International Law Aspects of the European Union

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The manifold manifestations of the regional economic integration organisation of the European states have produced a complex web of international relations without an always clear legal status. In contrast to the European Communities, the European Union is not supposed to have international personality at all. The relations between the member states are governed by international law precepts, and the Union acts towards third parties through the intermediary of its constituent organs, the member states, and the organs of the Community. It is submitted in this Article that this state of affairs inexorably leads towards an implicit recognition of the legal personality of the Union as well. Such recognition would not solve all problems, however. The Community enjoys legal personality by express reference in the founding treaties, but its competences are still less than those of a state. In many occasions, the Community and the member states have concurrent jurisdiction in the same subject-matter. The effective assumption of an international obligation necessitates then the conclusion of a mixed agreement, with all the problems of joint and several liability this might entail. The member states thus present to third parties a Janus face of both concerted and individual action. Balancing the inherent tensions within a continuously evolving institution remains the challenge of the future.

There is no question that one of the primary players acting in the international scene today is the regional economic integration organisation[1] of the European states in its manifold manifestations.

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1. This is the most common way in which the European Community is being referred to in international treaties. The term denotes two elements: a grouping of states in a contained geographic region and a transfer of competences from the Member States to the organisation. *See* I. MACLEOD ET AL., THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES 32 (1996).

There are in law three Communities and one Union, all established by international treaties but having distinct powers and attributions. The oldest is the Treaty on the European Coal and Steel Community (ECSC),[2] signed in Paris on 18 April 1951 and entered into force on 25 March 1952, whereby a separate entity with international legal personality[3] was "founded upon a common market, common objectives and common institutions."[4] The European Economic Community (EEC) and the European Atomic Energy Community (Euratom) were founded by treaties signed in Rome on 25 March 1957 and entered into force on 1 January 1958, each establishing a separate legal entity.[5] Euratom was given the specific task to facilitate the growth of nuclear industries, whereas the EEC aimed to establish a common market for all forms of economic activity, with the exception of the sectors falling under the other two agreements. The three Communities share their principal organs[6] and their membership: to the initial six states, France, Germany, Italy, Belgium, Luxembourg, and the Netherlands, were added Denmark, Ireland, and the United Kingdom (1973), Greece (1981), Spain and Portugal (1986), and finally Austria, Sweden, and Finland (1995). The fourth founding treaty, the Treaty of Maastricht, signed on 7 February 1992 and entered into force on 1 November 1993, renamed the European Economic Community to simply the 'European Community,' and created a new entity, the European Union. The

2. It is also the only one concluded for a specific period of 50 years. Once its lifetime expires in 2002, its subject matter will fall into the domain of the Community. *See* TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, art. 97, 261 U.N.T.S. 167 [hereinafter ECSC TREATY]; and TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 3, *as amended by* the TREATY OF MAASTRICHT, Mar. 1992, 31 I.L.M. 247 (1992), *new text to be found in the* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 305, para. 1, O.J. (C 340) 03 (1997) 37 I.L.M. 56 (1998) [hereinafter EC TREATY].

3. *See* ECSC TREATY, *supra* note 2, art. 6.

4. For a first presentation, see PAUL REUTER, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER (Paris 1953).

5. *See* TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Nov. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM TREATY]. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 210, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cond. 5179-II) [hereinafter EEC TREATY].

6. They acquired a single Assembly, which evolved into a directly elected European Parliament, and a Court of Justice of the European Communities by virtue of the Convention on Certain Institutions Common to the European Communities, signed in Rome on the same day as the founding treaties. This fusion of organs became complete with the "merger treaty," a Treaty establishing a Single Council and a Single Commission of the European Communities, signed in Brussels on 8 April 1965 and entered into force on 1 July 1967. Both were repealed by article 9 of the Treaty of Amsterdam, their operative provisions having been moved to the other treaties.

resulting mess was tidied—to a certain point[7]—by the Treaty of Amsterdam, signed on 2 November 1997 and entered into force on 1 May 1999.

This mass of international institutions displays a complex web of international relations combined with a not always clear legal status. Indeed, there are even doubts as to whether one is dealing with the Community or with the Union. In this context, the present Article shall attempt a first approach to the consideration of the legal status of the Union and its ramifications for the conduct of the external affairs, especially in terms of impact on third parties.

I. THE LEGAL STATUS OF THE EUROPEAN UNION

A. Constitutional Provisions

It is probably one of those wondrous and strange things that happen occasionally in the international legal scene that the European Union is supposed to have no international personality at all. Indeed, Article 1 of the Treaty on the European Union (TEU)[8] states:

> 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, in which decisions are taken as openly as possible and as closely as possible to the citizen.
>
> The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

Nowhere is to be found an express declaration of the will of the member states to attribute to the new entity legal personality,[9] separate from or in substitution for the three existing Communities. Indeed, there has been a series of declarations to the contrary, although whether they resulted from a conscious political decision[10]

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7. *See* Jean-Paul Jacqué, *La simplification et la consolidation des traités*, 33(4) REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 903 (1997).

