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Article

***37 THE EUROPEAN UNION: FROM AN AGGREGATE OF STATES TO A LEGAL PERSON?**Esa Paasivirta [\[FN1\]](#)

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I. INTRODUCTION.

The European Union (EU or the Union) was created by the Treaty on the European Union (TEU), (concluded at Maastricht, The Netherlands, on February 7, 1992, which entered into force on November 1, 1993. [\[FN1\]](#)) The Union is founded on the three existing Communities--the European Community (EC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (EAEC) and supplemented by policies and new areas of cooperation established by the TEU. The two new areas of cooperation were the common foreign and security policy (CFSP) and the cooperation in justice and home affairs (JHA). Both of these new areas now fall within the competence of the Union rather than the European Community. They are implemented according to an intergovernmental method rather than the supranational community method. [\[FN2\]](#)

The TEU raises complex issues about the nature of the Union and its relationship to the three European Communities. [\[FN3\]](#) Although the field of European integration has been broadened by the creation of the EU, the legal and institutional powers of the Union remain limited. The TEU, ***38** unlike the treaties establishing the three European Communities, [\[FN4\]](#) fell short of investing the Union with international legal personality.

The absence of international legal personality has significant ramifications, especially for the conduct of the CFSP and its implementing legal instruments. After the Maastricht Treaty, the legal structure of the European Union can be presented schematically as follows (see CHART on following page).

As the Chart shows, the European Communities did not disappear with the establishment of the European Union. Instead, the Union forms an umbrella-like concept which covers the three communities, forming one of the three pillars of the Union. The first pillar, or Community pillar, is marked by its supranational nature, whereas the second and third pillars operate on the basis of intergovernmental cooperation between the Member states. The three pillars are linked through a single institutional framework and the common provisions (Article A-F) and the final provisions apply to all three pillars.

This paper examines the question of the legal personality of the EU in the area of external relations by first discussing the general policy aspects of legal personality, by secondly considering the international legal personality of international organizations, and finally by assessing the specific legal personality of the European Union with particular reference to CFSP matters, taking into account the recent developments of the Treaty of Amsterdam (1997) as far as the legal personality issue is concerned. Otherwise the references are made to the TEU as it is in force today.

II. THE POLICY ASPECTS OF LEGAL PERSONALITIES.

It is axiomatic that law provides a framework for social relations and for the allocation and distribution of power and resources amongst the members of a society. Society, in turn, applies enforcement machinery to specific sets of social relations prescribed by law. Each society also defines the range of persons who can access resources and dispose

of them in accordance with law, and identifies who may invoke law to get their rights enforced.

***39 CHART**

EUROPEAN UNION

according to Treaty on European Union (TEU), done at Maastricht in 1992, and recently amended by the Treaty of Amsterdam (1997). [\[FNal\]](#)

Title I of the Treaty on European Union: Common Provisions (Articles A to F)

Pillar I European Communities			Pillar II	Pillar III
European Community	European Coal	European	Common	Co-op-
(Previously:	and Steel	Atomic	Foreign And	in the
Field				
European	Community	Energy	Security	Of
Justice				
Economic	Paris 1951.	Community	Policy	and
Home				
Community) Rome	Latest	Rome	(Article	Affairs
1957. Amended by	amendment by	1957.	J). Added	(Article
K).				
Title II of the	Title III of	Latest	by Title V	Added
by				
Treaty on	the Treaty on	amendment	of the	Title VI of
European Union	European	By Title	Treaty on	the
Treaty				
(inter alia by	Union	IV of the	European	on European
the addition and		Treaty on	Union.	Uni-
on.				
Monetary Union)		European	Recently	Re-
cently				
and by the		Union	amended by	amended
by				
Treaty of			the Treaty	the
Treaty				

Amsterdam (1997) of of Amster-
dam

[FN1] Amsterdam (1997)*
(1997)*

Title VII of
the Treaty
on
European
Union: Final
Provisions
(Articles
L-S)

FN1. Not yet in force.

***40** Generally, only a legal person can be a subject of legal rights and obligations. This implies that not everybody is eligible to participate in law and society in the same way. Some members of a society may be excluded or have their access to law significantly restricted. To have access to resources of a society and to take part in the exercise of power, a member of the society must have a certain standing and certain recognized capacities. In other words, an individual has a standing in a society when he or she is considered a legal personality. Only then is an individual entitled to participate fully in the sharing of power and resources and to invoke the special protection that society provides for the enforcement of rights.

