
The EU as a party to international agreements: shared competences, mixed responsibilities

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6.1 Introduction

The question of whether the European Union (EU) is competent to enter into international agreements with third States and other international organisations in the non-Community areas has been subject to intense debate ever since the negotiations on the Maastricht Treaty. The main controversy behind the debate was (and to some extent still is) the unclear legal status of the EU. While the Treaty of Lisbon (TL) clearly confirms the international legal personality of the Union (Art. 47 TEU revised), the current Treaty regime remains silent on this question.¹

This has not prevented the EU from engaging actively in legal relations with third States and other international organisations. At the time of writing (early 2007) the EU had become a party to some 90 international agreements. With the increasing legal activity of the EU on the international plane, particularly reflected in the coming of age of the European Security and Defence Policy (ESDP),² the question of its legal accountability becomes more prominent. Whereas the international legal responsibility of the European *Community* has been subject to extensive legal analysis,³ the same

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¹ Nevertheless, 'As time goes by, the debate seems ever more irrelevant', as Eeckhout rightly observes. Eeckhout also points to the consensus on this issue in academic circles, see P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004), p. 155. Cf. also the views by (the Council's Legal Counsel) R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', 43 CMLRev. (2006), pp. 354–5.

² More extensively, M. Trybus, *European Union Law and Defence Integration* (Oxford: Hart Publishing, 2005); and R.A. Wessel, 'The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice', *Journal of Conflict & Security Law* (2003), pp. 265–88.

³ See for a recent overview Eeckhout, *External Relations of the European Union*.

does not hold true for the European *Union*.⁴ It is unclear whether the EU as such may be held accountable for any wrongful act. While there are good reasons to assume that the EU already enjoyed an international legal status from the outset,⁵ this does not imply that its external relations regime is therefore also comparable to the rules we know from Community law. The general perception is that the relationship between the EU and its Member States in the Common Foreign and Security Policy (CFSP or second pillar) – and to a lesser extent in the Police and Judicial Cooperation in Criminal Matters (PJCCM or third pillar) – is still clearly different from the relation the same Member States maintain with the European Community, and that, therefore, different rules apply in relation to the legal effects of agreements concluded by the EU.⁶

Both the conclusion of international agreements by the EU and its international activities in relation to military missions, as well as some decisions related to the suppression of international terrorism call for a fresh look at the relation between the EU and its Member States in terms of international responsibility. If Henry Kissinger were in office, he would have every reason to raise the question ‘Whom should I sue?’, now that his famous question on the telephone number of Europe has been answered by the availability of the number of the High Representative for CFSP, Javier Solana. Indeed, it is in the external political (foreign affairs) and security relations in particular that the complex relationship between the EU and its Member States presents itself in its full dimension. The purpose of this contribution is to present a meaningful way to answer questions regarding the legal accountability of the EU in the area of foreign, security and defence policy, while acknowledging the important role of the Member States in this area. The division of powers between the EU and its Member States is a central issue in the analysis. After all, the Treaty provides that the EU ‘shall assert its identity on the international scene, in

⁴ See, however, F. Naert, *International Law Aspects of the EU's Security and Defence Policy* (Dissertation to be defended at the University of Leuven, 2008); as well as S. Blockmans, *Tough Love: The European Union's Relations with the Western Balkans* (The Hague: T.M.C. Asser Press, 2007).

⁵ R.A. Wessel, ‘The International Legal Status of the European Union’, *EFARev.* (1997), pp. 109–29; see also ‘Revisiting the International Legal Status of the EU’, 5 *EFARev.* (2000), pp. 507–37.

⁶ See, in general, E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford: Oxford University Press, 2002); see, nevertheless, for the legal development of CFSP: Gosalbo Bono, ‘Some Reflections’.

particular through the implementation of a common foreign and security policy' (Art. 2), but 'the Member States shall support the Union's external and security policy actively and unreservedly in a spirit of mutual solidarity' (Art. 11(2)).

In order to place the developments in a broader context, I will first investigate the division of external competences in the area of the CFSP and the more recent ESDP (Section 6.2). Section 6.3 will subsequently deal with the different types of agreements concluded by the EU. This will be followed, in Section 6.4, by an analysis of the role of the Member States in these agreements. Finally, Section 6.5 will be used to draw some conclusions on the responsibility of the EU and/or its Member States on the basis of the agreements.

6.2 Shared competences in European foreign policy

In the absence of case law in the non-Community areas of the EU, the question has arisen how the competences in this field are divided between the two distinct levels of governance. Research over the past decade pointed to a clear distinction between the competences of the Member States and the competences of the EU. Obviously, there is a difference between the 'States', as represented by the Heads of State as the original 'contractors', and the 'European Union' they created. While the Treaty on some points shows ambiguity, a separate role of the EU, alongside the actions of the Member States, has been accepted from the outset.⁷

With regard to international agreements concluded by the EU, Article 24 TEU is the applicable provision. This provision is modelled after Article 300 EC, as indicated for instance by its paragraph 6,⁸ and has undergone changes with the Nice Treaty revision.⁹ However, as will be

⁷ See for references R.A. Wessel *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (The Hague, Kluwer Law International, 1999). More recently: Gosalbo Bono, 'Some Reflections', p. 253, who observes a certain development: 'it clearly became an international organisation, separate from the European Communities and the Member States'.

⁸ Compare with Article 300(7) EC.

⁹ Namely the inclusion of paragraph 6 and an extension of qualified majority voting, see E. Regelsberger and D. Kugelmann, 'Article 24 EUV para. 1', in R. Streinz, *EUV/EGV* (Munich: Beck, 2003); as well as I. Österdahl, 'The EU and Its Member States, Other States, and International Organisations – The Common European Security and Defence Policy after Nice', *Nordic Journal of International Law* (2001), pp. 341–72.

shown below, there are clear differences between Community and EU procedures. Article 24 TEU provides:

1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise 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.
2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.
3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2).
4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).
5. 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 nevertheless apply provisionally.
6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.

The scope of this provision extends to police and judicial cooperation in criminal matters, as the cross-references in Articles 24 (CFSP) and 38 (PJCCM) indicate. This turns the provision into the general legal basis for the EU's treaty-making, which may even be used to conclude cross-pillar (second and third) agreements.¹⁰ The debate on whether such agreements are concluded by the Council on behalf of the EU or on behalf of the Member States¹¹ seems to be superseded by practice now that the EU has become a party to a number of international agreements on the basis of

¹⁰ See the 2006 Agreement between the European Union and the United States of America on the processing and transfer of passenger name records (PNR) data, which is based on Decision 2006/729/CFSP/JHA of the Council of 16 October 2006, OJ 2006 L 298. This refers to both Articles 24 and 38.

¹¹ See more extensively Wessel, 'The International Legal Status'.

Article 24.¹² And, even before that it was clear that ‘it would hardly be persuasive to contend that such treaties are in reality treaties concluded by individual Member States’.¹³

Nevertheless, the regime of Article 24 reflects the multilevel character of the external relations regime.¹⁴ The Nice Treaty underlined the separate competence of the Union to conclude treaties. According to modified paragraphs 2 and 3 of Article 24, the Council shall still 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. Finally, paragraph 6 sets out that the agreements concluded by the Council shall be binding on the institutions of the EU. This explicitly hints at the possibility of the EU having obligations under international law as distinct from the obligations of the Member States.¹⁵

While ‘mixity’ has become the solution in the Community to overcome the division of competences,¹⁶ the international agreements concluded

¹² See, however, some early agreements which mention ‘The Council of the European Union’ as the contracting party, including the 1999 Agreement with Republic of Iceland and the Kingdom of Norway, and the 2000 Agreement with Republic of Iceland and the Kingdom of Norway.

¹³ C. Tomuschat, ‘The International Responsibility of the European Union’, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002), p. 181. Cf. also Eeckhout, *External Relations of the European Union*, p. 159; P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2006), pp. 406–9 and Gosalbo Bono, ‘Some Reflections’, pp. 354–6.

¹⁴ See more extensively R.A. Wessel ‘The Multilevel Constitution of European Foreign Relations’, in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press, 2007), pp. 160–206.

¹⁵ Nevertheless, some Member States (still) hold to the view that the Council concludes agreements on their behalf, rather than on behalf of the Union, see S. Marquardt, ‘La capacité de l’Union européenne de conclure des accords internationaux dans le domaine de la coopération policière et judiciaire en matière pénal’, in G. De Kerchove and A. Weyembergh (eds.), *Sécurité et justice: enjeu de la politique extérieure de l’Union européenne* (Brussels: Editions de l’Université de Bruxelles, 2003), p. 185. See the same contribution for arguments underlining the view that the Council can only conclude these agreements on behalf of the EU. Cf. also S. Marquardt, ‘The Conclusion of International Agreements Under Article 24 of the Treaty on European Union’, in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague: Asser Press, 2001), pp. 333–50; D. Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague: Asser Press, 2004), p. 74; and R.A. Wessel ‘Revisiting the International Legal Status of the EU’.