8. The Treaty was originally concluded in Maastricht in 1992 and was amended in 1997 by the Treaty of Amsterdam, which renumbered the articles. The present Article will follow the new enumeration. *See* TREATY ON EUROPEAN UNION, Nov. 10, 1997, art. 4, O.J. (1340) 02 (1997), 37 I.L.M. 56 (1998) [hereinafter TEU].

9. Koen Lenaerts & Eddy De Smijter, *The European Community's Treaty-Making Competence*, 16 Y.B. EUR. L. 4, 5-6 (1997).

10. *See* M.R. EATON, LEGAL ISSUES OF THE MAASTRICHT TREATY 215-25 (D. O'Keefe & P.M. Twomey eds., 1994).

or constituted an attempt to rationalize a politically opportune omission[11] remains a matter of some doubt.

Either way, it is evident in the three-pillared structure envisaged by the Treaty of Maastricht[12] that the Communities constitute but a part of the Union: the first pillar, operating along the traditional procedures established by their respective treaties and safeguarding the *acquis communautaire*; the second pillar is the Common Foreign and Security Policy (CFSP), operating on a basis of cooperation expressed through the European Council;[13] the third pillar comprises the fields of justice and home affairs, operating on a purely inter-governmental basis.[14]

B. The Law Applicable Within the Union

The status of the Union as a legal entity with no distinct personality in the international scene is probably better understood in the workings of the second and the third pillars. The common action envisaged under the third pillar is clearly set out in terms of international cooperation,[15] mostly through international treaties concluded between the Member States.[16] Equally, the provisions on the CFSP are readily comparable to an intergovernmental framework treaty, the current standard in international environmental law-making. The relations between Member States under the second pillar remain wholly within the realm of international law, their joint actions[17] and common declarations or positions[18] constituting international treaties in their various manifestations.[19] This being the case, such expressions of political will may also entail legal

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11. *See* Jan Klabbers, *Presumptive Personality: The European Union in International Law*, *in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 231, 238-39 (M. Koskenniemi ed., 1998).

12. *See* Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV. 17, 23-24 (1993).

13. *See* TEU, *supra* note 8, tit. vi.

14. *Id.*

15. *See* I.D. Hendry, *The Third Pillar of Maastricht: Cooperation in the Fields of Justice and Home Affairs*, 36 GER. Y.B. INT'L L. 295 (1993). Monica den Boer, *Justice and Home Affairs Cooperation in the Treaty on the European Union: More Complexity Despite Communautarization*, 4 MAASTRICHT J. FOR EUROPEAN & COMP. L. 310-16 (1997).

16. *See* TEU, *supra* note 8, art. 34.

17. *See id.* art. 14.

18. *See id.* art. 15. Indeed, more often than not, they are also published in the legislative series of the Official Journal; *see* Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, *in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 31 (M. Koskenniemi ed., 1998).

19. *See* Jan Klabbers, *The Concept of Treaty in International Law* (The Hague, Kluwer Law International, 1996).

consequences toward third parties, thus binding the Union and its Member States. They might be considered unilateral declarations containing an express commitment to future action,[20] or they might even graduate into an agreement in simplified form.[21] Such an assumption is not only valid in international law, where the Vienna Convention on the Law of Treaties makes the conclusion of a treaty dependant upon the internal element of the will of the "subjects of international law"[22] rather than any external element of formality;[23] it has also been acknowledged within the domestic legal order of the Community through a series of decisions by the European Court of Justice (ECJ).[24]

Whatever the content of its decisions, the Union *does* present in practice a single uniform front to the outside world, at least most of the time. This is accomplished through the action of the European Council on the one hand and the Council and the Commission on the other. The latter belong to the institutional framework of the Communities borrowed by the Union with a view to "ensure the consistency and the continuity of [its] activities."[25] The former is the only organ the establishment of which is provided for in the Treaty itself: the European Council, not to be confused with the Council, one of the principal organs of the Community,[26] is comprised of the Heads of State or Governments of the Member States and the President of the Commission. It is entrusted with the task of providing the Union with the necessary impetus for its development and it defines the general political guidelines thereof.[27] The statements of the European Council do not constitute in this respect decisions of a treaty organ binding upon the Member States; they are rather the common expression of the joint diplomatic action Member States have decided to undertake on a specific issue.

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20. *See, e.g.*, Nuclear Tests Case (Australia. v. France), 1974 I.C.J. 253, 268 para. 46.

21. *See, e.g.*, Case Concerning Maritime Delimitation (Qatar v. Bahrain) 1994 I.C.J. 112, 126-27.

22. *See* J.A. BARBERIS, LOS SUJETOS DEL DERECHO INTERNACIONAL ACTUAL (1984). Note, however, the terminological difference between "subjects" and the perceived as wider in scope "persons in international law." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES part II (1986); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 91 (7th ed. 1997).

23. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, para. 1(a), 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

24. *See* Case 1/75, Local Cost Standard, 1975 E.C.R. 1355; Case 61/66, Sea Fisheries, 1978 E.C.R. 417, 438; Case 141/78, Sea Fisheries, 1979 E.C.R. 2923; Case 804/79, Sea Fisheries Conservation Measures, 1981 E.C.R. 1045.

25. *See* TEU, *supra* note 8, art. 3.

26. *See* EC TREATY, *supra* note 2, art. 7.

27. *See* TEU, *supra* note 8, art. 4.

