



## Revisiting the International Legal Status of the EU

RAMSES A. WESSEL\*

### I. Introduction: The Union's Legal System

In 1997 this author wrote an article in this journal on the international legal status of the EU.<sup>1</sup> Since then, not only the Amsterdam Treaty entered into force – modifying a number of provisions in the EU Treaty – but also some other developments took place, both in academic thinking and in the legal practice of the EU, which all together justify a fresh look at the topic. Arguments to define the international legal status of the EU can not only be drawn from the existence of external legal capacities of the Union, but also from the unity of the Union's legal system. Where the first article analyzed the international legal status of the EU mainly by pointing to existing international capacities of the Union, the present article takes the *inherent* status of the EU as an international legal entity as a starting point.

The popularity of the 'pillar-structure' in emphasizing the differences between the three issue-areas of the Union, has prevented many observers from taking the single legal system underlying the EU as a basis of their analyses. To this very day one can observe the existence of largely isolated EC, CFSP and Police and Judicial Cooperation in Criminal Matters (PJCC) research communities, in which research is frequently 'content driven' rather than that the impetus is taken from legal institutional starting points. Existing literature generally stresses too much the differences between the 'pillars', while neglecting the overall context of the EU legal system.<sup>2</sup>

In fact, looking at international law or international organizations in terms of legal systems is rather uncommon. Even Hart – who devoted most of his time to the definition of a legal system – did not find his concept of law to be

\* R. A. Wessel is associate professor of International and European Law at the Center for European Studies of the University of Twente, The Netherlands and associated with the Europa Instituut of Utrecht University.

<sup>1</sup> 'The International Legal Status of the European Union', 2 EFA Rev. (1997), pp. 109–129.

<sup>2</sup> See on this topic R. A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations', CML Rev. (2000), pp. 1135–1171. The present article is partly based on R. A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Analysis* (Kluwer Law International, The Hague 1999).

applicable to international law. Unlike Kelsen he denied the existence of a basic norm, or a rule of recognition in international law. In his view the rules of international law do not constitute a single *system*; ‘international law simply consists of a *set* of separate primary rules of obligation which are not united in this manner’.<sup>3</sup> It is not intended here to address the problems related to the study of *the* international legal system and the ways in which this system differs from domestic legal systems. This topic has already been given considerable attention by others.<sup>4</sup> This introduction rather purports to address the concept of more ‘limited’ international legal systems that are the results of particular treaties – which, after all, is the case with the EU. Regardless of Hart’s analysis of international law in general, legal systems created by individual treaties can be seen as not only *sets*, but indeed *systems* of rules, to which the theories concerning ‘legal validity’ may be applied. Hence, while it may be difficult to explain *the* international legal system in terms of a legal system of hierarchically related norms, it is claimed here that such an analysis is to a certain extent possible for individual legal orders based on treaties. Contrary to the contention of the European Court of Justice in the leading case *Costa-ENEL*, that ‘*by contrast* with ordinary international treaties, the EEC Treaty has created its own legal system’,<sup>5</sup> it is assumed in this article that the conclusion of *any* treaty constitutes a separate legal system, in which the agreed objectives and specific rules may essentially derogate from general international law.<sup>6</sup> After all, the concept of treaty cannot be conceived of as consisting of primary rules (Hart) only; its existence is defined by the constitutive, terminative and consequential rules laid down in international treaty law.<sup>7</sup> Treaties thus create new systems of norms, or new ‘legal systems’. This is possible as international law is *ius dispositivum*, under which the conclusion of agreements is

<sup>3</sup> H. L. A. Hart, *The Concept of Law* (Clarendon Press, Oxford 1961, 1994) at p. 233.

<sup>4</sup> Two excellent studies deserve to be mentioned in particular: J. Combacau, ‘Le droit international; bric-à-brac ou système?’, *Archives de philosophie du droit* (1986) pp. 85–105 and H. Mosler, ‘The International Society as a Legal Community’, *Recueil des Cours* 1974 (1976) No. 140, pp. 1–47. Furthermore Hart’s Chapter 10 (1994) is devoted entirely to this issue.

<sup>5</sup> Case 6/64, *F. Costa v. ENEL* [1964] ECR 585. Emphasis added.

<sup>6</sup> For the sake of completeness it should be noted that there exists a controversy about treaties being a source of *law* or merely a source of *obligation*. See J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, The Hague 1996) at p. 2. Regarding international organizations, it is now generally recognized that they have a legal order of their own, usually distinct from that of the Member States. H. J. Schermers and N. M. Blokker, *International Institutional Law* (Kluwer Law International, The Hague 1995) at p. 709; also P. Cahier, ‘L’ordre juridique interne des organisations internationales’, in R. J. Dupuy (ed.), *A Handbook on International Organizations* (Martinus Nijhoff, Dordrecht 1988) at pp. 237–240.

<sup>7</sup> See D. W. P. Ruiter, ‘Structuring Legal Institutions’, *Law and Philosophy* (1998), pp. 215–232.

subject to a few limitations only (for instance *ius cogens* and Article 103 of the Charter of the United Nations).<sup>8</sup>

A consequence of this line of reasoning is that the entry into force of the Treaty on EU (TEU) marked the coming into being of a new legal system, comprising a number of sub-orders (the different issue areas – or ‘pillars’ – of the Union as well as the subordinate legal systems developed within the areas).<sup>9</sup> The norms in the TEU are not merely to be seen as a loose ‘set’, but indeed form a system with mutual dependencies. The question, however, is whether the existence of this legal system implies the enjoyment of legal personality by the EU. In order to be able to answer that question one must be willing to take a closer look at the concept of legal personality.

## II. The Concept of Legal Personality

### 1. What is Legal Personality?

It is asserted here that whenever a treaty purports to establish a new entity under international law, this entity is to be regarded as a ‘legal person’. A legal person is then conceived as an entity that is, in principle, capable of acting both

<sup>8</sup> Article 103 UN Charter provides: ‘In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’.

<sup>9</sup> See for instance O. Dörr, ‘Zur Rechtsnatur der Europäischen Union’, *EuR* (1995), pp. 334–348; W. Devroe and J. Wouters, *De Europese Unie. Het Verdrag van Maastricht en zijn uitvoering: analyse en perspectieven* (Peters, Leuven 1996); J. Klabbers, ‘Presumptive Personality: The European Union in International Law’, in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Kluwer Law International, The Hague 1998), pp. 231–253; Chr. Trüie, *Verleihung von Rechtspersönlichkeit an die Europäische Union und Verschmelzung zu einer einzigen Organisation – deklaratorisch oder konstitutiv?* (Vorträge, Reden und Berichte aus dem Europa-Institut, No. 357, Universität des Saarlandes 1997); Wessel above note 1, B. De Witte, ‘The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?’, in T. Heukels, N. Blokker and M. Brus (eds.), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law International, The Hague 1998), pp. 51–68; D. M. Curtin and I. F. Dekker, ‘The European Union as a “Layered” International Organization: Institutional Unity in Disguise’, in P. Craig and G. De Búrca (eds.), *European Union Law: An Evolutionary Perspective* (Oxford University Press 1999), pp. 83–136 and most recently: I. F. Dekker and R. A. Wessel, ‘The European Union and the Concept of Flexibility: Proliferation of Legal Systems within International Organizations’, in H. J. Schermers and N. M. Blokker (eds.), *The Proliferation of International Organizations* (Kluwer Law International, The Hague 2001), pp. 381–413. Some authors have even argued that the existence of a Union legal order implies a *fusion* of the three pillars. See in particular A. von Bogdandy and M. Nettesheim, ‘Ex Pluribus Unum: The Fusion of the European Communities into the European Union’, *ELJ* (1996), p. 267.

*vis-à-vis* its own Member States and *vis-à-vis* other international legal persons, like third states. Contrary to the way in which it is dealt with in most studies, the concept of legal personality in international institutional law does not find its primary value in the explanation of what international organizations may do on the international scene, but rather in the possibility of demarcating them from their Member States. Thus, legal personality is first and foremost a concept that can be used whenever international institutional law addresses the form of cooperation between the participating states.<sup>10</sup> This implies that whenever there is an international legal entity, it is a legal person. Legal personality is nothing more (or less) than independent existence within the international legal order. There would not be any use of speaking of an international legal entity when it would not exist under international law. One consequence of this line of reasoning is that there is not much sense in speaking of a ‘partial legal personality’ of international organizations; neither can we say that a particular international entity possesses legal personality ‘to some extent’.

Legal personality may be defined as the potential ability to exercise certain rights and to fulfil certain obligations.<sup>11</sup> The distinction between *legal personality* and *legal capacity* is illuminating in this respect: the first concerns a *quality*, the second is an *asset*. Where international personality thus means not much more than being a subject of public international law,<sup>12</sup> capacity is concerned with ‘what the entity is potentially entitled to *do*’.<sup>13</sup> This rather formal approach is also apparent in the work of a number of other authors who have stressed that ‘the concept of personality does not say anything about the qualities of the person’ and that ‘it is a mistake to jump to the conclusion

<sup>10</sup> In that respect one may probably see it as the legal counterpart of the concept of supranationalism used in political science.

<sup>11</sup> Based on P. H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff, Dordrecht 1994) at p. 53.

<sup>12</sup> In German: *Rechtspersönlichkeit*. See Bekker, *ibid.*, at 60, and Schermers and Blokker, above note 6 at p. 975. See also G. Hafner, ‘The Amsterdam Treaty and the Treaty-Making Power of the European Union: Some Critical Comments’ in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Seidl-Hohenveldern – in Honour of his 80th Birthday* (Kluwer Law International, The Hague 1998), pp. 257–284 at p. 259: ‘As such, the organization becomes a fundamental structural element of the international order’.

