

## The International Legal Status of the European Union

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### I Introduction

The Common Foreign and Security Policy (CFSP) in particular has raised the question of the European Union being an autonomous subject of international law. The Union, comprising both the three European Communities (EC, ECSC and Euratom) and the two new areas of cooperation (CFSP and CJHA, Cooperation in the Field of Justice and Home Affairs)<sup>1</sup> differs to a large extent from the international organizations we are familiar with in international institutional law. This has led many authors to conclude that the Union is *sui generis*.<sup>2</sup> While for these authors this answer seems to be satisfactory, it does not give a clue as to its external competences. In a journal on the 'foreign affairs' of the European Union, a further investigation of this issue seems to be justified.

In the Preamble of the Treaty on European Union (TEU, 1992) the Heads of State declare they are

Resolved to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.

These purposes come close to those the Heads of State had decided upon in the Preamble of the Single European Act (SEA, 1986)<sup>3</sup> in which they

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<sup>1</sup> CFSP and CJHA are also respectively referred to as the 'second' and 'third' pillar of the European Union, next to the 'first' Community pillar.

<sup>2</sup> See for instance M. R. Eaton, 'Common foreign and security policy' in D. O'Keefe and P. M. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery, London 1994), 215–226 at 224; G. Ress, 'Ist die Europäische Union eine juristische Person?' in G. Ress, J. Schwarze and T. Stein (eds.), *Die Organe der Europäischen Union im Spannungsfeld zwischen Gemeinschaft* (Nomos Verlag, Baden-Baden 1995) 27–40 at 34.

<sup>3</sup> The only parts of the SEA which have not been merged with or replaced by other treaties are the Preamble, the Common Provisions (Title I) and the General and Final Provisions (Title IV). While the political value of the SEA has thus become insignificant, the remaining parts of the treaty are still legally valid.

stated that they were 'aware of the responsibility incumbent upon Europe to aim at speaking increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence ... so that together they may make their own contribution to the preservation of international peace and security'. Despite of some inconsistencies in this statement (by 'together' making their 'own contribution' the states aim to 'speak with one voice' and to 'act with consistency and solidarity'), the chosen words explain the absence of a reference to a *common* policy. The purpose of the SEA was, as its Article 30 stipulated, to establish a 'European Cooperation in the sphere of foreign policy'. Obviously the TEU aims to go beyond this in establishing a *common* policy, and not just an *ad hoc* tuning of different individual policies.

According to Article A TEU, the European Union is established among the High Contracting Parties. The concept of the 'Union' is not explicitly defined by the Treaty; it is said to be 'founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty'. Nowhere in the Treaty has it been granted an explicit international legal personality. Nevertheless, on the eve of the entry into force of the TEU, the European Council declared:

Common foreign and security policy is the framework which must enable the Union to fulfil the hopes born at the end of the cold war and the new challenges generated by the upheavals on the international scene, with the resultant instability in areas bordering the Union. The aim of the common foreign and security is to enable the Union to speak with a single voice and to act effectively in the service of its interests and those of the international community in general.<sup>4</sup>

The CFSP indeed hints at a role for the European Union on the international scene.<sup>5</sup> This evokes the question of whether the European Union possesses international legal personality. In the *Reparation for Injuries* case, the International Court of Justice held that to say that an international organization possesses personality means that 'it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing inter-

<sup>4</sup> European Council, Brussels, 29 October 1993.

<sup>5</sup> The same does not hold for the Cooperation in the Field of Justice and Home Affairs (CJHA). The CJHA is much more inward looking, in the sense that it mainly aims at coordinating the actions of the Member States (compare Art. K.3, para. 1). The only external dimension of the CJHA may be found in Art. K.5, which calls upon the Member States to 'defend the common positions adopted under the provisions of this Title'. See also Oliver Dörr, 'Zur Rechtsnatur der Europäischen Union' *EuR* (1995), 334–348 at 340–341.

national claims'.<sup>6</sup> Bekker defined legal personality as 'the concrete exercise of, or at least the potential ability to exercise, certain rights and the fulfilment of certain obligations'.<sup>7</sup> The distinction between *legal personality* and *legal capacity* is illuminative in this respect: the first is a quality, the second an asset. Where international personality thus means not much more than being a subject of public international law,<sup>8</sup> capacity is concerned with 'what the entity is potentially entitled to do'.<sup>9</sup> International actors thus may have a capacity to bring international claims, they may have international procedural capacity, treaty making capacity, the right to establish diplomatic relations or the right to recognize other subjects of international law.<sup>10</sup> Legal capacity of entities other than states is never general in character; it exists only in relation to the competence attributed to them by the founding states. The competence is concerned with 'what a given international organization, being a subject of law endowed with the potential capacity to act, is specifically empowered to do';<sup>11</sup> it is subject to the organization's specific functions and purposes.

So, what about the European Union? International law does not provide any clear objective criteria for the acquisition of international legal personality, which makes it difficult to give any definitive answers to our question. For a long time different schools of thought existed.<sup>12</sup> The so-called 'socialist' school held that the attribution of legal personality needed an explicit basis in the constituting treaty of the organization.<sup>13</sup> At the other extreme we could find a school which claimed that the existence of legal personality does not depend on the subjective will of the Member States. In this view international organizations are *ipso facto* international legal persons; they do not enjoy legal personality because the Member States so decided, but because international law so

<sup>6</sup> Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ Reports 174.

<sup>7</sup> Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers, Dordrecht 1994) at 53.

<sup>8</sup> H. G. Schermers and N. M. Blokker, *International Institutional Law* (3rd rev. edn., Martinus Nijhoff Publishers, Dordrecht 1995) at 975; Bekker, *op. cit.*, at 60.

<sup>9</sup> Bekker, *op. cit.*, at 63.

<sup>10</sup> Bekker, *op. cit.*, at 63–64; Ian Brownlie, *Principles of International Law* (4th edn., Clarendon Press, Oxford 1990) at 683–689.

<sup>11</sup> Bekker, *op. cit.*, at 71. To clarify the distinction between personality, capacity and competence, Bekker used the International Tin Council as an example: although the ITC, being endowed with personality, may have the general capacity to contract, it is only competent to contract with respect to tin.

<sup>12</sup> See Schermers and Blokker, *op. cit.*, at 978–979.