Lack of standing as a legal personality bars a person from participating in important social activities, such as owning property, entering into contracts and voting in elections. In ancient Roman law, a distinction in legal capacity was drawn between a citizen (civis), capable of managing his own affairs (sui generis), and mere inhabitants under the control of others (alieni juris). In old English law, the list of individuals who were not considered to be legal persons included infants, lunatics, idiots, jews, monks, and married women. In the United States, (at various times and in various settings) women, African and Native Americans have been, excluded from the original scope of "We the People" in the Constitution. [\[FN5\]](#)

Groups of individuals (rather than individuals by themselves) also may be recognized collectively as legal or juristic persons in a variety of forms. At times groups of individuals in the form of corporations, towns, churches, and states are viewed in the eyes of law as one body, a corpus with specific powers, like the power to buy and sell. This collective legal standing is accomplished with the help of the concept of a persona, a legal artefact originally denoting the mask worn by an actor. [\[FN6\]](#)

Such groups are treated in the same way as individual legal persons. They may own property, enter into contracts and have their rights protected and enforced.

The bestowal upon such non-legal persons of legal personality involves a limited degree of social engineering. At the same time, the bestowals of legal capacity upon non-persons need not either contravene the interests of pre-existing legal persons or be adopted for altruistic reasons. For example, the inclusion of married women among those *41 having legal personality was advocated by fathers to protect family estates and not to better the lot of married women. [FN7] And the recognition of legal personality for corporations was primarily to improve efficient allocation of society's resources and was only secondarily to bestow benefits on the members of society at large.

III. THE INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS.

In domestic society, the original members tend to control for a time the granting or withholding of legal personality to other subsequent entities and actors in that society. The same is true in international society.

The "original" members of modern international legal society are states. And states control the admission of new states and other entities into membership in international legal society. They have exercised such control through devices such as recognition, diplomatic relations, consular relations, treaties, etc. Today, however, with the expansion of domestic societal life beyond national borders, an increasing number of specific social functions, relating to inter-nation peace, economy and welfare, have become arranged, not by states directly, but by international organizations created by states. These international organizations necessarily have a degree of international legal personality in order to function as intended.

That said, present international legal society is significantly more restrictive than present national societies in the range of entities and persons who have legal personality. In international legal society, there is no general code to require automatic recognition of legal persons when certain general conditions are fulfilled as is the case with, for example, private and public corporations. In general, bestowal of international legal personality remains an exclusively reserved option of states. This is especially true with regard to bestowal of international legal personality on international organizations. This very limited pathway to legal personality in international society reflects the historical operation of international law, which has been first and foremost to regulate relations among states. Only incidentally did states allow international law to permit recognition of non-state actors as having elements of international legal personality. When states did allow such limited personality for *42 international organizations, it was usually accomplished through the form of the treaty that created the international organization. This treaty source for the legal personality of international organizations has inhibited subsequent claims to enhanced capacity or standing for international organizations on the basis of need or changed circumstances.

International law doctrine today reflects three basic approaches to the issue of legal personality of international organizations. [FN8] The first is the contract or subjective theory approach, which holds that the legal personality of an international organization derives from the will of states explicitly attributed to the organization in a constitutive treaty. This treaty-contract approach was especially supported by socialist countries, but it has generally lost its appeal with the collapse of communism. This state-centered, restrictive contract theory of personality also has been difficult to uphold in the post-Second World War period, with a rapid growth of a large number of specialized international organizations which exercise legal personality even though their constitutive instruments provisions do not explicitly confer legal personality.

The second approach is the objective theory which suggests that if an organization operates in a sufficiently autonomous manner, it may possess legal personality ipso facto in addition to that conferred by constitutive instruments. Today, most of those organizations, apart from their constitutive treaties, do possess some degree of international legal personality and do act in their own name on the international stage to carry out their assigned or implicit tasks. [FN9]

Under this objective theory for personality, autonomy arises generally when an organization both is not subject to the jurisdiction of any particular state and is endowed with an organ the function of which is to express the will of

the organization. [\[FN10\]](#) Here, the source of legal personality is not so much the subjective and explicit will of states as it is international law determined from objectively viewed criteria. The *43 objective approach is often criticized for precisely this apparent disregard of the will of the member states associated with a given organization. That said, the objective theory accommodates (better than does the contract theory) the rapid growth in number and the increasing activity and relevance of international organizations.

