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**Research Report**

## A paradigm shift in the EU's Common Foreign and Security Policy: From transformation to resilience

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# SWP Research Paper

Stiftung Wissenschaft und Politik  
German Institute for International  
and Security Affairs

*Annegret Bendiek*

## A Paradigm Shift in the EU's Common Foreign and Security Policy: From Trans- formation to Resilience

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### **A Paradigm Shift in the EU's Common Foreign and Security Policy: From Transformation to Resilience**

The EU's Common Foreign and Security Policy (CFSP) is thriving. To the great surprise of many observers, there has been a sharp increase in the conceptual and practical activity of the Common Security and Defense Policy (CSDP), which legally belongs to the CFSP. Issues ranging from the creation of the European Defence Fund, to cyber security and the implementation of Permanent Structured Cooperation (PESCO, for short) have seen major reform or proposals for reform. These activities demonstrate a level of integration that is supported by a "Multi-speed Europe" and that goes beyond the familiar old token politics. How can we explain this renaissance of a policy area that was assumed dead? What legal driving forces and political dynamics contribute to the revival?

Externally, the illegal Russian annexation of the Crimea triggered the return of war and conflict to Europe for the first time since the wars in the former Yugoslavia. Simultaneously, the looming US withdrawal from Europe, the UK's exit from the EU, the threat of terrorism, the vulnerability of critical infrastructure and the migration crisis are all forcing the EU to reorganise its internal and external security policy. They are increasing public pressure on European politics to make the EU's currently ineffective foreign, security and defence policy more forceful.

Internally, the EU still suffers from a legitimacy crisis. Nevertheless, opinion polls emphasise that EU citizens consider security issues to be very important and would like Europe to play a noticeably bigger part in them. In spring 2017, the European Parliament called upon the European Council to form "Coalitions of the Willing". The Council of Ministers is supposed to become more efficient by gradually replacing unanimity with Qualified Majority Voting. The "Europe of security", which, as Commission President Juncker put it, "protects, empowers and defends", is receiving support, including from Emmanuel Macron in his speech given at the Sorbonne in late September 2017. The crisis discourse has been replaced by a new narrative of Europe as opportunity and necessity.

The new CFSP differs fundamentally from its predecessor. Contrasting with previous fundamental strategy documents, the EU's Global Strategy of June 2016 indicates that the CFSP's drive for transforma-

tion, which was still referenced in the Lisbon Treaty, ultimately cannot be realised for the foreseeable future. There will be limits to Europe's ability to stabilise and pacify its international surroundings. Instead, the EU's new Global Strategy centres on the strategic concept of resilience. Resilience is generally understood as "a capacity to resist and regenerate", as well as be "crisis-proof". The concept acknowledges that there are practical limits to the normative goal of external transformation as outlined in article 21 paragraph 2 of the TEU. Resilience therefore aims to enable the EU both to maintain its existing values and norms and to pursue its own interests.

Resilience needs to be built up in both the internal and the external dimensions. The rising Security and Defence Union will rest on three pillars: the Security Union, the Defence Union and EU-NATO cooperation. While functionally and regionally flexible, political power will nevertheless be concentrated and institutionalised within the CFSP. Typical interior policy areas such as cyber security, migration or antiterrorism are becoming fields of action for the CFSP. Simultaneously, foreign and security policy – which used to be purely political areas – are increasingly subject to legal reform and incorporation into the European legal community. This makes the European legal community itself more resilient when facing political actions by member states that are at odds with its fundamental norms and values. The ECJ is ever more active in supporting this process. A resilient legal community is the necessary precondition for repelling external threats.

The so-called Bresso-Brok Report of February 2017 provides very detailed descriptions of what further advances in integration are possible within the treaties. Brexit even makes treaty revision feasible, as the Verhofstadt Report from July 2016 outlines. However, administrative reforms and project-related progress in integration are not sufficient in themselves to solve a problem that ultimately results from strategic disagreements between member states. To avoid one-sided political dynamics that run the risk of neglecting EU or national law, the German Federal Constitutional Court in its Lisbon verdict introduced the concept of "integration responsibility" for the European integration process. This encompasses the associated parliamentary oversight of any further transfers of sovereignty rights, the creation of efficient European decision-making processes and the dynamic development of the EU Treaty, including foreign, security and defence policy. At least four areas require reform:

1. A European Whitebook on Security and Defence should formulate European interests while acknowledging the EU's actual capacities. This would allow for strategic clarity while also increasing democratic control. Such clarity should also be reflected in the design and priorities of Title IV, Europe in the World, for the new Multiannual Financial Framework beginning in 2021. In order to allow the European judicial area to work effectively in both its internal and external dimensions, Member States should substantially increase funds for Title IV.

2. To build a resilient legal community, the offices of President of the Commission and High Representative of the Union for Foreign Policy and Security Affairs should be fused. Commission President Juncker's proposal of merging the Commission and European Council Presidencies points in a similar direction. This integration into the Commission structures would comprise all CFSP agencies and all spheres of activity in foreign, security and defence policy. Simultaneously, the treaty would enshrine the ECJ's role in foreign affairs and CFSP issues. The ECJ's decisions have already paved the way for this adjustment.

3. Within the decision-making process, majority voting should replace unanimity. Alternatively, article 20 of the TEU allows for enhanced cooperation among at least nine Member States. A stronger culture of constructive abstention could also increase efficiency. The highest priority should be given to asserting the interests of the legal community; any conduct that breaches the TEU should be more strongly sanctioned. Beyond inclusive modes of intensified cooperation, it will also be necessary to consider forming a core group consisting of the Euro Group, and, in subjects regarding Russia, Poland as well. Closer cooperation in armament procurement should be tied to a common arms-export policy to avoid competitive distortion among EU states.

4. The new CFSP should be under parliamentary oversight via the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC). Cooperation should be based on the principles of consensus, exchange of information and consent. The Commission and Council should be obliged to take part in interparliamentary meetings. The participation of the European Parliament in matters of sanctions and trade embargos is strictly needed.

# The Old Paradigm: Transformation

In the past, the EU's external actions and the CFSP were characterised by lofty and often delusional ambitions.<sup>1</sup> Official texts, such as the European Security Strategy (ESS) of 2003 as well other strategy documents (including some on the EU neighbourhood policy), time and again asserted the EU's ability to shape its political environment single-handedly and act within its European neighbourhood as a stabilising and transforming power. Never again was Europe to find itself in a situation such as the war in the former Yugoslavia, where it had been able neither to act independently nor even to formulate its interests. Another important objective was to enable Europe to protect its interests globally. In environmental, human-rights and Middle-East policy – to name just a few examples – it had become increasingly clear that EU and US interests, and especially their priorities, differed. The CFSP, established in 1993 by the Maastricht Treaty, was meant to put the EU in a position to defend its interests rigorously in both European and global politics. Academic debate is dominated by the theory that the CFSP structures are dysfunctional. Some warn of disintegration,<sup>2</sup> since key decisions continue to require unanimity and since essential differences persist among member states on an appropriate role for the US in Europe, on Russia policy, and on migration policy. By contrast, politicians and political advisors have held onto the sacred idea of Europe's capacity to act.<sup>3</sup> Some prominent academics, such as Andrew Moravcsik, have even stated that the EU is already a superpower and will remain one for the next decades.<sup>4</sup>

1 Until 2009 the CFSP was anchored in the EU's pillar structure as its "second pillar". Since the Lisbon Treaty, the CFSP has been formally defined under the heading "General Provisions on the Union's External Action Service and Specific Provisions on the Common Foreign and Security Policy" in TEU arts 21 to 46.

2 Douglas Webber, "How Likely Is It That the European Union Will Disintegrate? A Critical Analysis of Competing Theoretical Perspectives", *European Journal of International Relations* 20, no. 2 (2014): 341–65.

3 Mark Leonard, *Why Europe Will Run the 21st Century* (London, 2005).

4 Andrew Moravcsik, "Europe Is Still a Superpower, and It's Going to Remain One for Decades to Come", *Foreign Policy*, 13

In other words, the EU's Common Foreign and Security Policy was not rendered defunct when the member states' preferences diversified during the eastern enlargement. On the contrary, it is thriving, particularly in "coalitions of the willing". It was even developed further in the 2009 Lisbon Treaty and now encompasses all areas of foreign and security policy (TEU art 24 para 1). Under article 42 paragraph 1 of the TEU, the Common Security and Defence Policy (CSDP) is an integral part of the CFSP, which can rely on its civilian and military capabilities throughout the entire crisis cycle, from crisis prevention to conflict aftercare. A large number of the EU's external actions – such as EU accession negotiations, the European Neighbourhood Policy, foreign trade and development policy – are a shared competency and technically in the hand of the European Commission. For a long time, the EU was seen as a "non-imperial power" – to use former Commission President Barroso's words – which had set itself the target of transforming its international surroundings. The view that the EU is a "transformative power" has been expressed in various ways, all founded on certain legal provisions in the Treaty and on individual EU policies.

## The EU as a Normative and Imperial Power

The first variant of the idea that the EU is a transformative power was supplied by Ian Manners' much-quoted argument<sup>5</sup> positing the EU as a "normative power" that is exceptionally attractive to other states. The unique circumstances of the EU's creation after World War Two – meaning the states' voluntary rapprochement and relinquishing of sovereignty – had a constitutive effect on its nature, values and

April 2017, <http://foreignpolicy.com/2017/04/13/europe-is-still-a-superpower/> (accessed 30 May 2017).

5 Ian Manners, "Normative Power Europe. A Contradiction in Terms?", *Journal of Common Market Studies* 40, no. 2 (2002): 235–58; Kalypso Nicolaidis and Robert Withmann, eds., *Special Issue on Normative Power Europe, Cooperation and Conflict* 48, no. 2 (2013).

norms (see the Copenhagen Criteria)<sup>6</sup> as well as their expansion. According to this conception, the CFSP is subject to no geographical restrictions, and is guided by the values of democracy, rule of law, universal validity and indivisibility of human rights, and other noble aims (see TEU art 21 para 1). The EU's legal and political reality contains a series of proofs that reinforce this view.

EU policies are tied to the EU's self-conception as a soft power. They concentrate on human rights (the Council's Working Party on Human Rights, COHOM), non-proliferation of weapons of mass destruction and disarmament (Council Working Parties CODUN and CONOP), arms export control (Council Working Party on Conventional Arms Control, COARM), counter-terrorism (Council Working Party on Terrorism, COTER) and international law (Comité Juridique, COJUR). According to Manners, normative power describes an actor's ability "to define what passes for 'normal' in world politics".<sup>7</sup> For him, this is the "greatest power of all",<sup>8</sup> since it sets a standard for the actions of all actors. The EU's constitutional and political objectives (TEU art 3 para 5 and art 21 para 2, respectively) are correspondingly ambitious.<sup>9</sup> Human rights are of

central importance in its external actions.<sup>10</sup> In June 2012 member states agreed a human-rights strategy and an action plan to implement their objectives. The EU's policy on respecting human rights has also become significant on an operational level through the insertion of human-rights clauses into its partnership, cooperation and association agreements. In cases of serious human-rights violations, it can draw on the suspension clauses also contained in the new agreements. In the EU's accession policy, these high expectations for respecting human rights and the principles of the rule of law and democracy are formulated in the Copenhagen Criteria.

The creation of the post of High Representative for the CFSP – initially in the Amsterdam Treaty and then ultimately in the Lisbon Treaty – aimed to improve the EU's ability to pursue its normative objectives. The High Representative wears two hats: that of Commissioner for Foreign Affairs and that of Vice-President of the Commission. The High Representative exerts influence on the design of the CFSP by chairing all CFSP formats at all levels.<sup>11</sup> As Commission Vice-President, the current High Representative Federica Mogherini (in office from 1 November 2014 to 31 October 2019) chairs the Foreign Council and the Council Working Party on Foreign Affairs. This, alongside her regular meetings with the Commissioners responsible for external affairs, allows her to coordinate the CFSP more closely with the other areas of EU external action to work towards the objectives embedded in the Treaty.<sup>12</sup> In practice, it is the European External Action Service (EEAS), with its more than 5,500 employees and 139 delegations abroad, which implements the Treaty

<sup>6</sup> European Council Copenhagen, 21–22 June 1993, *Conclusions of the Presidency*, [http://g7.europa.eu/en/european-council/conclusions/pdf-1993-2003/PRESIDENCY-CONCLUSIONS\\_-COPENHAGEN-EUROPEAN-COUNCIL\\_-21-AND-22-JUNE-1993/](http://g7.europa.eu/en/european-council/conclusions/pdf-1993-2003/PRESIDENCY-CONCLUSIONS_-COPENHAGEN-EUROPEAN-COUNCIL_-21-AND-22-JUNE-1993/) (accessed 30 May 2017).

<sup>7</sup> Manners, "Normative Power Europe. A Contradiction in Terms?" (see note 5), 253.

<sup>8</sup> Ibid.

<sup>9</sup> Its objectives are to: "safeguard its values, fundamental interests, security, independence and integrity; consolidate and support democracy, the rule of law, human rights and the principles of international law; 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; foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; 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; assist populations, countries and regions confronting natural or man-made disasters; and promote an international system based on stronger multilateral cooperation and good global governance".

<sup>10</sup> On a proposal from the High Representative, the Council can use qualified-majority voting to appoint an EU Special Envoy for specific political issues (TEU art 33). Over the years, a dozen such representatives have been deployed – not only for human rights, but also for Afghanistan, the African Union, Bosnia and Herzegovina, the Georgia crisis and the southern Caucasus, etc.