<sup>13</sup> For instance G. I. Tunkin, 'The legal nature of the United Nations' 119 RdC (1966–III), 2–25.

demands.<sup>14</sup> The currently prevailing school of thought, however, is of the opinion that international organizations possess international legal personality if (and only if) this status is given to them by their founding states. This may take the form of an explicit provision in the constitutional treaty or it may be an implicit attribution, in the sense that the quality can be derived from certain external competences of the organization. This view is in line with the opinion of the International Court of Justice in the *Reparation* case already referred to, which, for most scholars, indeed forms the basis for their conclusions on this topic.<sup>15</sup> The implicit attribution of international legal personality may become visible through the actions of the organization or through the attitude of other international organizations or of third states. It should be kept in mind, however, that recognition by other international actors is never a prerequisite for the enjoyment of international legal personality. In the words of Higgins: 'If the attributes are there, personality exists. It is not a matter of recognition. It is a matter of objective reality.'<sup>16</sup> The practice of dealing with third states may be the prove of an (implicit) attribution of international competences by the Member States, rather than the source of legal personality.

In the *Reparation* case, the International Court of Justice, in establishing the international legal personality of the United Nations, based its conclusions on a number of (implicitly developed) criteria, which may be identified as follows:<sup>17</sup>

<sup>14</sup> For example F. Seyersted, 'Objective international personality of intergovernmental organizations' 34 *Nordisk Tidsskrift for International Ret* (1994) 1–112; F. Seyersted, 'The legal nature of international organizations' 51 *Nordisk Tidsskrift for International Ret* (1982) 203–205. The criteria used by Seyersted are: international organs, (a) which are not all subject to the authority of any other organized community except that of participating communities acting jointly, and (b) which are not authorized by all their acts to assume obligations (merely) on behalf of the several participating communities; see F. Seyersted, 'International personality of intergovernmental organizations: do their capacities really depend upon their constitutions?' 4 *Ind JIL* (1964) at 53.

<sup>15</sup> Most handbooks reflect a consensus on this issue: see for example C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, Cambridge 1996) at 83; Schermers and Blokker, *op. cit.*, at 979; Ignaz Seidle-Hohenveldern and Gerhard Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (5 Auflage, Carl Heymanns Verlag, Cologne, 1992) at 39; D. W. Bowett, *The Law of International Institutions* (4th edn., Stevens and Sons, London 1982) at 335–341; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford 1994); Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit International Public* (3rd edn., Librairie générale de droit et de jurisprudence, Paris, 1987) at 528; Bekker, *op. cit.*, at 56. The criteria used by Brownlie (*op. cit.*, at 681–682) are also derived from the *Reparation* case, but they do not include the subjective element, which brings his approach close to the one presented by Seyersted.

<sup>16</sup> Higgins, *op. cit.*, at 48.

<sup>17</sup> See Amerasinghe, *op. cit.*, at 83. While the Court did not list these criteria explicitly, similar criteria are used by the writers referred to (*supra* note 15).

- The entity must be an association of states or international organizations or both (a) with lawful objects and (b) with one or more organs which are not subject to the authority of any other organized communities except the participants in those organs acting jointly.
- There must exist a distinction between the organization and its members in respect of legal rights, duties, power and liabilities, etc. on the international plane as contrasted with the municipal or transnational plane, it being clear that the organization was ‘intended’ to have such rights, duties, power and liabilities.

In the subsequent sections of this article, some characteristics of the European Union will be highlighted in order to find out whether and to what extent the European Union is able to meet these criteria.

## II The First Set of Criteria: An Identification of the Entity

This article leaves aside the question of whether the European Union should be regarded as an ‘international organization’. While an answer to this question may be of interest to students of the law of international organizations in deciding whether or not the Union should be an object of study, no direct relevance exists in relation to the possible enjoyment of international legal personality. Nevertheless, the term ‘international organization’ will occasionally be used for reasons of convenience.

The first part of the first criterion mentioned above contains two elements: there must be an ‘association’ and states or other international organizations are to be the (principal) members. Brownlie pointed at the additional requirement that the association needs to be ‘permanent’.<sup>18</sup> Regarding the Union, the element of ‘permanent association’ can be discovered in Article A TEU, which provides:

By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called ‘the Union’. This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe ... Its task shall be to organize, in a matter demonstrating consistency and solidarity, relations between the Member States and between the peoples.’

That the association called the ‘European Union’ is not meant to serve as a an *ad hoc* framework for cooperation follows from the fact that it is only the beginning of the creation of an ever closer union and that it is

<sup>18</sup> Brownlie, *op. cit.*, at 681.

subject to the requirements of consistency and continuity (also compare Article C). The fact that the currently existing Union is not to be seen as the ultimate form of cooperation does not contradict this view.<sup>19</sup> According to Article Q the TEU is concluded for an unlimited period. Regarding the membership element, it follows from the wording of the Treaty that only states can be members. No provision allows non-governmental (or even governmental) organizations or other subjects of international law to become a member. In fact, Article O TEU explicitly allows 'any European State' to apply to become a member of the Union. The same provision leaves no doubt as to the fact that new states become members of the *Union*, as also reflected in the Accession Treaties of Sweden, Finland and Austria.<sup>20</sup>

The commitment regarding the creation of the new entity is reflected in the fact that the European Union is established through the conclusion of a treaty. The first sentence of the above quoted Article A clearly indicates that the Treaty on European Union should be regarded as the *traité constitutive* of the Union, whereas the Communities are established by their own respective treaties. Article R puts forward the usual requirement for international legal agreements that they be ratified by the High Contracting Parties in accordance with their respective constitutional requirements.

Regarding the 'lawful objectives' of the Union, these are listed in Article B TEU. This provision states that the objectives of the Union shall be achieved as provided in the treaty. There are no reasons to question the lawful character of these objectives, which were decided on in absolute freedom by the High Contracting Parties and laid down in an international agreement. Furthermore, the objectives in Article B clearly differ from the objectives of the constituting treaties of the Communities and should therefore be regarded as 'independent' objectives of the Union.

The question whether the Union can claim to have institutions of its own is more controversial. No institutions of the Union are explicitly mentioned in the Treaty. The only possible exception may be found in Article D TEU, which stipulates that '[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof'. This explicit link between the European Council and the Union, together with the fact that the provision which serves as the basis for the European Council is to be

<sup>19</sup> Also Dörr, *op. cit.*, at 336.