The third approach, the implied powers or functional theory, is the most widely accepted approach for determining international legal personality. More often than not, the constitutive instruments of international organizations do not contain an express provision conferring legal personality upon the organization. In these circumstances, a question arises whether an organization possesses legal personality. Under the implied powers approach, personality derives indirectly from the functions of the organization appropriately exercised through its organs especially when that exercise demonstrates a will separate from its members.

The movement of international society from a contract approach to an implied powers approach to determine the nature and extent of international legal personality has been confirmed by the International Court of Justice. In the *Reparation for Injuries Case*, [\[FN11\]](#) the issue was whether the United Nations could bring an international claim against a responsible government for injuries suffered by an agent of the UN. The Court employed the functional approach when it examined the concept of legal personality of the UN by looking at the organization's implied powers in its constitutive documents supplemented by later practice. The ICJ concluded that the UN indeed possessed legal personality because the constitutive instruments of the UN and subsequent UN practice established a status for the UN organization separate from its state members. The Court noted that the UN Charter equipped the organization with its own functioning organs that had unique tasks. The Court specifically referred to Article 2(5) of the Charter that requires the members not only to assist the organization in its tasks but also to refrain from acting on their own when the UN acting through the organ of the Security Council is itself taking preventive or enforcement action. [\[FN12\]](#) The Court also observed that member states agreed to grant the organization legal *44 personality and privileges and immunities in the territories of the members and that the Charter specifically provided for the conclusion of agreements between the organization and its members. In the opinion of the Court:

The Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of legal 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. . . 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 the performance of its duties. [\[FN13\]](#)

Importantly for present purposes, the Court concluded that the UN organization has international legal personality even without an express provision conferring personality. The Court emphasized efficiency considerations in analyzing the functions of the organization with regard to legal personality. Here, it emphasized three main requisites for legal personality: (1) legal personality must be indispensable to the achievement of the organization's objectives; (2) the organization must have its own organs and special tasks; and (3) the organization itself must be distinct from its member states (in the *Reparations case* this was reflected both in the language of the UN Charter and in practice). [\[FN14\]](#) The Court thus rested its decision both on the implied powers doctrine and the objectively determined characteristics of the UN organization. [\[FN15\]](#)

The preference of most writers today is to include the implied powers approach or functional approach to any analysis to determine whether international organizations have international legal personality. *45 [\[FN16\]](#) That preference corresponds to actual practice, at least where a measure of personality is invoked on the basis of the con-

stitutive instrument of the organization rather than by applying objective criteria. The modern complex concerns of states generally are more easily accommodated under the implied powers approach than under the objective approach because state permission or acquiescence remains at least indirectly relevant.

Whichever theory is relied upon, an organization, once it has international legal personality, is able to assert rights and accept correlative duties on the international plane. The nature and content of those rights and duties vary from one organization to another depending on the organization's constitutive instruments. [\[FN17\]](#) The powers of the organizations are thus limited in a primary sense to its purposes and functions and it is probably accurate to refer to a functional personality of international organizations. [\[FN18\]](#)

IV. THE INTERNATIONAL LEGAL PERSONALITY OF THE EUROPEAN UNION.

A. The EU is distinct from its Member States and the three Communities.

The examination of the international legal personality of the EU requires an acceptance that the EU is distinct from its Member States and the Communities, that it has but limited powers in CFSP matters (as well as JHA matters), and that it has not been granted legal personality unlike the three Communities. It is normally maintained that the EU lacks legal personality. [\[FN19\]](#) However, it is not accurate to claim either that the EU is legally non-existent or that it is not distinct from the Member States or the existing three Communities.