<sup>13</sup> In German: *Rechtsfähigkeit*. Bekker, above note 11 at p. 63. The definition of legal personality as having a standing under international law seems also to have been the basis for the following remarks made by the International Court of Justice in the *Reparation for Injuries* case: ‘Has the organization such a nature as involves the capacity to bring an international claim? [...] In other words, does the Organization possess international personality?’ The Court continued: ‘[...] what it does mean is that it is a subject of international law and capable of possessing international rights and duties [...]’. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949 at p. 179.

that an organization has personality and then to deduce specific capacities from an *a priori* conception of the concomitants of personality'.<sup>14</sup> Nevertheless, it is not so interesting to decide only to an entity's legal personality. The practical value of the possession of legal personality can be found in the fact that the entity has the required status to have certain categories of rights that enable it to manifest itself on the international plane and to enter into relationships with other subjects of international law, traditionally referred to as the right of intercourse.<sup>15</sup> It is the capacities of the entity that ultimately reveal the 'independent' position of a legal person. Thus, international legal persons may have a capacity to bring international claims, they may have international procedural capacity (for instance to start a procedure before an international court), treaty making capacity, the right to establish diplomatic relations or the right to recognize other subjects of international law.<sup>16</sup> International capacities are thus to be seen as *general competences* of an international entity. However, the international legal capacity of entities other than states is never comprehensive; it exists only in relation to the *specific competences*

<sup>14</sup> I. Detter, *Law-Making by International Organizations* (Norstedt & Söners Förlag, Stockholm 1965) at p. 21; and D. P. O'Connell, *International Law*, Vol. 1 (Stevens & Sons, London 1970) at p. 109.

<sup>15</sup> See M. Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', *BYIL* (1997), pp. 111–155 at pp. 124 and 134; and L. Oppenheim, *International Law* (Longmans, London 1967) at p. 216. This must have been the reason for De Witte, above note 9 at p. 62, also to assert that '[l]egal personality should be held to refer only to the capacity of the European Union to act as a subject of international law, that is, to conclude treaties and conduct diplomatic relations with third states and other international organizations'. It seems important to recall that international organizations as independent legal persons are not by definition bound to the same international legal obligations as their Member States. Apart from *ius cogens* international organizations too can only be bound on the basis of their own free will. See R. A. Lawson, *Het EVRM en de Europese Gemeenschappen – Bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties* (Kluwer, Deventer 1999) at pp. 154–157 and 163–166.

<sup>16</sup> Bekker, above note 11 at pp. 63–64, I. Brownlie, *Principles of Public International Law* (Clarendon Press, Oxford 1990) at pp. 683–689. While the 'will approach' in particular would stress that the existence of any of these capacities would depend on their express or implied inclusion in the constituting treaty, Rama-Montaldo (1970) at pp. 139–140, asserted that some general capacities seem to follow from the entities recognized standing in international law: 1.) the right to express its will through the different legal ways found in the international order for producing legal effects on the international plane; and 2.) rights which enable the organization to manifest itself as a distinct entity and make possible relations with other international persons. While at first sight these capacities indeed seem necessary to make any sense of the concept of legal personality, the problem is that the categories are so broad that any distinction between personality and capacity would disappear. Therefore, for a theoretical analysis, the more formal approach seems the most helpful, since it enables one to unravel further elements.

attributed to them by the founding states.<sup>17</sup> These specific competences are concerned with ‘what a given international organization, being a subject of law endowed with the potential capacity to act, is specifically empowered to do’;<sup>18</sup> it is subject to the organization’s specific functions and purposes. Hence, the EU, for instance, would only be competent to exercise its capacities in relation to the functions and purposes ascribed to it by the TEU.

## 2. *Legal Systems, Legal Institutions, Legal Facts and Legal Personality*

‘Legal institutions’ form a core concept in the so-called ‘institutional theory of law’, as developed in the works of MacCormick & Weinberger, Ruiter, Wróblewski and others.<sup>19</sup> Legal institutions in this discipline are not to be seen as synonymous to (international) organizations. The concept has a broader, but nevertheless well-defined, meaning. Legal institutions are viewed as the building blocks of legal systems, which at the same time harbour their own legal system. In that sense they can be roughly characterized as distinct legal systems governing specific forms of social conduct within the overall legal system.<sup>20</sup>

<sup>17</sup> Or by another legal entity of which the legal person is an agency. See Brownlie, *ibid.*, at p. 65. In a somewhat different manner, Weiler made a distinction between *competence*, *power*, and *capacity*. In his analysis of federal states and international treaties Weiler looked at the extent to which the internal division of *competences* between the central authority and constituent Member States affects the ability of the federal government to secure the implementation of treaty obligations; the extent to which the division of internal competences affects the treaty *powers* of the federal government; and the extent to which the non-unitary character of the federal state affects the international *capacity* of the federation or the Member States. J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999) at p. 137.

<sup>18</sup> Bekker, above note 11 at p. 71. While Bekker does not refer to capacities as *general competences*, his analysis seems to amount to the same thing. To clarify the distinction between *personality*, *capacity* and *competence*, Bekker used the International Tin Council as an example: although the ITC, being endowed with *personality*, may have the general *capacity* to contract, it is only *competent* to contract with respect to tin.

<sup>19</sup> N. MacCormick and O. Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (D. Reidel Publishing Company, Dordrecht 1986, 1992), O. Weinberger, *Law, Institution and Legal Practice. Fundamental Problems of Legal Theory and Social Philosophy* (Kluwer Academic Publishers, Dordrecht 1991); N. MacCormick (ed.), *Constructing Legal Systems: ‘European Union’ in Legal Theory* (Kluwer Academic Publishers, Dordrecht 1998); D. W. P. Ruiter, *Institutional Legal Facts: Legal Powers and Their Effects* (Kluwer Academic Publishers, Dordrecht 1993); D. W. P. Ruiter, *Legal Institutions* (Kluwer Academic Publishers, Dordrecht 2000, *forthcoming*); and J. Wróblewski, *The Judicial Application of Law* (Kluwer Academic Publishers, Dordrecht 1992).

<sup>20</sup> D. W. P. Ruiter, ‘A Basic Classification of Legal Institutions’, 10 *Ratio Juris* (1997), pp. 357–371 at p. 358.

Legal institutions are a specific type of normative institutions, namely normative institutions which derive their validity from a legal system. Ruiter defines a legal institution as '[...] a régime of legal norms purporting to effectuate a legal practice that can be interpreted as resulting from a common belief that the régime is an existent unity.'<sup>21</sup> In other words, a legal institution does not refer to an existent entity, but to a presentation of a phenomenon that ought to be made true in the form of social practices. Thus, legal institutions have their counterparts in social reality, often referred to as 'real' institutions.

Ruiter distinguishes between seven categories of legal institutions.<sup>22</sup> Two of these seem to be relevant in particular to define the concept of legal personality: personal legal connections and legal persons. The first category is defined as 'a valid legal régime with the form of a connection between subjects'. The bottomline is that a legal institution in this form reflects a legal relation between legal persons (for instance on the basis of a treaty). The second category is the legal person. A legal person is defined as 'a valid legal régime with the form of an entity that can act'. In this case it is not so much the *relation* between legal persons that counts, but rather the existence of a new legal person, or in our case, a *new* international legal entity. An example in this respect is the establishment of the European Central Bank (ECB) within the EU legal system. So, while in many forms of international cooperation the legal system brought into existence by the international agreement does not include the creation of a separate legal person (but merely regulates the relations between legal persons), some legal systems function within the setting of a newly established international legal entity, in many cases referred to as an 'international organization'. It is exactly this distinction that illuminates the autonomous character of legal persons within a surrounding legal system.

Institutional legal theory can also help in grasping the distinction between a *legal person* and its *legal capacities*. In that respect the legal person should be presented as an 'institutional legal fact'. Analytic linguistic philosophy made us aware of the existence of institutional legal facts, which unlike 'brute facts' (that relate to physical phenomena, such as tables, seats, rain and hunger) refer to abstract, socially defined entities or events (such as museums, tennis games, speed limits, borders and social security).<sup>23</sup> Institutional facts are created

<sup>21</sup> *Ibid.*

<sup>22</sup> *Legal persons* (representing a subject); *legal objects* (representing an object); *legal qualities* (representing a property of a subject); *legal status* (representing a property of an object); *personal legal connection* (representing connection between subjects); *legal configurations* (representing a connection between objects); *objective legal connections* (representing a connection between a subject and an object). Ruiter, above note 20 at pp. 365–369.

<sup>23</sup> See Ruiter, above note 19 at p. 2. Ruiter's analysis can be seen as a legal application of the linguistic philosophy of John Searle, for instance presented in his *Speech Acts* (Cambridge University Press, 1990).

and recognized by constitutive rules. Thus, the institutional fact ‘marriage’ is created and recognized by the fact that constitutive rules exist which label the relationship between a man and a woman on the basis of a certain promise as ‘marriage’. Whenever the constitutive rule draws the institutional fact into the realm of law (thus making it a legal concept), we talk about an institutional *legal* fact.

Although dealing with another subject, in a recent paper Werner clarified the distinction between an institutional fact and the attached rights, duties and competences.<sup>24</sup> Applied to our topic the analysis runs as follows. ‘Legal persons’ are institutional legal facts since they exist by virtue of a constitutive legal rule that makes their creation possible. However, the legal person may only exercise its rights, duties and competences (and thus become a ‘successful’ legal person) when a relation is established between the institutional fact (*being* a legal person) and the rights, powers and responsibilities attached to the existence of that institutional fact (the ‘legal capacities’). The institutional fact as such is something of which the existence cannot be denied (*being a fact*) once a constitutive rule decides on its existence. This also underlines the view that *partial* legal personality is impossible: it either exists or it does not. The institutional legal fact of being a legal person is not something that can be counted and measured; its reality consists in its being used and accepted. On the other hand, the legal *capacities* attached to the institutional legal fact are not fixed and may indeed vary according to the amount of rights, duties and competences conferred on the legal person.