This is a characteristic fully acknowledged by the Treaty, which precludes any control of state action in this field by the European Court of Justice.[28] The Community remains a self-contained regime,[29] a separate legal order with its own primary rules and specific secondary rules on the interpretation, application, and breach of primary rules.[30] Outside, in the realm of foreign and security policy, Member States operate in an international law environment. Theoretically, they are bound only by their general obligation to support common activities "in a spirit of loyalty and mutual solidarity,"[31] thus ensuring "the unity, consistency and effectiveness of action"[32] undertaken by the Union. In case of breach of this contractual obligation, the usual methods of redress, state responsibility and dispute resolution, would apply. In other words, matters communitarian would be dealt with by Community institutions within the Community framework, whereas questions of international law, even arising among Member States, would be resolved according to the precepts of general international law.

It comes as no surprise that the apparent simplicity of this structure cannot stand the test of reality. Although Article 46 TEU exempts the whole foreign policy of the Union from the scrutiny of the European Court of Justice, albeit allowing for the purview of some aspects of the third pillar,[33] the Court retains, nevertheless, jurisdiction to establish whether a particular action falls within the ambit of the members' international relations or pertains to a

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28. *See id.* art. 46.

29. *See* Max Sørensen, *Autonomous Legal Orders: Some Considerations Relating to Systems Analysis of International Organisations in the World Legal Order*, 32 INT'L & COM. L.Q. 559 (1983); Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111 (1985).

30. Recourse to the European Court of Justice, to the exclusion of other international instances, being the more obvious manifestation. *See* Cases C-90 and 91/63, Commission v. The Grand Duchy of Luxembourg and the Kingdom of Belgium, 1964 E.C.R. 631; Case C-232/78, Commission v. the French Republic, 1979 E.C.R. 2729, 2739.

31. TEU, *supra* note 8, art. II, para. 2.

32. Which remains, nevertheless, the task of the Council, under article 13(3) TEU. *See also* Nanette Neuwahl, *Foreign and Security Policy and the Implementation of the Requirement of "Consistency" Under the Treaty on European Union*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY 227-46 (D. O'Keefe & P.M. Twomey eds., 1994).

33. TEU, *supra* note 8, art. 35, paras. 1-2.

> 1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title [VI] and on the validity and interpretation of the measures implementing them.
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> 2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

(reviewable) Community competence. In contrast to the natural reluctance of Member States to submit their actions to judicial control if they may at all avoid it, this most European-minded of all Community organs, the Court, exhibits a pronounced tendency to include questions of foreign policy into its sphere of competence. Thus, in a typical example, the freedom of the Member States to apply national sanctions in implementation of the relevant resolutions of the Security Council has been subjected to the restrictions imposed by the existence of a Community policy on the subject: the common commercial policy of the Community is considered as superseding the Member State's assessment of what constitutes external policy.[34] Equally, the suspension of an association treaty with a third state[35] is not simply regulated by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties.[36] Instead, it falls under the heading of the Community's cooperation and development policies[37] and under the "constitutional" clause on the protection of human rights in the Treaty on the European Union.[38]

C. The External Manifestations

The internal inadequacies of this scheme are further accentuated when called to address the complexities of international action. Not every activity undertaken by the Union may be explained away as a mere representation exercise. For instance, the Union does not have powers to administer territory,[39] nor does the Community for that matter. Yet, at the height of the Bosnian crisis the Union undertook to administer the city of Mostar, signing in effect a Memorandum of

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34. Case 84/95, Bosphorus Hava Yollari Turzim ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General, 1996 E.C.R. 3953, 3964, para. 26; Case 124/95, Centro-Com, 1997 E.C.R. 81, 96, para. 30.

35. Such agreements usually contain clauses making their continued application conditional upon the protection of human rights and a degree of democratisation in the beneficiary country. *See generally* Antonis Bredimas, *Les droits de l'homme dans la coopération Euro-Méditerranéenne*, 49 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 332, 332-54 (1996); T. King, *Human Rights in the Development Policy of the European Community: Towards a European World Order?*, 28 NETH. Y.B. INT'L L. 51-99 (1997).

36. *See generally* G. Barile, *The Protection of Human Rights in Article 60 Paragraph 5 of the Vienna Convention on the Law of Treaties*, *in* 2 ÉTUDES EN HONNEUR DE ROBERTO AGO 3-14 (1987).

37. Case 268/94, Portuguese Republic v. Council of European Union, 1996 E.C.R. 6177, 6216, paras. 23-29.

38. TEU, *supra* note 8, art. 6 ("The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.").

39. It may be possible to include such activities within the joint actions the Union is to adopt in pursuance of its objectives. *See id.* art. 12.