<sup>20</sup> On the other hand, association agreements are still concluded with the European Community on the basis of Art. 238 EC. See U. Everling, 'Reflections on the structure of the European Union' 29 *CML Rev.* (1992) 1053–1077 at 1063.

found in the Treaty on European Union – and not in Article 4 of the EC Treaty – amounts for the European Council to be regarded as an ‘institution of the Union’.<sup>21</sup>

While with the existence of one institution the criteria are already being met, one could take the discussion one step further. Many actors are involved in the CFSP and CJHA decision-making processes. Apart from the states, almost all Community institutions have competences or obligations in these areas (Council, Commission, European Parliament and Court of Justice). In accordance with the ‘single institutional framework which shall ensure the consistency and the continuity of the activities carried out’ (Article C TEU), the decisions in the ‘inter-governmental’ pillars are taken in the same institutions that have functions in other areas of the Union. Contrary to assertions that the institutions used remain Community institutions – only ‘borrowed’ to make decision-making in the second and third pillar possible<sup>22</sup> – one could even more convincingly argue that these institutions are in fact institutions of the Union.<sup>23</sup> Article E TEU provides that:

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

The fact that this provision is included in the Common Provisions of the Union Treaty together with the reference to ‘the other provisions of this Treaty’ points in the direction of institutions of the Union, albeit with ‘pillar-dependent’ competences and obligations. The extension of the

<sup>21</sup> In this line also P. J. G. Kapteyn, ‘Inleidende beschouwingen over het Verdrag betreffende de Europese Unie’ SEW (1992) 667–673, at 670; Everling, *op. cit.*; D. M. Curtin, ‘The constitutional structure of the Union: a Europe of bits and pieces’ 30 *CML Rev.* (1993) 17–69, at 27; Dörr, *op. cit.*, at 337; and Helmut Lecheler, ‘Der Rechtscharakter der “Europäischen Union”’ in J. Ipsen, H.-W. Rengeling, J. M. Mössner and A. Weber (eds.), *Verfassungsrecht im Wandel. Wiedervereinigung Deutschlands, Deutschland in der Europäischen Union, Verfassungsstaat und Föderalismus: Zum 180jährigen Bestehen der Carl Heymans Verlag KG* (Carl Heymans Verlag, Köln 1995) 383–393, at 388; Carlo Curti Gialdino, *Il Trattato di Maastricht sull’Unione Europea* (Istituto Poligrafico e Zecca dello Stato, Rome 1993) at 29.

<sup>22</sup> See for instance Curtin, *op. cit.*, at 26; Everling, *op. cit.*, at 1061; Dörr, *op. cit.*, at 337; and T. Heukels and J. De Zwaan, ‘The configuration of the European Union: Community dimensions of institutional interaction’ in D. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, Vol. II (Martinus Nijhoff, Dordrecht 1994), 195–228.

<sup>23</sup> Also G. Röss, ‘Die Europäische Union und die neue Qualität der Beziehungen zu den Europäischen Gemeinschaften’ JuS (1992) at 985: ‘Die Organe der Gemeinschaften sind zugleich Unionsorgane; eine Organleihe der Union bei der Gemeinschaften findet also nicht statt’.

competences of the Council to other areas than those falling within the Community sphere, and the fact that political declarations are adopted in the name of the Union, were reasons for the Council of Ministers to formally rename itself to 'Council of the European Union' one week after the entry into force of the TEU.<sup>24</sup> Regardless of its formally unchanged name, the Commission of the European Communities in practice is more frequently referred to as 'European Commission'.<sup>25</sup> An additional argument supporting the view that the CFSP institutions are not to be distinguished from the EC institutions may be found in Article J.11. This article lists a number of EC provisions dealing with the institutions which shall apply to CFSP as well.<sup>26</sup> The functioning of the institutions in different pillars of the Union does not conflict the requirement that the institutions are not to be subject to the authority of any other organized Communities, since the participants in all three pillars remain the same.

### III The Second Set of Criteria: A Distinction between the Entity and its Members

The purpose set forth by the Heads of State in the Preamble of the TEU to reinforce the European identity explains their decision to implement a common foreign and security policy. In Article B of the Common Provisions of the Treaty this purpose is however repeated as an 'objective of the Union'. This, together with other observations, raises the question whether there is a difference between the 'states', as represented by the Heads of State, and the 'European Union'? The relevance of the requirement of a distinction between the states and the international entity they created, as put forward by the International Court of Justice, is obvious. For the discussion regarding a possible international legal personality of the European Union would be deprived of any sense if the Union was nothing more than the mere collectivity of fifteen states. Only if a distinction exists between the states and the entity they established, has an

<sup>24</sup> Council Decision of 8 November 1993 concerning the name to be given to the Council following the entry into force of the Treaty on European Union, Decision 93/591, OJ 1993, L281.

<sup>25</sup> The Commission did not change its name because, as it rightly observed, Art. 9 of the Merger Treaty was not modified by the TEU. See one of the best articles that has been published on CFSP: Philippe Willaert and Carmen Marqués-Ruiz, 'Vers une politique étrangère et de sécurité commune. Etat des lieux' *Revue du Marché Unique Européen* (1995) 35–95 at 46, footnote 26.

<sup>26</sup> Art. J.11 mentions Arts. 137 (competences of the European Parliament), 138 (composition and election of the European Parliament), 139–142 (procedures of the European Parliament), 146 (composition of the Council), 147 (meetings of the Council), 150–153 (procedures of the Council), 157–163 (composition of the Commission) and 217 (language regime).

‘independent’ organization been created, possibly being in need of the possession of international legal personality.

Regardless of its precise definition, it follows from some Treaty provisions that the ‘Union’ is not equivalent to the ‘High Contracting Parties’ by which it is established.<sup>27</sup> The objective ‘to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence’, is presented as an objective of the Union and not of the individual states. In fact, as phrased in the Preamble of the Treaty, this was one of the reasons for the High Contracting Parties to establish the Union. The emerging question is who is responsible for attaining the objectives of a CFSP.