***46** A number of provisions of the TEU clearly contemplate and generally treat the EU distinct from the Member States (and the three Communities.) The TEU provides that the Member States "establish among themselves a European Union", which "marks a new stage in the process of creating an ever closer union among the peoples of Europe. . .". [\[FN20\]](#) While this clearly creates an entity distinct from the Member States, the TEU also reflects the view that the EU is a "process", rather than a fully formed legal personality (let alone a new federal state). [\[FN21\]](#) However, that reference to "an ever closer union" when linked to the principle of subsidiarity clearly implies a certain sense of hierarchy probably best explainable in terms of a federal framework. [\[FN22\]](#)

Unquestionably, the Union does have its own tasks and objectives. Its primary task is "to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples". [\[FN23\]](#) In addition, the objectives of the Union include the promotion of economic and social progress; the assertion of "its identity on the international scene", in particular through the implementation of the CFSP, and the strengthening of "the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union". [\[FN24\]](#)

The distinct nature of the Union is also implied by the separate presence of the principle of subsidiarity in the constitutive treaties, both for the Union [\[FN25\]](#) and for the European Community. [\[FN26\]](#) The Union is to ensure internal consistency and continuity of the activities of the Union in general, respecting the *acquis communautaire* and, in particular, to "ensure the consistency of its external activities as a whole". [\[FN27\]](#)

The Union's separateness from the Member States is also reflected in its institutions. For example, the Union is served by "a single ***47** institutional framework" based on the Community institutions (Council, Commission, Parliament, Court of Justice), although the powers of the institutions differ greatly depending on whether they emanate from the Treaties establishing the European Communities or from the TEU. [\[FN28\]](#)

The one institution that was specially created for the Union is the European Council. It is composed of the heads of states or heads of governments. The European Council has a different role than the Council of Ministers. The European Council provides "the Union with the necessary impetus for its development" and defines "the general political guidelines". [\[FN29\]](#) The Council exercises the main decision-making functions of the Union and ensures "the unity, consistency and effectiveness of action by the Union". [\[FN30\]](#) Thus, the Union is beyond question dis-

tinct from the Member States objectively viewed by its constitutive instruments and by its function.

What is less than clear is the exact legal nature of the Union under the TEU and its relationship with the existing three Communities. While the provisions of the TEU draw a distinction between the Union and the Communities that make a part of it, the TEU also contains elements which underline the "oneness" of the Union as a whole. The common provisions (Articles A to F) and the Final provisions (Articles L-S) apply to the Union as a whole. Thus, for example, Article A(3) provides that the Union "shall be funded on the European Communities" and Article O provides for a single membership in the Union, replacing corresponding provisions in the treaties establishing the Communities. However, unlike the treaties establishing the three Communities, the TEU does not contain a specific provision conferring the Union legal personality. According to the TEU [\[FN31\]](#) the Union provides "itself with the means necessary to attain its objectives and carry through its policies". This provision is problematic because, while it could theoretically serve as a basis upon which to presume legal personality of the Union, it has been narrowly interpreted not to confer international legal personality. [\[FN32\]](#)

***48 B. The European Union's Limited Powers and Instruments in CFSP Matters.**

The general objective of the European Union in the area of CFSP is "to safeguard the common values, fundamental interests and independence of the Union; to strengthen the security of the Union and its Member States in all ways; to preserve peace and strengthen international security; to promote international cooperation; to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms". [\[FN33\]](#)

The Union and its Member States "define and implement a common foreign and security policy," (CFSP) [\[FN34\]](#) The separation of the Union in external matters from the Member States is reflected in the solidarity obligation which stipulates:

"The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. . .". [\[FN35\]](#)

The main institution for the CFSP is the Council of Ministers. The Council, acting under the political authority of the European Council, makes the "decisions necessary for defining and implementing" the CFSP. [\[FN36\]](#) That is, it is the forum for discussions and mutual information. The role of the Council of Ministers here is central because it decides whether a matter shall be subject to joint action and it defines the procedures for such action. The Member State holding the presidency of the Council represents the Union in matters concerning the CFSP and the Council is responsible for the implementation of common measures and expresses the position of the Union in international organizations and conferences. [\[FN37\]](#)

The functions of the Commission in the field of CFSP differ from ***49** those under the treaties establishing the European Communities. Rather than having the exclusive right to make proposals or to exercise comprehensive decision making powers, as in the three Communities, the Commission is "fully associated" with the CFSP [\[FN38\]](#) and shares the right of initiation with the Member states. Both the Council and the Commission are responsible for ensuring the consistency of external relations as a whole, including security, economic and development policies, "each in accordance with its respective powers". [\[FN39\]](#) The Commission has not been assigned specific tasks in the framework of CFSP, but it is associated with the external representation of the Union. [\[FN40\]](#) It serves the Union through its missions in third countries. [\[FN41\]](#)

The European Parliament carries out a consultative function on the main aspects and basic choices concerning the CFSP. [\[FN42\]](#)