<sup>11</sup> For the impact of the financial and debt crisis on EU foreign policy, see Ronja Kempin and Marco Overhaus, *EU-Außenpolitik in Zeiten der Finanz- und Schuldenkrise*, SWP-Studie 9/2013 (Berlin: Stiftung Wissenschaft und Politik, April 2013); Ronja Kempin and Marco Overhaus, "EU Foreign Policy in Times of the Financial and Debt Crisis", *European Foreign Affairs Review* 19, no. 4 (2014): 179–94.

<sup>12</sup> Marianne Riddervold, "(Not) in the Hands of the Member States: How the European Commission Influences EU Security and Defence Policies", *Journal of Common Market Studies* 54, no. 2 (2016): 353–69.

objectives.<sup>13</sup> In 2016, it was allotted about 600 million euros from the EU general budget.<sup>14</sup> The relevant external relations of the European Parliament (EP), European Central Bank (ECB) and many other agencies are also aimed at pursuing the normative objectives set out in the Treaty.

The EU has also gained in confidence in international fora and organisations. Under article 15 paragraph 6 of the TEU, the President of the European Council (EC) inter alia carries out the foreign representation of the EU in CFSP matters “on his level and in his capacity” – notwithstanding the High Representative’s powers. The EU participates both in G7/G8 and G20 summits of heads of state and government (through the President of the European Council and the President of the Commission) and in G7/8 foreign ministers’ meetings through the High Representative. EU member states make up half of the OSCE membership and provide at least two-thirds of the financial contributions. Political dialogue is an important CFSP tool for influencing the behaviour and stance of partners through exchange of information and reinforcement. Dialogues with regional organisations, for instance with the African Union (AU) and ASEAN, have become particularly significant. The basis for the political dialogues is defined in association, partnership or cooperation agreements, joint declarations or exchanges of letters.

As a *sui generis* legal format, the EU fits quite naturally into international legal systems and derives some of its normative power and credibility from this.<sup>15</sup> Under article 34 paragraph 2 of the TEU, in the United Nations Security Council “[EU] Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed”. Since 2011, the UN General Assembly has admitted the EU into its work structures under Resolution 65/276 “Strengthening of the United Nations System:

Participation of the EU in the Work of the UN”.<sup>16</sup> Under treaty provisions, it may use neither pressure nor coercion to impose its interests in its external actions. Receiving the Nobel Peace Prize in 2012, the EU saw its past contributions to peace highlighted, while also being set the task of shaping globalisation in the future.

Another variant of the theory that the EU is a transformative power derives from the thesis that it cannot be understood “without borrowing from the imperial model of governance”.<sup>17</sup> The social scientists Herfried Münkler, Ulrich Beck and Edgar Grande categorise the EU as a “cosmopolitan empire”, thus distinguishing it from earlier empires such as the British. What Beck and Grande mean is “a form of exercising power whose characteristic is to strive constantly to govern the non-governed”.<sup>18</sup> This seemingly contradictory interpretation emphasises the fact that the EU is ultimately a voluntary alliance of states that must be kept together by a strong centre. Its foreign and security policy is held together through formalised cooperation in a) the CFSP processes, b) the large member states’ close interaction and c) “coalitions of the willing” outside the CFSP processes.

a) It is not the coercive power of a central authority but the obligation to promote the common objectives and refrain from doing anything that contravenes them that holds together the CFSP (TEU art 24 para 3). The role of the High Representative is intended to safeguard this coherence in the EU’s external actions. For instance, in May 2014 the Council passed conclusions to that effect concerning the “comprehensive approach”<sup>19</sup> to foreign, security, defence and development policy, so as to improve the coherence rule enshrined in the Treaty and the concerted approach of EU institutions and member states to

<sup>13</sup> European Union Institute for Security Studies (EUISS), *EUISS Yearbook of European Security. Policies, Instruments, Facts, Figures, Maps and Documents*, 2016; European External Action Service, *Annual Activity Report*, 2015, [https://eeas.europa.eu/sites/eeas/files/annual\\_activity\\_report\\_2015\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/annual_activity_report_2015_en.pdf) (accessed 29 June 2017).

<sup>14</sup> EU General Budget, Section 10, *European External Action Service*, L 51/2280, <http://eur-lex.europa.eu/budget/data/General/2017/en/SEC10.pdf> (accessed 30 May 2017).

<sup>15</sup> Sybille Scheipers and Daniela Sicurelli, “Normative Power Europe: A Credible Utopia?”, *Journal of Common Market Studies* 45, no. 2 (2007): 435–57.

<sup>16</sup> United Nations General Assembly, *Participation of the European Union in the Work of the United Nations*, A/RES/65/276 (New York, 3 May 2011), <https://documentsddsny.un.org/doc/UNDOC/GEN/N10/529/10/PDF/N1052910.pdf> (accessed 30 May 2017).

<sup>17</sup> Herfried Münkler, *Imperien: Die Logik der Weltherrschaft – vom Alten Rom bis zu den Vereinigten Staaten* (Hamburg, 2007), 254.

<sup>18</sup> Ulrich Beck and Edgar Grande, *Das kosmopolitische Europa. Gesellschaft und Politik in der Zweiten Moderne* (Frankfurt, 2007), 89.

<sup>19</sup> On the “comprehensive approach”, see Ronja Kempin and Ronja Scheler, *Vom “umfassenden” zum “integrierten Ansatz”*, SWP-Studie 8/2016 (Berlin: Stiftung Wissenschaft und Politik, April 2016); Ronja Kempin and Ronja Scheler, *Joining Forces: Necessary Steps for Developing the Comprehensive Approach*, SWP Comments 31/2016 (Berlin: Stiftung Wissenschaft und Politik, May 2016).

conflict settlement.<sup>20</sup> With the 2016 Global Strategy, the comprehensive approach became the “integrated approach”. Its goal to increase the coherence of EU crisis management will be implemented through the new PRISM unit (Prevention of Conflicts, Rule of Law/Security Sector Reform, Integrated Approach, Stabilisation and Mediation), which is located within the EEAS.<sup>21</sup>

- b) In keeping with the logic of empire, member states have at their disposal specific power capabilities and levels of commitment.<sup>22</sup> At the centre of the power structure are Germany and France, which both participate in all of the EU’s policy-specific regimes, whereas members such as Greece or the Baltic states are more norm takers in the EU. However, the states that form the inner core of the power structure also have to forfeit the most official sovereignty. Their central role gives Germany and France – and previously the UK as well – a particularly strong obligation to make a correspondingly large contribution to conflict-resolving measures.
- c) Indeed the large Member States successfully meet this responsibility. The crisis management in the Balkans, the initiative for the Kosovo-Serbia dialogue, the leadership in the EU+3 negotiations with Iran about the latter’s nuclear programme, and the Minsk Protocol all receive a high degree of political and material support from the central states.<sup>23</sup> For Beck/Grande, the deliberate negation of violence is another constitutive trait of the European cosmopolitan empire.<sup>24</sup> The EU is an empire “by invitation”, in which power is based on the voluntary recognition of and submission to the EU regulations. For instance, in the run-up to European Council summits, the German federal government worked

towards ambitious objectives for developing the CSDP: alongside France in December 2013 and June 2015, and alongside Poland in 2015. Using the “flexible solidarity” formula, it has also tried to involve the Visegrád states in migration issues to convince them of the value of following rules.

Moreover, the empire recognises no clear distinction between internal and external. Even “non-governed” states are bound to the rules using political and economic incentives. For example, the EU pays Turkey around 3 billion euros for humanitarian aid and refugee accommodation.<sup>25</sup> Officially, the money is intended for aid organisations. However, a substantial proportion goes to the state itself. Turkey also continues to receive money for its potential accession to the EU. For comparison: the total earmarked for EU external relations in its 2016 budget (under heading IV Global Europe) was 8.2 billion euros,<sup>26</sup> which includes inter alia the EU’s spending on humanitarian and development aid, on promoting the European Neighbourhood Policy (ENP) and on pre-accession support. These resources correspond, as it were, to the logic of permanent enlargement. The open and variable spatial structures (e.g. the Schengen area or the Economic and Monetary Union) and the semi-permeable borders of the imperial conception of power (e.g. the association and stabilisation process in Southeast Europe) also emphasise this.

## Criticism of transformative approaches

Nevertheless, the EU’s transformative approach can be said to have largely failed.<sup>27</sup> The EU has not managed to influence the European neighbourhood in matters

<sup>20</sup> EU Council, *Auswärtige Angelegenheiten*, 3312. Session, 12 May 2014, 18, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/DE/foraff/142824.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/DE/foraff/142824.pdf) (accessed 30 May 2017).

<sup>21</sup> Tobias Pietz, *Flexibilisierung und “Stabilisierungsaktionen”*: EU-Krisenmanagement ein Jahr nach der Globalen Strategie, Policy Briefing (Berlin: Zentrum für Internationale Friedenseinsätze [ZIF], September 2017), 2.

<sup>22</sup> Münkler, *Imperien* (see note 17).

<sup>23</sup> Oliver Meier and Azadeh Zamirirad, *Die Atomvereinbarung mit Iran: Folgen für regionale Sicherheit und Nichtverbreitung*, SWP-Aktuell 70/2015 (Berlin: Stiftung Wissenschaft und Politik, August 2015); Susan Stewart, *The Future of the Minsk Agreements: Press for Implementation and Support Sanctions*, SWP Comments 14/2016 (Berlin: Stiftung Wissenschaft und Politik, March 2016); Annegret Bendiek and Ronja Kempin, *Strengthening the Role of the EU-3*, SWP Comments 39/2011 (Berlin: Stiftung Wissenschaft und Politik, December 2011).

<sup>24</sup> Beck and Grande, *Das kosmopolitische Europa* (see note 18).

<sup>25</sup> Christian Geinitz, “EU zahlt Millionen an Flüchtlingshilfe an den türkischen Staat”, *Frankfurter Allgemeine Zeitung*, 26 June 2017, <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/eu-fluechtlingshilfe-fliesst-tuerkischem-staat-unter-erdogan-zu-15077071.html> (accessed 22 August 2017).

<sup>26</sup> European Commission, *Multiannual Financial Framework 2014–2020*, 7, <http://bookshop.europa.eu/en/multiannual-financial-framework-2014-2020-and-eu-budget-2014-pbKV0413055/?CatalogCategoryID=mpgKABstFogAAAEjbIUY4e5K> (accessed 30 May 2017).

<sup>27</sup> See Richard Youngs, “Is Hybrid Geopolitics the Next EU Foreign Policy Doctrine?”, *LSE Blogs*, 19 June 2017, <http://blogs.lse.ac.uk/euorppblog/category/authors/richard-youngs/> (accessed 19 September 2017); Richard Youngs, *Europe in the New Middle East: Opportunity or Exclusion?* (Oxford: Oxford University Press 2014).

of conflict settlement so as to effectively contain the negative consequences of the (in some cases disastrous) developments in African and Middle Eastern countries and thus prevent larger migrant flows.<sup>28</sup> On the contrary, every day hundreds of migrants attempt the Mediterranean crossing to escape poverty and the lack of prospects in their home countries. Despite all the measures to realise EU objectives that have been implemented as part of fostering democracy and the rule of law, and despite the conditionality policies towards the European Neighbourhood states, the overall result of the European Neighbourhood Policy (ENP) remains negative.<sup>29</sup> There are various reasons why the EU's transformative approach can only be partially implemented, including:

1. The EU's pursuit of a policy marked by normativity has always been associated with its genuine entitlement to power vis-à-vis other regional organisation and economic blocs. However, a normative foreign policy contradicts the EU's desire for more power since its member states' genuine actions are driven by the primary needs of security and wealth maximisation.<sup>30</sup> In other words: because all states have a say and each state has the right to object, the EU's external actions and its CFSP are criticised for being barely more than the "lowest common denominator" of the states' divergent interests. Seen from a realist's standpoint, it is the responsibility of the EU to secure and extend its position in the international community. From the perspective of international law, however, the EU is not a sovereign actor and therefore cannot live up to its ideals. Full membership for the EU in the system of the law of nations is not yet in sight.<sup>31</sup> Even the planned accession of the EU to the

European Convention on Human Rights (ECHR) is controversial.

2. The resources made available for the transformative approach under spending heading IV, Global Europe, are insufficient to satisfy the high hopes placed in the EU's transformative power. For instance, 15 billion euros have been earmarked for the European Neighbourhood Policy's 16 states for the period 2014 to 2020, which is not nearly enough to realise the desired objectives. The practice of tying relations with the EU to economic and political conditionality has also been much weakened – if not before, then certainly by Commission President Jean-Claude Juncker's statement that there would be no further EU enlargement during his period in office. To compensate, a new EU instrument for capacity-building will support civilian and also military security actors. Its introduction was justified using the Comprehensive Approach and the assumption that security and development are mutually dependent. In accordance with the July 2016 joint communication of the Commission and the High Representative on "Elements for an EU-wide Strategic Framework to Support Security Sector Reform",<sup>32</sup> the plan is to provide capacity-building for all institutions in charge of security and justice.

3. The results of the CFSP/CDSP missions and operations are mixed at best.<sup>33</sup> It is obvious that the EU can only take on crisis-management tasks with its member states' capacities. The EU's capacities consist of the capacities coordinated, procured and made available to it by its member states when the need arises. Additional costs incurred under the so-called Athena Mechanism, deployment-related additional expenses (both civilian and military) and hidden contributions – for example, the cost of the experts seconded to EU civilian missions and the maximum 700 soldiers in its military missions – are covered by each state. A framework agreement concluded in March 2003 authorises the EU to draw on NATO assets and capacities in planning and implementing military operations (Berlin

<sup>28</sup> Tobias Schumacher, "Uncertainty at the EU's Borders: Narratives of EU External Relations in the Revised European Neighbourhood Policy towards the Southern Borderlands", *European Security* 24, no. 3 (2015): 381–401; Steven Blockmans, *The Obsolescence of the European Neighbourhood Policy*, Report 4 (Stockholm: Swedish Institute for European Policy Studies, May 2017).