¹⁶ On mixity, see Eeckhout, *External Relations of the European Union*, Chapter 7; A. Dashwood, ‘Why continue to have mixed agreements at all?’, in J.H.J. Bourgeois, J.-L. Dewost and M.-A. Gaiffe (eds.), *La Communauté européenne et les accords mixtes* (Brussels: Presses Interuniversitaires Européennes, 1997), pp. 93–9; A. Rosas, ‘Mixed Union – Mixed Agreements’, in M. Koskeniemi (ed.), *International Law Aspects of the European Union* (The Hague: Martinus

under CFSP are – perhaps ironically – *exclusively* concluded by the EU.¹⁷ It would, of course, go too far to conclude on an exclusive competence for the Union on this basis. In fact the whole system of CFSP as described above seems to point to the existence of ‘shared’, or better, ‘parallel’ competences: both the EU and its Member States seem to be competent to conclude treaties in the area of CFSP (including ESDP). This implies that, once the EU has concluded an international agreement, there is no direct legal relationship between the Member States and the contracting third party.

At the same time, it may be argued that the so-called *Haegeman* doctrine is not only applicable to the Community but also to the EU and that the agreements form an ‘integral part of the Union’s legal order’.¹⁸ The reference in Article 24(6) TEU that the agreements bind the institutions supports this view. In this respect, the principle of consistency as reflected in Articles 1, 3 and 11 TEU should also be mentioned.¹⁹ The notion that ‘[t]he Union shall in particular ensure the consistency of its external activities as a whole’ (Art. 3 TEU) could link the EU agreements to agreements or other external actions based on the EC Treaty. It is disputed whether we are dealing with a justiciable principle.²⁰ The principle of consistency may be regarded as a special form of the loyalty principle laid

Nijhoff Publishers, 1998), pp. 125–48; N.A. Neuwahl, ‘Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements’, 28 CMLRev. (1991), pp. 717–40; and on responsibility in these cases, see in particular E. Neframi, ‘International Responsibility of the European Community and of the Member States under Mixed Agreements’, in Cannizzaro (ed.), *The European Union as an Actor*, pp. 193–205.

¹⁷ As the 2004 Agreement with the Swiss Confederation concerning the latter’s association with the so-called Schengen *acquis* shows, combined EC/EU agreements are possible (see Section 6.4.3). A similar construction has been debated for the 2006 Cooperation Agreement with Thailand. In the end, however, the agreement was concluded as a traditional Community/Member State mixed agreement; see D. Thym, ‘Die völkerrechtlichen Verträge der Europäischen Union’, *ZaöRV* (2006), p. 909. A similar debate took place on the EU’s accession to the ASEAN Treaty of Amity and Cooperation. As the relevant documents (such as Council Doc. 15772/06) are not in the public domain, the final outcome is not yet clear.

¹⁸ As provided by the ECJ in relation to international agreements concluded by the European Community: Case 181/73 *Haegeman* [1974] ECR 449 and Case 104/81 *Kupferberg* [1982] ECR 3641, see in the same line Thym, previous note, p. 38.

¹⁹ See more extensively R.A. Wessel ‘The Inside Looking Out: Consistency and Delimitation in EU External Relations’, 37 CMLRev. (2000), pp. 1135–71; as well as ‘Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe’, in J.W. de Zwaan *et al.* (eds.), *The European Union – An Ongoing Process of Integration, Liber Amicorum Fred Kellermann* (The Hague: Asser Press, 2004), pp. 123–40.

²⁰ See, for instance, B. Weidel, ‘The Impact of the Pillar Construction on External Policy’, in S. Griller and B. Weidel (eds.), *External Economic Relations and Foreign Policy in the European Union* (Vienna: Springer Verlag, 2002), p. 34.

down in Article 10 EC, as it emphasises institutional coordination and the coordination of actions among institutions and Member States (Section 6.4.3).²¹

6.3 Agreements concluded by the European Union

6.3.1 Conclusion of agreements by the Council

The Treaty regime in Article 24 TEU is reflected in the way this provision has been used by the EU in practice. Recent research by Thym reveals that the procedure through which agreements are concluded confirms the central position of the EU's institutions and organs at all stages of the decision-making process.²² The usual procedure is that the Council authorises the Presidency 'to designate the person empowered to sign the Agreement in order to bind the European Union'. Agreements are negotiated by the Presidency (often 'assisted by the Secretary-General/High Representative'). After discussion of the draft agreement in a Council working party, together with the decision by which it is to be adopted, the agreement follows the normal route through the Council's preparatory organs. The decision to conclude the Agreement is finally taken by the Council in a separate Decision on the basis of Article 24 (or in the case of PJCCM Article 38). It is striking that the Council Decision not only allows for the conclusion (signing) of the agreement, but at the same time provides the ratification of the agreement: the decision is used to 'approve the Agreement on behalf of the European Union' and to 'authorise to sign the agreement in order to bind the European Union'.²³ The actual signing of the agreement may be done by the President of the Council (when this can take place during a session of the Council), by the Secretary-General/High Representative, or by a Special Representative present in the third country.²⁴ A distinction

²¹ In addition, its influence is reflected in the context of the unity of law, which is generally seen as a guiding obligation in relation to the interpretation of Community law rather than overall Union law.

²² See Thym, 'Die völkerrechtlichen', pp. 870–75.

²³ Cf. Council Decision 2005/851/CFSP of 21 November 2005 concerning the conclusion of the Agreement between the European Union and Canada establishing a framework for the participation of Canada in the European Union crisis management operations, OJ 2005 L 315.

²⁴ See for the dates of the entry into force of the agreements the Agreements database, available at: http://www.consilium.europa.eu/cms3_applications/Applications/accords/search.asp.

between adoption and ratification is, however, made in the decisions related to third pillar agreements. A reason seems to be that in these cases some Member States invoked Article 24(5): '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' (Section 6.4.1).

It is indeed striking that all agreements are concluded by the 'European Union' only; the Member States are not mentioned as parties. This clearly deviates from earlier arrangements in which the EU was merely used to coordinate the external policies of the Member States.²⁵ Indeed, throughout the text of the current agreements, rights and obligations are related to the EU and the other party. The standard formula reads as follows: 'The EUROPEAN UNION, on the one hand, and [THIRD COUNTRY or INTERNATIONAL ORGANISATION], on the other hand, hereinafter referred to as the 'Parties', HAVE AGREED AS FOLLOWS: . . .'. In exceptional circumstances, the Agreement is based on an Exchange of Letters, in which case the High Representative acts as the legal representative of the EU. Even in that case, however, the formal conclusion of the agreement is decided upon by the Council. Thus, the entire decision-making process as well as the conclusion of the agreement does not reveal a separate role for the Member States. Apart from the references to the EU in both the texts and the preamble of the agreements and the fact that adoption and ratification is done 'on behalf of the Union', this is confirmed by the central role of the Union's institutions and organs (including the Presidency, the Council's working parties and the Council Secretariat), and the final publication in the L-series of the Official Journal (decision on *inter se* agreements of the Member States are published in the C-series).²⁶ Indeed, 'fairly strange operations would be needed to demonstrate that a treaty concluded under such circumstances has instead created legal bonds between the

²⁵ The prime example is formed by the *Memorandum of Understanding on the European Union Administration of Mostar*, which was concluded by the 'The Member States of the European Union acting within the framework of the Union in full association with the European Commission'; signed in Geneva on 5 July 1994. The Agreement was signed by the Presidency after approval by the Council on the basis of the very first CFSP Decision: 93/603/CFSP of 8 November 1993, OJ 1993 L 286; see also J. Monar, 'Editorial Comment – Mostar: Three Lessons for the European Union', 2 EFARev. (1997), pp. 1–6.

²⁶ More extensively, see Thym, 'Die völkerrechtlichen', p. 873.

third party concerned and each one of the Member States of the European Union'.²⁷

The international agreements to which the EU has become a party may largely be categorised as follows:

1. agreements between the EU and a third State on the participation of that State in an EU operation;
2. agreements between the EU and a third State on the status or activities of EU forces;
3. agreements between the EU and a third State in the area of PJCCM;
4. agreements between the EU and a third State on the exchange of classified information;
5. agreements between the EU and other international organisations;
6. agreements between the EU and a third State in the form of an Exchange of Letters;
7. joint Declarations and Memoranda of Understanding between the European Union and a third State;
8. agreements concluded by European Union agencies.

6.3.2 Agreements on the participation of a third state in an EU operation

The establishment of military and police missions on the basis of the ESDP called for agreements between the EU and non-Member States willing to participate in the mission. The lion's share of agreements to which the EU is a party fall into this category. Thus, agreements have been concluded with European third States (Albania, Ukraine, Norway, Turkey, Iceland, Switzerland). With non-European third States (Canada, New Zealand, Argentina, Morocco, Chile, the Russian Federation) as well as with most States that acceded to the EU in 2004 and 2007, prior to their accession. Some agreements have been concluded in the form of an Exchange of Letters (see Section 6.3.6).

The purpose of the agreements is to fix obligations between the EU and the third State participating in an EU mission. Recurring elements in these agreements are the association of the third State with relevant decisions of the EU, the status of personnel and forces, the exchange of classified

²⁷ Tomuschat, 'The International Responsibility', pp. 181–2.

information, the chain of command and financial aspects. In all cases the framework is set by the Joint Actions and other Decisions forming the basis of the operation. The third State accepts the obligation to place its participation within that framework and to transfer the operational control to the EU Head of Mission (in case of civilian crisis management operations) or the EU Operation Commander (in case of military crisis management operations). Nevertheless, all forces and personnel remain under the full command of their national authorities.²⁸ In relation to the exchange of information, the third State ensures that, when it handles EU classified information in the context of the operation, it respects the relevant principles and standards. Regarding the financial aspects, the third participating State assumes all the costs associated with its participation in the operation, apart from the costs that are subject to common funding.