This once more reveals that the discussion in European legal and political circles concerning the EU’s legal status is too much based on the confusion between *being* a legal person and the *possession* of legal capacities. On the basis of the rights, duties and competences of the international entity laid down in the treaty one may question the existence of certain capacities. However, there is no need to question the independent meaning of a legal institution, of which the very purpose is to make possible the legal debate on the existence of legal capacities (see *infra* par. III. 3).<sup>25</sup>

### 3. ‘Autonomy’ as the Conclusive Criterion

An investigation into the distinction between the concluding partners of a treaty on the one hand and the entity established by the treaty on the other, forces one to enter what one may call the core of international institutional law. After

<sup>24</sup> See W. Werner, ‘Speech Act Theory and the Concept of Sovereignty: A Critique of the Descriptivist and the Normativistic Fallacy’, (unpublished paper, 2000) at pp. 7–8.

<sup>25</sup> *Ibid.* at p. 6.

all, it is the presumed distinction that exists between the two that justifies the very existence of this special branch of international law. Therefore, the relevance of the requirement of a distinction between the states and the international entity they created – as put forward by the International Court of Justice in the *Reparation* case – is obvious. For, if there is any criterion fit to clarify the distinction between a ‘personal legal connection’ and a ‘legal person’, it would be the distinction between the participating states and the ‘independent’ entity they created.

At the same time, this question has never been dealt with thoroughly in textbooks on international organizations. Most studies somewhat circumvent the difficulties surrounding this topic by pointing to required characteristics of international organizations. Thus White, for instance, focuses on a description of different views on legal personality,<sup>26</sup> while Amerasinghe lists the criteria that can be derived from the *Reparation* case and seems to stress the importance of the possession of certain legal capacities by international organizations.<sup>27</sup> Schermers and Blokker underline the fact that at least one organ of the (alleged) international organization must have ‘a will of its own’.<sup>28</sup> Despite the valuable insights offered by these studies, they seem to relocate the problem rather than to solve it. There is much truth in saying that the new entity must have a will of its own, the question however remains: *when* does it have a will of its own? Without claiming to know the answer to this key question, an attempt could be made to take the discussion one step further by trying to elaborate upon the notion of the ‘autonomous’, or at least ‘separate’ will of the international entity.

Starting points from which to find answers to the question were provided by authors in studies on the concept of ‘supranationalism’.<sup>29</sup> As asserted earlier, both individually and cumulatively the parameters used there indeed give a clue

<sup>26</sup> N. D. White, *The Law of International Organizations* (Manchester University Press, 1996) at p. 27.

<sup>27</sup> C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 1996) at p. 83.

<sup>28</sup> Schermers and Blokker, above note 6 at p. 23.

<sup>29</sup> See for references Wessel, above note 1 at fn. 30. Following some literature on this topic, the following key parameters can be listed: 1.) the possibility of decision-making by the international institution, independently from the Member States; 2.) the ability of the international institution to enact binding rules by majority vote; 3.) the possibility to enact rules with a direct binding effect on the citizens of the Member States; 4.) the existence and competences of a parliamentary body; 5.) the existence of a judicial organ with (exclusive) competences in the area of treaty interpretation and, additionally, with powers to enforce the observance of the rules; 6.) financial autonomy; 7.) an independent existence; the impossibility of unilateral, or even collective, withdrawal (in the latter case it is no longer possible to dissolve the international organization); and 8.) the power of the international organization to alter or revise its own statute without the collaboration or confirmation of all Member States.

as to the existence of a distinction between the organization and its Member States. However, despite the merits of this approach in visualizing the distinction between an international entity and its members, concepts of ‘supranationalism’ or ‘transfer of powers’ do not seem to provide ultimate answers since in most cases (at least where the topic of this study is concerned) we are confronted with newly created competences rather than with ‘transferred’ competences. Moreover, it is never indicated how many conditions should be met to decide on the entity’s legal autonomy. What we look for are the *minimum* features of an international entity to conclude on some degree of independence *vis-à-vis* its Member States. With the help of Ruiter’s analysis of legal persons and of the elements which then are composed, an attempt can be made to select the relevant characteristics of an international entity in order to conclude on its legal personality.<sup>30</sup> It is important in this respect to recall the assertion that international legal personality only refers to the legal *status* of an entity.

According to Ruiter, three subsystems of legal conditions are required for legal institutions to play the role of a subject enabling a certain social group to act as a single agent and thus as a ‘legal person’:<sup>31</sup> 1. the existence of *decision-making processes*; 2. the existence of practices that can be conceived of as *external behaviour*; and 3. the existence of *behaviour of others* towards the legal person. Ruiter furthermore pointed to the fact that fictitious entities are incapable of acting and that they depend on other subjects for the performance of their acts. This assertion does not seem too far-fetched. For example, it would indeed be impossible to meet or talk to the ‘EU’. Therefore, generally legal persons are equipped with organs that are made responsible for taking the decisions and performing the acts imputed to the former. In that sense, organs are legal persons within legal persons. Organs may be composed of one natural person (the ‘office holder’, e.g. Mr. Solana as the High Representative for CFSP), or they may be composed of a number of subjects that are assigned the task of deciding and acting jointly on behalf of the organ (the ‘board’, e.g. the Council of the EU). The legal relation between the natural person and the organ (mostly by way of a ‘seat’ in the organ) is referred to as *membership*. The acts of members, though collectively constitutive of acts ascribed to the subject presented by the organ, are not identical with the acts of the latter. The result of acts that are ascribed to organs composed of members (‘boards’) are termed *decisions*. Since many legal persons have two or more organs, rules are required with a view to a division of powers between the organs as well as to their mutual relations. Not only must the division of powers ensure

<sup>30</sup> See D. W. P. Ruiter, ‘Institutions from the Perspective of Institutional Legal Theory’, NIG working papers 95-15 (University of Twente, 1995) at pp. 12–17.

<sup>31</sup> See Ruiter, above note 19 at pp. 102–103. For reasons of clarity Ruiters’ arguments have been simplified, which, of course, does not do justice to his carefully chosen words.

that the decisions and acts of the different organs can be perceived as originating from one single will (thus requiring authority and accountability rules), this internal practice must also be related to the surrounding societal practice. This brings us not only back to the necessary existence of legal *capacities*, but also leads us to rules on the responsibility of legal persons for violations of the law imputable to its organs (legal *liability*).

Indeed, the existence of these elements (*organ, membership and decision*) all imply a distinction between the participating states and the international entity. In fact, there is a strong inter-linkage between these elements. Organs act on behalf of the international entity, and are not to be equated with the (collectivity of) the states, in which case the term 'conference' would be more appropriate. The notion of 'membership' (in contrast to 'participation') underlines a similar distinctiveness of the international entity. This seems to allow for the conclusion that for an international entity to be regarded as existing separately from its Member States, the entity must have a decision-making organ that is able to produce a 'corporate' will, as opposed to a mere 'aggregate' of the wills of the Member States.<sup>32</sup> The outcomes of collective decision-making processes must allow for their ascription to an international organ rather than to the collectivity of the participants.<sup>33</sup> Admittedly, this also looks more like moving the problem than solving it, but at least it brings the issue back to its essentials: a new legal entity exists when the decisions are no longer taken by the collectivity of the participating states, but by an organ of the international entity, whose legal existence and capacity to act depend on rules of the legal person. This may also have been the underlying notion in the observation of the International Court in the *Reparation* case that:

The Organization is not merely a centre 'for harmonizing the actions of nations in the attainment of common ends' (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5). [I]t could not carry out the intentions of its founders if it was devoid of international personality.<sup>34</sup>

<sup>32</sup> See Klabbers, above note 9 at p. 243; E. Paasivirta, 'The European Union: From an Aggregate of States to a Legal Person?', *Hofstra Law & Policy Symposium* (1997), pp. 37–59; and Rama-Montaldo (1970) at p. 145: 'It is the existence of organs which makes it possible to distinguish international organizations from other looser associations of States like, for example the British Commonwealth'.

<sup>33</sup> See D. W. P. Ruiter, 'Normative and Real Institutions', in B. Steunenberg and F. van Vught (eds.), *Political Institutions and Public Policy* (Kluwer Academic Publishers, The Hague 1997), pp. 67–81 at pp. 65–66.

<sup>34</sup> *Reparation* case, cited *supra*.

In this perspective decision-making rules need to be present but their contents are less conclusive. The question whether decisions are taken unanimously or by a (qualified) majority is less relevant. Unanimity does not necessarily mean that decisions are not decisions of an organ, the forming of the ‘common will’ not being dependent on one Member State.<sup>35</sup> The same line of reasoning would put the relevance of the legal nature of decisions into perspective: ‘declaratory’ statements do not automatically hint at ‘intergovernmental’ cooperation, nor do ‘imperative’ decisions conclusively reveal the legal nature of the entity by which they were adopted. On the other hand, when the term ‘decision’ is used correctly, it has to be taken by an organ of an international legal entity – otherwise, the term ‘agreement’ would better suit the outcome of the negotiating process.<sup>36</sup>

Regarding decision-making, it may be recalled that decisions can be seen as normative acts.<sup>37</sup> The performance of these normative acts takes place by appeal to a normative power, which in turn rests on a power-conferring norm.<sup>38</sup> Power-conferring norms are to be found in the international legal agreement (‘treaty’) by which the new entity was established. In fact, it is these power-conferring norms that seem to imply the autonomous decision-making capacity of the international entity, allowing that entity to develop its own legal regime (in the sense of new norms and rules).<sup>39</sup> As we have seen, this is confirmed by the approach taken by the International Court in the *Reparation* case, when it concluded on the existence of general competences on the basis of specific competences attributed to the organization. One could argue that these general competences allow the organization to develop other specific competences than the ones that are explicitly referred to in the constituting treaty. Hence, – and it is admitted that this brings us back to the initial question, albeit with a reduced task – in order to decide on the legal status of an international entity it is important carefully to study the powers of the alleged ‘organ’. For instance, using Rama-Montaldo’s words, the distinctive feature does not exist in those cases in which states undertake a reciprocal collaboration through the medium of a ‘common organ’ whose manifestations of will are attributed simultaneously

<sup>35</sup> See Trüie, above note 9 at p. 15, and Schermers and Blokker, above note 6 at p. 30.

