles are needed for the Union to live up to the requirement of ‘consistency, effectiveness and continuity of its policies and actions’.<sup>25</sup> And, indeed, CFSP has always been part of the Union’s constitutionalised order<sup>26</sup> and of the integration process ‘that is the *raison d’être* of the EU itself’.<sup>27</sup> In this constitutionalised order, principles are one of the elements (or perhaps the glue) 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 legitimating foundations in view of the need to justify the exercise of public authority’.<sup>28</sup>

Finally, 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 will further be dealt with below, the reference to ‘external action’ cannot be read as

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<sup>21</sup> Cf Cremona (n 1) 12: ‘[t]hese principles are legal norms; they have a legal function and breach of them may result in the illegality of the resulting measure’. See also Von Bogdandy (n 10) 100: ‘[f]requently, 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’.

<sup>22</sup> Cremona (n 1) 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 (n 3) 1, referring to general principles expressing a core value.

<sup>23</sup> Cf Christophe Hillion, ‘A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy’ in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law* (Hart 2014) 69.

<sup>24</sup> Art. 23(1) TEU. Emphasis added.

<sup>25</sup> Art. 13 (1) TEU, as well as other provisions, including Art. 21(3) TEU. Cf also Azoulay (n 19) 33: ‘[s]tructural 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’.

<sup>26</sup> See Wessel, ‘Integration and Constitutionalisation’ (n 1); and earlier Wessel, ‘Dynamics’ (n 2). Cf also Bruno De Witte, ‘Too Much Constitutional Law in the European Union’s Foreign Policy’ in Marise Cremona and Bruno De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (OUP 2006) 3, debating the constitutional complexity in EU external relations.

<sup>27</sup> As phrased by the Court in Opinion 2/13, para. 172. In this statement no exception is made for CFSP.

<sup>28</sup> Cf Von Bogdandy (n 10) 105 (emphasis added). And at the same page: ‘principles 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.’

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: '[t]he 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.'<sup>29</sup>

The notion of a single legal order is further strengthened by the requirement of consistency, which is not termed a principle in the treaties,<sup>30</sup> but in EU external relations law is clearly seen as a key general principle that applies across the board towards the attainment of the objectives.<sup>31</sup> Both in Article 3(5)<sup>32</sup> and in Article 21 TEU on 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.<sup>33</sup> It establishes a legal connection between the different parts.

In the following sections, we subsequently analyse the function of structural principles (the principles of cooperation and representative unity; the principles of conferral, subsidiarity and proportionality; and the principles of consistency in the context of CFSP) and substantive principles (international law principles and EU law principles). 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.<sup>34</sup> On the basis of the initial analysis in the Introduction, the presumption is that principles of EU law apply across the board, including CFSP. Following Craig:

‘This presumption might be rebutted if it could be shown that there was some reason why a general principle, as normally formulated, should not be applicable in a particular area, such as where the wording of a Treaty article evinced a clear intent that a narrower, more specific conception of the principle was applicable in that sphere.’<sup>35</sup>

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<sup>29</sup> 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’.

<sup>30</sup> Nevertheless, Art. 22 TEU refers to ‘the principles and objectives set out in Article 21’.

<sup>31</sup> See also M. Estrada Cañamares, “‘Building Coherent Responses’”: Coherence as a Structural Principle in EU External Relations’ in Marise Cremona (ed.) *Structural Principles in EU External Relations Law* (OUP 2018) 244, 256: ‘[b]ecause of its location under Article 7 TFEU, coherence can be considered a “Principle” of “General Application” to the Union’. Cf. Larik (n 20) 962, 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’.

<sup>32</sup> Art. 3(5) TEU.

<sup>33</sup> Cf. Art. 7 TFEU. The TEU contains four other provisions which pertain to coherence in its material and institutional dimensions and strengthen the relationship (or in fact, the integration) between CFSP and other external relations policies. See in more detail Wessel and Larik (n 6) Chapter 1; as well as Christophe Hillion, ‘Cohérence et action extérieure de l’Union Européenne’ (2014) EUI Working Papers Law 202/14.