The agreement also ensures that there are no differences in the legal status of EU Member States and third States in a mission, as both 'shall have the same rights and obligations in terms of the day-to-day management of the operation'.²⁹ This is reflected in the fact that, although military missions fall under the political control of the Political and Security Committee, a 'Committee of Contributors', in which all participating States have a seat:

will play a key role in the day-to-day management of the operation; the Committee will be the main forum where contributing States collectively address questions relating to the employment of their forces in the operation; the Political and Security Committee, which exercises the political control and strategic direction of the operation, will take account of the views expressed by the Committee of Contributors.³⁰

For the present article, the most relevant parts are to be found in the sections on the status of personnel and forces and the chain of command. The 2005 agreement with Canada, for instance, provides that 'Canada shall exercise jurisdiction over its personnel participating in the EU crisis management operation' and that 'Canada shall be responsible for

²⁸ Cf. Articles 6 and 10 of the Agreement between the European Union and Canada establishing a framework for the participation of Canada in the European Union crisis management operations, OJ 2005 L 315/21.

²⁹ *Ibid.*

³⁰ See PSC Decision BiH/3/2004 of 29 September 2004 on the setting-up of the Committee of Contributors for the European Union military operation in Bosnia and Herzegovina (2004/739/CFSP), preamble.

answering any claims linked to its participation in an EU crisis management operation, from or concerning any of its personnel'.³¹ Questions of liability seem to be out of the hands of the EU as the participating third State remains fully responsible for actions of its own personnel and forces. Indeed, the agreements explicitly regulate a possible liability, although one may argue that the following (standard) clause counts only when a liability of the participating State has been established; it does not exclude possible liability of the EU:

In case of death, injury, loss or damage to natural or legal persons for the State(s) in which the operation is conducted, Canada shall, when its liability has been established, pay compensation under the conditions foreseen in the agreement on status of mission/forces.³²

In any case, it is made clear that there shall be no claims between the participating States in an EU operation. Thus, the agreement with Canada provides that 'Canada undertakes to make a declaration as regards the waiver of claims against any State participating in an EU crisis management operation' and '[t]he European Union undertakes to ensure that Member States make a declaration as regards the waiver of claims against Canada'.³³ While earlier agreements left the liability question in the dark, formulas such as this one have become a standard clause in all agreements on the participation of third States in EU operations.

6.3.3 *Agreements on the status or activities of EU forces*

A smaller number of agreements relate to the regulation of the status and activities of the EU in the State where the mission is established. These agreements are usually referred to as SOFAs (Status of Forces Agreements) or SOMAs (Status of Mission Agreements).³⁴ So far, for this purpose, agreements have been concluded with the former Yugoslav Republic of Macedonia, Georgia, Congo, Indonesia, the Federal Republic of Yugoslavia (before its dissolution), Bosnia and Herzegovina, and Albania.

³¹ Agreement between the European Union and Canada establishing a framework for the participation of Canada in the European Union crisis management operations, OJ 2005 L 315/21, Article 3(3) and (4).

³² *Ibid.*, para. 5. ³³ *Ibid.*, paras. 6 and 7.

³⁴ Model SOFAs and SOMAs exist for police (EU Doc. 14612/4/02 REV 4, 29 April 2003), civilian and military ESDP missions (not in the public domain, but see EU Doc. 8720/05 and EU Doc. 8886/05, 18 May 2005).

These agreements address a number of issues. First, they provide that EU personnel shall respect the laws and regulations of the Host Party.³⁵ At the same time, the Host Party shall respect the autonomy and the unitary and international nature of the EU mission. Other rules and agreements relate to the identification of EU personnel, headquarters and means of transportation; the facilitation by the Host States of the crossing of the border, the movement and the presence on its territory of EU troops; the employment of local personnel, the security of EU personnel, and the access to information and communications.

Central to the agreements are the provisions on immunities and privileges of EU personnel. In the 2005 Agreement with the Democratic Republic of Congo, for instance, it is provided that 'EUPOL Kinshasa (the name of the EU mission) shall be granted the status equivalent to that of a diplomatic mission under the Vienna Convention on Diplomatic Relations.'³⁶ The usual issues around immunities and privileges are regulated: immunity from the criminal, civil, and administrative jurisdiction of the Host Party; inviolability of premises, archives and documents and correspondence; exemption from all national and communal dues and taxes of imported goods and services, etc. Similar agreements are included on the immunities and privileges of EU personnel.³⁷ The frequent granting of privileges and immunities equivalent to that of a diplomatic mission and diplomatic personnel is quite unusual, in particular for larger military missions such as Concordia.³⁸

Reliance on the Vienna Convention on Diplomatic Relations, rather than on the SOFA regime developed in the UN framework seems to be typical of many EU missions, but not of all. Thus European Union Force (EUFOR) Althea in Bosnia and Herzegovina operates on the terms of its predecessor and uses the SOFA agreed on between NATO and Bosnia Herzegovina. Similarly, the SOFA of the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC) was declared

³⁵ With the exception of the very first SOFA on the EU Police Mission in Bosnia and Herzegovina (2003), which lacks a provision on applicable law, see also F. Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations', in M. Trybus and N. White (eds.), *European Security Law* (Oxford University Press, 2007), pp. 225–48.

³⁶ Agreement between the European Union and the Democratic Republic of Congo on the status and activities of the European Union police mission in the Democratic Republic of the Congo (EUPOL Kinshasa), OJ 2005 L 256/58.

³⁷ *Ibid.*, paras. 5 and 6. ³⁸ Naert, *International Law Aspects*, Chapter 2.

applicable to the EU mission in 2006 by the Security Council and comparable regulations may be found in relation to EU mission agreements with Indonesia (Aceh) and Gabon (on Congo).³⁹

In relation to the division of powers between the EU and the Member States, it is furthermore notable that immunities can be waived by the Secretary General/High Representative. In the agreement with Congo this is phrased as follows:

The Secretary General/High Representative shall, with the explicit consent of the competent authority of the Sending State or the sending EU institution, waive the immunity enjoyed by EUPOL Kinshasa personnel where such immunity would impede the course of justice and it can be waived without prejudice to the interests of the EU.⁴⁰

While these arrangements may give the impression that neither the EU nor its Member States is responsible in case of any wrongful act by the mission or its personnel, the agreements do include a provision on the basis of which separate regulations are to be made between the Head of Mission and the administrative authorities of the Host Party. These agreements entail procedures for settling and addressing claims, but are not in the public domain. In the words of the Congo Agreement they, however, do not deal with claims ‘arising out of activities in connection with civil disturbances, protection of the EUPOL Kinshasa or its personnel, or which are incidental to operational necessities’.⁴¹ Indeed, in general, claims arising out of activities in connection with the operation are not the subject of reimbursement by participating States or the EU.⁴² Special arrangements are created for other claims compensations and can be found in the more recent mission agreements. While in most cases a special claims commission will deal with the claims, the agreement with Gabon even introduces an ‘arbitration tribunal’ for claims above € 40,000. On the basis of paragraph 5 of the Agreement:

The arbitration tribunal shall be composed of three arbitrators, one arbitrator being appointed by the Host State, one arbitrator being appointed by EUFOR and the third one being appointed jointly by the Host State and

³⁹ Cf. also Thym, ‘Die völkerrechtlichen’, p. 879.

⁴⁰ Agreement between the European Union and the Democratic Republic of Congo, Article 6, paragraph 2. This provision was first used in the SOMA for the 2004 EU Proxima Mission in FYROM, OJ 2004 L 16/66.

⁴¹ *Ibid.*, Article 14. ⁴² Cf. also F. Naert, n. 4, Chapter 2.

EUFOR. Where one of the parties does not appoint an arbitrator within two months or where no agreement can be found between the Host State and EUFOR on the appointment of the third arbitrator, the arbitrator in question shall be appointed by the President of the Court of Justice of the European Communities.⁴³

Claims up to € 40,000 are to be settled by diplomatic means between the host states and EU representatives.

In general, it is striking that the SOFAs and SOMAs frequently grant privileges and immunities to the operations and missions, to the same extent as is normally done to diplomatic missions and diplomatic personnel. In the UN, for instance, full diplomatic status is reserved for top officials of a mission only. The provision in, for instance, the UN Model SOFA, that forces shall be under the exclusive jurisdiction of their sending State, is omitted in the EU agreements. While the possibility of a waiver may compensate for this, it is not expected that contributing States grant this waiver very easily as local jurisdictions – when they exist at all – may not function in accordance with international human rights standards.⁴⁴ Hence, while the SOFAs and SOMAs do deal with claims procedures, the question of a division between EU and Member States responsibilities is not regulated in any clear way. Nevertheless, the agreements provide that claims shall be submitted to the EU mission or operation. Thus, the 2005 EU Model SOFA (Art. 15) provides that claims ‘shall be forwarded to EUFOR via the competent authorities of the Host State’. When no amicable settlement can be found ‘the claim shall be submitted to a claims commission composed on an equal basis of representatives of EUFOR and representatives of the Host State’. In the case of a dispute, it shall be settled by diplomatic means ‘between the Host State and EU representatives’ or by an arbitration tribunal composed of arbitrators appointed by the Host State and the EU mission. The EU Model SOFA even foresees a role of the ECJ, to appoint the third arbiter when both parties cannot agree on the appointment of this

⁴³ Agreement between the European Union and the Gabonese Republic on the status of the European Union-led forces in the Gabonese Republic (14 June 2006). This agreement was necessary in view of the stationing of the EU-led operation EUFOR RD Congo on the territory of the Gabonese Republic.