<sup>29</sup> See "Krisenlandschaften". *Konfliktkonstellationen und Problemkomplexe internationaler Politik. Ausblick 2017*, ed. Volker Perthes (Berlin: Stiftung Wissenschaft und Politik, January 2017).

<sup>30</sup> Adrian Hyde-Price, "A 'Tragic Actor'? A Realist Perspective on 'Ethical Power Europe'", *International Affairs* 84, no. 1 (2008): 30; Andreas Dür and Hubert Zimmermann, "Introduction: The EU in International Trade Negotiations", *Journal of Common Market Studies* 45, no. 4 (2007): 771–87.

<sup>31</sup> Frank Hoffmeister, "Outsider or Frontrunner? Recent Developments Under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies", *CML Review* 44 (2007): 41.

<sup>32</sup> European Commission, Joint Communication to the European Parliament and the European Council, *Elements for an EU-wide Strategic Framework to Support Security Sector Reform*, 5 July 2016, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52016JC0031> (accessed 29 June 2017).

<sup>33</sup> See the reply of the German federal government to the parliamentary question put by MPs Doris Wagner et al on the development of the EU's Joint Security and Defence Policy, Parliamentary Paper 18/9643, German federal parliament, 18th legislative period, Berlin, 14 September 2016.

Plus Agreement).<sup>34</sup> To date, two EU operations have made use of the agreement (Operation ALTHEA in Bosnia and Herzegovina and Operation EUNAVFOR MED Sophia in the Mediterranean). However, such cooperation remains highly dependent on the willingness of NATO members (such as Turkey and the US) to pool resources. Firm plans for a permanent maritime association under the CSDP's Permanent Structured Cooperation are nevertheless being considered.

4. The primary purpose of the CSDP (TEU arts 42 to 46) as an integral part of the CFSP is to provide the EU with an "operational capacity drawing on civilian and military assets". However, this capacity may only be used for missions outside the EU and exclusively for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the UN Charter.<sup>35</sup> The EU currently has a total of ten civilian missions with around 2,500 employees in ten different states in the extended Neighbourhood area,<sup>36</sup> as well as six military operations with around 2,400 soldiers in the Balkans, the southern Mediterranean, Central African Republic, Gulf of Aden, Somalia and Mali.<sup>37</sup> For the latter, the Council for the first time used the decision-making shortcut of article 28 of the TEU, handing over mission responsibility to the High Representative. In May 2015, the Council on Foreign Relations in its conclusions on the CSDP urged member states and the EEAS to give more support for recruiting and deploying personnel. In Germany, for instance, the deployment of civilian experts on CFSP/CSDP missions is organised in cooperation with the Länder within the framework of the Working Group on International Policing Missions and the Centre for International Peace Operations (Zentrum für Internationale Friedenseinsätze, ZIF). However, there is no similar European institution. Furthermore, the CFSP budget only grants the very modest sum of 327 mil-

lion euros for such missions in 2017.<sup>38</sup> However, article 41 paragraph 2 of the TEU provides for an exception to the principle that CFSP measures are to be funded out of the EU budget when the spending is on measures related to the military or to defence policy; the Council's Legal Service is of the view that financing capacity-building measures for partners is admissible.<sup>39</sup> Outside the CFSP budget, there are only very modest resources for financing the EU's external actions: on the one hand, the instruments listed under heading IV (Global Europe) of the EU budget (8.2 bn in 2016);<sup>40</sup> on the other hand, the European Development Fund (EDF). New financial instruments – for capacity-building or the defence fund as part of the Multi-annual Financial Framework, for instance – are currently in the planning stage.

5. There is also a risk that member states could instrumentalise the CFSP/CSDP for their own respective foreign-policy agendas. The fight against piracy around the Horn of Africa – where the EU is intervening with its maritime operation EU NAVFOR Atalanta – is the only example of the EU being active independently and representing "the lowest common denominator" of the EU-27/28. In early November 2008, the EU-28 decided to send several battleships and soldiers to combat piracy off the coast of Somalia as part of Mission European Union Naval Force – Somalia (EU NAVFOR Somalia/Operation Atalanta) to replace the previous operation, NATO's Allied Provider, which used ships from the Standing NATO Maritime Group 2. However, once the United Kingdom has left the EU (Brexit), this operation will presumably no longer be managed from Operation Headquarters in Northwood near London, where a security centre has been installed that serves as a shipping interlocutor in fighting piracy around the Horn of Africa and in the Gulf of Aden. The Operation Commander of Mission Atalanta is a British major-general. An official consensus

<sup>34</sup> Berlin Plus Agreement, 17 March 2017, <http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf> (accessed 30 May 2017).

<sup>35</sup> Since 2003 at least 30 civilian and military CSDP missions and operations have been carried out in Europe, Asia and Africa. On this subject, see EEAS, *Military and Civilian Missions and Operations*, [https://eeas.europa.eu/headquarters/headquarters-homepage/430/military-and-civilian-missions-and-operations\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/430/military-and-civilian-missions-and-operations_en) (accessed 29 June 2017).

<sup>36</sup> Thierry Tardy, *Civilian CSDP: What Next?*, EUISS Brief 32 (Paris: European Union Institute for Security Studies [EUISS], 10 November 2016).

<sup>37</sup> See EEAS, *Military and Civilian Missions and Operations* (see note 35).

<sup>38</sup> European Commission, *Report on Budgetary and Financial Management of the European Commission, Financial Year 2016*, [http://ec.europa.eu/budget/library/biblio/documents/2016/Report\\_on\\_budgetary\\_and\\_financial\\_management-2016\\_en.pdf](http://ec.europa.eu/budget/library/biblio/documents/2016/Report_on_budgetary_and_financial_management-2016_en.pdf) (accessed 30 May 2017).

<sup>39</sup> Harry Cooper, "EU Plans to Militarize Aid Pass Parliament Hurdle", *Politico*, 13 July 2017, <http://www.politico.eu/article/eu-plans-to-militarize-aid-pass-parliament-hurdle/> (accessed 27 July 2017); Markus Becker, "Friedensgelder fürs Militär", *Spiegel Online*, 11 July 2017, <http://www.spiegel.de/politik/ausland/migration-eu-parlament-fuer-entwicklungshilfe-fuers-militaer-a-1157165.html> (accessed 27 July 2017).

<sup>40</sup> European Commission, *Multiannual Financial Framework* (see note 26), 7.

has emerged that the CFSP has developed into an instrument of a few select member states. Evidence can be found in the EU Global Strategy as well as in European Council decisions since 2016. Early on, some government officials advocated an informal division of labour between the EEAS and member states. The UK and Germany therefore launched an initiative on Bosnia and Herzegovina, which the EEAS and Commission, having been mandated by the Council, are now continuing. In Mali, it was France who initially intervened militarily, before the EU took over. However, this development could also be interpreted as showing that the CFSP is merely an extension of national foreign policy.

6. The EU also looks rather weak when it comes to fighting hybrid threats. Hybrid threats are characterised by a mixture of coercion and infiltration and of conventional and unconventional methods by state and non-state actors, but without crossing the threshold of an officially declared war. Although the EU's political dialogues with third states were extended to include cybersecurity issues, they have ultimately remained unsuccessful. According to reports by the German security agency, the Federal Office for the Protection of the Constitution, Russia and China host so-called proxies – meaning private actors such as hackers – who carry out regular attacks on European government agencies and companies either on behalf of the government or with its tacit connivance. Confidence and security-building measures have been initiated at the UN and OSCE levels; however, individual member states have conflicting concerns. Moreover, the EU commitment remains limited to the lowest common denominator. A catalogue of sanctions, the Cyber Diplomacy Toolbox, has also been commissioned at the EU level. By contrast with the USA, the EU has not yet seriously considered imposing concrete sanctions against these countries over the continued cyber-attacks. To push through its political objectives, the EU has increasingly used restrictive measures, which tend to target the government officials of specific third states as well as national companies and other legal entities and natural persons. Here, the sanctions imposed independently by the EU (e.g. against the former Tunisian and Egyptian heads of state) must be differentiated from those it is or was obliged to impose because of a UN Security Council resolution (e.g. against Guinea-Bissau or the Iranian nuclear programme). Often the sanctions are hybrid, with the EU passing a resolution to apply existing UN sanctions and augment them by its own lists

(e.g. North Korea or Syria).<sup>41</sup> The efforts of the International Criminal Court (ICC) against human-rights violations in the world have not been substantially driven by the EU. The ICC focuses on proceedings against defendants from African countries. However, its potential as one of the most important instruments of global governance has not been realised either in the EU's Africa policy or in other regions.<sup>42</sup> The reality of multilateral politics is sobering when set against the EU's self-imposed normative exactingness concerning external actions.

The paltry overall results of the EU's transformative foreign policy have contributed substantially to a strategic rethink of the CFSP. The operative words are now realism or "principled pragmatism" (as it is called in the EU Global Strategy), not utopianism or idealism.<sup>43</sup> All in all, the transformative narrative is little suited to the EU's external actions. In fact, it should be stressed that there has not been a convincing expression of the EU's normative or imperial power to date.

<sup>41</sup> An overview of the EU's current sanctions regimes and a list of all persons and organisations whose bank accounts have been frozen can be found on the EEAS website at [http://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf) (accessed 30 May 2017).

<sup>42</sup> On this point, see the seminal work by Denis M. Tull and Annette Weber, *Afrika und der Internationale Strafgerichtshof. Vom Konflikt zur politischen Selbstbehauptung*, SWP Studie 2/2016 (Berlin: Stiftung Wissenschaft und Politik, March 2016).

<sup>43</sup> European Union, *Global Strategy: Shared Vision, Common Action – A Stronger Europe*, 2016, <http://www.iss.europa.eu/uploads/media/EUGS.pdf> (accessed 29 June 2017).

# The New Paradigm: Resilience

In late 2016, the EU adopted its new Global Strategy for Foreign and Security Policy, which redefined the normative framework of the CFSP. Under the motto “Shared vision, common action: a stronger Europe”, its team of authors, centred on the then-deputy director of the Italian policy consultants Istituto Affari Internazionali (IAI), Nathalie Tocci, declared that building up the EU’s resilience<sup>44</sup> against internal and external threats was the overarching goal. The legally non-binding document replaces the 2003 European security strategy.<sup>45</sup> The central analytical concept of resilience denotes the “ability to resist and regenerate” and to be “crisis-proof” in disasters and other challenging situations.<sup>46</sup> The Global Strategy sets high standards for the resilience of member and neighbouring states: resilience encompasses the ability to defend against attacks and endure and repair damage, but also to build structures in which such attacks and damage cannot occur in the first place. According to the Commission, key elements include “fostering peace and guaranteeing the security of the EU and its citizens, since internal security depends on peace outside of the EU’s external borders.”<sup>47</sup> Security for the EU begins internally. The new EU strategy interprets resilience as a comprehensive concept of internal and external security that encompasses “all individuals and the whole of society”. From this perspective, a resilient society is democratic, based on institutional confidence and sustainable development. According to the Global Strategy, this requires an integrated approach that includes all relevant stake-

holders and fittingly refers to “societal resilience”.<sup>48</sup> The new paradigm of resilience foregrounds a protective and conservative foreign and security policy. Some observers see it as a “counter-concept to transformative approaches”,<sup>49</sup> whilst others consider it a constructive proposal to overcome the contradiction between fostering stability and promoting democracy through external action in third states.<sup>50</sup> This is qualitatively different from the EU’s previous, transformative goals.

According to the Global Strategy, a resilient EU would have two main characteristics: the ability to avert external risks and dangers, and the capability to stabilise its neighbouring states. The expectation the Strategy expresses – of continuing to act transformatively on its environment – has led to reproaches from experts that its concept of resilience is unclear. According to these critics, the Global Strategy often does not make plain who exactly is expected to show resilience against what, in what context and with what resources.<sup>51</sup> In fact, two different interpretations of the term emerge from the literature and documents, which can be juxtaposed as internal and external resilience. Both are equally important for understanding the new CFSP.

- The external interpretation of resilience is based on a fundamental distinction between internal and

<sup>44</sup> A very good introduction to the concept of resilience can be found in Henrik Brinkmann et al., *Ökonomische Resilienz. Schlüsselbegriff für ein neues wirtschaftspolitisches Leitbild?* (Berlin: Bertelsmann Stiftung, July 2017).

<sup>45</sup> Ibid.

<sup>46</sup> Sebastian Hanisch, *Was ist Resilienz? Unschärfen eines Schlüsselbegriffs*, Arbeitspapier Sicherheitspolitik, 19/2016; on the sociological basis of the concept, see Ulrich Bröckling, *Gute Hirten führen sanft – Über Menschenregierungskünste* (Berlin, 2017).

<sup>47</sup> Mogherini’s presentation of the Global Strategy for the EU’s security architecture can be found here: [https://ec.europa.eu/germany/news/mogherini-stellt-globale-strategie-C3%BCr-die-eu-sicherheitsarchitektur-vor\\_de](https://ec.europa.eu/germany/news/mogherini-stellt-globale-strategie-C3%BCr-die-eu-sicherheitsarchitektur-vor_de) (accessed 23 August 2017).

<sup>48</sup> In academic circles, this tends to be interpreted rather as *civil security*: see Emil J. Kirchner et al., “Civil Security in the EU: National Persistence versus EU Ambitions?”, *European Security* 24, no. 2 (2015): 287–303; Christopher C. Leite, “Cooperation in EU Disaster Response and Security Provision: Circulating Practices”, *European Security* 24, no. 4 (2015): 560–78.