<sup>34</sup> Among the many studies on these principles, see recently Koen Lenaerts and Jose A. Gutiérrez-Fons, ‘A Constitutional Perspective’, in Takis Tridimas and Robert Schütze (eds), *Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (OUP 2018) 103.

<sup>35</sup> Craig (n 16).

Our main aim is to establish whether this is the case.

## II. Structural principles

### 1. Principles of cooperation

The first structural principle mentioned by the treaty is the principle of sincere cooperation (Article 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’.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> The fact that CFSP has ‘its own’ loyalty principle does not seem to deny this.<sup>39</sup> 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.’

Indeed, and despite the fact that this provision is located in a title that is not subject to the Court’s jurisdiction,<sup>40</sup> 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 elsewhere,<sup>41</sup> 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

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<sup>36</sup> Obligations resulting from the principle of loyalty were confirmed, e.g. in 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, Joris Larik, ‘Pars Pro Toto: The Member States’ Obligations of Sincere Cooperation, Solidarity and Unity’ in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 175; Barbara Guastafarro, ‘Sincere Cooperation and Respect for National Identities’, in Tridimas and Schütze (n 34) 350.

<sup>37</sup> See more extensively Christophe Hillion and Ramses A. Wessel, ‘Restraining External Competences of EU Member States under CFSP’, in Marise Cremona and Bruno De Witte(eds), *EU Foreign Relations Law: Constitutional Fundamentals* (OUP 2006) 79.

<sup>38</sup> Cf Larik (n 36) 187 with regard to principles of sincere cooperation and solidarity.

<sup>39</sup> This loyalty principle forms an example of a principle that that is not ‘general’ in the sense that it specifically applies to the CFSP area.

<sup>40</sup> See Art. 24(1).

<sup>41</sup> See Hillion and Wessel (n 37).

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. 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,<sup>42</sup> 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. On the basis of a special decision, all EU institutions have been provided with specific roles for the implementation.<sup>43</sup> 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,<sup>44</sup> 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: '[t]he institutions shall practice mutual sincere cooperation'. Article 13(1) TEU established a single institutional framework for the entire Union.<sup>45</sup> 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.<sup>46</sup> Further, other provisions in

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<sup>42</sup> See Cremona (n 1) as well as in particular Anne Thies, 'The Search for Effectiveness and the Need for Loyalty in EU External Action', in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 263.

<sup>43</sup> 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).

<sup>44</sup> Art. 42(7) TEU.

<sup>45</sup> The reference to the 'single institutional framework' has been in the Preamble from the outset. See Wessel, 'Dynamics' (n 2) Chapter 4. This idea has not changed and, if anything, has only been strengthened by the disappearance of the pillar structure.

<sup>46</sup> On the contrary, Art. 13 TEU seems to strengthen the unity of the institutional framework.

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.<sup>47</sup>

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’.<sup>48</sup> The view of 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’. Furthermore, 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.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup>

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 in having the Court control the application of the principles. Indeed, ‘[t]he institutions shall practice mutual sincere cooperation’<sup>52</sup> 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

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<sup>47</sup> 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 Hillion (n 5) 128.

<sup>48</sup> See Case 28/12 *Commission v Council (Air Transport Agreement)*, EU:C:2015:282, paras 6 and 53.

<sup>49</sup> As was already established pre-CFSP in Case C-124/95 *Centro-Com* EU:C:1997:8. See also Hillion and Wessel (n 36).

<sup>50</sup> Along similar lines see Hillion (n 5) 163.

<sup>51</sup> Cf Govaere, who sees Art. 40 TEU as the best reflection of the principle of conferral; Inge Govaere, ‘To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon’, in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 79. See also Case C-130/10 *European Parliament v Council (Financial Sanctions)* EU:C:2012:472.

<sup>52</sup> Art. 13(2) TEU.