⁴⁴ See Naert, ‘ESDP in Practice’; see paras. 27 and 47(b) of the UN Model SOFA, UN Doc. A/45/594, 9 October 1990.

person.⁴⁵ As shown above, this possibility was already used in the Gabon agreement.

The EU as such thus seems to play a pivotal role in the claims procedure and no direct formal contacts are planned between the Host State and any EU Member State. Any legal duties the contributing States may have, thus seem to be regulated through the EU. Nevertheless, Member States have not been willing to waive any *rights* that they have on the basis of international law. Article 17(2) of the Model SOFA provides:

Nothing in this Agreement is intended or may be construed to derogate from any rights that may attach to an EU Member State or to any other State contributing to EUFOR under other agreements.

There are no reasons, however, not to apply the regular financial distribution system for common costs to claims compensation as well. The special ATHENA system invented for the allocation of costs can be used for a fair distribution.⁴⁶

A final point – which cannot be dealt with in the limited scope of this contribution – is the absence in the agreements of any reference to the applicability of international humanitarian law. While, by now, this has become standard practice in relation to UN missions,⁴⁷ international humanitarian law is assumed to be mentioned in non-public documents related to military missions only (such as the Operation Plan or the Rules of Engagement).⁴⁸

⁴⁵ As a procedure before the ECJ to hold the EU liable seems to be excluded because of the lack of a treaty basis, plaintiffs have no possibilities to use the regular (Community) procedures (Arts. 235 and 288 EC) in this regard. Cf. in general also M.-G. Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy', 55 ICLQ (2006), pp. 77–120.

⁴⁶ Also Thym, 'Die völkerrechtlichen', p. 880.

⁴⁷ See in particular the quite (in)famous *UN Secretary-General Bulletin on Observance by United Nations forces of international humanitarian law*, UN Doc. ST/SGB/1999/13, 6 August 1999, available at: http://www.un.org/peace/st_sgb_1999_13.pdf; as well as M.C. Zwanenburg, *Accountability of Peace Support Operations: Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organisation Peace Support Operations* (Leiden: Martinus Nijhoff Publishers, 2005), p. 70 and D. Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', 94 AJIL (2000), pp. 406–12.

⁴⁸ See Naert, *International Law Aspects*, Chapter 3. In this respect Naert points to Article 6 TEU, which at least reflects the Union's respect for fundamental rights.

6.3.4 *Agreements in the area of PJCCM*

So far, only a limited number of agreements have been concluded by the European Union on the basis of Article 38 EU, the specific legal basis for the conclusion of international agreements in the ‘Third Pillar’. Article 38 EU reads:

Agreements referred to in Article 24 may cover matters falling under this title.⁴⁹

In 2003, the EU concluded two agreements with the United States, one on mutual legal assistance and one on extradition.⁵⁰ While the EU Member States have not become a party to these agreements (Art. 2 provides: “Contracting Parties” shall mean the European Union and the United States’), these two agreements have established a complex legal regime in which the Member States do have rights and obligations as well. This is particularly clear in the provisions on the application of the Agreement in relation to (already existing or new) bilateral extradition or mutual legal assistance treaties with the US. These provisions lay down the rules of application of the Treaty and divide the competences between the EU and its Member States. In fact, these two agreements with the US reveal a marginal role for the EU as such: most rights and obligations rest on the ‘State’, which may either be an EU Member State or the US. An example may be found in Article 10 of the extradition agreements:

If the requested State receives requests from the requesting State and from any other State or States for the extradition of the same person, either for the same offence or different offences, the executive authority of the requested State shall determine to which State, if any, it will surrender the person.

⁴⁹ See also P. De Koster, ‘Bref état des lieux sur les accords de coopération conclus sur la base de l’article 38 du traité UE’, in De Kerchove and Weyembergh (eds.), n. 21, pp. 195–9; see in general on the third pillar S. Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2006).

⁵⁰ Both Agreements are published in OJ 2003 L 181; see on the negotiations and the content of the agreements G. Stessens, ‘The EU–US Agreements on Extradition and on Mutual Legal Assistance: how to Bridge Different Approaches’, in De Kerchove and Weyembergh, *Sécurité et justice*, pp. 261–73. Stessens points to the fact that certain results in these agreements would have been unattainable for individual states in bilateral agreements with the US.

Similar references to State obligations may be found in the Treaty on Mutual Legal Assistance, as its Article 4 shows:

Upon request of the requesting State, the requested State shall, in accordance with the terms of this Article, promptly ascertain if the banks located in its territory possess information on whether an identified natural or legal person suspected of or charged with a criminal offence is the holder of a bank account or accounts. The requested State shall promptly communicate the results of its enquiries to the requesting State.

Formally, however, the Member States are not bound by the agreements vis-à-vis the United States; they only have obligations to uphold the Treaty provisions in relation to the EU. This is confirmed by the fact that the US thought it necessary to ask for written instruments in which the Member States stated that they considered themselves bound by the agreements.⁵¹ This may very well be the reason for the somewhat peculiar provision in joint Article 3(2)(a) of the Agreements, on the basis of which the European Union 'shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application . . . of its bilateral mutual legal assistance treaty in force with the United States of America'. As we seem to be dealing with what are clearly 'shared' or 'parallel' competences, a mixed agreement should have been the obvious solution. This way the new agreement could have replaced the original bilateral treaties, rather than making them part of a new complex system.⁵²

A perhaps even more complex legal regime is created when both the European Union and the European Community enter into an agreement with a third party. In 2004, the EU (on the basis of Arts. 24 and 38 EU) and the EC concluded an agreement with the Swiss Confederation concerning the latter's association with the implementation, application and development of the so-called Schengen *acquis*.⁵³ While rights and obligations rest mainly on the Institutions (the Commission and the Council), there

⁵¹ See Marquardt, 'The conclusion of International Agreements', p. 193; and J. Monar, 'The EU as an International Actor in the Domain of Justice and Home Affairs', 9 *EFARev.* (2004), pp. 395–415.

⁵² See also Thym, 'Die völkerrechtlichen', p. 890; Marquardt (2003), 'The conclusion of International Agreements', p. 193 and T. Georgopoulos, 'What Kind of Treaty-Making Power for the EU?', 30 *ELRev.* (2005), p. 207.

⁵³ See Council Decisions 2004/849/EC and 2004/860/EC of 25 October 2004. These decisions are published in OJ 2004 L 368/26 and OJ 2004 L 370/78 respectively. The Agreement (13054/04) is available at the Public Register of the Council only.

are occasional references to the Member States. This confirms that, despite the different procedural rules, ‘cross-pillar mixity’ is possible.⁵⁴

A similar situation is created by the 2004 Agreement between the EU and the Republic of Iceland and the Kingdom of Norway.⁵⁵ This agreement relates to the application of certain provisions of the 2000 Convention on Mutual Assistance in Criminal Matters between the EU Member States. The purpose of the Agreement with Iceland and Norway is to extend the scope of the earlier Convention to these two States. Nevertheless, it is not the Member States that enter into a new agreement, but the EU, which means that a legal relation is established between the EU and Iceland/Norway only. On a more substantive note, however, it is clear that – as phrased by Article 1 – the original Convention ‘shall be applicable in the relations between the Republic of Iceland and the Kingdom of Norway and in the mutual relations between each of these States and the Member States of the European Union’.

It seems that in these cases the EU and its contracting party agreed on some role for the EU Member States. While legally the Member States have not entered into any treaty obligation, their rights and duties follow from the agreement the organisation of which they are a member concluded with a third State. While this sheds a new light on the binding nature of EU decisions vis-à-vis the Member States, on a political note one may argue that the decision to conclude the Treaty was taken by the Council, in which all of them have a seat. From a legal perspective, the distinction between the Council as Institution and the Member States should be upheld, as Member States may only be addressed on an individual basis by a third State when their obligations have explicitly been regulated in the agreement. In all cases it is made clear, however, that the agreements can be terminated by the Contracting Parties (i.e. the EU and the other party) only. The same seems to hold true for any modification of the agreements.

6.3.5 *Agreements on the exchange of classified information*

With a small number of third States, the EU entered into an agreement on the establishment of security procedures for the exchange of classified information (see the Agreements with Norway, Croatia, Ukraine, Romania, and Bosnia and Herzegovina). In contrast to the agreements discussed

⁵⁴ Cf. Eeckhout, *External Relations of the European Union*, p. 184. ⁵⁵ OJ 2004 L 26/1.

above, these agreements do not create separate rights and duties for the Member States. Again, they are concluded by the EU, and they even explicitly provide:

For the purposes of this Agreement, ‘EU’ shall mean the Council of the European Union (hereafter Council), the Secretary General/High Representative and the General Secretariat of the Council, and the Commission of the European Communities (hereafter European Commission).