<sup>49</sup> For a critical perspective, see also Sven Biscop, *A Strategy for Europe’s Neighbourhood: Keep Resilient and Carry On?* (Madrid: Real Institute Elcano, 16 January 2017), [http://www.real-institutoelcano.org/wps/portal/rielcano\\_en/contenido?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_in/zonas\\_in/ari4-2017-biscop-strategy-europe-neighbourhood-keep-resilient-carry-on](http://www.real-institutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari4-2017-biscop-strategy-europe-neighbourhood-keep-resilient-carry-on) (accessed 30 May 2017); Ana E. Juncos, “Resilience as the New EU Foreign Policy Paradigm: A Pragmatic Turn?”, *European Security* 26, no. 1 (2017): 1–18.

<sup>50</sup> See also the somewhat positive appraisal by Wolfgang Wagner and Rosanne Anholt, “Resilience as the EU Global Strategy’s New Leitmotif: Pragmatic, Problematic or Promising?”, *Contemporary Security Policy* 37, no. 3 (2016): 414–30.

<sup>51</sup> Ibid.

external policy. In this definition, resilience exclusively refers to security-relevant challenges and the ability to withstand attacks, shocks and challenges from the outside. These include cyber-attacks on the critical infrastructure of member states or the EU, natural and environmental disasters, uncontrolled migration movements and terrorist attacks.

- Where resilience is interpreted as internal, it removes the separation between the EU's internal and external policy, as well as between its security and other challenges for the EU or its legally binding legislative acts (*acquis*). Here, all actions by individuals and institutions that run counter to the EU's legal *acquis* are ultimately relevant for resilience. They include all breaches of European law by member states or other legal entities as well as explicit attacks. Most recently, in July 2017, the European Commission threatened to initiate proceedings against Poland to withdraw its right of vote at the European level under TEU article 7. In the Commission's view, if the Polish government were to put its controversial reform of the justice system into effect, its constitution would no longer conform to European legal standards for the independence of the judiciary.

## The Security and Defence Union

Developing the EU's resilience against internal and external challenges is based on close cooperation between legal and political initiatives. The vast political energy invested since July 2016 in implementing the EU's Global Strategy (EUGS) can be explained by the perceived necessity to create resilience.<sup>52</sup> It has created a security and defence union – as policy requires – under the responsibility of CFSP structures, particularly the EU High Representative for Foreign Affairs and Security Policy and Vice-President of the Commission, Federica Mogherini. The idea of a security and defence union is not new, but in the past, it mainly referred to the external aspect of security. Today it combines internal and external security policies, such as the security and defence union and EU-NATO cooperation.

<sup>52</sup> European Union, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy* (see note 43); *European Defence – A Year On from the Global Strategy*, EP Briefing, July 2017.

This has been an ongoing process for at least 15 years. As long ago as 2002 the French and German foreign ministers, Joschka Fischer and Dominique de Villepin, announced in the then-European Convention that the ESDP was to be developed into a security and defence union.<sup>53</sup> However, the Franco-German initiative only gained momentum after the UK's decision to leave the EU in June 2016. In its White Book on security policy and the future of the German army, published on 13 July 2016, the German federal government also advocated the development of the CSDP into a "European security and defence union". In November, German defence minister Ursula von der Leyen declared herself in favour of the long-term objective of establishing a European security and defence union.<sup>54</sup> In November 2016 the Commission's action plan on defence formulated the following priorities for achieving resilience, which first and foremost concern the security of the EU's citizens and territory:<sup>55</sup> a) reacting to crises and conflicts in the border regions of the EU, b) building capacities in neighbouring regions, and c) protecting the EU and its citizens. However, the original CSDP was not created for these purposes. Federica Mogherini, the EU High Representative for Foreign Affairs and Security Policy, and Jyrki Katainen, Vice-President of the European Commission responsible for employment, growth, investment and competitiveness, support a deepening of security policy. In January 2017, they called for the EU to be built into a true defence union that was not limited to the EU-27<sup>56</sup> because the EU's security could only be improved, they argued, through external measures and close cooperation with NATO. There are no treaty provisions to that effect, but the political will certainly exists.

<sup>53</sup> European Convention, Joschka Fischer and Dominique de Villepin, *Gemeinsame deutsch-französische Vorschläge für den Europäischen Konvent zum Bereich Europäische Sicherheits- und Verteidigungspolitik*, 22 November 2002.

<sup>54</sup> Ursula von der Leyen, "Die Europäer müssen mehr Verantwortung übernehmen", *Der Tagesspiegel*, 12 November 2016, <http://www.tagesspiegel.de/politik/ursula-von-der-leyen-die-europaeer-muessen-mehr-verantwortung-uebernehmen/14834596.html> (accessed 14 June 2017).

<sup>55</sup> For a fundamental exploration of this subject, see Vincenzo Pavone et al., "A Systemic Approach to Security: Beyond the Tradeoff between Security and Liberty", *Democracy & Security* 12, no. 4 (2016): 225–46.

<sup>56</sup> Federica Mogherini and Jyrki Katainen, "Wir sollten die EU zu echter Verteidigungsunion entwickeln", *Die Welt*, 27 January 2017, <https://www.welt.de/debatte/kommentare/article161587224/Wir-sollten-die-EU-zu-echter-Verteidigungsunion-entwickeln.html> (accessed 30 May 2017).

Currently there is a clear legal separation between the defence union and the security union. The initiative for a security union is predominantly driven by the Commission and focuses mainly on new issues in internal and judicial policy, but also aims to interlink internal and external security. By contrast, the defence union is a political project proposed by foreign and defence ministers. Cybersecurity and migration policy cut through this formal separation. In Europe's multi-level governance, they are an interface between major projects in internal and external security as well in domestic, foreign and defence policy. The EU plans to develop more resilience to terrorist attacks, illegal migration, changes in cyberspace and hybrid threats. To do so, it will rely on the Comprehensive Approach – meaning the coherent use of military, civilian and economic instruments – as well as a tighter interlocking of internal and external security. In August 2016, the Weimar Triangle states (France, Germany and Poland) even suggested creating an independent format of the European Council to deal exclusively with issues of internal and external security.<sup>57</sup>

Since the summer of 2016, France and Germany have been calling for closer cooperation not just in defence policy, but also in internal security.<sup>58</sup> Both states advocate a “multi-speed Europe” to deepen the security and defence union. They are prepared to proceed in small groups and want to rely more heavily than before on enhanced cooperation (TEU art 20 para 1), Permanent Structured Cooperation (TEU art 42 para 6 and art 46) and constructive abstentions (TEU art 31). European security is already organised differently by region and function. Not all member states are formerly involved in policy on internal security or in defence policy. The UK, Ireland and Denmark use opt-out clauses for internal and judicial policy. Moreover, Denmark does not participate in the common decision-making processes of the CSDP. Nor are all EU member states members of NATO: Finland, Ireland, Malta, Sweden, Cyprus and Austria are not.

<sup>57</sup> Frank-Walter Steinmeier, Jean-Marc Ayrault and Witold Waszczykowski, *Gemeinsame Erklärung der Außenminister des Weimarer Dreiecks zur Zukunft Europas*, 28 August 2016, [http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2016/160828\\_Gemeinsame\\_Erkla%C3%A4rung\\_Weimarer\\_Dreieck.html](http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2016/160828_Gemeinsame_Erkla%C3%A4rung_Weimarer_Dreieck.html) (accessed 14 June 2017).

<sup>58</sup> Frank-Walter Steinmeier and Jean-Marc Ayrault, *Ein starkes Europa in einer unsicheren Welt*, (Berlin, 2016), <https://www.auswaertiges-amt.de/cae/servlet/contentblob/736264/publicationFile/217587/160624-BM-AM-FRA-DL.pdf> (accessed 10 August 2017).

The security and defence union is characterised by variable geometry in judicial and domestic policy, security and defence policy, and EU-NATO cooperation. Some initiatives exist, to bind together this variable geometry: in late June 2017, the European Council for the first time signalled its readiness to rely on Permanent Structured Cooperation under the CSDP, for instance to realise the new civilian-military EU headquarters (MCCP).

## The Security Union

The security union is based on the concept of the “area of freedom, security and justice”. It was implemented via the Tampere (1999–2004),<sup>59</sup> The Hague (2005–2009)<sup>60</sup> and Stockholm programmes (2010–2015).<sup>61</sup> The relevant Treaty provision is article 3 paragraph 2 of the TEU. However, the current Commission programme and restructuring go further still. From the outset, the Commission's goal was to interweave internal and external security and domestic and foreign policy. In April 2015, after the attacks on the French satirical magazine Charlie Hebdo, the Commission presented the European Agenda on Security.<sup>62</sup> The Commission regards organised crime, terrorism and cybercriminality as cross-border challenges and a shared European task, and therefore as justification for deepening European cooperation within the framework of a European security agenda.<sup>63</sup> A year later, in response to the terror attacks in Brussels in March 2016, the Commission announced that it would be setting up a security union. Its main legal basis was to be article 67 of the Treaty on the Functioning of the

<sup>59</sup> European Council, Tampere, *Conclusions of the Presidency*, 15–16 October 1999.

<sup>60</sup> European Commission, “The Hague Programme: Ten Priorities for the Next Five Years – The Partnership for European Renewal in the Field of Freedom, Security and Justice” (Brussels, 10 May 2005), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005DC0184&from=de> (accessed 14 June 2017).

<sup>61</sup> EU Council, “The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens”, 17024/09 (Brussels, 2 December 2009), <http://register.consilium.europa.eu/doc/srv?l=DE&f=ST%2017024%202009%20INIT> (accessed 14 June 2017).

<sup>62</sup> European Commission, “The European Agenda on Security”, COM(2015) 185 final (Strasbourg, 28 April 2015), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/eu\\_agenda\\_on\\_security\\_de.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/eu_agenda_on_security_de.pdf) (accessed 14 June 2017).

<sup>63</sup> Ibid.

European Union (TFEU), subject to article 4 paragraph 2 of the TEU and article 72 of the TFEU, in which the EU creates an “area of freedom, security and justice”, also known as the Schengen Area. Commissioner Julian King, newly appointed in September 2016, was entrusted with implementing the “Schengen security”. His task will be to bring about an interlocking of internal and external security. He has set himself the following priorities: a) improving the legal framework for counter-terrorism, b) prevention and de-radicalisation, c) improving the exchange of information between member-state authorities, d) setting up data banks and their interoperability, e) border controls, and f) better protection for critical infrastructure. By September 2017, nine progress reports had been submitted for implementation. Among other things, a counter-terrorism centre has been established at Europol, gun laws have been tightened, and a counter-terrorism directive have been adopted. A data-protection directive for electronic communications (the ePrivacy directive) is under way. Police authorities in Europe increasingly rely on data from various sources in their analyses and investigations.<sup>64</sup> This means that they handle vast amounts of data and use them forensically across borders. Europol will have to play an ever greater part in transmitting personal data in the future. To date, it has concluded agreements on operational cooperation with the USA, Canada, Norway, Switzerland and Australia. IT management will inevitably have to be pooled at both the national and the EU level. The seventh report on implementing the security union, published in mid-May 2017, explains the Commission’s goal of bringing about the interoperability of IT systems in the areas of security, border management and migration management by 2020. It is intended to ensure that border-control and law-enforcement officials – including customs officers and employees of immigration and judicial authorities – have the necessary information at their disposal. The European Commission also checks whether US Internet groups adhere to the agreed codex on deleting hate speech, and how the digital economy in general deals with illegal content. A need for more regulation along the lines of Germany’s Internet Enforcement Law (*Netzwerkdurchsetzungsgesetz*) is imminent. All four areas of the security union – from counter-terrorism via organised crime and cybersecurity to the exchange of

information – show a high degree of overlap between internal and external security. This also explains the growing approval of Europe-wide cooperation on security, as well as the inter-institutional and political merger of legally distinct security and defense projects at the EU level.

## The Defence Union

The security and defence union currently enjoys broad approval, even in the European Parliament. This is a novelty. In its November 2016 report on future military cooperation within the EU, the European Parliament called for any newly created defence union to enable the interlocking of national armies and to transform the battlegroups, which have existed since 2009 but never been deployed, into standing units.<sup>65</sup> Member states are also expected to cooperate more intensively in arms procurement, of which about 80 per cent is currently still carried out using purely national markets. According to the Commission, the cost of this practice is up to 100 billion euros annually.<sup>66</sup> During Commission President Juncker’s State of the Union address in September 2016, he exhorted member states to coordinate their defence efforts more closely.<sup>67</sup> In late November 2016, the Commission submitted the European Defence Action Plan (EDAP).<sup>68</sup> The objectives it expresses go far beyond the civilian-military Headline Goals determined in 2008. Among other things, the Plan calls for sufficient capacity-building to carry out ten civilian and five military operations simultaneously. The European Council of December 2013 surely paved the way by agreeing four key projects in which member states were to pool capacities and establish common use with support from the European Defence Agency (EDA): in-flight refuelling,

<sup>65</sup> European Parliament, *Draft Resolution of the European Parliament on the Implementation of the Common Foreign and Security Policy*, 2016/2036(INI) (30 November 2016).

<sup>66</sup> European Commission, *Fact Sheet The European Defence Action Plan – FAQs*, MEMO/16/4101 (Brussels, 30 November 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-4101\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-4101_en.htm) (accessed 14 June 2017).

<sup>67</sup> Jean-Claude Juncker, “Towards a Better Europe – A Europe that Protects, Empowers and Defends”, State of the Union Address, 14 September 2016, <https://publications.europa.eu/en/publication-detail/-/publication/c9ff4ff6-9a81-11e6-9bca-01aa75ed71a1/language-en/format-PDF/source-30945725> (accessed 29 June 2017).