Understanding with all interested parties.[40] It was quite plausible at the time that the entities actually bound by the agreement were the Member States "acting within the framework of the Union," although the agreement was negotiated and signed by the Troika[41] and the Commissioner responsible for external political relations.[42] Indeed, Article 24 TEU authorises the Union to conclude international agreements through the institutional organs borrowed by the Community,[43] with no participation of the Member States. Admittedly the point is made that such an agreement would not be binding upon a Member State, who declares at that time that it has to comply with the requirements of its own constitutional procedure. However, rather than allowing this provision to stand as a kind of reservation of state competence to conclude such an agreement on a representative premise, the final phrase allows for its provisional entry into force among the other states. The distance between the Union acting as the representative of the Member States and what could be a simplified procedure for the adoption of binding decisions within the internal legal order of the Union may indeed be a matter of perception.[44] And this outcome is not materially addressed by Declaration No. 4 attached to the Treaty on the European Union,

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40. They included, apart from the Member States of the European Union, the Member States of the Western European Union, the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the local administration of Mostar East, the local administration of Mostar West and the Croats of Bosnia and Herzegovina; Preliminary Agreement Concerning the Establishment of a Confederation between the Federation of Bosnia and Herzegovenia and the Republic of Croatia, March 18, 1994, 33 I.L.M. 611. This medley of entities of different legal status seems to be the standard in the Bosnian agreements. *See* Paola Gaeta, *The Dayton Agreements and International Law*, 7 EUR. J. INT'L L. 147, 147 (1996).

41. The Troika is comprised of representatives of the Member States holding the Presidency of the Council during the previous, the current, and the coming six-month period. *See* EC TREATY, *supra* note 2, art. 203. Although not a treaty organ, they represent the Community and the Union when a show of political unity is required. For the workings of the Council, see T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 17-23 (4th ed. 1998).

42. On the working of the Commission, see *id.* at 11-17.

43. TEU, *supra* note 8, art. 24.

> When it is necessary to conclude an agreement with one or more states or international organisations in implementation of this Title [V], 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. 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 may apply provisionally to them. The provisions of this Article shall also apply to matters falling under Title VI.

44. *See* Pierre des Nerviens, *Les Relations Extérieures*, 33(4) REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 805-06 (1997).

which notes that such international agreements concluded by the Union do not also imply a transfer of competence from the Member States towards the Union. If anything, this precaution signifies that the constituent parties were well aware of the possible incremental effect of their activities. Either way, the Declaration pertains more to an internal division of powers between the organisation and its constituent parties rather than to the external parameters of the Union.

This tendency may be further accentuated, in view of some interesting developments in the Treaty of Amsterdam, which rewrote to a large extent Chapter V of the Treaty on the European Union. Whereas the original Article J.1 referred to the common foreign and security policy of the Union *and its Member States*, according to the new Article 11 TEU the CFSP pertains to the Union alone. The pursuit of this policy is further entrusted to a single person, the Secretary-General of the Council, who is to exercise the functions of the High Representative of the Union in this field. This shift from the collective action of the Member States[45] to the single personalised representation was effected through the recent appointment of the first such "Mr. Europe." It is not unrealistic to expect that the European Union would acquire a higher visibility in the international scene, as it is now institutionally possible to make its presence felt in a much more direct and effective way.[46]

The stage is thus set for an eventual recognition of the international personality of the Union,[47] for it would become progressively impossible to carry out the objectives set out by the founding treaties[48] without having the capacity to bear legal rights and duties under international law.[49] It is well established in the international organisations doctrine[50] that, in the absence of any

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45. On the status of states in the Union, see Alan Dashwood, *States in the European Union*, 23 EUR. L. REV. 201, 201-16 (1998).

46. It is also not unrealistic to establish a practice in matters previously held afar from the Community embrace, such as defence. *See* Daniel Vignes, *Et si Amsterdam Avait Fait Encore une Autre Chose de Bien: Permettre de Réaliser la Politique de Défense Commune?*, 425 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 77-83 (1999).

47. To the extent that it does not already possess "presumptive personality," see Klabbers, *supra* note 11, at 231-53; C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANISATIONS 91 (1996).

48. *See* M. Dupuy, *L'Application des Règles du Droit International Général des Traités aux Accords Conclus par les Organisations Internationales*, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 355-82 (1973).

49. *See* Vienna Convention on the Law of Treaties, May 23, 1969, preamble, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969): "international organisations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes."

50. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 58 (4th ed. 1990); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW (3d ed.

express indication to the contrary, "the rights and duties of [such] an entity must depend upon its purposes and function as specified or implied in its constituent documents and developed in practice,"[51] including powers "conferred upon it by necessary implication as being essential to the performance of its duties."[52] It would seem inevitable that, in the course of time and in view of the functional necessities of an ever closer Union, the European Union might be recognised as an international person after all.

II. THE TREATY-MAKING POWERS OF THE EUROPEAN COMMUNITY

Meanwhile, the Union continues to act through the intermediary of the Community organs, who remain as such in spite of their being renamed "Council of the European Union,"[53] "European Commission" or "European Parliament."[54] To the extent that even these organs cannot ensure the implementation of the objectives of the Union, specific provisions have been made in the treaties.[55] Thus, since the Union does not possess the *ius delegationis*, Article 20 TUE entrusts to its constituent parties, the Member States, and the Community, the task to serve as its diplomatic and consular missions abroad. It is interesting to note that the Member States, but not the Community, are further obligated to carry out the diplomatic protection of citizens of the Union[56] in the territory of a third country in which their state of origin is not represented.[57]

1995); A HANDBOOK ON INTERNATIONAL ORGANISATIONS (Rene-Jean Dupuy ed., 2d ed. 1988); R.L. Bindschedler, *International Organisations, General Aspects*, 2 ENCYCLOPAEDIA OF INTERNATIONAL LAW 1289-1309 (1995); Karl Zemanek, *International Organisations, Treaty-Making Power*, *in* 2 ENCYCLOPAEDIA OF INTERNATIONAL LAW 1343-46 (1995); Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organisations*, 44 BRIT. Y.B. INT'L L. 111, 124-26 (1970).