Hence, the obligations rest on the Parties only and in case of any violation of the procedures by an EU Member State, the third party will have no choice but to address the EU Institutions.

The Agreements form good examples of cross-pillar decision-making as the decisions by which they are adopted are based on both Articles 24 and 38.⁵⁶ In 2003, the Council adopted a model for this type of agreement.⁵⁷

6.3.6 Agreements between the EU and other international organisations

The first agreement concluded between the EU and another international organisation was the 2002 ‘Berlin Plus’ Agreement with the North Atlantic Treaty Organisation (NATO), which allows the EU to draw on NATO military assets.⁵⁸ This agreement, however, was not based on Article 24 EU and a decision to conclude this agreement was never adopted by the Council. It was merely announced at the 2002 Copenhagen European Council after it was signed by NATO’s Secretary-General George Robertson and the EU’s High Representative for CFSP Javier Solana.⁵⁹ As the prescribed procedures have not been followed, it is doubtful whether this is more than a gentlemen’s agreement.⁶⁰ However, this does not

⁵⁶ See, for instance, Decision 2004/731/EC (*sic!*) of the Council of 26 July 2004 concerning the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information, OJ 2004 L 324/15.

⁵⁷ See Agreement on security procedures for the exchange of classified information with Bulgaria, Romania, Iceland, Norway, Turkey, Canada, the Russian Federation, Ukraine, the United States of America, Bosnia and Herzegovina, and FYROM. Council authorisation to Presidency to open negotiations in accordance with Articles 24 and 38 of the TEU, Council Doc. 13819/03 (not public).

⁵⁸ Published in 42 ILM (2003), p. 242.

⁵⁹ See M. Reichard, ‘Some Legal Issues Concerning the EU–NATO Berlin Plus Agreement’, *Nordic Journal of International Law* (2004), pp. 37–67.

⁶⁰ *Ibid.* Reichard concludes that “‘Berlin Plus’ is nothing but a non-binding agreement”, although ‘legally binding force may arise for some of its contents through estoppel’. The letters

simplify matters. The ‘Berlin Plus’ Agreement forms the basis of all EU–NATO military cooperation and it would be difficult to disregard the mutual rights and obligations in practice. In any case, it seems fair to conclude that the agreement was concluded between the two organisations and that all possible controversies will have to be settled between the secretaries-general of the two organisations. The Member States are bound only through their organisations.

Article 24 is referred to in the subsequent 2003 Agreement between the EU and NATO on the security of information.⁶¹ The Agreement establishes a procedure to protect and safeguard classified information being exchanged between the two organisations. Again, the Member States play no role in this Agreement as it only creates rights and obligations for both organisations (in the case of the EU specified as the Council, the Secretary-General/High Representative, the General Secretariat and the Commission). This is made even more explicit in the 2006 Agreement between the International Criminal Court and the EU on cooperation and assistance.⁶²

For the purposes of this Agreement, ‘EU’ shall mean the Council of the European Union (hereafter Council), the Secretary-General/High Representative and the General Secretariat of the Council, and the Commission of the European Communities (hereafter European Commission). ‘EU’ shall not mean the Member States in their own right.⁶³

The clear division between the EU and its Member States returns in subsequent provisions, in which it is said that the Agreement shall only relate to EU documents and not to documents originating from an individual Member State.

6.3.7 *Agreements in the form of an Exchange of Letters*

Occasionally, agreements are not concluded in the form of a single document, but on the basis of an Exchange of Letters between the EU and a third State. Apart from the form, there do not seem to be any differences

from both Secretaries-General which formed the basis for the agreement had to be retrieved by Reichard using the Council’s procedure for disclosing information. In his book, Reichard also refers to and reproduced letters between the EU Presidency and the CFSP High Representative, see M. Reichard, *The EU–NATO Relationship – A Legal and Political Perspective* (Aldershot: Ashgate, 2006), pp. 400–2.

⁶¹ OJ 2003 L 80/35. ⁶² OJ 2006 L115/49. ⁶³ Article 2(1), emphasis added.

with the regular agreements concluded by the EU.⁶⁴ In the Decisions taken by the Council to approve the agreements, Article 24 is explicitly mentioned as the legal basis. Thus, in 2002 for instance, the Council approved of an agreement between the EU and the Republic of Lebanon on cooperation in the fight against terrorism.⁶⁵

More recently, this form of instrument was used to establish an agreement with Indonesia on an EU Monitoring Mission in Aceh and to allow for the participation of a number of third States in this mission. Thus, apart from the agreement on the tasks, status, privileges and immunities of the Aceh Monitoring Mission and its personnel (the so-called SOMA),⁶⁶ agreements in the form of an Exchange of Letters were concluded with Brunei, Singapore, Malaysia, Thailand and the Philippines.⁶⁷ In these cases, also, it is made clear that the EU as such becomes a party to the agreement and that possible obligations of the Member States are the concern of the EU. Thus, the 2005 Agreement with Thailand, for instance, provides that:⁶⁸

The European Union shall ensure that its Member States make, on the basis of reciprocity, a declaration as regards the waiver of claims, for the participation of the Kingdom of Thailand in the AMM.

The declaration itself is annexed to the agreement:

The EU Member States applying the Joint Action [...] on the EU Monitoring Mission in Aceh (Aceh Monitoring Mission – AMM) will endeavour, insofar as their internal legal systems so permit, to waive as far as possible claims against the Kingdom of Thailand for injury, death of their personnel, or damage to, or loss of, any assets owned by themselves and used by the AMM.

The Council Decision approving the agreements authorises the Presidency to designate the person(s) empowered to sign the Agreement in the form of an Exchange of Letters to bind the EU. The fact that the Presidency leaves the Exchange of Letters as well as their signing to the Secretary

⁶⁴ Indeed, it is generally held that there is no difference in the legal status between single document agreements and agreements in the form of an Exchange of Letters, see J. Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996).

⁶⁵ Doc. 7494/02, to be found in the Council's register. ⁶⁶ OJ 2005 L 288/59.

⁶⁷ See for the Council Decision, Doc. 12321/05. The agreements may also be found in the Council's register.

⁶⁸ Doc. 12321/05, 4 October 2005.

General/High Representative, Javier Solana, may again be seen as underlining the institutional role of the EU. While the Member States are of course involved in the adoption of the Decision approving the Agreement, their role is less visible in both the negotiation and the conclusion of the Agreements.

6.3.8 *Joint declarations and memoranda of understanding*

Irrespective of the fact that the Council's agreements database lists some Joint Declarations between the EU and third States as 'agreements', one may doubt whether they need to be mentioned here. All Joint Declarations seem to be lacking a 'consent to be bound' on the side of the parties and the form clearly differs from the other texts, while Article 24 is not referred to as the legal basis. Nevertheless, the Declarations seem to create new 'institutional facts' and rights and duties for the signatories. Thus, in the 2005 EU–Afghanistan Joint Declaration, Afghanistan and the EU agree to form a new partnership and even refer to this as an 'agreement'.⁶⁹ Both parties undertake clear commitments. Similar wording was used in, for instance, the 2005 EU–Iraq Joint Declaration on Political Dialogue or the 2004 Joint Declaration of the People's Republic of China and the European Union on Non-Proliferation and Arms Control.⁷⁰

The legal status of 'Memoranda of Understanding' (MOU) is even less clear. On some occasions the EU has made use of this instrument. An example is formed by the 2006 MOU on a Strategic Partnership between the EU and the Republic of Azerbaijan in the field of energy.⁷¹ As no reference is made to Article 24 or any other legal basis, we have to assume that we are not dealing with a formal agreement (in the sense that a 'consent to be bound' is lacking), but with a form of cooperation which may result in a formal legal relationship at a later stage. In any case, it is clear that the MOU is concluded between the third State and the EU as the commitments are all related to the EU and the MOU is signed 'on behalf of the European Union'.⁷²

⁶⁹ Doc. 14519/05, 16 November 2005.

⁷⁰ Doc. 12547/05, 21 September 2005 and Doc. 15854/04, 8 December 2004, respectively.

⁷¹ Available at: <http://register.consilium.europa.eu/pdf/en/06/st14/st14323.en06.pdf>.

⁷² See also n. 25.

6.3.9 *Agreements concluded by EU agencies*

Although the scope of this contribution does not allow a detailed analysis of the role of the EU agencies, their treaty-making competences should not be neglected. The EU agencies enjoy an independent international legal personality, which also allows them to enter into agreements with third States and other international organisations. Formally, these agreements thus fall outside the scope of this contribution; after all, they are not concluded by the EU itself.