The Court of Justice has no powers in the area of CFSP, except the power to examine the legality of economic sanc-

tions against third countries, which are implemented by the Community only after a common position or joint action has been taken by the Union. [\[FN43\]](#) The powers of the European Court of Justice are limited mainly to matters falling within the competence of the Communities and the final provisions of the TEU. [\[FN44\]](#) The administrative expenditures for the CFSP are charged to the budget of the European Communities. The operational expenditures to implement the CFSP, may be charged either to the budget of the European Communities or to the Member States. [\[FN45\]](#)

The TEU provides the Union only with very limited powers and instruments in CFSP matters. [\[FN46\]](#) Such limitations, of course, suit the Member States because it allows them simultaneously to both guard their rights and interests and to preserve their core area of State sovereignty. *50 However, limited powers and means at the Union level hamper the efficiency of the CFSP and may adversely affect the uniformity of action towards third parties. After all, the past experience of European integration, especially in the context of common commercial policy and GATT/WTO matters, has shown that the impact of common conduct is bound to be greater and more efficient than individual actions of the Member States (especially where those actions differ). While an increased impact for Europe has been an important motivating factor behind integration in general, that integration is not fully reflected in the field of CFSP, which takes the form of inter-governmental cooperation, with limited instruments for its implementation.

The European Community's comprehensive (and partly exclusive) competencies are in contrast to the limited powers and means of the European Union in CFSP matters. The instruments at the disposal of the Community, as distinct from the Union, include legislative instruments, regulations, directives and decisions, which are legally binding on the Member States, and international agreements in the area of external relations. The instruments available to the Union in the CFSP area include common positions (J.2), joint action (Article J.3) and declarations of the Union. [\[FN47\]](#) According to Article 1(3) TEU, the Union pursues its objectives by two methods:

- (1) by establishing systematic cooperation between Member States in the conduct of policy (Article J.2 TEU); and
- (2) by gradually implementing joint action in the area in which the Member States have important interests in common. [\[FN48\]](#)

The first method aims to coordinate national policies and to improve on the earlier so-called European Political Cooperation (EPC) that preceded the Maastricht Treaty. The second method aims to establish gradually a common approach of the Union in particular areas to complement the national foreign policies of the Member States. In principle, the joint action called for should apply to matters of important common interest which the Union gradually implements.

A common position is meant to be more than a diplomatic declaration. It is something which would provide a framework for consistent action. As such, a common position may outline certain *51 orientations or strategies and define common principles for the Union with regard to third countries or multilateral issues. The implementation is carried out by the Member States and by the Communities, in accordance with their own competences and procedures. Once adopted, common positions oblige the Member States to ensure that their national policies conform to them. [\[FN49\]](#)

The Member States are to coordinate their action in international organizations and conferences and they are obliged to uphold any common positions in such forums. [\[FN50\]](#) Majority of common positions at the moment relate to economic sanctions concerning Libya, the Sudan, Haiti and ex-Yugoslavia. Issues which have not been subject to the common position or joint action, remain a matter for each Member State's national foreign policy.

Common positions, not surprisingly, outnumber joint actions because they are easier to adopt and because they do not require prior general guidelines of the European Council.

Joint action implies a more closely integrated and more disciplined action than a common position and the TEU gives the impression that joint action is the key vehicle of the CFSP. [\[FN51\]](#) Both common positions and joint actions are legally binding on the Member States. Joint actions are more definitively and unambiguously stated than common positions because they "commit" the Member States to the positions they adopt by joint action (Art. J.3(4)). A joint action addresses precise questions. For example, joint actions were used to address the former Yugoslavia, to support the peace process in the Middle East, to support the Stability Pact in Europe, to support the transition to democracy in South Africa, to prepare for the conference of non-proliferation of nuclear weapons, to control the exports of dual use goods, to control the use of anti-personnel mines, and to supervise elections in Russia.

The most often used instrument of the CFSP is the declaration. Unlike the common positions and joint actions, declarations reflect purely political values. The Presidency of the European Union makes declarations on behalf of the Union with respect to a particular event or situation.