‘[t]he decision concerning the signing of an agreement with a third country covering 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.’<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> 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’.<sup>56</sup> 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.<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup> The latter even has a special task in this regard: ‘[t]he Council and the High Representative shall ensure

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<sup>53</sup> Case C-660/13 *Council v Commission (Memorandum of Understanding)* ECLI:EU:C:2016:616, paras 38–40. See more extensively Ramses A. Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements’, (2021) 44 *West European Politics* 72.

<sup>54</sup> See for the debate for instance: Thomas Spijkerboer, ‘Minimalist Reflections on Europe, Refugees and Law’ (2016) 1 *European Papers* 533; Gloria Fernández Arribas, ‘The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem’ (2016) 1 *European Papers* 1097; Jenny Poon, ‘EU-Turkey Deal: Violation of, or Consistency with, International Law?’ (2016) 1 *European Papers* 1195; Enzo Cannizzaro, ‘Denialism as the Supreme Expression of Realism – A Quick Comment on NF v European Council’ (2017) 2 *European* 251; Steve Peers, ‘The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?’ (*EU Law Analysis*, 16 March 2016) available at: <http://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html>; Enzo Cannizzaro, ‘Disintegration Through Law?’ (2016) 1 *European Papers* 3.

<sup>55</sup> Cf Case C-370/2 *Pringle* EU:C:2012:756. Bruno De Witte and Thomas Beukers, ‘The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*’ (2013) 50 *CMLR*, 805; Paula García Andrade, ‘The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments’ (2016) 1 *European Papers – European Forum*, 115, 115; as well as Paula García Andrade, ‘The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries’ in Juan Santos Vara and Soledad R. Sánchez-Tabernero (eds), *The Democratization of EU International Relations Through EU Law* (Routledge 2018) 115; Wessel (n 53).

<sup>56</sup> *Pringle*, *ibid* para. 158.

<sup>57</sup> Examples include Art. 26(1) TEU, but also Art. 26(2) TEU.

<sup>58</sup> More in general on these issues, see Hillion (n 5) 166–7.

<sup>59</sup> Thus Art. 27(2) TEU, e.g., provides: ‘[t]he High Representative shall represent the Union for matters relating to the common foreign and security policy.’ See also Arts 22(2), 24(1) TEU and 218(3) TFEU.

compliance with [the principles of loyalty and mutual solidarity]’.<sup>60</sup> 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.<sup>61</sup>

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’,<sup>62</sup> which has proven to be relevant in relation to mixed agreements in particular.<sup>63</sup> The Court clearly referred to this requirement as a ‘principle’.<sup>64</sup> Nevertheless, it has been doubted 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.’<sup>65</sup> 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.<sup>66</sup>

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’.<sup>67</sup> At the same time, Member States made sure to underline that the provisions of the 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 of Member States 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.

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<sup>60</sup> Art. 24(3) TEU.

<sup>61</sup> See also Case C-425/13 *Commission v Council (ETS)*, EU:C:2015:483, para. 62, referring to ‘a balance of power between the institutions’ in relation to Art. 218 TFEU. Along similar lines: Hillion (n 5) 169. Hillion, *ibid* at 170 also points to the *Tanzania* case (n 47) para. 73, in which the Court implicitly seemed to argue that it was for both the Council and the High Representative to uphold the obligation to inform the European Parliament.

<sup>62</sup> This principle was referred to in Opinion 2/19 EU:C:1993:106 as originally coming from the European Atomic Energy Community (EAEC) Treaty.

<sup>63</sup> See Peter Van Elsuwege and Hans Merket, ‘The Role of the Court of Justice in Ensuring the Unity of the EU’s External Representation’ in Steven Blockmans and Ramses A. Wessel (eds), *Principles and Practices of EU External Representation* (2012) CLEER Working Paper 2012/5, 37, 43.

<sup>64</sup> See Case C-246/07 *Commission v Sweden (PFOS)* EU:C:2010:203, para. 104. See Anne Thies, ‘Shared Competence and the EU Member States’ Obligations to Refrain from Unilateral External Action: *PFOS* and Beyond’ in Javier Diez-Hochleitner et al. (eds), *Recent Trends in the Case Law of the Court of Justice of the European Union (2008–2011)* (La Ley 2012) 721.