Article J.1 does provide some insight into this issue by stipulating that ‘the union and its Member States shall define and implement a common foreign and security policy’. This provision confirms the view that both the Union and the states are responsible for the implementation of a CFSP and that a distinction should be made between the two.<sup>28</sup> It does not, however, define the difference between the Union and the states. It even complicates their relationship by referring to ‘Member States’. Regarding the European Political Cooperation (EPC), the Single European Act consequently spoke of ‘High Contracting Parties’, since the EPC was not a part of the European Community, and it was not considered possible to be a ‘member’ of the EPC. The introduction of the term ‘Member States’ in the Treaty on European Union – which is used throughout the entire text – hints at the conclusion that a new entity was created, which is not to be equated with its founding states. While carelessness may of course very well be the source of these wordings, this conclusion is somewhat supported by several other provisions. Apart from the obligations of the ‘Member States’, the *Union* shall define and implement a policy (Article J.1, paragraph 1), the *Union* shall pursue objectives (Article J.1, paragraph 3), the *Union* has a (external and security) policy (Article J.1, paragraph 4 and Article J.4, paragraph 4), the *Union* requests (Article J.4, paragraph 2), the *Union* can have a position (Article J.5, paragraph 2), and the Union can take action (Article J.8, paragraph 2). Article J.1, paragraphs 1 and 4 in particular support the

<sup>27</sup> See also T. Heukels and J. De Zwaan, *op. cit.*, at 200: ‘the newly established Union is a separate entity of integration and co-operation, which in fact overarches the aforementioned three pillar structure’; Ress, *op. cit.*, at 27; Dörr, *op. cit.*, at 336.

<sup>28</sup> Fink-Hooijer pointed at the somewhat ironic fact that this notion was introduced at the request of the UK in order to stress the intergovernmental character of the CFSP. Florika Fink-Hooijer, ‘The Common Foreign and Security Policy of the European Union’ *EJIL* (1994), 173–198, at 177.

view that there is a distinction between the Union and its founding states; in these provisions both the Union and the Member States are mentioned as separate actors. Similar competences and obligations of the European Union hinting at its role as independent actor may be found in provisions elsewhere in the Treaty (Articles B, C, D, F).<sup>29</sup>

While the text of the treaty thus indeed implies a distinction between the Union and its Member States, the main difficulty lies in the identification of objective criteria that are fit to be used to conclude on such a distinction. Some indications were presented by authors in studies on the concept of 'supranationalism'. Following some literature on this topic,<sup>30</sup> the following key parameters can be listed: (a) the possibility of decision-making by the international institution, independently from the Member States; (b) the ability of the international institution to enact binding rules by majority vote; (c) the possibility to enact rules with a direct binding effect on the citizens of the Member States; (d) the existence and competences of a parliamentary body; (e) the existence of a judicial organ with (exclusive) competences in the area of treaty interpretation and, additionally, with powers to enforce the observance of the rules; and (f) the financial autonomy. Additional criteria may be: (g) an independent existence; the impossibility of unilateral, or even collective, withdrawal (in the latter case it is no longer possible to dissolve the international organization); and (h) the power of the international organization to alter or revise its own statute without the collaboration or confirmation of the Member States.

Both individually and cumulatively these parameters indeed give a clue as to the existence of a distinction between the organization and its Member States. What we need, however, is a minimum feature of an international entity to conclude on some degree of independence *vis-à-vis* its Member States. Without contesting the relevance of all of the above-mentioned features (which in our case are met to a very limited extent only), it is asserted in the present article that for an international entity to be regarded as existing in distinction from its Member States,

<sup>29</sup> See Dörr, *op. cit.*, at 336.

<sup>30</sup> Criteria to determine the degree of supranationalism were, *inter alia*, listed by A. J. P. Tammes, 'Wat is "supranationaal"?' 15 *Nederlands Juristenblad* (11 April 1953) 325–332; J. H. W. Verzijl, 'Supranational', in *Volkenrechtelijke opstellen. Liber Amicorum Gesina van der Molen* (Kok, Kampen 1962), 176–184; Peter Hay, *Federalism and Supranational Organizations: Patterns for New Legal Structures* (University of Illinois Press, 1966); Joseph H. H. Weiler, 'Supranationalism revisited – a retrospective: the European Communities after 30 years' in Werner Maihofer (ed.), *Noi si mura: Selected Working Papers of the European University Institute* (Florence 1986); and Schermers and Blokker, *op. cit.* See for a recent application on the European Union: Stephan Breitenmoser, 'Die Europäische Union zwischen Völkerrecht und Staatsrecht', *ZaöRV* (1995), 951–992.

the entity must at least be able to take decisions that have the potential to bind the Member States.<sup>31</sup> The question whether these decisions are taken unanimously or by a (qualified) majority is not relevant; the fact that Member States are bound by the decision until the organization has decided otherwise, however, is. Regarding CFSP, both Article J.2 and J.3 provide a basis for the Council to take binding decisions.<sup>32</sup> According to Article J.2 'Member States shall ensure that their national policies conform on the common positions'. The procedure for adopting 'joint actions' in Article J.3 includes the provision that 'Joint actions shall commit the Member States in the positions they adopt and in the conduct of their activity.' Moreover, the entire procedure in Article J.3 reflects the idea that once a joint action has been adopted, it can only be changed by the Council (with a unanimous vote). Even if there is a change in circumstances having a substantial effect on a question subject to joint action, it is up to the Council to review the principles and objectives of that action and to take the necessary decisions. As long as the Council has not so acted, the joint action stands. Plans for the adoption of national positions or national action pursuant to a joint action require prior consultations in the Council and major difficulties in implementing a joint action will be referred to the Council which will discuss them and seek appropriate solutions.

The binding character of the CFSP decisions is supported by a prior information and consultation obligation which leaves hardly any room for discretion. The provisions in Article J.2 on the systematic cooperation are phrased in a mandatory manner, and we should conclude, with Monar, that 'there can be no doubt that the respective loyalty obligations are fully binding under public international law'.<sup>33</sup> The same holds for Article J.1, paragraph 4, which reflects a more general 'loyalty obligation' comparable to Article 5 EC: 'The Member States shall support the

<sup>31</sup> Labelled by Higgins (*op. cit.*, at 46) as a *volonté distincte*. In Higgins's approach, however, this is just one of the four classic indicia to determine the distinctiveness of international organizations from their Member States. The other three are: an ability to contract, an ability to sue and to be sued, and an ability to own property. In the present article it is preferred to consider these three indicia as possible capacities of an international organization, rather than as criteria to determine a distinct international personality. The element of binding decisions taken by an organ of the organization may also be found in Karl Zemanek, *Das Vertragsrecht der internationalen Organisationen* (Springer, Vienna 1957) at 17.

<sup>32</sup> More extensively on this issue my 'De "tweede pijler" van de Europese Unie: een vreemde eend in de bijt?' SEW (1995), 554–579. Also C. W. A. Timmermans, 'The uneasy relationship between the Communities and the Second Union Pillar: back to the "Plan Fouchet"?' *Legal Issues of European Integration* (1996) 61–70, at 66–67.