The TEU does not provide the Union with CFSP treaty-making ^{*52} powers and so treaties are not among the instruments available to implement the CFSP. If treaties are concluded within the framework of the CFSP the individual member states become the contracting parties and not the EU. [\[FN52\]](#) For example, the agreement concluded in the former Yugoslavia conflict (a Memorandum of Understanding on the European Union Administration of Mostar), was concluded between "the Member States of the European Union acting within the framework of the Union in full association with the European Commission". [\[FN53\]](#) Normally, such an agreement would require individual signatures of all Member States of the Union. In this case, exceptionally, the Member States gave the Presidency of the Council the power to sign the Memorandum of Understanding on their behalf. Such an exceptional solution tends to prove the rule, even though it may be justified under Article J.5(2) TEU (which gives special responsibilities to the Presidency). Such Union action is also problematic under the constitutional laws of some Member States, which do not envisage the delegation of the powers of their own government to sign international agreements. [\[FN54\]](#)

C. The International Legal Personality of the European Union

The Union, at first sight, seems to satisfy two prime criteria for international legal personality--separation from the Member States and possession of its own organs. The Union, of course, was established by a treaty concluded by its Member States. The Union possesses permanent organs similar to those of the Community. And the Union is separate from its Member States, in the sense that it has distinct aims and goals. This separation from Member States is indirectly reflected in the Treaty provisions for solidarity of obligation and for a principle of subsidiarity separate from the Community.

On the other hand, the TEU did not confer on the Union treaty-making powers. Instead, its powers in the area of CFSP, are limited to the adoption of common positions and joint actions and declarations, neither of which require it to have international legal personality. The functions and powers of the EU were intentionally designed by the Member States to be restricted at the time of its creation, which argues for the absence of discrete legal personality. That design reflects a ^{*53} deliberate intention to curtail the Union's role and power in international legal relations. [\[FN55\]](#) To act on the international plane, the Union must rely either on the existing Communities, especially the EC, or on the Member States. [\[FN56\]](#)

The German Constitutional Court, [\[FN57\]](#) prior to German ratification of the TEU, took the view generally shared by other Member States, that the Union was not a legal person and that the narrow powers granted it did not make Union legal personality indispensable for the Union to perform its functions. It rejected the exclusive competence of the Union to decide jurisdictional conflicts under Article F(3). [\[FN58\]](#) In doing so, the German Constitutional Court relied largely on the intention of the Member States and noted that Article F(3) "merely states the political intention that the Member States forming the Union wish to provide it, under the scope of the required procedures, with the means necessary to attain its objectives and carry through its policies". It noted that "according to the interpretation

applied by the Federal Government, the Union does not have a distinct personality either in terms of its relationship with the European Communities or with the Member States." The Court stated that:

"the Union provides 'itself' with means in the same way as it sets 'itself' objectives in Art. B: the Maastricht Treaty construes the Union as a name for the Member States acting in concert, not an independent legal entity. It is the Member States which, through the Treaty, provide the means and set the objectives for the Union". [\[FN59\]](#)

A different interpretation according to the Court would conflict with "the intention expressed throughout by the contracting parties" to set forth the principle of limited individual powers, and it would also conflict with the "conscious decision of the Member States to exclude" foreign and *54 security policy and justice and home affairs from the supranational decision-making structures. [\[FN60\]](#) Article F(3), it said, is not supplemented by procedures which would assign specific tasks to specific institutions. Article F(3) contains "simply a declaration of intent as to the program to be pursued," rather than a standard of competence. [\[FN61\]](#)

The German Constitutional Court's opinion endorses the principle that the controlling power rest with the Member States of the Union.

V. FUTURE PROSPECT REGARDING THE UNION'S LEGAL PERSONALITY AND THE TREATY OF AMSTERDAM (1997).

The question of legal personality is not, of course, a purely technical legal question, but a matter which is treated with a high degree of caution by the Member States of the Union, who are anxious about its impact and possible limitations on their national sovereignty. Such impacts and limitations do not, on the other hand, necessarily depend so much on the existence of the legal personality as such as on the actual competences that the legal person would have. It is entirely possible to grant legal personality to the European Union, even to merge with the existing Communities and still maintain the presently existing three pillar structure. While the Union as a whole would have one legal personality, it would have very different competencies to act, depending on whether a particular issue falls within Community (I pillar), CFSP (II pillar) or Justice and Home Affairs (III pillar) activities and, correspondingly, different decision making procedures and voting rules would apply respectively.

It is likely that the EU in the years ahead eventually will emerge with an intact international legal personality regardless of the present state of law. That is not to say that the question of legal personality is posed in a legal, political, or social vacuum.