<sup>65</sup> See Larik (n 36) 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 Case C-246/07 *PFOS* EU:C:2009:589, para. 37.

<sup>66</sup> Blockmans and Wessel (n 63).

<sup>67</sup> Art. 4(2) TEU.

## 2. 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.<sup>68</sup> At the same time, the principle of conferral is also linked to the principle of sincere cooperation. In the words of the Court: ‘[u]nder 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.’<sup>69</sup> It has rightfully been underlined that ‘the general requirement of sincere cooperation cannot in principle alter the allocation of powers’.<sup>70</sup> This is also relevant in the CFSP context. As we have seen, the principle of cooperation is valid, but 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). The principle of sincere cooperation ‘cannot itself be a source of a new power’.<sup>71</sup>

Article 5(1) TEU provides in quite general terms that ‘[t]he limits of Union competences are governed by the principle of conferral’. Again, no exception is made for the CFSP. On the contrary, the provision refers to ‘Union competences’ and Article 2(4) TFEU in turn clearly refers to CFSP as a Union competence. The formal legal instrument in the 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.<sup>72</sup> The principle of conferral, however, is not strictly limited to the adoption of formal legal acts. It simply states that ‘[e]ach institution shall act within the limits of the powers conferred on it in the Treaties’,<sup>73</sup> 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.<sup>74</sup> It has been argued that ‘the CFSP attribution in Article 24(1) TEU is so broad

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<sup>68</sup> See also Hillion (n 5) 143; 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, para. 61; *ETS* (n 61) para. 69; *Memorandum of Understanding* (n 53) para. 32. See also Platon, Chapter 8 (above).

<sup>69</sup> *ITLOS*, *ibid* para. 84; See also *Commission v Council* (n 48) para. 34.

<sup>70</sup> Hillion (n 5) 149.

<sup>71</sup> *Ibid* 151.

<sup>72</sup> See Wessel (n 53).

<sup>73</sup> Art. 13(2) TEU.

<sup>74</sup> Art. 24(1) TEU: ‘[t]he 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).

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'.<sup>75</sup> 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 limits the use of Union competences by the principles of subsidiarity and proportionality. Again, we see a general reference to 'Union competences', which as we have seen include those in the CFSP area.<sup>76</sup> Furthermore, the principle of subsidiarity<sup>77</sup> is applicable 'in areas which do not fall within [the Union's] exclusive competence',<sup>78</sup> which is clearly the case for CFSP.<sup>79</sup> This is not contradicted by Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, to which Article 5(3) and (4) TEU refer. Despite the focus of this Protocol on 'legislative acts', Article 1 also requires that '*constant respect* for the principles of subsidiarity and proportionality',<sup>80</sup> referring to the general provision on the principle of subsidiarity in Article 5(1) TEU. 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.<sup>81</sup> 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.

One could 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.<sup>82</sup> Such reasoning, however, seems to confuse the question of the appropriate level of decision taking with the decision-making procedures in the Council.<sup>83</sup> An awareness of the subsidiarity requirement is needed in a CFSP context as well as anywhere else. The moment decision making on a certain issue is on the agenda of the Union institutions and decisions are taken, an

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<sup>75</sup> Geert De Baere, 'Subsidiarity as a Structural Principle Governing the Use of EU External Competences' in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 93, 103.

<sup>76</sup> See Edoardo Chiti, 'Enforcement of and Compliance with Structural Principles' in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 47, 53.

<sup>77</sup> Art. 5(1) TEU. See recently Federico Fabbrini, 'The Principle of Subsidiarity' in Robert Schütze (ed.), *Governance and Globalization: International and European Perspectives* (CUP 2018).

<sup>78</sup> 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 Guillaume Van der Loo and Ramses A. Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Options' (2017) *54 Common Market Law Review* 735.

<sup>79</sup> See also De Baere (n 75) 107.