<sup>68</sup> European Commission, *European Defence Action Plan*, COM(2016) 950 final (Brussels, 30 November 2016).

<sup>64</sup> Compare the critical perspective in Jorrit Rijpma and Mathias Vermeulen, “EUROSUR: Saving Lives or Building Borders?”, *European Security* 24, no. 3 (2015): 454–72.

remote-controlled aviation systems, national satellite communications and cyberdefence. The conclusions of the June 2015 European Council made these projects the subject of a strategic guideline on developing the CSDP. In June 2017, an agreement was reached, inter alia, on establishing a European Military Planning and Conduct Capacity (MPCC).<sup>69</sup> The previously primarily political declarations of member states have become more legally binding – in contrast to earlier initiatives. Additionally, Commission President Juncker forwarded a clear time-table in September 2017, setting 2025 as the deadline for creating a “fully-fledged European Defence Union”.<sup>70</sup>

In late June 2017, the Commission proposed the creation of a European Defence Fund to enable pooled investment in research and development.<sup>71</sup> The Fund is intended to promote joint research into defence technologies, such as electronics, metamaterials, encrypted software and robot technology. The Commission has earmarked 25 million euros for 2017, but projects that that figure may rise to 90 million euros per annum by 2020. The EU’s post-2020 Multiannual Financial Framework is envisaged to contain a defence research programme worth around 500 million euros a year. It is also expected to facilitate joint military procurement, for example of encrypted software or helicopters, generating annual savings of about five billion euros. To that end, the Commission intends to support the European structural and investment funds and the European Investment Bank (EIB) in financing the development of dual-use goods and technologies. Moreover, the general guidelines on awarding public contracts are to be extended to the defence and security sector so as to boost cross-border cooperation and drive the development of common industrial norms.

There is increasing focus on certain aspects of dual use, if from a new angle. A series of European Defence Agency (EDA) projects currently address the issue of how research results might be used not just for military and civilian ends, but also for internal and ex-

ternal security. The first two contracts have been awarded to research into unmanned aviation systems and mobile reconnaissance robots for urban warfare. A third consortium received a commission to develop an autonomous surveillance platform for both external and internal security. The project aims to connect autonomous reconnaissance systems – for instance drones and sensors – into a swarm (EuroSWARM) by using lasers and jammers and put it under central command. The EDA sees possible applications primarily in border control and surveillance security.

## EU-NATO Cooperation

European security is no longer merely built around better networking of internal and external security; it has also become an area of substantial activity within NATO.<sup>72</sup> Under a framework agreement dating from March 2003, the Berlin Plus Agreement, the EU is authorised to draw on NATO assets and capabilities for its military operations.<sup>73</sup> The two organisations’ joint declarations of July and December 2016 also reflect the central theme of the Global Strategy, which is that the EU’s territory can only be effectively defended if the EU and NATO cooperate closely.<sup>74</sup> Commission President Juncker emphasised the importance of this cooperation when, in September 2017, he called the defence union an explicit wish of NATO.<sup>75</sup>

During the NATO summit in Warsaw in early July 2016, the defence ministers of the EU member states that participate in the framework-nation concept decided to open up the cooperation initiative to partner states and existing multinational institutions – including the EDA. The new clause also authorises coopera-

<sup>69</sup> See also Rosa Beckmann and Ronja Kempin, *EU Defence Policy Needs Strategy: Time for Political Examination of the CSDP’s Reform Objectives*, SWP Comments 34/2017 (Berlin: Stiftung Wissenschaft und Politik, September 2017).

<sup>70</sup> Jean-Claude Juncker, “State of the Union Address 2017” (Brussels, 13 September 2017), [http://europa.eu/rapid/press-release\\_SPEECH-17-3165\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm) (accessed 28 September 2017).

<sup>71</sup> Beckmann and Kempin, *EU Defence Policy Needs Strategy* (see note 69).

<sup>72</sup> Markus Kaim, *Reforming NATO’s Partnerships*, SWP Research Paper 1/2017 (Berlin: Stiftung Wissenschaft und Politik, January 2017).

<sup>73</sup> *Berlin Plus Agreement*, 17 March 2003, <http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf> (accessed 30 May 2017).

<sup>74</sup> *Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization*, STATEMENT/16/2459 (Brussels, 8 July 2016), [http://europa.eu/rapid/press-release\\_STATEMENT-16-2459\\_de.htm](http://europa.eu/rapid/press-release_STATEMENT-16-2459_de.htm) (accessed 14 June 2017); “Statement on the Implementation of the Joint Declaration Signed by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization”, Press Release (2016) 178 (Brussels, 6 December 2016), [http://www.nato.int/cps/en/natohq/official\\_texts\\_138829.htm](http://www.nato.int/cps/en/natohq/official_texts_138829.htm) (accessed 14 June 2017).

<sup>75</sup> Juncker, “State of the Union Address 2017” (see note 70).

tion with EU states that are not NATO members. This time Cyprus did not veto EU-NATO cooperation, whose objective is to correct deficits. Only six months after the NATO summit in Warsaw, 42 measures had been agreed to accelerate the agreed intensification of cooperation in seven fields of action. They include defence against hybrid threats, early warning and situational awareness, parallel operations in identical areas, cybersecurity and cyber-defence, interoperable capabilities, defence industry and research as well as exercises to reinforce the resilience of the EU and NATO partners. Most member states are in favour of the close coordination of NATO and EU armed forces in these areas. All measures in foreign, security and defence policy should automatically also strengthen NATO or at least complement its range of tasks.<sup>76</sup>

Here are just two examples: First, both the EU and NATO are pursuing the stabilisation objective. As decided at the Warsaw Summit in July 2016, their respective measures should complement and complete each other. Second, the European External Action Service (EEAS) has established an analytical unit for hybrid threats, the EU Hybrid Fusion Cell. Its task is to pool information from security authorities in NATO and EU states, EU institutions and partner states.<sup>77</sup> The June 2017 European Council also confirmed that a European Centre of Excellence for Countering Hybrid Threats was to be set up in Helsinki. Based on this, the EU Hybrid Fusion Cell will be in charge of early warning and situational awareness for protecting against hybrid threats, such as cyber-attacks. NATO and EU also cooperate when training the defence against cyber attacks. NATO General-Secretary Jens Stoltenberg, for example, was invited to the “EU Cybrid 2017” wargame, while officials from EU member states will be invited to the NATO exercise “CMX 17”.<sup>78</sup>

Another fact in favour of EU cooperation with NATO is that the CSDP is exclusively orientated towards external threats, not intended for territorial defence and legally precluded from being deployed inside the EU. For NATO as a defensive alliance, national defence is obviously a central task.

## Cybersecurity

Cyber-attacks on states and critical infrastructure have been a reality for a long time.<sup>79</sup> Their quantity and quality is constantly growing. Even the border between offensive and defensive orientation is blurred. Wherever an actor has defensive capabilities, that actor can also attack. The difficulty in unequivocally attributing attacks to a perpetrator shows that, in political, technical and legal terms, cyberspace is de facto borderless. Cyberspace and information space know neither national borders nor an institutional structure. Jurisdiction over cybersecurity policy is shared between member states and the EU. In August 2016, the directive on “measures for a high common level of security of network and information systems across the Union” (NIS directive) came into effect.<sup>80</sup> It creates a uniform European legal framework for making national capacities in cybersecurity available EU-wide, facilitating more cooperation between member states, and formulating minimum security standards and reporting obligations for specific services that protect critical infrastructure. In order to draft the corresponding measures, two new coordinating mechanisms are being set up. One will support member states’ strategic cooperation and exchange of information; the other, the network of Cyber Security Incident Response Teams (CSIRT), will be responsible for emergency assistance in situ.

Cybersecurity policy in the EU is based not only on the NIS directive but also on the 2013 Cyber Security Strategy<sup>81</sup> and the 2015 Strategy for a Digital Single

<sup>76</sup> The authors of this collective work argue likewise: *Forward Resilience: Protecting Society in an Interconnected World*, ed. Daniel S. Hamilton (Washington: Center for Transatlantic Relations, Paul H. Nitze School of Advanced International Studies, 2016).

<sup>77</sup> European Commission, “Joint Framework on Countering Hybrid Threats”, JOIN(2016) 18 final (Brussels, 6 April 2016).

<sup>78</sup> Radio Free Europe, “EU Defense Ministers Hold Cyberwar Game in Tallinn”, 7 September 2017, <https://www.rferl.org/a/eu-defense-ministers-cyberwar-game-tallinn/28721870.html> (accessed 28 September 2017); European External Action Service, *Progress Report on the Implementation of the Common Set of Proposals Endorsed by NATO and EU Councils on 6 December 2016*, 14 June 2017, <https://eeas.europa.eu/sites/eeas/files/170614-joint-progress-report-eu-nato-en-1.pdf> (accessed 28 September 2017).

<sup>79</sup> Annegret Bendiek, *European Cyber Security Policy*, SWP Research Paper 13/2012 (Berlin: Stiftung Wissenschaft und Politik, October 2012).

<sup>80</sup> Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, L 194/1 (Brussels, 6 July 2016), [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2016.194.01.0001.01.ENG&toc=OJ.L:2016:194:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.194.01.0001.01.ENG&toc=OJ.L:2016:194:TOC) (accessed 14 June 2017).

<sup>81</sup> European Commission, *Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace*, JOIN(2013) 1 final (Brussels, 7 February 2013), <http://eeas.europa.eu/archives/>

Market.<sup>82</sup> It also builds on the most recent announcements regarding the implementation of the 2015 European Agenda on Security and on protecting against hybrid threats from 2016. Institutionally, cybersecurity is viewed as a cross-sectional task for the Council; it is tackled by the Horizontal Working Party on Cyber Issues. Even during crises, cybersecurity is located at the interface of civilian and military cooperation as well as internal and external security. Should a substantial cyber incident occur, a great number of EU institutions are henceforth called on to cooperate.<sup>83</sup> The 2013 Cybersecurity Strategy as well as its reform package from September 2017 aim to manage cybersecurity across policy areas.<sup>84</sup> This includes building resilience, fighting cybercrime, building cyberdefence, developing industrial and technical resources and elaborating a diplomatic strategy for cyberspace. However, whilst European cooperation in fighting cybercrime has already scored its first victories in the shape of successful Europol investigations, cyber-foreign policy and cybersecurity policy remain a matter of well-meant declarations of intent. The Commission has therefore encouraged the member states to include cyber-defence in PESCO and the defence fund.

In its Cyber Defence Policy Framework of November 2014, the EU urged its member states to check their cyber-defence capabilities for the CDSP and fulfil their obligations to the Alliance.<sup>85</sup> The EU's Military Staff has also demanded better protection against cyber-attacks on EU-led operations and missions. Cybersecurity and cyber-defence cooperation between the EU and NATO has been intensified since 2015, formalised in the July 2016 Warsaw Declaration, and reinforced with concrete implementation proposals at the joint

meeting of the EU and NATO foreign ministers in December 2016.<sup>86</sup> In November 2016, the European Parliament explicitly advocated deepening cooperation on cyber-defence.<sup>87</sup> It called on member states to build up the necessary capabilities with the support of the EDA and NATO's Cooperative Cyber Defence Centre of Excellence (CCDCOE). The EDA is tasked with creating synergies between the capability development of the EU and NATO. Projects for cyber-defence include the Collaboration Database (CoDaBa) and Capability Development Plan (CDP). Cooperative EU-NATO projects include early-warning capabilities for headquarters and a multi-agent system for Advanced Persistent Threat detection (MASFAD).

The current revision of the European Cyber Security Strategy will have to consider all of these initiatives in internal and external security as well as the developments in data security in the digital single market.<sup>88</sup> This is moving in the right direction since the CFSP, EEAS and the High Representative for Foreign and Security Policy all designate Europe as the level at which member states' security and defence is to be built up. The reforms of the EU Cyber Security Strategy will also have to develop the role of the EEAS and of civilian instruments of cyber-diplomacy – in other words, confidence and security-building measures – just as much as the 2016 Cyber Policy Tool Box. This EU catalogue of sanctions enables it to impose political, financial and legal counter-measures to respond appropriately to cyber-attacks that remain under the legally defined threshold of an armed conflict. In the past few years, progress has certainly been made in cybersecurity, especially in technical attribution, issues of international law, and confidence-building measures in the United Nations' Group of Governmental Experts (GGE), the Organisation for Security and Cooperation in Europe (OSCE) and the G20.

The Commission and High Representative further plan a European Competence Centre, which is to

[docs/policies/eu-cyber-security/cybsec\\_comm\\_en.pdf](#) (accessed 14 June 2017).

<sup>82</sup> *A Digital Single Market Strategy for Europe*, COM(2015) 192 final (Brussels, 6 May 2015), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192> (accessed 14 June 2017).

<sup>83</sup> They include the European Union Agency for Network and Information Security (ENISA), the EU's IT emergency team (CERT-EU), the European Cybercrime Centre (EC3) located within Europol, the EU judicial authority Eurojust, the EU Hybrid Fusion Cell, the EU Intelligence and Situation Centre (INTCEN) of the EEAS, and the EDA.

<sup>84</sup> European Commission, "State of the Union 2017 – Cybersecurity: Commission scales up EU's response to cyber-attacks", Press release (Brussels, 19 September 2017).

<sup>85</sup> EU Council, *EU Cyber Defence Policy Framework*, 15585/14 (Brussels, 18 November 2014), <https://ccdcoe.org/sites/default/files/documents/EU-141118-EUCyberDefencePolicyFrame.pdf> (accessed 14 June 2017).

<sup>86</sup> Bruno L  t   and Daiga Dege, *NATO Cybersecurity: A Roadmap to Resilience*, Policy Brief 3, 2017 (Washington: The German Marshall Fund of the United States, July 2017).