Legally, the present Union rules reflect the possibility that the Union may act independently and it already has done so within the limits available to it. While the prevailing view is that the Union falls short of being a legal person, the EU Treaty contains the legal elements to distinguish the Union from its Member States. This is particularly noticeable in the area of external relations, where the central objective of *55 the Union is to "assert its identity on the international scene". [\[FN62\]](#) That is, at least when the Union deals externally with other states, it may act as one entity even if that entity has not reached its full maturity.

Socially and politically, the EU operates in continuous intercourse with third states, international organizations and other actors on the international stage. That intercourse touches on some aspects of international legal personality and/or the lack of it. The increasing involvement of the EU in international life generates social and political expectations and pressures, which are likely to lead to the establishment of a single legal personality.

At the micro level, such expectations are prompted when the Communities and the Members States appear jointly under the sign of the European Union in international negotiations and conferences and speak with one voice, either through the Commission or through the Member State holding the presidency of the Council. Such joint appearances induce and consolidate the attitudes of third countries to treat the Union as one entity and, indeed, as if it were a legal person. The attitudes of third countries inevitably also affect the perceptions of the Member States themselves on

the issue of the legal personality.

Those social and political expectations also may arise at the macro level. For example, The Protocol Concerning Elections (Annex II) in the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip [\[FN63\]](#) makes several references to the European Union which is not a party to the agreement, but witnessed its signature. At the same time, the EU took a parallel joint action to support the peace process in the Middle East. The Protocol provides that security issues relating to international observers be dealt with within the framework of the trilateral Palestinian-Israeli-European Union forum (Art. IV(2)(c)). The Protocol also deals with communications and questions of logistics providing inter alia:

"The European Union will act as the coordinator for the activity of observer delegations (Art. V(4)).

The [Central Election Committee] Israel and the European Union shall establish a trilateral forum for the purpose of dealing with issues (for example: security of observers, communication, *56 visas, identification, and other questions of logistics) which are raised by observer delegations as requiring assistance, or which otherwise require coordination between the members of the trilateral forum. Other matters relating to the conduct of the elections may be dealt with between the [Central Election Committee] and the European Union bilaterally. The operational modalities of the trilateral forum will be agreed by the parties at its first meeting. (Art. V(7))

The [Central Election Committee] and Israel will bear no financial liability in respect of expenditure undertaken by observers, or of injury, damage or loss incurred by observers in the course of their duties or otherwise. The European Union will only bear such liability in relation to members of the coordinating body and to the European Union observers and only to the extent that it explicitly agrees to do so. (Appendix 2(8) to Annex II)"

Of course, such an agreement by itself does not create legal personality for the EU. However, it does show the involvement of the European Union as a (political) entity, and it reflects a certain external perception of the EU as a distinct personality. It is not suggested that the legal personality of the EU just grows out of its factual involvement in international politics (even as the outside world increasingly treating it as one, or as the political and social pressures increase for the treatment of the EU as a single legal person). Despite the social and political tendencies, it remains the legal reality that the bestowal of legal personality is ultimately controlled by the Member States of the Union.

The legal personality of the Union was under consideration in the Inter-Governmental Conference (IGC) opened on 29 March 1996 in Turin and closed in 16-17 June 1997 in Amsterdam. [\[FN64\]](#) However, due to the opposition of some Member States, any provision regarding the establishment of legal personality of the European Union was left out from the Treaty of Amsterdam, signed on October 2, 1997. [\[FN65\]](#)

*57 What was included in the new Treaty is a provision for a new facility as regards the conclusion of agreements relating to the second and third pillars of the Union. The Treaty provides in new Article J. 14 as follows:

"When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them.

The provisions of this Article shall also apply to matters falling under Title VI." One may, of course, ask whether Article J. 14 should be construed as some kind of implicit recognition of the legal personality of the Union. Such a

question could arise against the background of the jurisprudence of the International Court of Justice, especially in the above discussed Reparations for Injuries case, concluding that the international legal personality of the United Nations could be detracted from the functions and powers given to that organisation even in the absence of explicit recognition of such personality. Could such an approach possibly be applied also in the case of Article J. 14?