<sup>36</sup> In this respect the difference between ‘decision-making’ and ‘negotiation’ seems helpful as well. (In the *Intergovernmental* Conference negotiations took place on the decision-making procedures of the European Union.)

<sup>37</sup> See also Trüie, above note 9 at p. 38: ‘Handlungsbefugnisse, die Rechtssubjektivität begründen sollen, müssen Befugnisse zu rechtsverbindlichen Handlungen sein’.

<sup>38</sup> See Ruiter, above note 19 at p. 15.

<sup>39</sup> Recall that in Ruiter’s terminology norms present a particular state of affairs that ought to be realized by way of a social practice based on a general belief in the existence of that state of affairs. Rules prescribe that, whenever a fact of a certain category occurs, a certain norm comes to apply. *Ibid.* at p. 16.

and identically to all the states to which the organ is common.<sup>40</sup> In these cases the organ is only to be seen as a ‘pseudo-organ’ and the concept loses its distinguishing quality.

### III. The EU as a Legal Person

#### 1. Diverging Views

Over the past few years, a separate line of literature has pointed to the Union’s *objective* status as a legal person.<sup>41</sup> However, the *subjective* dimension – the conclusion that the organization was ‘intended’ to have rights, duties, power and liabilities on the international plane – is more difficult to reach, since some states (and their constitutional courts) have explicitly stated at the time of the ratification of the TEU, that the Union is not to be regarded as a legal person with individual legal capacities.<sup>42</sup> This forms the reason for most writers to deny the EU legal personality. As a matter of fact, the *travaux préparatoires* of the Maastricht negotiations seem to indicate an explicit unwillingness of the Member States to confer on the Union independent rights and

<sup>40</sup> Rama-Montaldo (1970) at p. 146.

<sup>41</sup> It may be recalled that it was, and still is, generally maintained that the Union lacks legal personality. See for instance U. Everling, ‘Reflections on the Structure of the European Union’, CML Rev. (1992), pp. 1053–1077; D. M. Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’, CML Rev. (1993), pp. 17–69; M. R. Eaton, ‘Common Foreign and Security Policy’, in D. O’Keefe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, London 1994), pp. 215–226; P. S. R. F. Mathijsen, *A Guide to European Union Law* (Sweet & Maxwell, London 1995); Schermers and Blokker, above note 6; or N. A. E. M. Neuwahl, ‘A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam’, EFA Rev. (1998), pp. 177–196.

<sup>42</sup> According to the German *Bundesverfassungsgericht* in the so-called ‘Maastricht Urteil’ the Union was not to be seen as ‘*ein selbständiges Rechtssubjekt*’ or as ‘*Träger eigener Kompetenzen*’, BverfGE 89 at p. 195 (in English: German Federal Constitutional Court judgement of the Maastricht Treaty of 12 October 1993, 33 *I.L.M.* 388 (1994)). The Netherlands Government, for instance, explicitly denied that the Union would be a new international organization possessing legal personality; see *Memorie van Antwoord bij de goedkeuring van het Verdrag van Maastricht*, at p. 22; *Memorie van Toelichting*, at p. 7 and *Nader Rapport*, at p. 18. The Dutch Presidency’s view at the time was supported by the Director General of the Council Legal Service and by the Director General of the Commission Legal Service. See D. McGoldrick, *International Relations Law of the European Union* (Longman, London 1997) at p. 38.

duties,<sup>43</sup> despite some attempts by the Commission to endow the Union with explicit treaty making capacity.<sup>44</sup> The reasons were not the same for each and every individual Member State. Some states were afraid of an ‘intergovernmentalization’ of the external competences of the Community (e.g. Belgium, the Netherlands, Luxembourg and Italy), others were of the opinion that failing legal personality would make the Union ‘weaker’ and less able to affect the sovereignty of the Member States (e.g. the UK).<sup>45</sup> The discussion was repeated during the Intergovernmental Conference (IGC) on the Treaty of Amsterdam. In 1995 the Report of the Reflection Group mirrored the continuing difference of opinion:

A majority of members point to the advantage of international legal personality for the Union so that it can conclude international agreements on the subject matter of Titles V and VI concerning the CFSP and the external dimension of Justice and Home Affairs. For them, the fact that the Union does not legally exist is a source of confusion outside and diminishes its external role. Others consider that the creation of international personality for the Union could risk confusion with the legal prerogatives of Member States.<sup>46</sup>

Indeed, despite the explicit provision in the Draft Treaty produced by the Irish

<sup>43</sup> In the opinion of, for instance, Everling ‘the Union is not a legal person and does not have legal capacity under international law’, Everling, above note 41; also Eaton, above note 41 at p. 224. The reasons for Eaton to deny the Union legal personality are the absence of any concrete provision to that end, the fact that the external legal relations are dealt with by the Community and the evidence of the (unpublished) *travaux préparatoires*. See also T. Heukels and J. de Zwaan, ‘The Configuration of the European Union: Community Dimensions of Institutional Interaction’, in D. M. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration*, Vol. II (Martinus Nijhoff Publishers, Dordrecht 1994), pp. 195–228 at p. 202: ‘[...] it may safely be assumed that the signatory states deliberately refrained from attributing any legal personality to the Union. Consequently, the Union does not have legal capacity under international law [...]’. See also Curtin, above note 41 at p. 27; Ph. Willaert and C. Marqués-Ruiz, ‘Vers une politique étrangère et de sécurité commun: état des lieux’, *Rev. du Marché Unique Européen* (1995), pp. 35–95 at p. 38, and the authors referred to by G. Ress, ‘Ist die Europäische Union eine juristische Person?’, *EuR* (1995), pp. 27–40 at p. 28 fn. 6.

<sup>44</sup> To this end the Commission proposed to modify Article 228a EC (now Article 301) in order to make it possible for the Union to conclude treaties related to CFSP issues; supplement 2/91 – *Bull. EC*, at p. 192.

<sup>45</sup> C. Curti Gialdino, *Il Trattato di Maastricht sull’Unione Europea* (Istituto Poligrafico e Zecca dello Stato, Roma 1993) at p. 30; Devroe and Wouters, above note 9 at p. 71.

<sup>46</sup> Report of the Reflection Group on the IGC, December 1995, at p. 40.

Presidency in December 1996 that ‘The EU shall have legal personality’,<sup>47</sup> no reference to this status can be found in the final text of the 1997 TEU. It was clear from the Irish Draft that there was not yet consensus on the final formulation, notwithstanding the conviction of some Member States that the Union must be regarded as a legal person.<sup>48</sup> However, the fact that the reference to the legal personality of the Union was removed in the final text cannot be used to decide *conclusively* that the Member States in the end withheld that personality from the Union. It could also be argued that no consensus could be reached on explicitly referring to the legal status of the Union in the Treaty.<sup>49</sup>

In that respect it should also be pointed out that, with regard to the element of ‘intention’, it would seem that the International Court of Justice in the *Reparation* case was not referring to some subjective intention in the minds of the founders but to an objective one that was to be found in the circumstances of creation and in the constitutive treaty.<sup>50</sup> In doing so, the Court did not rely on either the so-called ‘will theory’ (in which the will of the states is conclusive) or the ‘objective theory’ (in which international legal personality

<sup>47</sup> *The European Union Today and Tomorrow, Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future. A General Outline for a Draft Revision of the Treaties*, Document CONF 2500/96, Brussels, 5 December 1996, Chapter 13. More extensively on this topic: Neuwahl, above note 41.

<sup>48</sup> Illustrative in this respect is the Report of the Italian Presidency presented to the European Council in June 1996, in which the legal personality of the Union was acknowledged. The Report is reproduced in European Parliament Intergovernmental Task Force, *White Paper on the 1996 Intergovernmental Conference, Vol. 1, Official Texts of the European Union Institutions*, at p. 64.

<sup>49</sup> A similar conclusion is drawn by N. M. Blokker and T. Heukels, ‘The European Union: Historical Origins and Institutional Challenges’, in Heukels *et al.*, above note 9, pp. 9–50 at p. 37. See also the statement made by British Prime Minister Tony Blair to the House of Commons on 18 June 1997: ‘[...] others wanted to give the EU *explicit* legal personality across all pillars. At our insistence, this was removed’ (*emphasis added*). This seems to confirm the assertion made by De Witte, above note 9 at p. 63, that the ‘lack of consensus is, apparently, due to the ‘word-fetishism’ displayed once more by the British delegation, but [that] the subjective intention to withhold legal personality does not exclude that legal personality may have been implicitly granted [...]’. See also I. Seidl-Hohenveldern and G. Loibl, *Das Recht der Internationalen Organisationen einschliesslich der Supranationalen Gemeinschaften* (Carl Heymanns Verlag, Köln 1996) at p. 11: ‘Das Fehlen ausdrücklicher Bestimmungen über die *Rechtspersönlichkeit* der EU im Völkerrecht und im innerstaatlichen Recht ist kein Grund, diese der EU zu verweigern. Sie kann solche vielmehr kraft *implied powers* [...] genießen. Im übrigen entspricht es dem Willen der Mitgliedstaaten, der EU einen “einheitlichen institutionellen Rahmen zu geben” [...]’.