<sup>87</sup> European Parliament, *European Parliament Resolution of 23 November 2016 on the Implementation of the Common Security and Defence Policy*, 2016/2067(INI) (Strasbourg, 23 November 2016), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0440+0+DOC+XML+V0//EN&language=GA> (accessed 14 June 2017).

<sup>88</sup> Annegret Bendiek, *Due Diligence in Cyberspace: Guidelines for Germany's International Cyber Policy and Cyber-Security Policy*, SWP Research Paper 7/2016 (Berlin: Stiftung Wissenschaft und Politik, May 2016).

develop instruments and technologies for internal and external cyberdefence from 2018 onwards. Additionally, an agency for cybersecurity is to bundle competences on cyber-defence and resilience-building in the areas of network and information security. It will build upon the European Agency for Network- and Information Security, ENISA. Nevertheless, far too much critical national infrastructure is still protected nationally or privately. To incentivise cooperation, the Commission and High Representative plan a cybersecurity emergency fund as well as an EU framework for cyber and other crisis management exercises. Both hope that this legislative package will introduce a wide array of internal and external measures to strengthen European cybersecurity. The exchange of information on cyber-risks is inadequate not only between the EU and its member states, but also between the European agencies Europol, Eurojust, EDA and ENISA. The responsible Directorates-General only cooperate partially and often do not receive the necessary information from member states to be able to create a Europe-wide security net.

## Migration

The migration crisis has made it obvious that there is almost no solidarity between EU member states. Since the European Commission proposed its Agenda on Migration in May 2015, it has passed 34 legislative acts to try and find a European response to the migration crisis.<sup>89</sup> All member states agree that in the long term, the only solution is to improve living conditions in countries of origin. To this end, Commission and member states have agreed a “New European Consensus on Development”.<sup>90</sup> In the short and medium term, a European response to the refugee crisis is to consist

of improved external border controls as well as more effective and improved cooperation with countries of transit. Additionally, a Europe-wide quota solution or even immigration policy is envisaged. However, this will not be possible until member states put aside their national egotisms or, if need be, until the ECJ urges them to cooperate (chapter 2.1).<sup>91</sup>

Since September 2015, EU countries including Germany, Austria, Hungary, Slovenia, and Macedonia have reacted to migration flows at their own discretion and without agreement with the neighbouring states concerned.<sup>92</sup> They have closed their borders partially or entirely and thus shifted the problem to their nearest neighbour to the southeast. Border-control and asylum authorities were so ill-equipped to cope with the situation that EU Commissioner Dimitris Avramopoulos was forced to propose deploying an EU border-protection force. The resettlement of 160,000 refugees from Greece and Italy, decided in 2015, has also failed resoundingly: only a few tens of thousands were accommodated in other EU countries. The European Commission has used a supplementary budget to cobble together an emergency package for member states that were particularly badly affected by the refugee crisis. Greece and Italy will only be able to tackle the additional immigration adequately if Turkey and the North African states, which have been categorised as safe countries of origin, cooperate closely with the EU.<sup>93</sup> Turkey will accept the return of all Syrian refugees who have illegally entered Greece if, in return, the EU takes up to 72,000 registered Syrian refugees off Turkey’s hands.<sup>94</sup> The idea is to fight illegal migration by converting it into legal migration. Since the EU-Turkey summit in mid-March 2016, the EU’s refugee policy has also been in Libya’s hands: the closure

<sup>91</sup> ECJ verdict of 26 July 2017 on the right to asylum.

<sup>92</sup> See also Annegret Bendiek and Jürgen Neyer, *Europäische Solidarität. Die Flüchtlingskrise als Realitätstest*, SWP-Aktuell 20/2017 (Berlin: Stiftung Wissenschaft und Politik, March 2017).

<sup>93</sup> The EU has developed three dialogue formats for this: the Rabat Dialogue, the Khartoum Dialogue and the Intercontinental Dialogue. All three are funded by the Africa-EU Dialogue on Migration and Mobility (MMD).

<sup>94</sup> On the problematic nature of the EU-Turkey deal, see Günther Seufert, *Turkey as Partner of the EU in the Refugee Crisis. Ankara’s Problems and Interests*, SWP Comments 1/2016 (Berlin: Stiftung Wissenschaft und Politik, January 2016). Since the attempted coup in July 2016, the Turkish government under President Recep Tayyip Erdoğan has been behaving in increasingly authoritarian ways. Maintaining rule-of-law standards is a precondition for visa-free travel for Turkish citizens as well as for EU accession talks, which were halted in December 2016.

<sup>89</sup> European Commission, *European Agenda on Migration – Legislative Documents*, [https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en) (accessed 10 August 2017).

<sup>90</sup> European Parliament, Council and European Commission, “The New European Consensus on Development. ‘Our World, our Dignity, our Future’”, *Official Journal of the European Union* C 210 (30 June 2017), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2017:210:TOC> (accessed 15 September 2017). On the criticism from NGOs such as Oxfam, see Matthew Tempest, “‘New Consensus’ on Development Adopted – and Immediately Condemned”, *Euractiv*, 19 May 2017, <http://www.euractiv.com/section/development-policy/news/new-consensus-on-development-adopted-and-immediately-con-demned/> (accessed 15 September 2017).

of the Balkans route has shifted refugee routes to Europe to the southern Mediterranean. Italy has concluded a comparable bilateral agreement with Libya on combating illegal immigration and human trafficking.<sup>95</sup> Libya, due to its political instability, is turning out to be particularly problematic. At the Malta Summit in early February 2017, the EU heads of state and government decided to reinforce Libya's border guard to enable it to intercept more migrants and take them to reception camps in Libya, where they will be persuaded to return home.<sup>96</sup>

The EU is utilising three main CFSP activities – the EU Border Assistance Mission Libya (EUBAM Libya), Planning and Liaison Cell (EUPLC) and Operation EUNAVFOR MED – to go on the offensive in foreign and security policy as well.<sup>97</sup> At the European Council's special meeting on migration in April 2015, the heads of state and government had already decided on CSDP measures.<sup>98</sup> They include adapting the mandates of EUCAP Sahel Niger and EUTM Mali, as well as EUCAP Sahel Mali. From July 2016 onwards, those missions were integrated into Migration Partnership Framework of the EU's migration policy. By summer 2017, the Commission initiated so-called Project Cells and Regional Coordination Cells respectively for all CSDP missions in the Sahel zone, in order to support the five Sahel states in the areas of security, border management, and defence.<sup>99</sup> Migration and border management in the Mediterranean serves as an example of how external and internal EU policies are to intertwine: Frontex, Europol and Eurojust cooperate with Sophia, EUBAM Libya and the NATO mission in the Mediterranean.

<sup>95</sup> See also Raphael Bossong, *Zwänge und Spielräume für eine europäische Grenz- und Flüchtlingspolitik*, SWP-Aktuell 38/2017 (Berlin: Stiftung Wissenschaft und Politik, June 2017).

<sup>96</sup> The aid organisation Médecins sans Frontières is not alone in pointing out that detaining people in Libya or remitting them to their home country is contrary to the EU's principles of human dignity and rule of law: Ärzte ohne Grenzen, "Statement zu EU-Plänen gegen Flüchtende im Mittelmeer", 26 January 2017, <https://www.aerzte-ohne-grenzen.de/libyen-mittelmeer-eu-schutzlinie-fluechtlinge> (accessed 29 June 2017).

<sup>97</sup> Restricted Document Outlines Official Proposals and Recommendations for Future EU Actions in Libya, in *State-watch*, July 2017.

<sup>98</sup> For a critical perspective on this approach, see Mattia Toaldo, *Don't Close Borders, Manage Them: How to Improve EU Policy on Migration through Libya* (London: European Council on Foreign Relations [ECFR], 15 June 2017).

<sup>99</sup> Pietz, "Flexibilisierung und Stabilisierungsaktionen" (see note 21).

In May 2015, the EU foreign and defence ministers established EUNAVFOR MED, the European Union Naval Force – Mediterranean, dubbed Sophia. The June 2015 operational plan provides for reconnaissance and intelligence gathering to improve situational awareness of smuggler networks. All information obtained by the force will be gathered at headquarters and put at the disposal of the member states' law-enforcement authorities. Since October 2015, it has been authorised to take action on the high seas against boats being used by people smugglers. In September 2016, the Political and Security Committee (PSC) decided to launch a further support task. Operation Sophia is also intended to help prevent illegal arms transports in the operational area in accordance with UN Security Council Resolution 1970 (2011) and later, in particular Resolution 2292 (2016) on the arms embargo against Libya. Sophia is mandated by a Security Council Resolution under chapter 7 of the UN Charter to "maintain or restore international peace and security". The use of military resources even outside international waters, for instance in Libyan territorial waters, is thus authorised.

Concurrently, in late February 2016, NATO set out the modalities of maritime surveillance in the Aegean Sea. The Standing NATO Maritime Group 2 (SNMG 2), which is currently under German command and also consists of ships from Greece, Canada and Turkey, is monitoring the Aegean Sea and establishing situational awareness of trafficking. The goal is to make a joint contribution to combating people trafficking and illegal migration in light of the refugee crisis. It is based on a proposal by Greece, Germany and Turkey that was adopted by NATO at its defence ministers' meeting in mid-February 2016. NATO makes available the data gathered during its maritime surveillance to Frontex and the Greek and Turkish coastguards. At its Warsaw Summit in July 2016, NATO also decided to launch mission Sea Guardian, whose goal is to control the Mediterranean more effectively and contain the activities of the terrorist Islamist organisation IS. In exceptional cases, it will also be allowed to search boats of suspected supporters of terrorist groups. Mission Sea Guardian replaces the NATO-led Operation Active Endeavour, which was launched after the attacks of 11 September 2001 and ended on 15 July 2016. NATO's mission in the Mediterranean, Sea Guardian, and the EU mission Sophia are intended to complement each other. Since, NATO has also been sending ships and aircraft to the Mediterranean to

provide location information and logistical support to the EU marine mission Sophia.

The “military crisis-management measures” agreed by the EU and NATO since 2015 to combat people smuggling and trafficking networks – as well as the EU’s enhanced cooperation with the AU and other countries of origin and transit in Africa – suggest that the EU’s central strategic objective is not to transform the source states or fight the causes of migration, but rather to defend against threats. Critics such as Steven Blockmanns from the Brussels think tank CEPS even consider Operation Sophia and the “development of a semi-military European Border and Coast Guard Agency” to be military actions by the EU to combat migration.<sup>100</sup> In Bosnia-Herzegovina and off the coast of Somalia, there are currently comparable military deployments within the CSDP framework. Above all, however, it is the anti-piracy mission in the Gulf of Aden, Mission Atalanta, that critics see as an important model for Sophia and “maritime security” in general. Additionally, the EU relies on the so-called technical and material upgrading of partners. These military measures are currently financed *inter alia* by the foreign-policy stability instrument, and in future also by development cooperation funds.<sup>101</sup>

Border protection, migration policy and counter-terrorism have become fields of action for the CFSP/CSDP. This does not remove them from ECJ oversight if EU citizens bring lawsuits against the corresponding EU laws. Even citizens of third states can sue for their rights by appealing to the European Court of Human Rights. The separation between the CFSP and the legal community should thus become increasingly meaningless. Moreover, the ECJ will have to verify more closely in future whether the agreed CFSP measures on combating piracy, human trafficking and illegal migration and the restrictive measures should have been implemented on the basis of the treaty principles of the “area of freedom, security and justice” (TFEU art 75).<sup>102</sup> This same question also arises for the

deployment of the European Border and Coast Guard Agency in Serbia.<sup>103</sup> Other issues that must be addressed are what legal framework covers the training of security forces in Libya and how migration management can be harmonised with human rights.<sup>104</sup>

## The Legal Community and the Role of the ECJ

The EU “is a legal community in its external actions as well”<sup>105</sup> because its authorities are subject to oversight under EU law even when they act at the international level. The furthest reach of its jurisdiction is considered to be the assertion of the integrity and autonomy of EU law not just vis-à-vis member states, but also vis-à-vis international law.<sup>106</sup> EU courts do not recognise a categorical distinction between “inside” and “outside”. The precondition for the existence of the legal community is that the judicial paradigm is valid as a matter of principle. Whether a measure forms part of external actions or “internal policies” (TFEU, third part) makes no difference in terms of legal supervision. The ECJ plays a central role in implementing efforts to build up a legal resilience that has at its core the objective to “provide a European legal space” to “cooperatively conceive and realise a common order in Europe”.<sup>107</sup>

A resilient EU is emerging from the legal community. The role of the ECJ is essential for the EU’s resilience, which gets its bearings from the concept of the rule of law, the principle of legality, judicial control and the protection of individual rights.<sup>108</sup> A resilient

<sup>100</sup> Timon Mürer, *Die neue Grenzschutz-Agentur – ein Fortschritt für die EU?* (Friedrich-Ebert-Stiftung, 16 September 2016), <https://www.fes.de/de/themenportal-flucht-migration-integration/artikelseite-flucht-migration-integration/die-neue-grenzschutz-agentur-ein-fortschritt-fuer-die-eu/> (accessed 10 August 2017).

<sup>101</sup> Nikokaj Nielson, “EU Development Aid to Finance Armies in Africa”, *EUobserver*, 5 July 2016.

<sup>102</sup> Maise Cremona, *Implementation of the Lisbon Treaty. Improving Functioning of the EU: Foreign Affairs* (Brussels: Policy Department C: Citizens’ Rights and Constitutional Affairs, European Parliament, 2016).

<sup>103</sup> Council of the EU, *Status Agreement between the EU and the Republic of Serbia on Actions Carried out by the European Border and Coast Guard Agency on the Territory of the Republic of Serbia* (Brussels, 19 May 2017).