51. Reparation for Injuries Suffered in the Service of the United Nations, 1949 Op. I.C.J. 174, 180 (1949).

52. *Id.* at 182.

53. *See* 1993 O.J. (L281) 18 with a statement to the effect that the change in no way affected the *current* legal position that the European Union does not enjoy legal personality (emphasis added).

54. GUY ISAAC, DROIT COMMUNAUTAIRE GÉNÉRAL 26 (4th ed. 1994).

55. For an argument that such provisions are evidence of the will of the states to deprive the Union of legal personality, see Astéris Pliakos, *La Nature Juridique de L'Union Européenne*, REVUE TRIMESTRIELLE DE DROIT EUROPÉENNE 187, 212 (1993).

56. According to Article 17 of the EC Treaty, and not of the Treaty on the European Union, "Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship." EC TREATY, *supra* note 2, art. 17.

57. *See id.* art. 20.

A. The Legal Status of the Communities

No problems of international personality plagued the development of the original three Communities. The provision of Article 6 of the ECSC Treaty[58] is certainly much more restrained than its equivalent in the EC Treaty; yet, the Court never had any difficulty treating it in the same expansive manner as the capacity of the European Community to assume rights and obligations.[59] The subject matter and thus also the treaty-making power of the Euratom was clearly delimited and there never was cause for concern.[60] As to the European Community, apart from the express statement in Article 281 of the Treaty,[61] the founding members endowed the new entity with "the most extensive legal capacity accorded to legal persons under their laws."[62]

The Community enjoys express treaty-making powers in two cases: in concluding commercial agreements, under Article 133, and association agreements, under Article 310. The procedure to be followed for the conclusion of such agreements, and consequently the attribution of tasks between the treaty organs, is set out in Article 300. Its provisions relate to the administration of the treaty-making power; they do not confer it.

The commercial agreements referred to in Article 133 cover a wider area of the common commercial policy, including multilateral commodity agreements and development policy in the form of aid to developing countries.[63] The power conferred thus upon the Community is exclusive: the Member States are precluded from concluding any such agreement.

A further express treaty-making power may be seen regarding the relations with international organisations. The Commission is obligated to "ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies" as well as "such relations that are appropriate with all international organisations."[64] The Community as a whole "shall [also] establish all appropriate forms of cooperation with the Council of Europe"[65] and "close cooperation with the organisations for Economic

58. "In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives." EC TREATY, *supra* note 2, art. 6.
59. HARTLEY, *supra* note 41, at 173.
60. *See id.* at 174-75.
61. "The Community shall have legal personality." EC TREATY, *supra* note 2, art. 281.
62. *Id.* art. 282.
63. *See generally* Case 45/86, Commission v. Council, 1987 E.C.R. 1493.
64. EC TREATY, *supra* note 2, art. 302.
65. *Id.* art. 303.

Cooperation and Development, the details of which shall be determined by common accord."[66]

As with all international organisations,[67] the particular functions assigned to the Community by the founding treaties are supplemented by such implied powers that are necessary for the attainment of its objectives or functions. The ECJ has already accepted such an extension of Community powers, specifying that when the Treaties confer a specific task, they also confer the powers that are necessary for the execution of this task.[68] Transferring this concept into the realm of external relations, the Court argued that the treaty-making power of the Community, its external competence, should reflect the developments in its internal jurisdiction. In granting judicial assent to this doctrine of parallelism in the celebrated *ERTA* case,[69] the Court distinguished between *capacity*, seen as a general potentiality to act on the international plane, and *authority*, which is derived from particular treaty provisions. The notion of capacity relates to the legal power of the Community to enter into an agreement; it is a matter of legal personality and ultimately a question of international law. Authority, on the other hand, pertains to the legality of its exercise in that power; it is a matter of the internal legal order created by the Treaty and ultimately a question of Community law. The Court concluded that: "as and when such [additional] common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system."[70]

In other words, the abstract existence of internal powers did not suffice for the Community to acquire additional jurisdiction to conclude treaties in the specific field. It is the actual exercise of such

66. *Id.* art. 304.

67. Although Community lawyers and the Court tend to forget it, the Community has certainly started life as an international organisation albeit with some special characteristics; *see* Alain Pellet, *Les Fondements Juridiques Internationaux du Droit Communautaire*, 2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 193-271 (1994); J.H.H. Weiler & Ulrich R. Haltern, *Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz*, *in* THE EUROPEAN COURTS & NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE 331, 339 (Anne-Marie Slaughter et al. eds., 1998).

68. *See* Joined cases 281, 283-5 & 287/85, Germany v. Commission, 1987 E.C.R. 3203. Note, however, the categorical assertion of the Court that the European Community "has only those powers that have been conferred on it;" Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, 1996 E.C.R. 1-1759, I-1787 para. 23.