<sup>33</sup> Jörg Monar, 'The foreign affairs system of the Maastricht Treaty: a combined assessment of the CFSP and the EC external relations elements' in J. Monar, W. Ungerer and W. Wessels (eds.), *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic* (European Interuniversity Press, Brussels 1993) 139–152, at 144.

Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity'.<sup>34</sup> Like Article 5 EC,<sup>35</sup> this provision contains a positive obligation for the Member States to actively develop the Union's policy in the indicated area and even a similar negative obligation not to undertake 'any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations'. Article 5 EC has proven its added value in Community law; it is often seen as the basis of the constitutional nature of Community law<sup>36</sup> and it has been frequently used by the Court of Justice in its case law,<sup>37</sup> albeit that the materialization of the obligation needs to be established in conjunction with other provisions in the Treaty or in secondary law.<sup>38</sup> Article 5 has thus been interpreted as to include: (a) the obligation to take all appropriate measures necessary for the effective application of Community law; (b) the obligation to ensure the protection of rights resulting from primary and secondary Community law; (c) the obligation to act in such a way as to achieve the objectives of the Treaty, in particular when Community actions fail to appear; (d) the obligation not to take measures which could harm the *effet utile* of Community law; (e) the obligation not to take measures which could hamper the internal functioning of the institutions; and (f) the obligation not to undertake actions which could hamper the development of the integration process of the Community.<sup>39</sup> It is interesting to note that the Court made it clear that these obligations may extend beyond the limits of Community law:

<sup>34</sup> One could be struck by the word 'external', which in this provision replaces the familiar term 'foreign', but there are no reasons to give any specific meaning to this inconsistency.

<sup>35</sup> Art. 5 EC: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

<sup>36</sup> See for instance John Temple Lang, 'European Community constitutional law: the division of powers between the Community and the Member States' 3 *Northern Ireland Legal Quarterly*, 209–234 at 221.

<sup>37</sup> In the period 1987–1993 Art. 5 featured in more than a hundred cases of the Court. Kapteyn and VerLoren van Themaat, *Inleiding tot het recht van de Europese gemeenschappen: Na Maastricht* (Kluwer, Deventer 1995) at 97. See also A. Bleckmann, 'Article 5 EWG-Vertrag und die Gemeinschaftstreue' DVBI (1976) at 483; and A. Bleckmann, 'Die Rechtsprechung des Europäischen Gerichtshof zur Gemeinschaftstreue' RIW/AWD (1981) at 653. See for a survey of the concrete rules following from Art. 5 EC: R. Barents and L. J. Brinkhorst, *Grondlijnen van Europees recht* (Samson H. D. Tjeenk Willink, Alphen aan den Rijn 1996) at 82. Also O. Due, 'Artikel 5 van het EEG-Verdrag. Een bepaling met een federaal karakter?' SEW (1992) at 355; J. Temple Lang, 'Community constitutional law: Article 5 EEC Treaty' *CML Rev.* (1990) at 595.

<sup>38</sup> Case 78/70, *Deutsche Grammophon*, [1971] ECR 487.

<sup>39</sup> See in particular O. Due, *op. cit.*; and J. E. de Cockborne, L. Defalque, C. I. Durant, H. Prahl, G. Vandersanden, *Commentaire Mégret*, Vol. 1 (Brussels 1992) at 26–42.

Article 5 of the treaty provides that the Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the treaty. If, therefore, the application of a provision of community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the treaty, every member state is under a duty to facilitate the application of the provision and, to that end, to assist every other member state which is under an obligation under community law.<sup>40</sup>

The absence of any competences of the Court of Justice within the second pillar,<sup>41</sup> makes the question whether these interpretations could also apply to Article J.1, paragraph 4 a very abstract and theoretical one. Nevertheless, it cannot be denied that the wordings of this provision provide no reasons to limit its scope in relation to Article 5 EC. It certainly provides an additional tool for the Council on the basis of the same provision to check on the actions of the Member States.

On the basis of these considerations the conclusion can be drawn that there are not too many problems in meeting the objective part of the criteria. The subjective part – the conclusion that the organization was ‘intended’ to have rights, duties, power and liabilities on the international plane – is more difficult to reach, since some states (and their constitutional courts) have explicitly stated at the time of the ratification of the Treaty on European Union, that the Union is not to be regarded as possessing international legal personality.<sup>42</sup> As a matter of fact, the (unpublished) *travaux préparatoires* indicate an explicit unwillingness of states to confer on the Union independent rights and duties,<sup>43</sup> despite

<sup>40</sup> Case 235/87, *Annunziata Matteucci v. Communauté Française de Belgique*, [1988] ECR 5589, para. 19.

<sup>41</sup> The Court does have a competence to judge the delimitation between the pillars, based on Art. 5 EC and the preservation of the *acquis communautaire* (Art. M TEU). See also my ‘Merging WEU into EU: a necessary step towards an ever closer union?’ in *Contemporary International Law Issues: Conflicts and Convergence*, Proceedings of the ASIL/NVIR Third Joint Conference (T.M.C. Asser Instituut, The Hague 1996), 347–352, at 348 (and at 225). Also Timmermans, *op. cit.*, at 68; and David A. O. Edwards, ‘Is Article L of the Maastricht Treaty workable?’ 2 *EuR* (1995), 23–25.

<sup>42</sup> According to the German *Bundesverfassungsgericht* the Union was not to be seen as ‘ein selbständiges Rechtssubject’ or as ‘Träger eigener Kompetenzen’, BverfGE 89, 155 at 195. The Netherlands government, for instance, explicitly denied the assertion that the Union would be a new international organization possessing legal personality; see *Memorie van Antwoord bij de goedkeuring van het Verdrag van Maastricht*, at 22; *Memorie van Toelichting*, at 7 and *Nader Rapport*, at 18.