<sup>104</sup> “Europas Armutszeugnis. Die EU ist in der Flüchtlingspolitik nicht nur zerstritten”, *Frankfurter Rundschau*, 19 July 2017. Recommended reading on this subject is the legal classification by Daniel Thym, “Migrationssteuerung mit den Menschenrechten”, *Frankfurter Allgemeine Zeitung*, 3 August 2017.

<sup>105</sup> Matthias Kottmann, *Introvertierte Rechtsgemeinschaft. Zur richterlichen Kontrolle des auswärtigen Handelns der EU* (Heidelberg, 2014), 3. The seminal text is Walter Hallstein, *Die Europäische Gemeinschaft*, 5th edition (Düsseldorf and Vienna, 1979), 53.

<sup>106</sup> *Ibid.*

<sup>107</sup> Armin von Bogdandy, “Raum der Hoffnung”, *Frankfurter Allgemeine Zeitung*, 27 April 2017; Armin von Bogdandy, “European Law Beyond ‘Ever Closer Union’. Repositioning the Concept, Its Thrust and the ECJ’s Comparative Methodology”, *European Law Journal* 22, no. 4 (2016): 519–38.

<sup>108</sup> Kottmann, *Introvertierte Rechtsgemeinschaft* (see note 105), 79.

legal community defends itself against all actors and actions that undermine it. According to constitutional judge Andreas Vosskuhle, it is not possible to preserve the values on which the EU is based and achieve its objectives within an alliance of 28 member states with vastly different historical, cultural, social and economic characteristics without adhering to self-imposed rules.<sup>109</sup> The law, he asserts, offers substance, helps to avoid or solve conflicts, and creates legitimacy by assigning decision-making powers and providing decision-making procedures. However, only certain actors are involved in making the idea of the legal community a reality in the EU's external actions: the member-state governments that negotiate and develop European treaties; the Council, which in some cases enacts secondary legislation with the Commission; the agencies that deal with the application and implementation of decisions; the EP and national parliaments; and, last but not least, private actors, who can participate in various ways, for instance through associations or lobby initiatives. Simultaneously, the Commission and ECJ have restricted possibilities for supranational action under the CFSP.<sup>110</sup>

Under article 275 of the TEU, the ECJ has only limited competence for the CFSP. As defined in the treaties (TEU art 19 para 1, TFEU art 263), the ECJ assesses the political authorities' actions against the legal order. It thus has the same structural relationship to the EU's external actions as national courts do towards their governments' foreign policies.<sup>111</sup> Despite having been coined internationally, the expression "integration through law"<sup>112</sup> is a very German concept, which meets its limits especially in the CFSP. The CFSP cannot be imposed on member states by a central court decision. However, the Lisbon Treaty and the ECJ's administration of justice have argued that the EU authorities are not exempt from court oversight even during EU external actions where these occur in constellations relevant to legal protection. The ECJ has emphasised that "the review by the Court

of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement".<sup>113</sup>

The extension of the EU legal community to the CFSP occurs both in Commission lawsuits against individual member states and in proceedings by non-state legal entities against allegedly unlawful practices by member states or EU institutions.<sup>114</sup> The following ECJ verdicts are important junctures cementing the European legal community in the EU's external actions:<sup>115</sup>

**Sanctions against Russia:** In response to Russia's actions destabilising Ukraine, the Council in July 2014 adopted a resolution and regulation on restrictive measures that limited a variety of money transactions, the export of certain sensitive goods and technologies, the access of specific Russian organisations to capital markets, and performing specific services in the oil sector.<sup>116</sup> The aim was to raise the costs of Russia's actions against Ukrainian sovereignty. One of the Russian companies targeted by the measures is Rosneft, which specialises in petroleum and natural gas. Rosneft launched a lawsuit against the restrictions on its operations. The ECJ dismissed its claim, arguing that the political interests of the EU must take priority over the market freedoms of non-EU legal entities. It thus expressed its political willingness to back both the sanctions regime imposed by the Council and the resilience of the EU against third parties. It also supports the powers of the High Representative of the Union for Foreign Affairs and Security Policy. The ECJ rejected Rosneft's argument that rights could be derived from

<sup>109</sup> Andreas Vosskuhle, "Integration durch Recht" – Der Beitrag des Bundesverfassungsgerichts", Audimax Humboldt-Universität zu Berlin, 22 October 2015.

<sup>110</sup> Riddervold, "(Not) in the Hands of the Member States" (see note 12); Marianne Riddervold and Guri Rosén, "Trick and Treat: How the Commission and the European Parliament Exert Influence in EU Foreign and Security Policies", *Journal of European Integration* 38, no. 6 (2016): 687–702.

<sup>111</sup> Kottmann, *Introvertierte Rechtsgemeinschaft* (see note 104).

<sup>112</sup> Coined by Mauro Cappelletti, Monica Secombe and Joseph H. Weiler, *Integration through Law* (Berlin, 1986).

<sup>113</sup> ECJ, 3 September 2008, Case C-402/05 P, Kadi, I-6351, para 316, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0402>.

<sup>114</sup> The ECJ is responsible for preliminary decisions on the legality or otherwise of restrictive measures that have been enacted under the CFSP vis-à-vis natural or legal persons. Graham Butler, "A Question of Jurisdiction: Art. 267 TFEU Preliminary References of a CFSP Nature", *European Papers* (2017): 1–8.

<sup>115</sup> Christina Eckes, "The CFSP and Other EU Policies. A Difference in Nature?", *European Foreign Affairs Review* 20, no. 4 (2015): 535–52; Christina Eckes, "Common Foreign and Security Policy. The Consequences of the Court's Extended Jurisdiction", *European Law Journal* 22, no. 4 (2016): 492–518.

<sup>116</sup> ECJ, 28 March 2017, C-72/15, <http://curia.europa.eu/juris/liste.jsf?num=C-72/15>.

the EU-Russia partnership and cooperation agreement which were contrary to, and took priority over, the EU sanctions regime.

**Defence market:** The ECJ is also very important in promoting a common European defence market and thus improving the EU's defensive capabilities. Alongside directive 2009/43/EC issued by the European Parliament and the Council on 6 May 2009 on simplifying transfers of defence-related products within the EU, directive 2009/81/EC aimed to make a contribution to creating a European market for defence products and strengthening Europe's base in arms technology and industries.<sup>117</sup> As a matter of principle, defence contracts were no longer to be awarded using the exception clause of article 346 of the TFEU, i.e. outside of the framework provided by the internal-market regulations. By August 2011, three member states were able to demonstrate complete implementation of the directive; a fourth did so in September 2011. The Commission initiated infringement proceedings under article 258 of the TFEU against 23 member states, by serving them with formal notices. By March 2012 a further 15 member states had informed the Commission that they had fully implemented the directive. The Commission continued infringement proceedings against the remaining eight member states. By June 2012, two had implemented the directive fully, another two only partially. The objective of the Commission's current proposals to create a European defence market is to make implementation of directives 2009/43 and 2009/81 legally binding, so as to ultimately reduce market dependency on third parties.

**Migration:** The ongoing infringement proceedings against Hungary, the Czech Republic and Poland are significant in emphasising European resilience. The Commission accuses the three states of violating EU law by refusing to participate in the distribution of refugees among EU member states. The legal proceedings are of central importance for the consistency of EU policy and thus a precondition for agreements with third parties. In September 2015 the EU states took a majority decision to distribute 160,000 of the migrants that had arrived in Italy and Greece amongst themselves. Using a quota system, the refugees were

meant to be transferred to other member states by September 2017. However, to date only around 21,000 have been resettled in the EU. Several eastern European countries still refuse to do their share under this legally binding decision. Hungary and Slovakia have brought lawsuits before the ECJ in Luxembourg against the obligation to receive refugees. Poland and Hungary have so far not accepted a single person. The Czech Republic did let 12 asylum seekers from Greece enter the country, but it has not taken in any further refugees from the resettlement programme for a year. In mid-June 2017, the Commission therefore launched infringement proceedings against the three countries, which can result in fines. Slovakia recently accepted a small number of refugees, the only one of the four Visegrád countries to have done so. It is therefore currently not facing similar proceedings. Austria was granted an exception until March 2017 because of its own high numbers of refugees. However, it has since agreed to accept asylum seekers according to the quota system.

The ECJ is also an important actor in defending individual rights against member-state violations. Immediately prior to the special meeting on refugee policy in September 2015, the European Commission launched 40 infringement proceedings against 19 EU countries. It accused them of not having adequately implemented existing European law on asylum. This encompasses regulations on granting refugee status, minimum standards for asylum proceedings and reception conditions for applicants. Alongside Germany, the proceedings concerned France, Italy, Austria, Spain, the Netherlands and Hungary, among others. Two weeks before the Council meeting, Commission President Jean-Claude Juncker had already announced his intention to launch infringement proceedings against states that had not implemented the decisions of the common asylum policy. These include in particular Directive 2013/32/EU,<sup>118</sup> which sets out common procedures for "granting and withdrawing international protection", and Directive 2013/33/EU, which determines the "standards for the reception of applicants for international protection".<sup>119</sup> The contents of

<sup>117</sup> European Commission, *Report from the Commission to the European Parliament and the Council on Transposition of Directive 2009/81/EC on Defence and Security Procurement*, COM(2012) 565 final (2 December 2012).

<sup>118</sup> European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0060:0095:EN:PDF> (accessed 29 June 2017).

<sup>119</sup> European Union, *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection* [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0060:0095:EN:PDF)

both laws resolve a great number of legal issues and obligations concerning the reception of refugees. The threat of legal action ensured that most states were cooperative.

**Sanctions:** The ECJ's decisions show that the law is a stable instrument of integration for the CFSP as well. When imposing sanctions, legal minimum standards must be met vis-à-vis the affected EU citizens.<sup>120</sup> Some listed citizens have already taken legal action against their inclusion in sanctions, and in some cases have had their inclusion annulled. On 3 September 2008, the ECJ made a landmark decision in its *Kadi and Al Barakat* cases: not only can autonomous EU sanctions be reviewed by the EU judiciary, but so can UN sanctions which have had no separate material-legal review by the EU. The ECJ declared the resolution applying the UN Resolution to the plaintiffs null and void because it breached the minimum standards set by the rule of law (especially the right to be heard by a court and to adequate legal protection). After the immediate adoption of a resolution that satisfied the requirements of effective legal protection and a hearing before a court, the EU procedure for accepting UN lists had to be adapted.

Concurrently, the sanctions committee of the UN Security Council (UNSC) began to bring its listing procedure closer in line with the rule of law under Resolution 1822 (2008).<sup>121</sup> Following an ECJ decision of 30 September 2010, the renewed inclusion in an EU sanctions list of a person listed by the UNSC on suspicion of financing terrorism is invalid (*Kadi II* decision).<sup>122</sup> The ECJ objects to this type of listing decision because, by definition, it fails the EU's minimum legal requirements. When the person concerned appeals, a listings decision has to be reviewed thoroughly, and evidence must be disclosed. The ECJ confirmed its verdict on 18 July 2013. For the EU, legal protection

takes precedence over the implementation of UN sanctions in accordance with international law.

**Data protection and data security:** A key area of Europe's resilience to data misuse is the building up of effective instruments for ensuring data protection and data security. The personal data of European Internet users are inadequately protected against access by authorities in the US – so said an ECJ decision from early October 2015 (C-362/14).<sup>123</sup> A lawsuit was also brought by the Austrian Max Schrems who considered his Facebook data to be insufficiently protected from state surveillance in the USA.<sup>124</sup> This invalidated the Commission's so-called Safe Harbour Agreement on data protection in the USA. The Irish data-protection authorities were able to prohibit the transfer of European facebook data to servers in the US. The Commission was forced to negotiate a new agreement with the USA, known as Privacy Shield. Its Facebook decision is the ECJ's third recent decision that develops data protection and security in Europe. The ECJ made its first decision in April 2014 on the EU's data-retention directive,<sup>125</sup> its second in May 2014 against Google and for the "right to be forgotten". The decision on data retention called for minimum standards in data security and data protection, and gave momentum to the implementation of the directive as part of the 2013 EU Strategy on Cybersecurity (see chapter 2.4).<sup>126</sup> In July 2017, the ECJ invalidated the EU's planned Passenger

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:en:PDF (accessed 29 June 2017).

<sup>120</sup> Eckes, "The CFSP and Other EU Policies. A Difference in Nature?" (see note 115); Eckes, "Common Foreign and Security Policy. The Consequences of the Court's Extended Jurisdiction" (see note 115).

<sup>121</sup> United Nations Security Council, *Resolution S/RES/1822* (2008), 30 June 2008, <https://www.un.org/sc/suborg/en/s/res/1822-%282008%29> (accessed 29 June 2017).

<sup>122</sup> ECJ, *Judgment of the General Court, 30 September 2010 – T-85/09*, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83733&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1> (accessed 29 June 2017).

<sup>123</sup> Annegret Bendiek, "Am Ende werden die Gerichte entscheiden", *Zeitschrift für Außen- und Sicherheitspolitik* 8, no. 3 (2015): 335–45 (335); Henry Farrell and Abraham Newman, "The Transatlantic Data War", *Foreign Affairs* 95, no. 1 (2016): 124–33.

<sup>124</sup> Paul De Hert/Pedro Cristobal Bocos, *Case of Roman Zakharov v. Russia: The Strasbourg Follow up to the Luxembourg Court's Schrems Judgment*, 23 December 2016, <https://strasbourg-observers.com/2015/12/23/case-of-roman-zakharov-v-russia-the-strasbourg-follow-up-to-the-luxembourg-courts-schrems-judgment/> (accessed 29 June 2017).