69. *See* Case 22/70, Commission v. Council, 1971 E.C.R. 263.

70. *Id.* para. 18.

powers that is of importance, external relations being but a facet of such an exercise.

The distinction between the international law capacity of the Communities to conclude international agreements and the authority of the Commission, under Article 300 of the EC Treaty, to negotiate and sign them on behalf of the Community, is probably the clearest possible practical example of this formulation. The Court has emphasised time and again that "it is the Community alone, having legal personality pursuant to article 210 [new Article 281] of the Treaty, which has the capacity to bind itself by concluding agreements with a non-member country or an international organisation."[71]

Even if the Commission were to be found acting *ultra vires* in concluding a treaty with a third party, such an agreement remains in force and is binding upon the Community, in application of the general rules of international law.[72] This being the case, the founding fathers were careful to endow the Court with competence to conduct a type of compatibility review (under the guise of an advisory opinion) to be performed before the Community enters into an international agreement.[73] This normally means that negotiations may have started but no conclusion has been reached as yet, although the Court has been known to act in anticipation of even the commencement of talks.[74] The opinion of the Court is binding.[75] A negative answer precludes the conclusion of such an agreement, unless the EC Treaty is amended so as to permit the Community to undertake the proposed action. A positive answer, however, does not preclude the possibility of a further attack against the agreement before the Court.[76] In practice, the contracting parties would usually oblige the Community organs with a modification of the offending provisions, provided that they do not relate to matters of crucial importance. In such cases, the

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71. Case C-327/91, France v. Commission, 1994 E.C.R. I-3641, para. 24.

72. Indeed, the Court has consistently considered that the Vienna Convention on the Law of Treaties (to which the Community is not a party) "codifies universally binding rules of customary law and hence the Community is bound by the rules codified by the Convention"; see case T-115/94, Opel Austria v. Council, 1997 E.C.R. II-39, para. 77.

73. *See* EC TREATY, *supra* note 2, art. 300(6); *see also* Syméon Karagiannis, *L'Expression "Accord Envisagé" dans l'Article 228 § 6 du Traité CE*, CAHIERS DE DROIT EUROPÉEN 105-36 (1998).

74. Most notably in the case referring to a possible accession of the Community to the European Convention on Human Rights, opinion 2/94, *supra* note 68.

75. "Opinion" is therefore a misnomer. *See also* Jean Charpentier, *Le Contrôle par la Cour de Justice de la Conformité au Traité des Accords en Vigueur Conclus par la Communauté*, REVUE DU MARCHÉ COMMUN 413, 416 (1997).

76. *See* Vassili Christianos, *La Compétence Consultative de la Cour de Justice à la Lumière du Traité sur L'Union Européenne*, REVUE DU MARCHÉ COMMUN 37-44 (1994).

negotiations simply fail. If the agreement is concluded with no ruling[77] by the time the Court must give its opinion, then the only remedy is an action under Article 230 for the annulment of the decision of the Council to conclude the agreement. This remedy is available in the Community legal order but not in international law.

B. Concurrent Jurisdiction: Mixed Agreements

Should any additional competence of the Community organs signify an immediate transfer of jurisdiction from the Member States to the Community, the international community would probably have no cause for concern. The substitution would rather be seen as facilitating the conduct of international affairs. Instead of dealing with six, nine, ten, twelve, or fifteen states at the time, one would have to contend with only one entity represented by a single delegation.

However, this is not the case. There still remain many cases where the Community and the Member States enjoy concurrent jurisdiction, or cases where the effective implementation of an obligation undertaken by the Community may only be accomplished through the national authorities of the Member States.[78] As the Communities and the states enjoy separate legal personality, an agreement entered into by the Community does not bind the Member States under international law.[79] The provision of Article 300(7) of the EC Treaty[80] does not suffice to establish joint liability of the Member States for the implementation of obligations undertaken by the Community alone. At most, the states are bound by their general duty of loyal cooperation[81] to assist the Community in the execution

77. *See* Opinion 3/94, Bananas Case, 1995 E.C.R. I-4577.

78. This is a standard feature of the Community legal order, as the Community itself lacks enforcement jurisdiction. For a recent example of application of international obligations undertaken by the Community within the domestic legal order of Member States, see Case C-177/95, Ebony Maritime SA and Loten Navigation Co. v. Prefetto Della Provincia di Brindisi and Ministero Dell'Interno, 1997 E.C.R. I-1111; Noreen Barrows, *Reinforcing International Law*, 23 EUR. L. REV. 79-82 (1998).

79. *See* 1969 Vienna Convention on the Law of Treatise, *supra* note 23, art. 34; *see also* 1986 Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, May 1986, Preamble, 25 I.L.M. 543 (1986). On the uneasiness of the Community over the provisions of the latter, see Philippe Manin, *The European Communities and the Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations*, 24 COMMON MKT. L. REV. 457, 457-81 (1987).

80. "Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States." EC TREATY, *supra* note 2, art. 300(7).