<sup>43</sup> In the opinion of, for instance, Everling ‘the Union is not a legal person and does not have legal capacity under international law’. Everling, *op. cit.*; also Eaton, *op. cit.*, at 224. Reasons for Eaton to deny the Union’s legal personality are the absence of any concrete provision to that end, the fact that the external legal relations are dealt with by the Community and the evidence of the (unpublished) *travaux préparatoires*. Heukels and De Zwaan, *op. cit.*, at 202: ‘it may safely be assumed that the signatory states deliberately refrained from attributing any legal personality to the

some attempts by the Commission to endow the Union with a treaty-making capacity.<sup>44</sup> The reasons were not the same for each and every individual Member State. Some states were afraid of an intergovernmentalization of the external competences of the Community (e.g. Belgium, The Netherlands, Luxembourg and Italy), others were of the opinion that an absence of legal personality would make the Union 'weaker' and less able to affect the sovereignty of the Member States (e.g. the UK).<sup>45</sup> However, with regard to the element of 'intention' it would seem that the Court in the *Reparation* case was not referring to some subjective intention in the minds of the founders but to an objective that was to be found in the circumstances of creation and the constitution.<sup>46</sup> Hence, it is the objectives of the European Union that may supply additional clues as to the possible existence of (an implied) international legal personality.

#### IV An Implied International Legal Personality?

Unlike the Communities (Article 211 EC, Article 6 ECSC, and Article 184 EAEC) not even a legal capacity under the domestic laws of the Member States has been granted to the Union. This problem may, to a large extent, easily be solved by the fact that the institutions are at the same time Community institutions, while the lack of any explicitly granted external relations powers of the Union can be overcome by the conclusion of necessary agreements with third states by the Community, by the Member States or through a mixed agreement. Therefore it could be argued that a legal personality of the Union would be superfluous. The question is whether the development of a CFSP should lead to a re-examination of this view. All CFSP decisions are taken by the Council of the European Union on the basis of provisions on the Union Treaty (Articles J.2 and J.3) and not on the basis of the Community Treaties. These decisions of the Council are binding the Union, not the Communities. Claims of third states in case of a violation of interna-

Union. Consequently, the Union does not have legal capacity under international law'. See also Curtin, *op. cit.*, at 27; Willaert and Marqués-Ruiz, *op. cit.*, at 38; and the authors referred to by Ress (1995), *op. cit.*, at 28.

<sup>44</sup> To this end the Commission proposed to modify Art. 228A in order to make it possible for the Union to conclude treaties related to CFSP issues; supplement 2/91 – Bull. EC, at 192.

<sup>45</sup> Curti Gialdino, *op. cit.*, at 30; W. Devroe en J. Wouters, *De Europese Unie. Het Verdrag van Maastricht en zijn uitvoering: analyse en perspectieven* (Peeters, Leuven 1996) at 71.

<sup>46</sup> Amerasinghe, *op. cit.*, at 82. With regard to the United Nations, the Court argued that 'it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.'

tional legal rules cannot be addressed to the Community, because of the simple fact that the legal basis of the decisions is to be found outside the framework of the Community legal order. This leaves open two possibilities: claims should either be forwarded to the Union or to the Member States.

Regarding the absence of any reference to legal personality in the Union Treaty, we have seen that the prevailing view holds that organizations are legal persons not because it was explicitly attributed in the constitution, or because of the objective fact of its existence,<sup>47</sup> but because this status is given to them, either explicitly or implicitly.<sup>48</sup> In fact, there are only few organizations which have been granted an explicit legal personality in their constitution.<sup>49</sup> With regard to the United Nations any reference in the Charter was deliberately omitted as it was considered superfluous. It was held that the international personality of the UN 'will be determined implicitly from the provisions of the Charter taken as a whole'.<sup>50</sup> In the *Reparation* case the International Court of Justice proved to hold the same view when it based the international legal personality of the United Nations, *inter alia*, on the following arguments:

Whereas a State possesses the totality of rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice ... Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to its duties.

... to achieve these ends the attribution of international personality is indispensable ... The Organization is not merely a centre 'for harmonizing the actions of nations in the attainment of common ends'

<sup>47</sup> As was claimed in particular by Seyersted, *op. cit.* Contra with regard to the Union: Eaton, *op. cit.*, at 224.

<sup>48</sup> *Supra* note 15. See Bekker, *op. cit.*, at 57, who asserted that this is dictated by the 'functional necessity'. With regard to the European Union see also H. Lecheler, 'Die Pflege der auswärtigen Beziehungen in der Europäischen Union' 32 *Archiv des Völkerrechts* (1994) 1–23, at 16.

<sup>49</sup> Schermers and Blokker, *op. cit.*, at 978. See Bekker, *op. cit.*, at 60: 'Explicit acknowledgement of the possession of international personality is not necessary, at least not for the organizations's Member States and third states that have entered into relations with or have otherwise implicitly recognized the organization concerned, since it is based on the concrete exercise of acts and the objective fact of its existence. In any event, it is rarely found in treaty law.'

<sup>50</sup> 13 UNCTAD Doc. 803, IV/2/A/7 (1945) at 817; quoted in Bekker, *op. cit.*, at 61. Practice has even shown the development of extensive organisations on the basis of simple multilateral treaties (for instance GATT and NATO).

(Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It had defined the position of the members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5). [I]t could not carry out the intentions of its founders if it was devoid of international personality.

An analogous qualification of the European Union as an entity possessing international legal personality is not obvious. In the case of the Union it is often argued that it is indeed no more than a structure 'for harmonizing the actions of nations in the attainment of common ends'.<sup>51</sup> Moreover, the Union has proved to function without an explicitly granted international legal capacity. However, in future practice this may prove to be otherwise. While in the quoted Opinion the Court's focus was on the international legal personality of the United Nations, the words 'an entity such as the Organization' open the possibility of extending the opinion of the Court to other international entities as well. Most importantly, the Court recognized that the purposes and functions may be an indication of existing *implied* powers.

With regard to the purposes of the Union, Article B states that the Union is to assert its identity on the international scene. Even if this objective does not automatically imply an immediate legal personality, some international capacity seems to be necessary in order to be able to attain this objective.<sup>52</sup> The CFSP objective in Article J.1, paragraph 2 'to safeguard the common values, fundamental interests and independence of the Union' is striking in this respect. The objective can literally be traced back to the first Draft Treaty by the Luxembourg Presidency,<sup>53</sup> and similar wordings were used in an Italian proposal earlier, which stated that the Community/Union should 'in particular pursue the defence of the general interests and common values of its Member States, their independence and their security'.<sup>54</sup> In this objective the 'independence' was not related to the Union. The fact that in the final version the word 'independence' is explicitly linked to the European

<sup>51</sup> Compare the qualification of the Union by the German *Bundesverfassungsgericht* as a 'Staatenverbund'.

<sup>52</sup> Also Dörr, *op. cit.*, at 339.

<sup>53</sup> Draft Treaty on the Union from the Luxembourg Presidency, 18 June 1991, in Finn Laursen and Sophie Vanhoonacker (eds.), *The Intergovernmental Conference on Political Union* (Martinus Nijhoff, Dordrecht 1992) at 358.