The prime example of an agency which has concluded a number of international agreements is Europol.⁷³ Apart from the cooperation agreement with the United States,⁷⁴ Europol concluded agreements with a number of European and non-European third States, with EU bodies and other international organisations.⁷⁵ A similar position is taken by Eurojust, the body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime.⁷⁶ In 2005, cooperation Agreements were concluded with Romania and Iceland.⁷⁷ A final agency in the third pillar area is the European Police College (CEPOL), which was granted legal personality in 2004.⁷⁸ In June 2006 the European Police Academy concluded cooperation agreements with Iceland, Norway and Switzerland.⁷⁹

In the second pillar, the agencies also enjoy a separate legal personality.⁸⁰ But, so far, the European Defence Agency, the European Institute for

⁷³ See for its legal status Article 26 of the first Europol Convention of 10 March 1995 (entry into force 1 October 1998), OJ 1995 C 316/2; more extensively C. Rijken, 'Legal Aspects of Cooperation between Europol, Third States, and Interpol', in Kronenberger, n. 21, p. 587.

⁷⁴ See N. Lavranos, 'Europol and the Fight Against Terrorism', 8 EFARev. 2003, p. 259.

⁷⁵ A list of agreements is available at: <http://www.europol.europa.eu/index.asp?page=agreements>.

⁷⁶ See Article 1 of Council Decision 2002/187/JHA by which Eurojust was established, OJ 2002 L 63/1.

⁷⁷ See Eurojust Press Release of 2 December 2005, available at: http://www.eurojust.europa.eu/press_releases/2005/02-12-2005.htm.

⁷⁸ See Decision 2004/566/JHA of the Council of 26 July 2004, OJ 2004, L 251/19 as well as Decision 2005/681/JHA of the Council of 20 September 2005, OJ 2005 L 256/63.

⁷⁹ See Thym, 'Die völkerrechtlichen', p. 893 who refers to Council Documents 9259/06, 9265/06 and 9179/06 for the draft versions.

⁸⁰ See respectively Decision 2004/551/CFSP of the Council of 12 July 2004, OJ 2004 L 245/17; Joint Action 2001/544/CFSP of the Council of 20 July 2001, OJ 2001 L 200/1; and Joint Action 2001/555/CFSP of the Council of 20 July 2001, OJ 2001 L 200/5.

Security Studies and the European Union Satellite Centre have not entered into international agreements.⁸¹

6.4 The role of the Member States in the agreements

6.4.1 National constitutional approval

One of the main issues in the debate on the question of whether the Council concludes the agreements on behalf of the EU or on behalf of the Member States was related to Article 24, paragraph 5:

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 nevertheless apply provisionally.

This provision was often read in conjunction with Declaration No. 4 adopted at the Amsterdam IGC:

The Provisions of Article J.14 and K.10 [now Articles 24 and 38] of the Treaty on European Union and any agreements resulting from them shall not imply any transfer of competence from the Member States to the European Union.

However, neither in theory, nor in practice these provisions limited the treaty-making capacity of the EU. Article 24 provides that the Council concludes international agreements after its members (the Member States) have unanimously agreed that it can do so.⁸² On the basis of paragraph 5, Member States may invoke their national constitutional requirements to prevent becoming bound by the agreement, but this does not affect the conclusion

⁸¹ See on the European Defence Agency M. Trybus, 'The New European Defence Agency: A Contribution to a Common European Security and Defence Policy and a Challenge to the Community *Acquis*?', 43 CMLRev. (2006), pp. 667–703.

⁸² 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 G. Hafner, 'The Amsterdam Treaty and the Treaty-Making Power of the European Union: Some Critical Comments', in G. Hafner *et al.*, *Liber Amicorum Professor Seidl-Hohenveldern – In Honour of his 80th Birthday* (The Hague: Kluwer Law International, 1998), 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 themselves, the legal effect of agreements concluded by the Council.

of the agreement by the EU. While on some occasions the issue was raised,⁸³ it has obviously not precluded the conclusion of these agreements.

One may argue that when agreements are not binding on Member States that have made constitutional reservations, *a contrario*, agreements are binding on those Member States that have not made this reservation. While this may hold true for the relation between the Member State and the EU, it cannot be maintained vis-à-vis the third State or other international organisation. After all, no treaty relationship has been established between the Member States and this party, and unless the agreement explicitly involves rights and/or obligations for Member States in relation to the other party there is no direct link between them. In case Member State participation is necessary for the EU to fulfil its treaty obligations, the other party seems to have to address the EU, which, in turn, will have to address its Member States.

The above-mentioned Declaration No. 4 on the negation of a transfer of competences does not seem to conflict with this distinct treaty-making capacity of the EU. Since the right to conclude treaties is an original power of the EU itself, the treaty-making power of the Member States remains unfettered and, indeed, is not transferred to the EU. Therefore, the Declaration can only mean that this right of the EU must not be understood as creating new substantive competences for it.⁸⁴ Through the Council Decision, Member States have been provided with an opportunity to set limits to the use by the EU of its treaty-making capacity, both from a procedural and a substantive perspective.

The fact that the EU becomes a party to the agreement (and not its Member States), is underlined by the way the agreements come into force. Many agreements use the following provision on the entry into force:⁸⁵

This agreement shall enter into force on the first day of the first month after the Parties have notified each other of the completion of the internal procedures necessary for this purpose.

⁸³ See Marquardt, 'The conclusion of International Agreements', p. 182, who refers to Germany and France. More extensively: R.A. Wessel and G. Fernander Arribas, 'EU agreements with third countries: Constitutional reservations by Member States, in S. Blockmans (ed.), *The European Union and international crisis management: legal and policy aspects* (The Hague: T.M.C. Asser Press, 2008).

⁸⁴ As submitted by Hafner, 'The Amsterdam Treaty' p. 272.

⁸⁵ See, for instance, the 2005 Agreement between Romania and the European Union on security procedures for the exchange of classified information, OJ 2005 L 118/47.

However, so far, the ‘internal procedures’ on the side of the EU seem to relate to the necessary decision of the Council and not to any national constitutional procedure in the Member States. In other cases, the entry into force is even more simple:⁸⁶

This Agreement shall enter into force on the first day of the month after the Parties have signed it.

It goes beyond the scope of this contribution to investigate the parliamentary procedures related to these agreements in all 27 Member States, but based on some discussions it seems that Member States generally do not consider the EU agreements relevant to be put through their regular parliamentary procedure.⁸⁷ As ratification by the Governments of the Member States is not required for agreements concluded by the EU, their constitutional requirements simply do not apply. At least in the Netherlands the agreements are not considered to be in need of parliamentary approval as the Kingdom of The Netherlands is not a party. For the same reason the agreements are not published in the national official journal of treaties concluded by the Kingdom, the *Traktatenblad*. An exception was made for the two agreements concluded with the United States in the area of PJCCM, because these could be considered to complement or even amend existing bilateral treaties with the US. However, the position of the Netherlands was not exceptional: all Member States – with the exception of Austria, Estonia, France and Greece – made a constitutional reservation. The same situation occurred in relation to the conclusion of the agreements with Iceland and Norway, while eight Member States invoked Article 24(5) in relation to the agreement with Switzerland.⁸⁸ This clearly differentiates the third pillar agreements from the ones concluded under CFSP. In these cases, again, the question becomes relevant why the EU and its Member States

⁸⁶ See for instance the 2006 Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ 2006 L 115/ 49.

⁸⁷ This is confirmed by G. de Kerchove and S. Marquardt, ‘Les accords internationaux conclus par l’Union Européenne’, *Annuaire Français de Droit International* (2004), p. 813: ‘... dans la pratique suivie jusqu’à présent aucun État membre n’a invoqué le respect de ses règles constitutionnelles lors de la conclusion par le Conseil d’accords dans le domaine de la PESC’. More extensively: Wessel and Fernandez Arribas, ‘EU Agreements with third countries’.

⁸⁸ *Ibid.*, pp. 813 and 823. In these cases the Council decided to have a procedure in two stages, allowing for Member States to follow domestic parliamentary procedures; see Conclusions of the Council of 6 June 2003, Doc. 10409/03 of 18 June 2003; Cf. also Monar, ‘The EU as an International Actor’ and Georgopoulos, ‘What kind of’, p. 193.

have not opted for the same construction that has proven its value under Community law: the ‘mixed agreement’.

6.4.2 *The role of the Member States in agreements concluded by international organisations*

The question of the distinction between an international organisation and its Member States in international law is a classic in the law of international organisations. The general opinion is that international organisations are separate legal entities that have their own legal responsibilities under international law. Usually, the principles of the law of state responsibility apply by analogy to international organisations.⁸⁹ At the same time, States may not use the creation of international organisations to escape their own responsibilities. Their involvement may flow from: (i) the fact that they may have established an international organisation without binding it to their own international obligations; (ii) their own conduct in the framework of the organisation; or (iii) issues related to complicity or control of an international organisation by a State.⁹⁰ These propositions were recently summarised by Brölmann as follows:

1. International organisations are separate legal creatures, and thus not entirely open in the way of classic international law relations; 2. they are not entirely closed in the way of states either; 3. they are thus (perceived as) transparent, layered legal entities; 4. consensual, equality branches of the law such as the law of treaties have difficulty accommodating this quality; 5. endeavours in this regard are made nonetheless, although not rendered explicit; 6. the legal system – in this case the law of treaties – ultimately prevails, as the legal order of necessity sets the term for participation of legal subjects.⁹¹

The latter proposition points to the fact that the international law of treaties works with closed entities. Indeed, under treaty law the international parties should not be bothered with the complexity of the EU’s institutional set-up. International organisations, just like States, are

⁸⁹ See, for instance, M. Hirsch, *The Responsibility of International Organisations Toward Third Parties: Some Basic Principles* (Dordrecht: Kluwer, 1995); Zwanenburg, *Accountability* n. 47, p. 70 and the references made there.