81. *See* EC TREATY, *supra* note 2, art. 5.

of its obligations.[82] The conclusion therefore of "mixed agreements," encompassing one or more of the Communities[83] and one or more of the Member States,[84] is not only unavoidable[85] but indeed likely to increase in the future, as the Union cannot undertake international obligations unless it acts through the intermediary of its constituent parties, the Communities and the Member States.[86]

The practicalities of negotiating and concluding mixed agreements remain one of the most contested issues in the Community legal order. This contention is evidenced by a perennial hackling between the parties concerned as to their respective competences,[87] which cannot be solved without the authoritative intervention of the European Court of Justice.[88] Within the Community legal order, the Community and the Member States remain liable toward third parties for the implementation of that part of the agreement pertaining to their respective jurisdiction. On the international field, however, there is no clear indication as to whom an outsider may consider as "the other contracting party." The Court tends to emphasise the bilateral nature of mixed agreements, with the Community and the Member States on the one hand and the third party or parties on the other. Consequently, in view of the obligation of the Member States to act in unity in the representation of the Community,[89] Advocate-General Jacobs opined that: "Under a mixed agreement, the Community and the Member States are jointly held

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82. *See* Case 104/81, Hauptzollamt Mainz v. Kupferberg, 1982 E.C.R. 3641. *But see* Walter Ganshof van der Meersch, *L'ordre Juridique des Communautés Européennes et le Droit International*, 148 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1975-V, 147-61.

83. Most such agreements involve the European Community alone or at most the EC and the ECSC. Agreements where all three Communities are signatories are rare, the typical example being the "Europe agreements" whereby the transition economies of Eastern Europe were associated with the Communities.

84. For a typical example, regional environmental agreements where, besides the Community, only the coastal states are involved, see MACLEOD ET AL., *supra* note 1, at 322-37.

85. *See* Ruling 1/78, *Re Draft Convention on the Physical Protection of Nuclear Materials*, 1978 E.C.R. 2151; Opinion 1/78, *Re Draft International Agreement on Natural Rubber*, 1979 E.C.R. 2871; Opinion 2/91, *Re ILO Convention 170*, 1993 E.C.R. I-1061; Opinion 1/94, *Re WTO Agreement*, COMMON MKT. L. REV. 205 (1995).

86. Allan Rosas, *Mixed Union-Mixed Agreements*, *supra* note 11, at 125-48.

87. *See generally* MIXED AGREEMENTS (D. O'Keeffe H.G. Schermers eds. 1983); N. Neuwahl, *Joint Participation in International Treaties and the Exercise of Powers by the EEC and its Member States: Mixed Agreements*, 28 COMMON MKT. L. REV. 717, 717-40 (1991).

88. *See generally* T. Tridimas & P. Eechout, *The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism*, Y.B. EUR. L. 143-77 (1994).

89. *See* Eleftheria Neframi, *Quelques Réflexions sur la Réforme de la Politique Commerciale par le Traité d'Amsterdam: Le Maintien du Statu Quo et L'Unité de la Représentation Internationale de la Communauté*, CAHIERS DE DROIT EUROPÉEN 137-59 (1998).

liable unless the provisions of the agreement point to the opposite direction."[90]

Although this formulation certainly seems generous, it does not practically help third parties who wish to have the mixed agreement they concluded with the Community implemented, rather than resort to the mechanism of responsibility for breach of contractual obligation. Furthermore, there are other problems in this respect as well, such as to whom should a retaliation action be addressed?[91]

As expected, the Community and the Member States are reluctant to clarify their respective obligations,[92] more often than not because their internal allocation of powers is currently under consideration and may change in the future. In order to solve the conundrum and avoid further complications, third parties have tended recently to insist on a statement demarcating the respective fields of competence of the Community and its members, before they allow the Community to participate in international treaties. Thus, such a subordination statement was required as a condition for Community participation, e.g., in the Law of the Sea Convention, the Vienna Convention for the Protection of the Ozone Layer, the Convention on Biological Diversity, and the Framework Convention for Climate Change.[93] It is clearly understood that such "declarations of competence" are made without prejudice to the allocation of powers within the Community legal order. Indeed, they are usually modified when a shift of competence occurs: For instance, when the Community submitted supplementary declarations of competence to the FAO, first in 1992 when a common organisation of the market in bananas was adopted, and then again in 1994 to take account of the amendments brought about by the Treaty on the European Union. In terms of international law, however, such declarations bind the Community and the Member States towards third parties, creating, at the very least, a *bona fide* obligation of compliance and *prima facie* jurisdiction on the subject.

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90. *See* Opinion of the Advocate-General Jacobs, Case C-316/91, 1994 E.C.R. I-625 para. 69.

91. *See* Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, 36 COMMON MKT. L. REV. 387-405 (1999).

92. *See* J. Temple Lang, *The Ozone Layer Convention: A New Solution to the Question of EC Participation in 'Mixed' Agreements*, 23 COMMON MKT. L. REV. 157 (1986).

93. *See* Phoebe Okowa, *The European Community and International Environmental Agreements*, 15 Y.B. EUR. L. 169-92 (1995).