<sup>50</sup> Amerasinghe, above note 27 at p. 82. With regard to the United Nations, the Court argued that ‘[...] it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged’.

simply follows from the existence of an international organization).<sup>51</sup> Rather, a combination of both elements was used to justify the possession of legal personality by the United Nations (UN). The will of the Member States was not instrumental in establishing the legal personality of the organization, but rather in determining the *capacities* of the organization.<sup>52</sup> This seems to be underlined by the opinion of the Court that ‘the rights and duties of an entity such as the Organization must depend upon its purposes and function as specified or implied in its constituent documents and developed in practice’. Hence, it is the explicit or implied competences of an organization that may indicate the existence of international legal capacities.

The mainstream view among experts in European law still is that the EU – when seen as a legal institution – is to be concerned of as a ‘personal legal relation’ between the participating states.<sup>53</sup> In this view, the ‘Union’ merely reflects traditional mechanisms of intergovernmental cooperation under international law, in which the European Council, for instance, is to be qualified as a conference of governments, rather than as an organ of an international organization. The same holds true for the Council of Ministers once it acts under CFSP or PJCC. While not denying the legal nature of the relations between the actors and the existence of rules on delimitation and coherence,<sup>54</sup> this view rejects the idea of a new entity standing separately from the High Contracting Parties that established it. The decisions taken on the basis of the CFSP or PJCC provisions are not regarded as legal acts of the Union, but as multilateral agreements among governments.

This view is also found in the opinion of the German Constitutional Court, delivered prior to German ratification of the TEU.<sup>55</sup> The Court noted that

<sup>51</sup> See more extensively: Klabbers, above note 9; and P. J. Kuyper, ‘The Netherlands and International Organizations’, in H. F. van Panhuys *et al.* (eds.), *International Law in the Netherlands*, Vol. II (Alphen aan den Rijn, 1979), pp. 3–41 at pp. 15–19.

<sup>52</sup> *Reparation* case at 180; *Cf.* Klabbers, above note 9 at p. 245.

<sup>53</sup> This view is most clearly and consistently expressed in Chr. Koenig and M. Pechstein, *Die Europäische Union: Der Vertrag von Maastricht* (J.C.B. Mohr, Tübingen 1995) at pp. 6 and 21–24. See also L. F. M. Besselink, ‘Tussen supranationaliteit en soevereiniteit: over het niet-communautaire recht van de Europese Unie’, in L. F. M. Besselink *et al.* (eds.), *Europese Unie en nationale soevereiniteit*, Publicaties van de staatsrechtkring (Tjeenk Willink, Deventer 1997). Implicitly this concept is used by most other authors as well. See for examples: Everling, above note 41; Schermers and Blokker, above note 6 at p. 977; and P.-C. Müller-Graff, ‘The Legal Basis of the Third Pillar and its Position in the Framework of the Union Treaty’, *CML Rev.* (1994), pp. 507–510.

<sup>54</sup> See for instance M. Pechstein, ‘Das Kohärenzgebot als entscheidende Integrationsdimension der europäischen Union’, *EuR*, Heft 3 (1995), pp. 247–258 at p. 247.

<sup>55</sup> See the German Federal Constitutional Court judgement of the Maastricht Treaty of 12 October 1993, *op. cit.*

the Union provides 'itself' with means in the same way as it sets 'itself' objectives in Article B: the Maastricht Treaty construes the Union as a name for the Member States acting in concert, not an independent legal entity. It is the Member States which, through the Treaty, provide the means and set the objectives for the Union.<sup>56</sup>

It indeed seems self-evident to regard the relations between the fifteen EU states as a personal legal relation. After all, their cooperation is based on the legal institution 'treaty'. The provisions laid down in this treaty reflect the agreements among the contracting parties. The question, however, is whether or not these agreements include the establishment of a new international entity. An affirmative answer to this question would present the Union as a 'legal person'. In this sense the Union is not only a set of mutual legal rights and duties of fifteen states, but at the same time an entity which in legal terms and to a certain extent occupies an independent position *vis-à-vis* its *Member States*, as well as towards third states. Qualified as a legal person the EU can be regarded as either a 'state', an 'international organization', or a legal person *sui generis* (compare the qualification as a '*Staatenverbund*' by the German Bundesverfassungsgericht).<sup>57</sup> Since the qualification of the Union as a 'state' is obviously implausible – as the criteria for statehood set by international law are not met<sup>58</sup> – we are left with a reference to the Union in terms of an international organization or a legal person *sui generis*. While a choice between the latter two qualifications may be of interest to students of the law of international organizations in order to decide whether or not the Union should be an object of their study, no direct relevance exists in relation to the enjoyment of legal personality. Nevertheless, the term 'international organization' is occasionally used below for reasons of convenience.

<sup>56</sup> *Ibid.* at pp. 428–429.

<sup>57</sup> *Ibid.* at p. 155. See also Von Bogdandy, above note 57. See for a variety of international legal persons other than states or international organizations: Brownlie, above note 16 at pp. 60–64.

<sup>58</sup> Article I of the Montevideo Convention on Rights and Duties of States (1933) provides: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States'. While at first sight the European Union may score relatively high on these points, it remains clear that its Member States have not ceased to exist as individual states. See Brownlie, above note 16 at p. 72.

## 2. *Application of the Different Institutional Elements*

The question now is whether the TEU supports a distinctive position of the Union *vis-à-vis* its Member States. Apart from the arguments relating to the purposes and functions of the Union presented earlier,<sup>59</sup> answers may be found in an application of Ruiters' description of a legal person to the EU.

The first question then is whether the institutions active in the field of European law-making can be regarded as organs of the EU and not (only) of the European Communities. Depending on the rules by which they operate and are instituted, they can either confirm or deny the Unions' status as a legal person. On the basis of Article 7 TEC, the status of the European Parliament (EP), the Council, the Commission, the Court of Justice and the Court of Auditors as organs ('Institutions') of the European Community is beyond any doubt. The question is whether these (or at least one of these) organs can be regarded as organs of the EU, or whether the EU is maybe represented by another (non-EC) organ. This question has been on the agenda of European law experts ever since the establishment of the EU. Indeed, the TEU does not explicitly refer to institutions of the Union. The only exception may be found in Article 4 TEU, which stipulates that '[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof'. This explicit link between the European Council and the Union, together with the fact that the provision which serves as the basis for the European Council is to be found in the TEU – and not in Article 7 of the EC Treaty – at least indicates that the European Council must be regarded as an organ of the Union.<sup>60</sup>

What about the *other* institutions on which competences have been conferred in the context of CFSP and PJCC? In accordance with the 'single institutional framework which shall ensure the consistency and the continuity of the activities carried out' (Article 3 TEU), the decisions on CFSP and PJCC are taken by the same institutions that have functions in other areas of the Union. Contrary to early assertions that these institutions remain *Community* institutions – only 'borrowed' to make decision-making in the other two areas of the Union possible<sup>61</sup> – it has been argued that these institutions must in fact

<sup>59</sup> See my earlier contribution to this journal, Wessel, above note 1; as well as Wessel, above note 2, Chapter 7.

<sup>60</sup> In this sense, see also: Everling, above note 41; Curtin, above note 41 at p. 27; Curti Gialdino, above note 45 at p. 29; Trüe, above note 9 at p. 15; O. Dörr, above note 9 at p. 337; H. Lecheler, 'Der Rechtscharakter der 'Europäischen Union'', in J. Ipsen *et al.* (eds.), *Verfassungsrecht im Wandel* (Carl Heymanns Verlag, Köln 1995), pp. 383–393 at p. 388.

<sup>61</sup> See for instance Curtin, above note 41 at p. 26; Everling, above note 41 at p. 1061; Dörr, *ibid.* at p. 337; and Heukels and De Zwaan, above note 43.

be considered as institutions of the Union. This approach seems to have been developed in a separate line of the existing literature.<sup>62</sup> Support for this view can be found in the text of Article 5 TEU as well, which points in the direction of institutions of the Union, albeit with ‘area-dependent’ competences and obligations.<sup>63</sup>

The EP, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the provisions of this Treaty.

An additional argument supporting the view that in CFSP and PJCC we are dealing with the same institutions as the ones we know in the Community may be found in Articles 28 and 41 TEU. These articles list a number of EC provisions dealing with the institutions which shall apply to CFSP and PJCC as well.

The new names of the decision-making Institutions (‘Council of the EU’ and ‘European Commission’) reflect the extension of their competences to areas other than those falling within the Community sphere.<sup>64</sup> Moreover, the Council’s Secretary-General is at the same time the ‘High Representative for CFSP’ (Article 26 TEU) and political Declarations are adopted by the Council in the name of the Union. The functions of the EP are equally related to all Union

<sup>62</sup> See for instance G. Ress, *Die Europäische Union und die neue Qualität der Beziehungen zu den Europäischen Gemeinschaften* Jus (1992) at p. 985: ‘Die Organe der Gemeinschaften sind zugleich Unionsorgane; eine Organleihe der Union bei der Gemeinschaften findet also nicht statt’; Trübe, above note 9 at pp. 16–17, who emphasized that the principle of the single institutional framework and the principle of coherence are incompatible with the ‘borrowing’ thesis; Curtin and Dekker, above note 9; Wessel, above note 1 and note 2 and R. Barents and L. J. Brinkhorst, *Grondlijnen van Europees Recht* (Tjeenk Willink, Deventer 1999) at p. 86 (in contrast to earlier editions of this leading Dutch textbook). Viewing the institutions as organs of the Union may be a reason to put the distinction between ‘institutions’ and ‘organs’ into perspective; See P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities* (edited and further revised by L. W. Gormley, Kluwer Law International, The Hague 1998) at pp. 310–311.