<sup>80</sup> Emphasis added.

<sup>81</sup> De Baere (n 75) 100.

<sup>82</sup> Cf De Baere, *ibid* 108.

<sup>83</sup> Cf also Gráinne De Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' (1999) Harvard Jean Monnet Working Paper 7/1999.

EU competence is being used; the decision is binding on the Member States, and there may be consequences for questions of international responsibility.<sup>84</sup>

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. 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.’<sup>85</sup> The references to ‘Union action’ and the ‘objectives of the Treaties’ are quite general and do not seem to exclude any policy area.<sup>86</sup> 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.<sup>87</sup> This puts the practical use of the principle of proportionality in the CFSP context into perspective.

### III. Substantive principles

While ‘structural’ principles are thus relevant in the CFSP context, it has to be asked further whether more ‘substantive’ principles guide action taken under CFSP. Here we find two separate (but closely related) sets of principles: those laid down in international instruments (international law principles) and those that can be found in the EU Treaties themselves (EU law principles).

#### 1. *International law principles*

General principles of EU law have not been defined by the treaties. The question, therefore, is how to classify what we may perhaps term ‘international law principles’ which link EU law and international law. While principles of international law are not by definition general principles of EU law, the fact that a number of them are expressly referred to turns them into principles that are to be taken into account in the EU foreign policy context. While one could argue that these principles are in fact largely procedural in nature (in the sense that they should

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<sup>84</sup> See more extensively on the binding nature of CFSP Decisions: Ramses A. Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’ (2015) 20 *European Foreign Affairs Review* 123; as well as Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty’s Treasury et al.* EU:C:2017:236. On questions of responsibility Ramses A. Wessel and Leonhard den Hertogh, ‘EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?’ in Malcolm Evans and Panos Koutrakos (eds), *International Responsibility: EU and International Perspectives* (Hart 2013) 339.

<sup>85</sup> See on the principle of proportionality Takis Tridimas, ‘The Principle of Proportionality’ in Robert Schütze and Takis Tridimas (eds), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (OUP 2018) 243.

<sup>86</sup> Cf Larik (n 36) 181.

<sup>87</sup> Cf Art. 21(2) TEU.

be taken into account in EU policies), it is also clear that their main aim is to bring substantive content into the realm of EU law, which forms a reason to address them in the current section.<sup>88</sup> The Treaty text itself refers to international principles first, before addressing EU law principles;<sup>89</sup> already in Article 3(5) TEU ‘the principles of the United Nations Charter’ are mentioned, in close relation to ‘the strict observance and the development of international law’. As this reference is part of the provision on the Union’s ‘relations with the wider 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.<sup>90</sup> Also, in scholarly work, the impact of international law principles on CFSP (or on EU external relations in general) seems largely neglected.<sup>91</sup> Yet, the treaty reference is not without meaning as Article 3(5) TEU is phrased in quite mandatory terms: the Union ‘*shall* contribute to ... the development of international law’, including the mentioned principles.<sup>92</sup> A similar reference can 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.’<sup>93</sup>

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.<sup>94</sup> Given the Union’s own intentions on the international plane – which generally 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.<sup>95</sup> On the contrary, the international law principles may have positively influenced the global ambitions of the Union, as for instance laid down in the 2016 Global Strategy.<sup>96</sup> Finally, it is worthwhile noting that also other international agreements than the UN Charter may contain principles that would or could be applicable to CFSP actions. These would be agreements the Union is a party to (or to which the Union considers itself to be bound) and

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<sup>88</sup> See more in general Mads Andenas, Malgosia Fitzmaurice, Attila Tanzi and Jan Wouters (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff 2019).

<sup>89</sup> Also, the preamble to the TEU already mentions some substantive principles, 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’.

<sup>90</sup> 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, [2011] OJ EU L 188/37.

<sup>91</sup> See on the relevance of international principles like good faith in the context of CFSP already Ramses A. Wessel, *The European Union’s Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International 1999), ch 5.

<sup>92</sup> Emphasis added.