<sup>125</sup> In December 2016 the ECJ decided that member states could not impose a general obligation to store data on the providers of electronic communications services: Judgment of the Court (Grand Chamber) of 21 December 2016 in the joined cases C-203/15 and C-698/15, 21 December 2016; Dennis-Kenji Kipker, *Neues in Sachen Vorratsdatenspeicherung: Das jüngste Urteil des EuGH vom 21.12.2016*, 7 January 2017, <https://community.beck.de/2017/01/07/neues-in-sachen-vorratsdatenspeicherung-das-juengste-urteil-des-eugh-vom-21122016> (accessed 29 June 2017).

<sup>126</sup> Niklas Otte and Hugo Zylberberg, "A European Perspective on the Protection of Personal Data in Cyberspace: Explaining How the European Union is Redefining Borders", *Kennedy School Review* 16 (2016): 69–75.

Name Records Agreement with Canada for violating EU citizens' basic rights. This is the first time that the most senior judges have rejected an international agreement with reference to the basic rights set out in the EU charter. This expert assessment should have an impact on other EU agreements, for instance with the USA or Australia, but is also likely to influence the internal EU directive on flight passenger data.

**CSDP missions:** The EU's military operations are proving the growing importance of protecting individuals' rights in the domain of the CFSP/CSDP. Under article 43 paragraph 1 of the TEU, CFSP/CSDP missions can encompass common disarmament measures as much as combat missions as part of crisis management, including peace-restoring measures and stabilising operations after conflicts. Because EU military missions draw on member states' troops and because of the EU's international legal status under article 47 of the TEU, questions are increasingly being raised over its responsibility and the possibilities for legal protection against military actions during those missions. Article 7 of DARIO (Draft Articles on the Responsibility of International Organisations) stipulates that in cases of organs being placed at the disposal of an international organisation the latter is liable as long as it exercises "effective control" over the organ's actions.<sup>127</sup> Shielding external actions from the principles of the rule of law, as desired by EU governments, is thus invalid. The Court drew on the DARIO decision as a benchmark for attribution in the key decision on *Behrami and Saramati*, so as to pronounce itself on the attribution of actions by KFOR troops on the EU mission in Kosovo. A decision by the European Court of Human Rights further sets out that deployed personnel are always accountable for their own human rights violations. In 2012, the ECHR made clear in its ground-breaking *Hirsi* decision that human rights also apply on the high seas. As soon as refugees are on a European ship, they are under the effective control of the respective state. That state must provide access to

asylum procedures. In the *Hirsi* case, the ECHR only had to decide about a specific push-back operation from Italy to Libya. Such operations aim to push back third country nationals who lack residence permits, before they might reach EU waters. However, the instructions from its decision apply to remittances to all African transit states in which refugees are at risk of receiving debasing or inhuman treatment or even torture. A remittance to such states is a violation of article 3 of the European Human Rights Convention.<sup>128</sup> Current CFSP missions are strongly connected to border protection and migration and are thus also directly relevant for the protection of individual rights. This will likely be a significant future area for ECJ decisions pertaining to resilience.

These court decisions all make very clear that not only the EU's external actions, but also the CFSP, are increasingly subject to legal standardisation by the ECJ. The old separation between the legal community and external politics is increasingly ineffective and almost impossible to sustain.<sup>129</sup> Simultaneously, it is obvious that the resilience of the European legal community to member-state violations of the *acquis* is not limited to the single market, but is increasingly being transferred by the ECJ to the domain of foreign and security policy as well.

## The Outlook for Reform

The resilience paradigm shakes up past logics of CFSP integration and action. The idea of democratic transformation of the European neighbourhood and the goal of perpetual integration of all member states are gradually sidelined. Instead, the EU focuses on building resilience against external threats and develops new flexible modes of cooperation of increased integration – including third states. At the same time, the EU is quite willing to further integrate single policy

<sup>127</sup> International Law Commission, *Draft Articles on the Responsibility of International Organizations – DARIO*, Art. 7: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct." *Yearbook of the International Law Commission* (2011), vol. II, Part Two, [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf) (accessed 23 August 2017).

<sup>128</sup> European Court for Human Rights, *Grand Chamber Case of Hirsi Jamaa and Others v. Italy* (Application no. 27765/09) Judgment. This Version was Rectified on 16 November 2016 under Rule 81 of the Rules of Court. Strasbourg, 23 February 2012, <https://www.proasyl.de/news/internationales-recht-eu-muss-bootsfluechtlinge-retten-und-aufnehmen/> (accessed 10 August 2017).

<sup>129</sup> See the similar assessment in Thomas Giegerich, "Wege zu einer vertieften Gemeinsamen Außen- und Sicherheitspolitik: Reparatur von Defiziten als 'kleine Lösung'", in *Die Europäische Union am Scheideweg: mehr oder weniger Europa?*, ed. Stefan Kadelbach (Baden-Baden: Nomos, 2015), 135–82 (146).

areas with only a limited number of member states, if no all-encompassing consensus can be found.

The security and defence union builds on three major fields: the security union, defence union and EU-NATO cooperation. It aims to increase the resilience of the EU to external and internal risks and challenges. It may vary by region and function, but it concentrates power in the CFSP. In the emerging new security and defence union, such classic domestic-policy domains as cybersecurity or migration policy become fields of action for the CFSP. As the fields of action for foreign and security policy expand, the CFSP is simultaneously opening up to the ECJ's juridification. The distinction between juridified domestic/judicial policy and "political" foreign/security policy is being weakened or even demolished entirely in key domains such as counter-terrorism, the fight against organised crime and cybersecurity.

This has certain consequences for the EU's self-image as an international actor:

1. It is difficult to overlook the fact that the "Europe of security" and the concept of resilience have a tense relationship with the idea of multilateralism, and especially the idea of "effective multilateralism" as embedded in the previous European Security Strategy (ESS) of 2003. Security interpreted as resilience goes hand in hand with dismantling vulnerability and thus aims to lower interdependence, especially in the EU's relations with third states. In other words: since interdependence – from the realistic perspective of international relations – must always also be understood as mutual vulnerability, the objective of reducing vulnerability inevitably also implies reducing interdependence. A multilateral world order, on the other hand, is founded on the idea of global public goods and the necessity of cooperating on the basis of reciprocal dependence. It is therefore highly controversial whether or not the resilience paradigm contradicts the very idea of a multilateral order.

2. If the security and defence union actually develops into a new key element of the integration process, it will be accompanied by a tendency to shift the EU's normative emphasis from the cosmopolitan ideal of the integrated market to an integration project aiming at protectionism and European sovereignty. A Europe of security and defence could allow the return of old modes of confrontation, security dilemmas and the arms race. The EU's goal of "strategic autonomy" is a lofty and at first sight attractive ideal. However, it also contradicts the idea of a convergent and interdependent world in which conflicts cannot be solved

unilaterally ("with strategic autonomy") – for instance through maximum deterrence – but by using dialogue and cooperation. The terminology must therefore be explicated, especially as regards technological sovereignty between the EU and NATO. Fundamentally, the idea of strategic autonomy does not complement but rather competes with the objective of interweaving the European and American pillars of Western security policy. The aim of Europe's foreign and security policy should therefore not be "strategic autonomy" but "strategic intertwining", particularly with a view to the UK's and US's commitment to the European security order.

3. Resilience is closely related to terms such as "self-assertion", "military empowerment of third countries", "digital sovereignty" or "externalising migration". Here, the EU relinquishes its transformative ideal in its external actions towards third states and restricts it to those elements which are significant for resilience, in the sense of preserving the stability of the political order as a community of shared laws and values. Although this does not mean that the EU will stop supporting human rights and the rule of law in third states, it does mean a reprioritisation. The EU's new leitmotif – "a safe and secure Europe" – was embedded in the Rome Declaration of March 2017, which articulated a marked prioritisation of European interests in an environment that is increasingly, to use N. Tocci's words, "complex, contested and conflictive". Every sovereign unit strives to be resilient, not least since that eases cooperation. However not all societies, not even within the EU, are willing to subsume themselves to a legal dimension of resilience, which the "Masters of the Treaties" once set for the EU's external actions through its treaties.

4. In June 2017, the EU decided to rely more on forms of flexible integration. These include foremost, in the CSDP, the Permanent Structured Cooperation and, in the CFSP, enhanced cooperation and constructive abstentions. They make it possible to overcome the decades-old blockade of foreign and security-policy integration and bring about a Europe of security and defence. The process is driven by an extension of the Berlin-Paris axis to Rome and the increasingly close cooperation between the three member states, preferably with members of the Eurozone. The political plan is to keep the creation of a security and defence union inclusive and open to all EU member states as well as close partners, such as the UK and US. Within the EU however, Qualified Majority Voting must be applied, an advance which was explicitly supported

by Commission President Juncker in 2017, but which continues to fail in the political reality. If the ECJ continues to play an active role in permeating Europe's external actions with European legislation, then this condensing of the EU's ability to act should in the foreseeable future also translate into an increase in power at the supranational level. The ECJ's stance towards member states would then gain in importance in the CFSP. Similarly, the High Representative and the EEAS would likely be held much more accountable by the national parliaments and the EP. An important lever would be an inter-institutional agreement between the High Representative and the EP, ensuring that EP requests are promptly processed and considered.

In the short term, these challenges should be tackled in a European White Book on security and defence; in the medium term, through treaty changes. Emmanuel Macron suggested a strategy for Europe's defense and security just a few days after the German election in late September. The EU's Global Strategy (EUGS) of July 2016 is still a non-binding document. Therefore, a European White Book on security and defence would clarify the substantive reorientation of the EUGS and, in technical terms, transform it into an "endorsed" and therefore legally binding document that would have to be accepted by the national parliaments. European policy should be honest, so that the discrepancy between the CFSP's public representation (as normative power) and its actual orientation towards a new "Europe of security" does not endanger its public support or its democratic and strategic credibility.

A European White book process on security and defence should start by defining the stance of resilience towards multilateralism and transformative ambitions. The strength of the European Foreign and Security Policy lies both in its affirmation of multilateralism and in its recognition that Europe's past can be instructive for its own value system, which it has advocated since the end of World War II. Ironically, some of the global norms and institutions that have been carefully constructed in the last two decades to repudiate the idea of sovereignty as impunity – including the responsibility to protect, and the International Criminal Court – are increasingly challenged. Moreover, the EU principles of flexible integration and "strategic autonomy" have an uneasy relationship, to say the least; their contents need to be fleshed out in a way that goes beyond the conceptual terminology of principled pragmatism. Security may increasingly

depend on political stability in other countries. Yet foreign and defence policy should not automatically act in what traditionally used to be the province of economic and domestic policy. Only then will the full spectrum of "resilience" become visible, one that goes far beyond issues of upgrading measures, technological sovereignty and externalising forced displacement and migration in third states. The EU's June 2016 Global Strategy on foreign and security policy thus leaves the possibility of an inclusive process to create a European White Book on security and defence. In the medium term, the UK's exit from the EU also creates a window of opportunity for EU treaty reforms, which could be used to bring about the necessary changes in primary legislation.

## Abbreviations

ASEAN	Association of Southeast Asian Nations	IS	“Islamic State”
AU	African Union	MASFAD	Early warning capabilities for headquarters and multi-agent system for Advanced Persistent Threat detection
CCDCOE	Cooperative Cyber Defence Centre of Excellence, NATO	MPCC	Military Planning and Conduct Capability
CDP	Capability Development Plan	NATO	North Atlantic Treaty Organisation
CERT-EU	European Union Computer Emergency Response Team	NIS	Network and Information Systems
CFSP	Common Foreign and Security Policy	OSCE	Organisation for Security and Cooperation in Europe
CFSP-IPK	Interparliamentary Conference for the Common Foreign and Security Policy	PSC	Political and Security Committee
CoDaBa	Collaboration Database	SC	Security Council
CODUN	EU Council Working Group on global disarmament and arms control	SNMG 2	Standing NATO Maritime Group 2
COHOM	EU Council Working Group on human rights	TEU	Treaty on European Union
COJUR	EU Council Working Group on international law	TFEU	Treaty on the Functioning of the European Union
CONOP	EU Council Working Group on general affairs	UN	United Nations
CORAM	EU Council Working Group on conventional arms control	UNSC	United Nations Security Council
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union	ZIF	Zentrum für Internationale Friedenseinsätze (Centre for International Peace Operations)
COTER	EU Council Working Group on terrorism		
CSDP	Common Security and Defence Policy		
CSIRT	Computer Security Incident Response Team		
DARIO	Draft Articles on the Responsibility of International Organisations		
EC	European Community		
EC	European Council		
EC3	European Cybercrime Centre		
ECB	European Central Bank		
ECFR	European Council on Foreign Relations		
ECHR	European Court of Human Rights		
ECHR	European Convention on Human Rights		
ECJ	European Court of Justice		
EDA	European Defence Agency		
EDAP	European Defence Action Plan		
EDF	European Development Fund		
EEAS	European External Action Service		
EIB	European Investment Bank		
ENISA	EU Agency for Network and Information Security		
ENP	European Neighbourhood Policy		
EP	European Parliament		
ESDP	European Security and Defence Policy		
ESS	European Security Strategy		
EU	European Union		
EUBAM Libya	EU Border Assistance Mission Libya		
EUCAP	EU Capacity Building Mission		
EUGS	EU Global Strategy		
EUNAVFOR MED	European Naval Force – Mediterranean		
EUPLC	EU Planning and Liaison Cell		
G7	Group of 7		
G8	Group of 8		
G20	Group of 20		
GGE	Group of Governmental Experts		
HR	High Representative of the Union for Foreign Affairs and Security Policy		
ICC	International Criminal Court		
INTCEN	EU Intelligence and Situation Centre		

SWP Berlin

CFSP: From Transformation to Resilience

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