<sup>63</sup> This not only holds true for the institutions that are referred to in the CFSP procedures (the Council, the Commission and the European Parliament), but also for the Court of Justice and the Court of Auditors, albeit that in the latter two cases the link with Community law will have to be apparent.

<sup>64</sup> *Décision du Conseil du 8 Novembre 1993 relative a sa dÈnomination suite a l’entrÈe en vigueur du Traite sur l’Union Européenne*, Decision 93/591, O.J. L 281, 16 November 1993. The modification of the name of the Commission is informal only, because, as it rightly observed, Article 9 of the Merger Treaty was not modified by the Treaty on European Union. Willaert and Marqués-Ruiz (1995) at p. 46, fn. 26.

areas, either through an influence on the decision-making in CFSP and PJCC (Articles 21 and 39 TEU) or through its influence on the budget. Finally, even the Court of Auditors is (implicitly) involved in non-Community matters, whenever CFSP or PJCC expenditure is charged to the EC budget.

This means that not only the European Council, but also the key Community institutions can be regarded as organs of the Union. The claim that these organs would only represent the Member States when operating under Title V or VI of the EU Treaty does not make sense. Article 5 TEU in particular makes clear that the organs remain the same regardless of the legal base that serves for their actions, but that only their competence depends on the legal base chosen in either the Community or the EU Treaty. Regarding the Council, as the key decision-making organ, decision-making rests on explicit power-conferring norms in all Union areas. It would be difficult to hold the view that the Council is merely a meeting hall for fifteen states once it acts under CFSP or PJCC provisions. The Council's agenda does not clearly distinguish CFSP and PJCC matters from Community issues, and everything in the EU Treaty points in the direction of a *membership* of the individual states in the Council.

As far as one of Ruiter's conditions – the existence of *decision-making* procedures and the ability to produce *decisions* – is concerned, one may further point to the competence-conferring norms governing the decision-making not only in the Communities but also under CFSP and PJCC. The competences of the various organs involved are written down in detailed procedures, thus indeed establishing a division of competences between the Institutions. In the light of such procedures, it is hard to maintain that these norms merely govern the relations between states. While some norms indeed have this purpose (e.g. the obligations of Member States to support the Union's external and security policy and to refrain from any action which is contrary to the interests of the Union – Article 11 TEU), other norms explicitly address the organ in question and not the Member States (e.g. 'The Council shall adopt common positions' – Article 15 TEU). The Treaty clearly distinguishes between norms directed at the Member States and norms addressed to the Institutions.

As far as the *decisions* are concerned the terminology at first sight hints at agreements between the Member States, rather than at actual decisions taken by an organ (e.g. 'Joint Actions', 'Common Positions', 'Common Strategies'). Notwithstanding this terminology, the Council has clearly been endowed with competences to produce decisions in the non-Community areas that are thus to be regarded as decisions of an organ of the EU. A general legal basis may be discovered in Article 13 TEU for 'decisions necessary for defining and implementing the common foreign and security policy', while the same article provides for the definition of Common Strategies, as well as for the adoption of principles and general guidelines by the European Council. Two specific legal

bases are to be found in Articles 14 and 15, provides for the adoption of two broad categories of CFSP decisions: Joint Actions and Common Positions. Furthermore, a specific legal basis may be discovered in Article 17, paragraph 3, allowing the Union to avail itself of the Western European Union in the case of defence matters. Regarding PJCC, a specific competence of the Council to adopt decisions ('Common Positions', Framework Decisions', general 'Decisions' and 'Conventions') can be found in Article 34 TEU. Only with regard to the latter (the 'Conventions') one may argue that, in the end, they are to be seen as 'agreements' and not as 'decisions', since the Council merely 'establishes' these conventions and subsequently recommends them to the Member States for adoption in accordance with their respective constitutional requirements. And, indeed, measures implementing Conventions are adopted '*within*' the Council, rather than by the Council, indicating a limited role of the Council *as such*.

While this reflects the role of the Council as an organ of the Union, academic research over the years equally revealed the involvement of the other Institutions in the non-Community issues.<sup>65</sup> The competences of the Court of Justice in particular permit this organ to further define and develop the EU's legal system.

### 3. *The Treaty-making Capacity of the Union*

The second condition mentioned by Ruiter for a legal institution to be regarded as a legal person, concerns the existence of external practices. The practices may be based on explicit as well on implied competences. In one case an international legal capacity of the Union quite explicitly follows from a Treaty provision. At the same time this happens to be one of the most fundamental capacities, almost inherent to any effective international legal person. The Amsterdam Treaty introduced the possibility for the Council to conclude international agreements. Article 24 TEU provides:

When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this Title, the Council, acting unanimously, may authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency.

It has been argued that such agreements are concluded by the Council not on

<sup>65</sup> With regard to CFSP, a survey may be found in Wessel, above note 2.

behalf of the Union but on behalf of the Member States.<sup>66</sup> An argument is often found in the second part of Article 24:

No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them’.

Additional confusion is caused by Declaration No. 4, adopted by the Amsterdam IGC, which reads: ‘The Provisions of Article J.14 and K.10<sup>67</sup> [now Articles 24 and 38 TEU; RAW] of the TEU and any agreements resulting from them shall not imply any transfer of competence from the Member States to the EU’.

How should we interpret Article 24 and Declaration No. 4? Blokker and Heukels already indicated that the view that the agreements are in fact concluded on behalf of the Member States is difficult to reconcile with Article 11 TEU, according to which it is for the Union to ‘define and implement a common foreign and security policy’, as well as with Article 23, paragraph 1, providing that ‘[d]ecisions under this Title shall be taken by the Council [...]’. The conclusion of agreements is one instrument the Union may use in implementing CFSP. As we have seen, the Union as such does not act; it acts through its organs and institutions, and the capacity to conclude agreements has been given to the Council.<sup>68</sup> Moreover, Article 24 clearly provides that the Council concludes the international agreements after its members (the

<sup>66</sup> See in particular Neuwahl, above note 41; M. Cremona, ‘External Relations and External Competence: The Emergence of an Integrated Policy’, in P. Craig and G. de Búrca (eds.), *European Union Law: An Evolutionary Perspective* (Oxford University Press, 1999), pp. 137–175 at p. 168; and R. H. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Kluwer, Deventer 1999) at p. 370. See also J. W. de Zwaan, ‘Community Dimensions of the Second Pillar’, in Heukels *et al.*, above note 9 at p. 182, who seems to recognize that this is a legal capacity of the *Union*, but nevertheless denies the existence of a ‘formal legal personality’. It has even been argued that Article 24 agreements are ‘not legally binding’ and not to be viewed as treaties; see the opinion of the Dutch Government in the documents of the Second Chamber, TK 1997–1998, 25 922 (R 1613), no. 5, at p. 51.

<sup>67</sup> According to Article 24 provisions shall also apply to matters falling under PJCC; Article 38 in turn refers back to Article 24.

<sup>68</sup> Blokker and Heukels, above note 49 at p. 34. See also De Witte, above note 9 at p. 63: ‘As the Council is an institution of the European Union, it will be acting in the name of the European Union, and therefore the EU will be a contracting party to the agreement’. And, Hafner, who pointed to the fact that the scope of the treaties is restricted to the ‘implementation of this Title’, i.e. to the implementation of CFSP which, according to Article 11 TEU, is a competence of the Union itself. G. Hafner, ‘The Amsterdam Treaty and the Treaty-Making Power of the European Union: Some Critical Comments’, in G. Hafner *et al.*, above note 12, pp. 257–284 at p. 271.

Member States) have unanimously agreed that it could do so.<sup>69</sup> No reference is made to the fact that the Council in concluding the agreement would only act on behalf of the Member States. On the contrary, the second part of Article 24 underlines that the international agreements will be concluded by the Council on behalf of the Union, since it is provided that agreements shall not be binding on a Member State claiming that it has to comply with national constitutional procedures. This provision only makes sense when the Member States themselves do not become a party to the agreement. After all, the question concerning the application of national constitutional procedures would not need to be brought up when the Member States as such would be the parties to the agreement. *A contrario*, agreements shall be binding on the Union and as Union-law on the Member State that has failed to state that it has to comply with the requirements of its own constitutional procedure.<sup>70</sup>

This is further underlined by the need for a unanimous decision for the conclusion of an agreement. As indicated by Hafner, the Council, only acting as an agent of the Member States would not require such a decision-making procedure as three or four individual Member States could also authorize the Council to perform such an act, a decision to that end not being dependent on the consent of the other Member States. Moreover, in practice it is hardly imaginable that the Council will conclude agreements ‘on behalf of’ certain specified Member States; it will rather act in the name of the Union itself so that the other (state) party will undoubtedly attribute the agreement to the Union.<sup>71</sup>

Declaration No. 4 can therefore be understood as a statement to reassure the public in certain Member States that are particularly sensitive to these issues. Declarations – in case of a conflict with Treaty provisions – can never overrule

<sup>69</sup> The explicit reference to the unanimity rule (as a *lex specialis*) seems to exclude the applicability of the general regime of constructive abstention in cases where unanimity is required as foreseen in Article 23 TEU. Furthermore, as indicated by Hafner, above note 12 at p. 279, the application of the constructive abstention to Article 24 would make little sense, since Article 24 already provides the possibility of achieving precisely the same effect insofar as Member States, by referring to their constitutional requirements, are entitled to exclude, in relation to them, the legal effect of agreements concluded by the Council.