<sup>54</sup> Italian Proposal on Common Foreign and Security Policy, 5 February 1991; The Draft Treaty on the Union from the Luxembourg Presidency, 18 June 1991, was an adapted version of a non-paper presented by the Luxembourg Presidency on 12 April 1991. The Drafts were said to be 'based on the dominant tendencies' of the discussions; in Laursen and Vanhoonacker, *op. cit.*, at 14, 322 and 358.

Union hints at an intention of the states to confirm the sovereign status of the Union in international law, and its status as an autonomous entity.<sup>55</sup> The Union was not established to become completely independent from its creators. More in line with the other parts of the sentence is to interpret 'independence' externally, that is in relation to non-Member States and other international organizations. In the most obvious interpretation the safeguarding of the Union's independence would be seen as a confirmation of its sovereign competences *vis-à-vis* third states. As elements of state sovereignty were bound to be affected the moment international agreements on foreign and security cooperation were concluded, it might be that states felt a need to confirm the independence of the entity which would be involved in the implementation of their formerly sovereign policies.

Another objective in Article J.1 is phrased as 'to strengthen the security of the Union and its Member States in all ways'. In this objective again it is implied that there is a difference between the security of the Union and the security of the Member States. The objective is thus not only aimed at the strengthening of the security of the Union, but also at the security of individual Member States. If only the collectivity of Member States was intended, the distinction would be without any meaning.

According to paragraph 3 of Article J.1, these objectives shall be pursued by the Union. As paragraph 1 explicitly states that both the Union and the Member States are in charge of the definition and implementation of CFSP, it is curious that the pursuit of the objectives is to be taken up by the Union individually. The Member States as such are thus put in a less active role; the institutions of the Union are responsible of achieving the objectives. Regardless of any deeper thoughts behind these formulations, some capacity to act seems to follow from their wordings. After all, paragraph 3 and 4 make clear that the Union will establish a systematic cooperation between the Member States, and that the Union will gradually implement joint action. The Member States are to support the Union's external and security policy.

Additional indications of an international capacity may be found in Articles J.4, J.5 TEU and in Article 8 EC. Article J.4, paragraph 2 calls upon the Union to request the Western European Union to elaborate and implement decisions and actions of the Union which have defence implications. This is a formal request on the basis of a treaty to an interna-

<sup>55</sup> Needless to say that in this sentence the emphasis should be on 'international law', since an interpretation of 'independence' as 'free from any external influence' would certainly be in conflict with the active role foreseen for the Union on the international scene.

tional organization enjoying legal personality,<sup>56</sup> and therefore implying a certain international capacity of the Union. Moreover, the final regulation of any concrete cooperation between the EU and the WEU will have to take the form of an international agreement.<sup>57</sup> According to Article J.5, paragraphs 1 and 2, the Union will be represented by the Presidency in CFSP matters. The Presidency will be responsible for the implementation of common measures and it will in principle express the position of the Union in international organizations and international conferences.<sup>58</sup> While these competences of the Presidency provisions certainly strengthen the image of the Union as a coherent whole, Dörr has rightfully asserted that they cannot be used to prove the Union's international capacity to act. The Presidency acts on a mandate of the Council only; it represents the Union without any competence to conclude legally binding agreements.<sup>59</sup> As a last argument a reference may be made to Article 8 EC, which established a 'Citizenship of the Union'.<sup>60</sup>

Regardless of the fact that the relevant provisions are not conclusive, it is clear that the text of the Treaty indeed hints at an international legal status of the Union.<sup>61</sup> Keeping in mind the *Reparation* Opinion of the International Court of Justice, and Article 31, paragraph 3(b) of the Vienna Convention on the Law of Treaties, additional clues may be found in the 'subsequent practice' of the Union. To this date the Union has not explicitly enacted any international acts to prove its possession of international capacities.<sup>62</sup> Nevertheless, there is one document that in

<sup>56</sup> See Art. 3 of the Status Agreement in Arie Bloed and Ramses A. Wessel (eds.), *The Changing Functions of the Western European Union: Introduction and Basic Documents* (Martinus Nijhoff, Dordrecht 1994), Document No. 6.

<sup>57</sup> According to Dörr a 'request' to another international organization does not imply the enjoyment of international personality, because of the legally non-binding character of a request; Dörr, *op. cit.*, at 341. The present author holds the view that regardless of the binding nature of the request, it is to be seen as an international act of the Union which finds its basis in the TEU.

<sup>58</sup> The argument of the representation by the Presidency is also used by Lecheler (1994), *op. cit.*, at 16 and (1995) at 389; Ress (1995), *op. cit.*, at 27.

<sup>59</sup> Dörr, *op. cit.*, at 342.

<sup>60</sup> Ress (1995), *op. cit.*, at 34 and Lecheler (1995), *op. cit.*, at 389.

<sup>61</sup> See Lecheler (1995), *op. cit.*, at 389: 'Das alles setzt voraus, daß die Union selbst handeln kann. Sie selbst muß Trägerin von Rechten und Pflichten sein können'. Also Armin von Bogdany and Martin Nettesheim, 'Die Europäische Union. Ein einheitlicher Verband mit eigener Rechtsordnung' *EuR* (1996) 3–26, at 26, with regard to the 'independent' tasks, competences and obligations of the Union: 'Jede andere lesart dieser Bestimmungen widerspricht dem Text der Bestimmungen und der Struktur der Organisation'. Contra Matthias Pechstein, 'Das Kohärenzgebot als entscheidende Integrationsdimension der Europäischen Union' *EuR* (1995) 247–258, at 249; C. Koenig and M. Pechstein, *Die Europäische Union* (1995) at 48; and Astéris Pliakos, 'La nature juridique de l'Union européenne' 29 *RTD eur.* (1993) at 212.