C. The Impact of Union Action Upon Third Parties

Although not competent to safeguard the rights of third parties impacted by Community action,[94] the judicial intervention of the European Court of Justice has ensured that the Community at large complies with its obligations under international law. The political structure of the Union, however, allows for action undertaken in the field of common foreign and security policy to escape such judicial review. In principle, such common action constitutes an international agreement between the Member States that leaves third parties indifferent. At most, it might create rights for third parties through the application of the principle of good faith or estoppel, a typical example being the conditions of recognition of new states in Eastern Europe.[95]

Questions of conflict between obligations of the Member States in the context of the CFSP and obligations towards third parties are resolved according to the generally applicable rules of international law. Thus, in a typical example, the parties are obligated through the UN Charter to comply with Security Council resolutions establishing a trade embargo against states with whom they have concluded a trade agreement within the framework of the Community. Since the obligations are a matter of foreign policy, the issue escapes the confines of the Community legal order and the members' individual obligations take precedence.[96]

In practice, the Community accommodates such conflicts either through its membership of international organisations or by directly encompassing in its own domestic legal order provisions similar to those that might give rise to an eventual conflict. Although the Court found that, for reasons of constitutional structure,[97] the Communities could not accede to the European Convention of Human Rights, Article 6 of the Treaty on the European Union brought the full

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94. The most the Court can do is to decide on whether the agreement could be recognized and applied within the Community legal order, notwithstanding their validity in international law. *See* Joined Cases 21-24/72, Opinion of the Advocate General Mayras, 1972 E.C.R. 1219, at 1234; *see also* Pierre Pescatore, *Les Relations Extérieures des Communautés Européennes*, 103 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1961-II, 1 (1962).

95. *See United Kingdom Materials on International Law*, 62 BRIT. Y.B. INT'L L. 559 (Geoffrey Marston ed., 1991); Jean Charpentier, *Les Déclarations des Douze sur la Reconnaissance des Nouveaux États*, 96 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 343-56 (1992).

96. *See* Lockerbie (Libyan Arab Jamahiriya v. United States) 1992 I.C.J. 113 para. 42; 1992 I.C.J. 114, 126.

97. *See* Opinion 2/94, *supra* note 68.

complement of its normative power into the Community ambit,[98] thus ensuring the compatibility of the two major international institutional legal orders in Europe.[99] Indeed, the Court has gone out of its way to bring into the Community legal order and give effect not only to agreements concluded by the Community and its Member States,[100] but also to customary rules of international law as well.[101]

If, however, such a conflict cannot be avoided, the resolution of the dispute may give rise to additional problems in finding an instance competent to adjudicate. Since the applicable law is international law, recourse to the International Court of Justice (ICJ) is a perfectly possible option, provided that the parties to the dispute consent to its jurisdiction. One could only imagine the ensuing political embarrassment, however, should a Member State opt for such a solution when the international legality of an action undertaken in the framework of the common foreign and security policy of the Union is challenged.[102]

Moreover, no such action may be impeded by the (probable) joint liability of the Member States arising out of a mixed agreement. The ICJ made it clear that a third party may take an individual state to the Court, irrespective as to whether other parties may also be held liable under the same conditions.[103] Thus any state (including a fellow member of the Union, the duty of community loyalty notwithstanding) may bring a Union member to the Court alleging that a particular measure of common Union policy is in contravention of a rule of international law, without necessarily involving the other Member States in the case.

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98. TEU art. 6(2). "2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

99. *See generally* THE EUROPEAN UNION AND HUMAN RIGHTS (N.A. Neuwahl & A. Rosas eds., 1995); A.G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491, 528 (1997); Patrick Wachsmann, *Les Droits de L'Homme*, 33(4) REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 883-902 (1997).

100. *See* Case 21-24/72, *supra* note 94; HARTLEY, *supra* note 41, at 177-79.

101. *See, e.g.*, Roberto Mastroianni, *La Rilevanza Delle Norme Consuetudinarie Sulla Sospensione dei Trattati Nell'ordinamento Comunitario: La Sentenza Racke*, RIVISTA DI DIRITTO INTERNATIONALE 86-105 (1999). *See generally* Anne Peters, *The Position of International Law Within the European Community Legal Order*, GER. Y.B. OF INT'L LAW 9-77 (1998).

102. *See* Koskenniemi, *supra* note 18, at 41.

103. *See* Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J., paras. 49-55; *see also* <www.icj-cij.org> (listing the NATO cases currently pending before the Court).

III. IN GUISE OF CONCLUSIONS

This constituted a first attempt to touch upon certain issues of international law relevant to both the internal construction and the manifestations of Union action in the international scene. Although the Union is probably the newest international entity, the problems attached to its operations are not to be addressed on a *tabula rasa*. There is a wealth of experience that accompanies it, by the organs of the Communities and the practice of Member States both within the Community order and toward third parties, which cannot be set aside.

On the other hand, the workings of the Union are still in a nascent stage. Most institutions are still trying to find a new *modus operandi* under their dual capacity as members of the Communities and members of the Union.[104] Relationships are still in a state of flux, and individual state reflexes are in overdrive in anticipation of a quasi-federal onslaught upon their traditional *domaine réservé* in the field of foreign and security policy. The legal status of the Union is still developing, hopefully toward the full acknowledgement of its international personality. If anything, it is too early to draw any conclusions.

104. *See* Romano Prodi, *La relance du rôle de la Commission, la dimension internationale de I'UE, un espace de liberté pour les citoyens européens*, REVUE DU MARCHE UNIQUE EUROPEEN, Feb. 1999, at 5-8.