<sup>70</sup> In the same line, Hafner, above note 12 at p. 276: ‘[...] the silence of [the] State amounts to an acceptance of the legal effect of the respective treaty with regard to itself already by virtue of Article 24’. See also I. Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?’, 36 CML Rev. (1999), pp. 703–750 at p. 745: ‘[...] all indications point to agreements concluded in the name of the Union and not the individual Member States’. See also A. Dashwood, ‘External Relations Provisions of the Amsterdam Treaty’, 35 CML Rev. (1998), 1019 at p. 1028; and M. Zuleeg, ‘Die Organisationsstruktur des Vertrags von Amsterdam’, EuR Beiheft 2 (1998), 1515 at p. 153.

<sup>71</sup> Hafner, above note 12 at p. 271.

agreements reflected by the Treaty itself.<sup>72</sup> In any respect, the Declaration in question does not seem to conflict with Article 24 TEU. Since the right to conclude treaties is an original power of the Union itself, the treaty-making power of the Member States remains unfettered. The Declaration can only mean that this right of the Union must not be understood as creating new substantive competences for it.<sup>73</sup>

Nevertheless, the conclusion that the Union possesses a treaty-making capacity calls for an explanation of the role of the Member States and the legal effects of the concluded treaties on their national legal orders. First of all, it was already submitted that Article 24 envisages a separation between the external and the internal effect of an agreement within the Union. Whereas the external effect results from the act of conclusion performed by the Council, the internal effect is achieved through the omission of a declaration of the individual Member State aiming at excluding this effect.<sup>74</sup> It is important to note that the treaty creates a legal relation between the Union and the third state (or organization) involved. In relation to the other party to the treaty in question, the Union is accountable for the execution of this agreement, irrespective of whether or not it imposes duties on the Member States or can be executed only with the cooperation of Member States. The law of treaties does not permit the Union to invoke the provisions of its internal law as a justification for its failure to perform an agreement.<sup>75</sup>

According to Article 24 TEU, the Member States that have not excluded the binding effect of the treaty concluded by the Council ‘may agree that the agreement shall apply provisionally to them’. The meaning of this provision is not clear. It cannot be seen as ‘provisional application’ in the sense of Article 25 of the Vienna Convention,<sup>76</sup> since this would render the provision completely incomprehensible as it is unclear how long the provisional period

<sup>72</sup> Wessel, above note 2 at pp. 37–40.

<sup>73</sup> As also submitted by Hafner, above note 12 at p. 272.

<sup>74</sup> *Ibid.* at p. 273.

<sup>75</sup> *Ibid.* at p. 281, and the Vienna Convention on the international treaties between States and international organizations or between international organizations, Article 27. This provision is generally held to reflect customary international law.

<sup>76</sup> Article 25 reads as follows:

‘Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
  - (a) the treaty itself so provides; or
  - (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

could last. Along the same lines, viewing the ‘provisional application’ as analogous to the obligation in Article 18 of the Vienna Convention<sup>77</sup> not to defeat the object and purpose of a signed treaty would not ensure full observance of the agreement. Hence, the meaning of the provision should probably be found in the regulation of the legal relation between the Member States and the Union. It cannot affect the legal relation between the Union and the third state or other international organization.<sup>78</sup>

Finally, it goes without saying that the competences of the Council on the basis of Article 24 are limited by the material boundaries of the CFSP and PJCC legal systems – as is the case with the other legal bases. Article 24 refers to the ‘implementation of this Title’ and to ‘matters falling under Title VI’, which means that agreements based on Article 24 must aim at reaching the CFSP and PJCC objectives. In practice this means that an agreement with the USA on the non-proliferation of nuclear weapons may be covered by Article 24, but that the same does not hold true for an agreement on education. Likewise, an agreement on the liberalization of trade with Russia will still have to find its basis in Article 133 EC.<sup>79</sup>

To date, the Union has not *explicitly* entered into any international agreements which would prove its possession of international capacities.<sup>80</sup> Nevertheless, earlier references were made to the 1993 document on the ‘Relations between the Union and the WEU’,<sup>81</sup> adopted by the General Affairs

<sup>77</sup> Article 18 reads: ‘A state or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) that state or that organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed’.

<sup>78</sup> See Hafner, above note 12 at p. 283.

<sup>79</sup> Examples taken from Van Ooik, above note 66 at pp. 348–349.

<sup>80</sup> *Contra* G. Ress, ‘Ist die Europäische Union eine juristische Person?’, *EuR*, Beiheft 2 (1995), pp. 27–40 at p. 33, who seems to regard the Accession Treaties with the new Member States as treaties concluded by the Union on the basis of Article O TEU (now Article 49). However, regardless of the competences of the Institutions in this area, the final agreements are concluded between the Member States of the Union and the new State; the Union as such is not mentioned as a party.

<sup>81</sup> Annex IV of Chapter IV of the document on the implementation of the Maastricht Treaty, Brussels European Council, 29 October 1993, Conclusions of the Presidency. Also published as Document 1412 of the Assembly of the Western European Union, 8 April 1994.

Council on 26 October 1993 and accepted by the WEU Council on 22 November 1993. Since on the basis of this document, both organizations are under the clear obligation to work together in explicitly indicated areas, it does not seem too far-fetched to consider this document as an international agreement.<sup>82</sup> And, signing a treaty is a legal act, which can only be performed by (agents of) international legal persons having the capacity to conclude international agreements.<sup>83</sup> The negotiating practice between the two organizations concerning their future merger confirms their status as legal entities. Other examples of international legal obligations may be found in the *Memorandum of Understanding on the EU Administration of Mostar* (MoU),<sup>84</sup> as well as in the 'Exchange of Letters' between the EU, on the one hand, and Norway, Austria, Finland and Sweden, on the other. This exchange of letters underlines the existence of a *jus tractatus* on the side of the Union.<sup>85</sup> Finally, legal effects were also intended when the EU Presidency signed, as one of the 'witnesses', the *General Framework Agreement for Peace in Bosnia and Herzegovina* (the 'Dayton Agreement'), albeit that in this case it was clear from the text that the Union itself was not to be considered a party. The competence of the Presidency to involve the Union in these international matters was, however, not disputed. A comparable situation concerned the EU's witnessing of the signing of the Protocol Concerning Elections (Annex II) in the *Israeli-Palestinian Interim*

<sup>82</sup> See Article 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) in which a 'treaty' is defined as 'an international agreement governed by international law and concluded in written form [...] between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation'. It is indeed generally held that there are no substantive requirements as to form; see for instance Brownlie, above note 16 at p. 606. J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, The Hague 1996), at p. 46, pointed to the fact that a draft of the 1969 Vienna Convention on treaties between states included a separate definition of 'treaty in simplified form', by which was meant 'a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other document concluded by any similar procedure'. However, the juridical differences with 'regular' treaties were thought to be negligible and it proved difficult to come up with a precise definition. Hence, the International Law Commission decided to dispense with a separate definition. See also J. A. Frowein, 'Die Europäische Union mit WEU als Sicherheitssystem', in O. Due *et al.* (eds.), *Festschrift für Ulrich Everling* (Nomos Verlagsgesellschaft, Baden-Baden 1995), pp. 315–326 at p. 323: 'Das [...] Dokument muß als eine völkerrechtliche Vereinbarung zwischen der Europäischen Union und der Westeuropäischen Union gewürdigt werden'. See also Trüe, above note 9 at p. 55. *Contra* Neuwahl, above note 41 at p. 180.

<sup>83</sup> Klabbers, above note at p. 251.

<sup>84</sup> Signed in Geneva on 5 July 1994.

<sup>85</sup> See Klabbers, above note 9 at p. 250. The text of the Letters can be found in *OJ* 1994, C 241/399.

*Agreement on the West Bank and the Gaza Strip*.<sup>86</sup> The Protocol makes several references to the EU and the Union took a parallel Joint Action to support the peace process in the Middle East.<sup>87</sup> The Protocol provides that security issues relating to international observers be dealt with within the framework of the trilateral Palestinian–Israeli–EU forum and provides *inter alia*: ‘The EU will act as the coordinator for the activity of observer delegations’ (Article V(4)); and ‘The EU will only bear [...] liability in relation to members of the coordinating body and to the EU observers and only to the extent that it explicitly agrees to do so’ (Appendix 2(8) to Annex II). This latter provision in particular reveals the Union’s acceptance of a possible future liability on the basis of the Agreement and thus of its standing under international law.

#### 4. *Implied External Capacities*

In addition to explicit capacities, the purposes and functions of an international organization may be an indication of existing *implied* powers, or more accurately in this respect of implied legal capacities. The TEU indeed reveals the existence of a number of specific competences implying more general international capacities on the part of the Union.<sup>88</sup> The distinction between the Union and its Member States and the individual competences of the Union to ‘implement a policy’, to ‘pursue objectives’, to ‘engage in an external and security policy’, to ‘request’ another international organization, to ‘have a position’ and to ‘take action’ seem to indicate the existence of a number of legal capacities on the part of the Union. With regard to the purposes of the Union, Article 2 states that the Union is to assert its identity on the international scene. An international capacity seems to be necessary in order to be able to attain this objective.<sup>89</sup> The CFSP objective in Article 11 ‘to safeguard the common values, fundamental interests, independence and integrity of the Union’ is striking in this respect. The fact that in the final version of this provision the word ‘independence’ was explicitly linked to the EU indicates an intention of the states to confirm the separate status of the Union in international law, and its status as an autonomous entity. Another objective in Article 11 is phrased as ‘to strengthen the security of the Union in all ways’. In this

<sup>86</sup> Concluded in Washington on 28 September 1995. The Interim Agreement is partly reproduced in 36 *ILM* 551 (1997). See also Paasivirta, above note 32 at p. 55.