<sup>62</sup> Contra Ress (1995), *op. cit.*, at 33, who seems to regard the Accession Treaties with the new Member States as treaties concluded by the Union on the basis of Art. O TEU. However, regardless of the competences of the institutions in this area, the final agreements are concluded between the Member States of the Union and the new State; the Union as such is not mentioned as a party.

fact could qualify for the status of an international agreement. On 29 October 1993 the European Council endorsed a document on the Relations between the Union and the WEU.<sup>63</sup> This document was adopted by the General Affairs Council on 26 October 1993 and accepted by the WEU Council on 22 November 1993. In this document both organizations agreed on a number of situations in which the Union could make a request to the WEU and on further arrangements to implement their cooperation. Since on the basis of this document both organizations are under the clear obligation to work together in explicitly indicated areas, it is hard not to consider this document as an international agreement.<sup>64</sup> In addition, some decisions seem to imply an autonomous international role of the Union. The EC Council Regulation on the control of exports of dual-use goods, for instance, explicitly refers to the Union were mentioning the Community would have sufficed: ‘an effective system of export control on dual-use goods on a common basis is also necessary to ensure that the *international commitments of the Member States and the European Union ... are complied with*’.<sup>65</sup> Another example may be found in the Memorandum of Understanding on the European Union Administration of Mostar.<sup>66</sup> While, the Union as such is not a party to this Agreement – the heading mentions ‘The Member States of the European Union acting within the framework of the Union in full association with the European Commission’ – the text was approved of by the Council on the basis of a CFSP decision, and the Agreement was finally signed by the Presidency.<sup>67</sup> The reference to the ‘Member States’ as parties in this Agreement does in itself not deny an international capacity of the European Union. The Agreement was also signed by ‘The Member States of the Western European Union’, despite the fact the legal capacity of the WEU to enter into international agreements is not at all contested. Moreover, throughout the entire text of the Agreement the European Union is presented as the responsible actor. It seems fair to assume that any possible claims on the basis of this

<sup>63</sup> Annex IV of Chapter IV of the document on the implementation of the Maastricht Treaty, Brussels European Council, 29 October 1993, Conclusions of the Presidency. Also published as Document 1412 of the Assembly of the Western European Union, 8 April 1994.

<sup>64</sup> Also J. A. Frowein, ‘Die Europäische Union mit WEU als Sicherheitssystem’ in O. Due, M. Lutter and J. Schwarze (eds.), *Festschrift für Ulrich Everling, Band I* (Nomos Verlag, Baden-Baden 1995) 315–326, at 323: ‘Das ... Document muß als eine völkerrechtliche Vereinbarung zwischen der Europäischen Union und der Westeuropäischen Union gewürdigt werden.’

<sup>65</sup> Council Regulation (EC) No. 3381/94 of 19 December 1994, OJ 1994 L367; emphasis added. See Dörr, *op. cit.*, at 334.

<sup>66</sup> Signed in Geneva on 5 July 1994.

<sup>67</sup> The original basis of this decision was the very first CFSP Council Decision 93/603/CFSP of 8 November 1993, OJ 1993, L286. See also Bull. EU 6-1994, point 1.3.9.

Memorandum will be addressed to the Union and not to the fifteen individual Member States.

Apart from formal international agreements the assertion of the identity of the Union on the international scene is in particular reflected in its Declarations. Most opinions of the European Union concerning CFSP issues are not presented in either Article J.2 or Article J.3 decisions; they are expressed as Declarations.<sup>68</sup> It is curious that this instrument has not lost the popularity it had gained in the period of the European Political Cooperation (EPC), now that the Treaty explicitly mentions two types of decisions in which the opinions of the Union are to be expressed. While the Treaty nowhere expressly refers to Declarations, this instrument is mentioned in the Document on the Working Methods of the Council next to the common positions and joint actions.<sup>69</sup> According to this document Declarations may either be taken upon initiatives of two or more Member States and discussed in the Political Committee or through the COREU-network (Declaration of the Presidency on behalf of the European Union), or they may be the outcome of a meeting of the Council or the European Council (Declaration of the European Union). In both cases they are made public through a press communiqué, to be distributed by the Secretariat General of the Council, and follow the rule of the Council established in 1993 that all political declarations adopted in the framework of CFSP are made on behalf of the European Union.<sup>70</sup> Declarations may however contain extensive international commitments, as is for instance shown in The New Transatlantic Agenda and the Joint EU–US Action Plan.<sup>71</sup>

## V Conclusion

From the considerations presented in this article only one answer can be drawn: the European Union fulfils the criteria developed in international law for the possession of international legal personality. By nature the international legal personality of international entities other than states is limited to certain capacities, which are in turn limited by the compe-

<sup>68</sup> Until *medio* 1995 the Council had adopted 188 Declarations against 14 J.2 decisions and 19 J.3 decisions.

<sup>69</sup> Méthodes de travail du Conseil. Relations extérieures de l'Union, Doc. 7896/95, adopted by the General Affairs Council, 12 June 1995, Annex I, 12.

<sup>70</sup> Decision 93/591 of the General Affairs Council of 8–9 November 1993, OJ 1993, L281.

<sup>71</sup> The NTA was adopted on 3 December 1995. See 1 EFA Rev. (1996) at 135. The Joint Action Plan was published in Agence Europe: Europe Documents Nos. 1970 and 1971, 12 and 13 January 1996. See on this issue Horst G. Krenzler and Astrid Schomaker, 'A New Transatlantic Agenda' 1 EFA Rev. (1996) 9–28.

tences attributed to the international entity. Some objectives and some concrete tasks of the European Union imply an attribution of international personality. A number of indications have been presented to support the view that it would be very hard for the Union to reach its objectives without the enjoyment of international legal personality. In denying any international capacity of the Union, some Member States have obviously not been aware of the implications of establishing a Common Foreign and Security Policy in which the Union plays an essential role.

There are reasons to assume that the coming revised Treaty will make an end to all theoretic speculations on the international legal status of the European Union. The formal attribution of legal personality is on the political agenda of the Intergovernmental Conference and some states have explicitly pointed at the need of the Union to be formally given means to 'assert its identity on the international scene'.<sup>72</sup> The recent Draft Treaty presented by the Irish Presidency even plainly stipulates that 'The European Union shall have legal personality' and that 'In each of the Member States, the Union shall enjoy the most extensive legal capacity...'<sup>73</sup> Regardless of the outcome of the IGC, the present article supplies enough arguments to conclude that any willingness of the Member States to seriously develop CFSP necessarily implies the acceptance of an international legal personality of the European Union.

<sup>72</sup> Explicitly in favour are Austria, Spain and Luxembourg. Others have indicated not to be against (Finland and Portugal). See the opinions of the Member States on the Europe internet page: <http://europa.eu.int/en/agenda/igc-home/general/>.

<sup>73</sup> The European Union Today and Tomorrow. Adapting the European Union for the Benefit of its Peoples and Preparing for the Future. A General Outline for a Draft Revision of the Treaties. Conf. 2500/96, 5 December 1996.