<sup>93</sup> Art. 42(2) TEU.

<sup>94</sup> See more extensively Ramses A. Wessel, ‘Flipping the Question: The Reception of EU Law in the International Legal Order’ (2016) 35 *Oxford Yearbook of European Law* 533, as well as the reference there to the many studies on ‘the EU as a normative actor’.

<sup>95</sup> 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.

<sup>96</sup> *A Global Strategy for the European Union’s Foreign and Security Policy* (2016) [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/eugs\\_review\\_web.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf).

would hence limit the options of the EU to decide or act.<sup>97</sup> A very concrete example can be found in the reference of Article 6(3) TEU to fundamental rights, which ‘constitute general principles of the Union’s law.’<sup>98</sup>

## 2. EU Law Principles

A number of substantive EU law principles seem particularly relevant in the CFSP context. 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 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 ...’

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.<sup>99</sup>

It is interesting to note that the mentioned principles in this provision should guide ‘the Union’s *action* on the international scene’. While this does seem to imply that they are merely meant to function as procedural requirements in the framework of external action,<sup>100</sup> one could argue that, also in a substantive sense, the principles are meant to influence the content of EU’s external policies and that policies or international agreements which would clearly infringe the mentioned principles would violate provisions such as Article 21 TEU.<sup>101</sup>

In some instances, principles binding the Union have been spelt out in more detail. Thus, for instance, the principle of equality, which according to Article 9 TEU applies in ‘*all its activities*’.<sup>102</sup> The wording suggests a Union-wide application and including possible effects of CFSP decisions or actions on EU citizens. In other contexts, principles are not called ‘principles’ in the EU treaties, despite these having the same effect. An example is the principle

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<sup>97</sup> 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’ (2016) edited by Violeta Morena-Lax and Paul Gragl in *Yearbook of European Law*; as well as Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011).

<sup>98</sup> Emphasis added.

<sup>99</sup> Cf also Peter Van Elswege, ‘The Duty of Sincere Cooperation and its Implications for Autonomous Member State Action in the Field of External Relations’ in Marton Varju (ed.), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2018) 283; 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, para. 41; *Rosneft Oil Company* (n 84) para. 72.

<sup>100</sup> As, e.g., argued by Vianello (n 19). Having said that, this is a very interesting and extensive analysis of the function of the rule of law in external action.

<sup>101</sup> Cf Estrada Cañamares (n 31) 260, in relation to the protection of human rights.

<sup>102</sup> Emphasis added.

of transparency in Article 11 TEU,<sup>103</sup> 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’. The principle of transparency is generally believed to apply to CFSP.<sup>104</sup> A general limitation, however, may result from the fact that ‘legislation’ (or at least the ‘legislative procedure’) is excluded in the CFSP<sup>105</sup> which limits the use of some aspects of this principle.<sup>106</sup> Similarly, the protection of personal data in Article 16(1) TFEU is another rule applicable to CFSP.<sup>107</sup>

#### IV. The Enforcement of General Principles in CFSP

A final question concerns the enforcement of general principles in a CFSP context. For the more theoretical debate on whether and to what extent (general) principles are fit and meant to be enforced at all, we refer to the first chapter in this volume.<sup>108</sup>

Despite our general findings that the various EU principles are applicable in a CFSP context, equal application does not automatically lead to equal enforcement possibilities. While

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<sup>103</sup> See for instance Päivi Leino, ‘The Principle of Transparency in EU External Relations Law: Does Diplomatic Secrecy Stand a Chance of Surviving the Age of Twitter?’ in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 201.

<sup>104</sup> Ibid; Chiti (n 76) 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 1049/2001 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 (n 1).

<sup>105</sup> Art. 31(1) TEU.

<sup>106</sup> Cf Art. 15(2) TFEU.

<sup>107</sup> Cremona, ‘Constitutional Architecture’ (n 1) 9. Cremona points to the fact that Art. 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 Art. 39 TEU a provision which, in turn, does not exempt the CFSP from data protection. See also Art. 8, Charter of Fundamental Rights.