<sup>87</sup> Council Decision 95/403/CFSP of 25 September 1995 concerning the observation of elections to the Palestinian Council and the coordination of the international operation for observing the elections.

<sup>88</sup> See Wessel above notes 1 and 2, Chapter 7.

<sup>89</sup> Also Dörr, above note 9 at p. 339.

objective it is again implied that there is a difference between the security of the Union and the security of the Member States. The 1992 version even explicitly referred to ‘the security of the Union and its Member States’.

According to Article 12, these objectives shall be pursued by *the Union*. The Member States *as such* are thus put in a less active role; the institutions of the Union are responsible for achieving the objectives, the Member States shall support the *Union’s* policy (Article 11, paragraph 2). Indeed, an international capacity to act seems to follow from these formulations. After all, *the Union* shall decide on Common Strategies and adopt Joint Actions and Common Positions. Other indications of existing international capacities on the basis of specific competences may be found elsewhere. Article 17, paragraph 3 deserves to be highlighted again since it calls upon the Union to avail itself of the Western European Union to elaborate and implement decisions and actions of the Union which have defence implications. This competence entails a formal request on the basis of a treaty to an international organization enjoying legal personality,<sup>90</sup> and therefore implies an international legal capacity of the Union to engage in a legal relationship with other international organizations. According to Article 18, paragraphs 1 and 2 the Union shall be represented by the Presidency in CFSP matters. The Presidency shall be responsible for the implementation of CFSP Decisions and it shall in that capacity express the position of the Union in international organizations and international conferences.<sup>91</sup> The very fact that the Union as such can be represented on the international plane – whether it is through Presidential declarations, *démarches*, statements in international organizations and conferences, or political dialogues – calls for the Presidency to be regarded as an agent of a legal person with international capacities.<sup>92</sup> The same holds true for other ‘agents’ acting on behalf of the Union, like electoral units for monitoring elections<sup>93</sup> and appointed special envoys to supervise the implementation of measures on the spot.<sup>94</sup>

<sup>90</sup> See Article 3 of the Status Agreement, reprinted in A. Bloed and R. A. Wessel, *The Changing Functions of the Western European Union: Introduction and Basic Documents* (Martinus Nijhoff Publishers, Dordrecht 1994).

<sup>91</sup> The argument of the representation by the Presidency is also used by Lecheler, above note 60 at p. 389; Ress, above note 43 at p. 27; and Pernice (1999) at p. 745.

<sup>92</sup> See Trübe, above note 9 at p. 45: ‘Article J.5 Abs. 1 EUV [now Article 18; RAW] kann daher nur so verstanden werden, daß die EU selbst vertreten wird, und dazu muß die EU ein Rechtssubjekt sein’.

<sup>93</sup> See for instance Council Decisions 93/604/CFSP (Russian Parliamentary elections); 93/678/CFSP (South Africa); 96/406/CFSP (Bosnia and Herzegovina); 96/656/CFSP and 97/875/CFSP (Zaire/Congo).

<sup>94</sup> See for instance Council Decisions 96/250/CFSP (African Great Lakes); 96/676/CFSP (Middle East); and 98/289/CFSP (Palestinian Authority).

The assertion of the identity of the Union on the international scene and a capacity to act is furthermore reflected in its Declarations and in some Decisions. Some decisions implicitly underline an autonomous international role of the Union.<sup>95</sup>

As a last argument a reference may be made to Article 17 EC, establishing a 'Citizenship of the *Union*',<sup>96</sup> which, among other things, marks a new phase in the diplomatic protection of the citizens of Union Member States.

The conclusion is that these concrete competences of the Union allow for potential activities that can only be understood on the presumption that the Union possesses international legal capacities.<sup>97</sup> Moreover, the mentioned examples indicate that practice increasingly reveals a behaviour of third states towards the Union as a legal person (Ruiter's third condition).<sup>98</sup> In denying any international capacity of the Union, some Member States have obviously not been aware of the implications of establishing non-Community policy areas in which the Union as such plays an essential role.

<sup>95</sup> See for instance Wessel, above note 1 in which I already referred to the EC Council Regulation on the control of exports of dual-goods, which explicitly refers to the Union where merely mentioning the *Community* would have sufficed: '[...] an effective system of export control on dual-use goods on a common basis is also necessary to ensure that the *international commitments* of the Member States and the European Union [...] are complied with'. Council Regulation (EC) No. 3381/94 of 19 December 1994, *OJ* 1994 L 367; emphasis added. Cf. Dörr, above note 9 at p. 334. That the Union not only can have 'international commitments', but that it even regards itself as a guarantor of the overall international legal order follows from the Common Position on Cuba, in which United States laws are criticised because they 'affect or are likely to affect the established legal order'. Common Position of 2 December 1996. See also Cremona (1998) at p. 93.

<sup>96</sup> Ress, above note 43 at p. 34; and Lecheler, above note 60 at p. 389.

<sup>97</sup> See Klabbers, above note 9; and Lecheler, above note 60 at p. 389: 'Das alles setzt voraus, daß die Union selbst handeln kann. Sie selbst muß Trägerin von Rechten und Pflichten sein können'. Also Von Bogdany and Nettesheim, above note 9 at p. 26, with regard to the 'independent' tasks, competences and obligations of the Union: 'Jede andere Lesart dieser Bestimmungen widerspricht dem Text der Bestimmungen und der Struktur der Organisation'. See also Blokker and Heukels, above note 49; W. Schroeder, 'Die Rechtsnatur der Europäischen Union und verwandte Probleme', in W. Hummer and M. Schweitzer (eds.), *Österreich und das Recht der Europäischen Union* (1996); and D. Vignes, 'L'absence de personnalité juridique de l'Union Européenne: Amsterdam persiste et signe', in Hafner *et al.*, above note 12, pp. 757–770. *Contra* Pechstein, above note 54 at p. 249; Koenig and Pechstein, above note 53 at p. 48; and A. Pliakos, 'La nature juridique de l'Union européenne', *RTD eur* (1993), pp. 208–213 at p. 212.

<sup>98</sup> See for another aspect of this practice, the development of the diplomatic relations of the Union; Wessel, above note 2 at pp. 272–281.

#### IV. Concluding Observations

It is well known that the chosen structure of the EU was a compromise between 'intergovernmentalists' and 'supranationalists', but it is questionable whether the consequences of the introduction of a new legal person were taken into account during the negotiations. CFSP and PJCC may be presented as 'supplementary' by the Treaty, but to keep these areas really apart from the Community regime, one should have been more aware of their inclusion in a EU legal system. The acceptance of the Union as a legal person and the connected 'unity thesis', may very well call for a replacement of the familiar notion of the 'Greek temple', which is mostly used to emphasize the difference between the EC and the other two Union-areas. Indeed, different metaphors have been proposed, ranging from religiously inspired notions such as the 'trinity structure' or the 'gothic cathedral' to the more profane 'Russian doll'.<sup>99</sup> However, it seems that all metaphors have their own flaws and their application usually brings about a number of new questions.<sup>100</sup> Nevertheless, one conclusion emerging from the present article is that the pillar structure is less explanatory and that it may be more appropriate to use the concept of the '*gestufte internationale Organization*' or 'layered international organization' introduced by Trüe and elaborated by Curtin and Dekker in particular.<sup>101</sup> This notion allows for the EU to be seen as a legal entity sheltering a number of other legal entities (the European Communities), which in turn may shelter other legal persons, such as the Investment Bank or the European Central Bank. It also corresponds better to the existence of a legal system (the EU legal system) sheltering the systems of its different issue areas (the European Communities, CFSP and PJCC) as well as the legal systems (or regimes) forming part of them.<sup>102</sup> Irrespective of new attempts to replace the 'Greek temple' by other architectural metaphors, the acknowledgement of the existence of this Union legal system and its status as an international legal person with autonomous capacities to use this status seems essential for a full comprehension of the complex and unprecedented form of international institutional cooperation introduced by the TEU.

<sup>99</sup> See Weiler, above note 19; De Witte, above note 9 and Curtin and Dekker, above note 9 respectively.

<sup>100</sup> Regarding the 'Russian doll' it remains difficult to imagine different dolls being put together side by side in one larger doll.

<sup>101</sup> Trüe, above note 9; Curtin and Dekker, above note 9.

<sup>102</sup> See in that respect A. Dashwood, 'The Council of the European Union in the Era of the Amsterdam Treaty', in Heukels *et al.*, above note 9, pp. 117–129 at p. 126, who also referred to the Union's 'sub-orders' rather than to 'pillars'.

## **V. Postscript – The Treaty of Nice**

In December 2000 the Intergovernmental Conference was concluded with the adoption of the Treaty of Nice. When this Treaty enters into force it will not change the legal status of the EU as described in the present contribution. With the discussions during the former IGC in mind, the issue of international legal personality was not formally on the agenda of the IGC 2000 and the Nice Treaty indeed does not refer to a modification of the EU Treaty in that respect. Nevertheless, the Nice Treaty does support the conclusions drawn here. Additional examples pointing to the autonomous legal status of the EU include the notion that special representatives of the Union will no longer be appointed on the basis of a unanimous vote, but are appointed by a qualified majority vote in the Council (the new Article 23). More importantly, however, is the new Article 24 on the conclusion of international agreements. According to new paragraphs 2 and 3, the Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions, but it will act by a qualified majority whenever the agreement is envisaged to implement a Joint Action or Common Position. The possibility for the Council to conclude International agreements by a qualified majority further strengthens the idea of a Council that acts as an institution of the EU rather than as a representative of fifteen individual Member States. Finally, a new paragraph 6 sets out that the agreements concluded by the Council shall also be binding on the institutions of the Union. This explicitly answers the question of whether the Union may have obligations under international law.