⁹⁰ For a recent survey of the different arguments, see Naert, *International Law Aspects*, Chapter 3.

⁹¹ C. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford: Hart Publishing, 2007).

seen as unitary actors and may in general not invoke internal issues to escape treaty obligations. One problem, however, is that international organisations are not a party to the 1969 Vienna Convention on the Law of Treaties and that the 1986 Convention between States and International Organizations or Between International Organizations has not yet entered into force (apart from the fact the EU has not signed this agreement). For treaty law to be applicable, it has, thus, to be established that the relevant provisions are part of customary law.⁹² Nevertheless, the 1986 Convention is generally used as a framework for doctrine to settle issues related to the conclusion of treaties by international organisations.

The distinct role of the Member States in the agreements concluded by their organisation was one of the most difficult issues to settle in the 1986 Convention. In the end, a rather general provision was devoted to this issue only: Article 74(3):

The provisions of the present Convention shall not prejudice any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.

This provision seems to pay respect to the internal legal order of the organisation, in particular in conjunction with Article 5:

The present Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.

However, it would go too far to conclude on a priority of the internal rules of the organisation (for instance in relation to the extent its Member States are bound by an agreement) on the basis of these provisions. In fact, attempts to introduce in the Convention separate rights and obligations

⁹² Customary international law is generally believed to apply to international organisations as well, see H.G. Schermers and N.M. Blokker, *International Institutional Law* (Leiden: Martinus Nijhoff Publishers, 2005), p. 988. One of the best arguments in this regard is also reproduced by Naert, *International Law Aspects*, 2007, Chapter 3: 'It is submitted that the better basis for holding that international organisations are bound by (relevant) customary international law (subject to necessary modifications) is the argument that this simply derives from their international legal personality.' Indeed, as one could argue, participation in the international legal order implies being subject to its rules.

for Member States on the basis of treaties concluded by the organisation (either through the constituent instrument of the organisation or a subsequent unanimous decision) have failed.⁹³ And, indeed, other provisions in the 1986 Convention underline the 'dualist' approach. Thus, both Articles 27 (Internal law of States, rules of international organisations and observance of treaties) and 46 (Provisions of internal law of a State and rules of an international organisation regarding competence to conclude treaties) do not allow for a party to rely on its internal law as a ground for non-compliance or for challenging the validity of its consent to be bound.⁹⁴ This would prevent the EU to, for instance, invoke implementation problems or constitutional reservations at the level of the Member States as a ground for non-compliance vis-à-vis the other party.

This does not mean that Member States may simply ignore agreements concluded by their international organisation. Apart from the three possible grounds mentioned above, it is generally held that at least the internal rules of the organisation may extend some duties of the organisation to the Member States,⁹⁵ which may lead to 'a good faith duty not to hinder the organisation to give effect to agreements it has lawfully entered into'.⁹⁶ In the case of the EU, the loyalty obligation in Article 11, paragraph 2 could be used to build on this idea (see Section 6.4.3).

In relation to the responsibility of Member States for any actions of their international organisation, there is considerable disagreement between authors, in particular when no express clause in relation to their responsibility for conduct of the organisation has been included in the constituent treaty.⁹⁷ Both international practice and case law are limited, and, when available, not always consistent. Usually a balance is sought

⁹³ See on the history of this provision and the proposed far-reaching draft articles which underlined a distinct position of the Member States: Brölmann, *The Institutional Veil*, pp. 273–90.

⁹⁴ *Ibid.*, pp. 292–5.

⁹⁵ See, for instance, Schermers and Blokker, *International Institutional Law*, p. 1143.

⁹⁶ Naert, *International Law Aspects*, Chapter 3.

⁹⁷ The topic is currently on the agenda of the International Law Commission. See the interesting reports by Special Rapporteur G. Gaja on the Responsibility of International Organisations, available at <http://www.un.org/law/ilc/>. The accountability of international organisations was also addressed by the International Law Association, see its Final Report (2004) on this issue, reproduced in *International Organizations Law Review*, 2004; also K. Wellens, *Remedies against International Organisations* (Cambridge: Cambridge University Press, 2002) and I.F. Dekker, 'Making Sense of Accountability in International Institutional Law', *Netherlands Yearbook of International Law* (2005), pp. 83–118.

between the separate international legal personality of an organisation (and its connected individual responsibility) and the need to protect the other party in situations where no remedies exist for the harm inflicted upon it. This was reflected in the 1995 Report of the *Institut de Droit International* (IDI) on this issue. Rapporteur Higgins took the view that:

by reference to the accepted sources of international law, there is no norm which stipulates that Member States bear a legal liability to third parties for the non-fulfilment by international organisations of their obligations to third parties.⁹⁸

A minority of the members of the IDI, however, held that, in principle, there is a Member State liability. It seems fair to conclude, however, that the majority of writers agrees on the presumption that Member States are not liable for any conduct of the organisation, but that this presumption may be rebutted.⁹⁹

With regard to the EU these questions may, in particular, return in relation to the ESDP missions. The practice in other organisations underlines the difficulty to come up with clear-cut answers. In a recent study on the accountability under international law of UN and NATO peace support operations, Zwanenburg concluded that state practice in connection with UN peace support operations demonstrates that the conduct of national contingents in these operations is attributed to the UN or NATO because the contingents have been placed at the disposal of the organisation.¹⁰⁰ Thus, there is a presumption that a contingent is placed at the disposal of the organisation and this is rebutted only if it is established that the troops in question were acting in fact on behalf of a troop contributing State. For some ESDP missions (i.e. where one Member State acts as a leading nation) this could imply a responsibility for the troop contributing State.¹⁰¹ In any case, practice seems to support the view that Member State responsibility is secondary to the responsibility of the organisation. In the case of the UN, claims in relation to the conduct of a UN peace support operation have so far been addressed to

⁹⁸ Droit IDI 66-I (1995) 415, para. 113.

⁹⁹ It goes beyond the scope of this contribution to go into detail, see for a rather extensive analysis Zwanenburg, *Accountability of Peace Support*, Chapter 2.

¹⁰⁰ *Ibid.*, pp. 130–4.

¹⁰¹ See on the varying character of the ESDP missions Naert, *International Law Aspects*.

the organisation.¹⁰² In the *Use of Force* cases of the Federal Republic of Yugoslavia against ten NATO members before the International Court of Justice, the arguments used related to the role of the troop contributing States in the command and control of the operation, as well as to the idea that the actions of the NATO command structure are imputable jointly and severally to individual Member States (the so-called ‘piercing the institutional veil’ argument).¹⁰³

6.4.3 *Binding nature of the agreements under Union law*

In Section 6.2 it was argued that there are no reasons not to apply the *Haegeman*-doctrine to the agreements concluded by the EU and to regard them as forming ‘an integral part of Union law’. Indeed, the reference in Article 24(6) TEU that the agreements bind the institutions supports this view.¹⁰⁴ The remaining question, however, is whether this indeed means that Member States are automatically bound by the agreements as a matter of EU law, or that perhaps even a ‘direct effect’ of the agreements can be construed. After all, this would place the Member States in a different position towards the agreements than in other international organisations. In the European Community, Member States do have special obligations on the basis of agreements concluded by the Community.¹⁰⁵ After all, Article 300(7) EC clearly provides that agreements shall be binding on the Institutions *and* the Member States and, in *Kupferberg*, the Court held:

In ensuring respect for commitments arising from an agreement concluded by the Community Institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement.¹⁰⁶

Irrespective of the fact that the past 15 years have blurred the distinction between Community law and the law of the other Union Pillars (see also Section 6.4.4), judgments such as in *Haegeman* and *Kupferberg* explicitly

¹⁰² Zwanenburg, *Accountability of Peace Support*, p. 339.

¹⁰³ *Ibid.*, pp. 340–1. ¹⁰⁴ See also Thym, ‘Die völkerrechtlichen’, p. 38.

¹⁰⁵ See in general on this issue for instance V. Lowe, ‘Can the European Community Bind the Member States on Questions of Customary International Law?’, in Koskeniemi, *International Law*, pp. 149–68.

¹⁰⁶ Case 104/81 *Kupferberg* [1982] ECR 3641, para. 13.

related to the ‘autonomous legal order’ of the Community and it cannot easily be argued that all differences have disappeared. EU law can still be seen in distinction to Community law, which implies that the legal nature of agreements that form part of EU law should be judged first and foremost on the basis of the EU legal order. Hence, Article 300(7) EC does not apply and Article 24(6) TEU provides that EU agreements are binding on the Institutions, without a reference to the Member States. While there are good reasons to assume that decisions in the non-Community parts of the EU are also binding on the Member States and that they cannot be ignored in their domestic legal orders,¹⁰⁷ it is not at all obvious that the principles of ‘direct effect’ and ‘supremacy’ form part of EU law.¹⁰⁸ This implies that the domestic effect (applicability) of the agreements depends on national (constitutional) arrangements. As we have seen, the practice of the PJCCM agreements indeed reveals that Article 24(5) TEU is used in a way to allow national parliaments to allow their governments to approve of the treaty before the EU adopts the final ratification decision.