<sup>108</sup> Cf also Von Bogdandy (n 10) 103: ‘[t]he qualification as principle as such does not trigger specific legal consequences’.

this is not the place to repeat the extensive analyses of the role of the Court in CFSP,<sup>109</sup> it is important to underline that despite a persistent view in legal doctrine, the CJEU has a clear role in relation to CFSP. Recent cases suggest 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*, principles on role of the European Parliament in the procedure to conclude international agreements,<sup>110</sup> legal protection by the different EU and/or national courts,<sup>111</sup> regulations for (seconded) staff to EU bodies and missions,<sup>112</sup> or of rules on public procurement.<sup>113</sup> It could, therefore, be concluded that, EU principles (both structural and substantive) have been used as tools by the Court to extend its jurisdiction to the CFSP area to ensure, for instance, basic elements of the rule of law. At the same time, the still relatively limited role of the Court in the CFSP<sup>114</sup> also limits the Court's possibilities to enforce certain EU principles in that context. Thus, it remains difficult, for instance, to make sure that Member States live up to the principle of loyalty as described above. However, monitoring and enforcement of principles in the CFSP, is not only in the hands of the Court, but also a task of other institutions.<sup>115</sup> Thus, in the light of the *Mauritius* and *Tanzania* cases,<sup>116</sup> it has 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'.<sup>117</sup> Also, more generally '[a]s enforcement mechanisms, both administrative control and judicial review may be used to directly enforce a structural principle'.<sup>118</sup>

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<sup>109</sup> See, most notably Hillion (n 23) and Christophe Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy' (2016) 1 *European Papers* 55; Christina Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 *European Law Journal* 492; Graham Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 *European Constitutional Law Review* 673; Marise 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) 2 *European Papers* 671; Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 *International and Comparative Law Quarterly* 1; Christophe Hillion and Ramses A. Wessel, 'The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP', in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar 2018) 65; Joni 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) 2 *Europe and the World: A Law Review*, 1.

<sup>110</sup> See also *Parliament v Council* (n 51); Case C-658/11, *European Parliament v Council (Mauritius Agreement)*; and *Tanzania* (n 47).

<sup>111</sup> *Rosneft* (n 84) para. 75: '[s]ince 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.'

<sup>112</sup> Case C-455/14P *H v Council* ECLI:EU:C:2016:569.

<sup>113</sup> Case C-439/13P *Elitaliana* ECLI:EU:C:2015:753.

<sup>114</sup> Cf Opinion 2/13, para. 252: '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, 'The Good' (n 109).

<sup>115</sup> Art. 24(3) and 26(2) TEU.

<sup>116</sup> See *Mauritius Agreement* (n 110) and *Tanzania* (n 47).

<sup>117</sup> Larik (n 36) 188.

<sup>118</sup> Chiti (n 76) 52.

## V. Conclusion

It remains difficult to change the image of CFSP as an area where completely different rules and principles apply. It has been argued that there is a ‘tradition of otherness’<sup>119</sup> which continues to keep alive the notion that the 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.

This 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 a valid presumption exists that all structural as well as more substantive principles apply to the CFSP, which is not easily rebuttable. This conclusion can be drawn on the basis of the various treaty provisions themselves, which are usually phrased in quite general terms, and are not excluding specific policy areas. This holds true both for all structural EU principles (including the principles of cooperation, and the principles of conferral, subsidiarity and proportionality), and for more substantive principles. At the same time, the Court confirmed the Union-wide application of EU principles also with regard to the CFSP, despite the ‘specific rules and procedures’ in this policy area. The key principles of Union law were the tools used by the Court to extend its jurisdiction to decision and actions taken in a CFSP context. Based on our analysis, it would be difficult to find principles that would not be applicable to the CFSP area. In that sense, all principles are indeed ‘general’ in nature. And, as was already laid out in Article 23(1) TEU, these principles are to guide the Union’s action on the international scene and are thus essential in attaining the EU’s external objectives.

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<sup>119</sup> Cardwell (n 1) 445.