On the other hand, it is also questionable whether one can still maintain the view that under CFSP and PJCCM no sovereign rights were transferred to the Union and that therefore Member States have retained complete freedom to enter into international agreements on issues already covered by EU agreements.¹⁰⁹ Elsewhere, we have argued that the CFSP normative order does indeed restrain the external competences of the Member States and that the primary CFSP norms entail a consultation obligation which cannot be ignored by Member States without a complete denial of the *rationale* behind CFSP. In addition, Member States’ specific obligations under the CFSP title should be interpreted in the light of the general loyalty obligation to support the Union’s CFSP (Art. 11(2) TEU). This obligation becomes more substantive once the Union has acted, and given the proximity between the provisions of Article 11(2) TEU and Article 10 EC respectively, there are reasons to interpret the former in the light of the latter’s interpretation. In addition, in a situation of parallel

¹⁰⁷ See more extensively R.A. Wessel *The European Union’s Foreign and Security Policy: A Legal Institutional Perspective*, Chapter 5.

¹⁰⁸ Cf. Also K. Lenaerts and T. Corhaut, ‘Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law’, 31 *ELRev.* (2006), pp. 287–315.

¹⁰⁹ Cf. Thym, ‘Die völkerrechtlichen’, p. 904: ‘Hiernach besitzen die Mitgliedstaaten die rechtliche Möglichkeit, innerstaatlich und im völkerrechtlichen Verkehr auch Regelungen zu treffen, die im Widerspruch zu ihren unionsrechtlichen Verpflichtungen stehen.’

competences, the nature of the EU competence involved should be considered, and, in particular, its possible pre-emptive effect. Indeed, it seems too early completely to rule out exclusivity in the field of CFSP. After all, the (international) legal status of agreements concluded by the EU could be deprived of any effect if they would allow Member States to conclude agreements which would depart from established EU law.¹¹⁰

6.5 Conclusion: mixed responsibilities for the Union and its Member States?

Both legal analysis and recent case law provide a mixed picture of the possible responsibilities of the Member States on the basis of international agreements concluded by the EU. So far, agreements concluded under Article 24 and/or Article 38 TEU are concluded by the EU only; the EU Member States are not contracting parties. This explains why no ratification procedures take place on the basis of domestic constitutional provisions. The possibility of invoking Article 24(5) on domestic constitutional requirements remains open, but should not be equalled with ratification and does not legally stop the EU from concluding the agreement. In practice, national parliamentary involvement seems to have been limited to third pillar matters (police and judicial cooperation in criminal matters), because of the separate role of the Member States in those agreements.

The conclusion not to deviate from the general starting point in international institutional law by arguing that the EU is itself primarily responsible for the implementation of the agreement seems therefore justified. The Member States did indeed allow the EU to become a party to the agreements, but this does not mean they themselves have entered into a legal relationship with the third States or international organisations.

Nevertheless, agreements concluded by the EU also bind the Member States indirectly. Clear examples can be found in the third pillar agreements on the basis of which member States have obligations as well. More in general, the agreements concluded by the EU seem to be restraints on Member State competences to conclude new agreements covering the same issues. Both Article 10 EC and Article 11(2) TEU seem to call for a

¹¹⁰ C. Hillion and R.A. Wessel, 'Restraining External Competences of EU Member States under CFSP', in: M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford: Hart Publishing, 2008).

loyal attitude of the Member States with regard to agreements adopted (or planned) by the EU. Member States do seem to remain free to conclude agreements in the same domain that do not conflict with existing EU agreements, but in case of a conflict between an agreement concluded by the EU and a bilateral agreement between an EU Member State and a third party, there are reasons to give priority to the former.¹¹¹ This is in clear contradiction to rules of general treaty law, as reflected in particular by Article 30 of the 1969 Vienna Convention (which is believed to form part of customary law). After all, treaty law has a clear preference for the application of the *lex posterior* principle. However, holding on to this principle would allow EU Member States to conclude agreements with third parties and to circumvent the agreements concluded by the EU, which would violate the loyalty principle as a central element in the cooperation between the EU and its Member States. One could argue, indeed, that this restraint boils down to a ‘tacit recognition of the supremacy of obligations arising out of the second and third pillar over obligations arising under other obligations’,¹¹² calling for an obligation for the Member States to try and solve the conflict with the third party.

In general, the question remains whether the EU and a third State are competent at all to commit EU Member States when the latter have not become a party to the agreement. In some cases, Member States have been given special responsibilities in the agreements. However, even in these cases, the presumption seems that the other contracting party has no legal right to directly approach EU Member States with regard to these matters, unless a special procedure to this has been established in the agreement. In any case, the EU does not seem responsible for actions by third States participating in an operation. In the separate agreements with these States, responsibility has been placed in the hands of the contributing State. With a view to the fact that these States participate in an EU operation and that their only legal relation is with the EU, it would be better when the EU would at least be the formal addressee of any claims as the host State should not be bothered with the complex composition of an EU mission.¹¹³ Claims could then be

¹¹¹ See also Marquardt, ‘The Conclusion of International Agreements’, p. 191.

¹¹² J. Klabbers, ‘Restrains on the Treaty-Making Powers of Member States Deriving from EU Law’, in E. Cannizzaro (ed.), *The European Union as an Actor*, p. 169.

¹¹³ Cf. C. Tomuschat, n. 13, p. 183: ‘third States do not need to proceed to lengthy investigations to find out who was competent *de jure*. They may address any possible claims to the entity that has acted *de facto*.’

handled internally, either between the EU and its own Member States or between the EU and a participating third state.

Returning to the renewed ‘Kissinger question’: it seems that responsibility should first of all be sought at the level of the EU as this is the only contracting party. International treaty law seems to point to the presumption that Member States are not liable for any conduct of the organisation. This presumption may, however, be rebutted and in the case of the EU no provisions or procedures on the non-contractual liability exist and a collective responsibility may be the result. An example could be the inability of the EU to live up to either its obligations arising out of the agreement or to more general (customary) obligations for instance related to the protection of human rights. Some recent case law could be interpreted as supporting this view.¹¹⁴

In practice, situations in which the question of international responsibility needed to be answered have not yet come up. Generally, claims – for instance related to the liability of a military mission – are dealt with within a private law system and borne by the responsible national contingent in a mission. This may very well flow from the fact that even Member States themselves have not concluded on their own immunity and accept responsibility for their behaviour in EU operations. While concrete issues are thus settled on a case-by-case basis, Naert recently presented some more general rules of guidance in these matters.¹¹⁵ In his view, Member States remain responsible for any violation of their own international obligations, including through or by the EU, whenever the opposite would lead to an evasion of their international obligations. This view comes close to the one held by the ECtHR in relation to the protection of human rights and the requirement of equal protection by the international organisation to prevent responsibility on the side of the Member States.¹¹⁶

¹¹⁴ See in particular Case T-49/04 *Hassan*, para. 116 and Case T-253/02 *Ayadi*, judgments of 12 July 2006, nyr. The CFI held that: ‘the Member States are bound, in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

¹¹⁵ Naert, *International Law Aspects*, Chapter 3.

¹¹⁶ Cf. in particular the *Bosphorus* case, 30 June 2005. Statements like this could be interpreted as pointing to a responsibility on the side of Member States for agreements concluded by the Union, and come close to a remark on the nature of CFSP made by the ECHR in the *Segi* case, in which it held that ‘CFSP decisions are . . . intergovernmental in nature. By taking part in

This 'piercing of the institutional veil' may certainly be required from a practical point of view. After all, it remains difficult to sue international organisations even if they have violated agreements to which they are a party. On a more principal note, however, the question remains whether holding the Member States responsible is legitimate, taking into account the fact that in almost all cases the EU agreements have not even been dealt with at the domestic level: national parliamentary involvement has been excluded and governmental involvement has been limited to a vote as a member of one of the organisations institutions. Indeed, the differences with the Community are clear: the Union does not conclude mixed agreements and unlike Article 300(7) EC, Article 24(6) TEU explicitly relates the binding nature of the agreements to the Institutions. The conclusion could therefore be that in cases where the Union is simply not able and/or willing to answer any legitimate demands of a third party, the proper route for the EU would nevertheless be to accept responsibility at the international level and to seek compensation on the basis of internal EU law in relation to its own Member States. After all, to conclude with a politico-legal statement:

An entity discarding any notion of liability for its conduct could not be taken seriously in international dealings. As strange as it may seem, the capacity to incur international responsibility is an essential element of the recognition of international organisations in general and of the European Union in particular as entities enjoying personality under international law.¹¹⁷

their preparation and adoption each State engages its responsibility. That responsibility is assumed jointly by the States when they adopt a CFSP decision.' Application No. 6422/02, *Segi and Gestoras Pro-Amnistia and others v. 15 States of the European Union*, 23 May 2002. See more extensively E. Cannizzaro, 'Panorama – International Responsibility for Conduct of EU Member States: The Bosphorus Case', *Rivista di diritto internazionale* (2005), pp. 762–6; and the annotation by D. Scott, 43 CMLRev. (2006).

¹¹⁷ Tomuschat, 'The International Responsibility', p. 183.