It would seem that due constraint should be in place so as not to read too much into a provision such as Article J. 14. The legal personality of the Union has been under serious consideration twice, in Maastricht 1992 and in Amsterdam 1997, and in both cases the proposals for establishing the legal personality of the Union have not won the approval of all Member States. In the light of this, it would now seem rather difficult to argue that, the implicit intention of the Member States was, in fact, to provide the Union with legal personality. Such reading would seem particularly problematic in the light of the fact that, in the case of *58 the existing three Communities, upon which the Union is based, the legal personality has been established in clear and express terms. Thus, an a contrario interpretation would suggest that one should not consider Article J.14 as a recognition of the Union's legal personality as it would probably not correspond to the intention of the 15 Member States as a whole. This would indeed also find support in the actual wording of Article J.14, especially the second sentence of the paragraph, which states that no agreement is binding on a Member State whose representative states that it has to comply with the requirements of its own constitutional procedure, for example the approval by its Parliament. Thus the role of the Council is in this particular context made dependent on the requirements of the law of the Member States. In other words, if the legal personality is ultimately about capacity to be subject to legal rights and obligations, that capacity, or that measure of personality, to put it differently, is made subject to the constitutional requirements of the Member States. Some such requirements exist in all Member States and they vary depending on the nature of the agreement. And, of course, it is not excluded that the fulfillment of such requirements may finally result in the rejection of a particular agreement by one, several or all of the Member States, which does not really suggest that they have intended to establish the legal personality of the Union. In fact, the wording of Article J.14, stating that no agreement shall be binding "on a Member State" and that some Member States may agree that the agreement shall apply provisionally "to them", conveys an idea of individual obligations of the Member States rather than the European Union as such.

It should be added that the legal personality is not merely about capacity to be subject of rights, but also of obligations. In the final analysis, that capacity implies that, in the case of violation of obligations, one is faced with the obligation to make reparation. More often than not, that is a matter of providing monetary compensation but, in that regard, the Union does not have the ability to meet the obligation, given the fact that the Union does not have a separate budget of its own: the Second and Third Pillar activities rely on the budget of the three Communities and, possibly, separate contributions by the Member States. So, this aspect, too, seems to support the remarks made above.

Consequently, the better view would suggest that the intention of the Member States is that Article J.14 entails a kind of facilitation as regards the procedure concerning the conclusion of agreements under the Second and Third Pillar activities. In other words, the Council is enabled to conclude such agreements on behalf of the Member States. This would mean that Article J.14 should be understood as a kind of institutionalisation *59 of the one time ad hoc solution that was followed in the conclusion of the Memorandum of Understanding on the European Union Administration of Mostar, where the Member States gave the Presidency of the Council the power to sign the Memorandum on their behalf. [\[FN66\]](#)

VI. CONCLUSION.

This paper reflects the view that if the EU is to function effectively in the future, it should be bestowed with international legal personality, ultimately to serve the interests of its Member States. It would also be important that such personality appears as one from the viewpoint of the outside world. However, given the political sensitivities that some Member States attach to the idea of legal personality of the Union it has been rejected in Maastricht in 1992 and again in Amsterdam in 1997, although the Amsterdam Summit took some steps in this direction by facilitating

the conclusion of international agreements related to the second and third pillar activities of the Union. The issue of legal personality of the Union, including its relationship to the existing three Communities, will be subject to debate also in the future and likely to be addressed in the future inter-governmental conferences.

One basic lesson of the discussion of legal personality of the EU is that it demonstrates the central status that the nation-states still have in international society generally (and in Europe in particular) and that the grant of international legal personality is still today essentially controlled by states.

In this regard, the nature of the play in the international stage does not greatly differ from historical experiences on the domestic stage in municipal societies. In both cases, the "original" members of the society control whether or not to bestow legal personality to new groups of actors. Little in the handling of legal personality of the EU changes that observation.

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[FN1]. 1993 O.J. (L.293)61 (entry into force of the Treaty followed ratification by parliaments of 12, as it then was, Member States, on certain cases, France, Germany, Denmark and Ireland after approval by referendum); Fed. Constitutional Court Decision Concerning the Maastricht Treaty, [35 I.L.M. 388](#) 1994. (In Germany, the entry into force of the Treaty was preceded by the Federal Constitutional Court, Bundesverfassungsgericht, decision of Oct. 12, 1993, which allowed Germany to ratify the Treaty.)

[FN2]. See generally, P. Demaret, *The Treaty Framework*, in *Legal Issues of the Maastricht Treaty 3* (D. O'Keeffe and P.M. Twomey eds., Wiley Chancery Law 1994).

[FN3]. See generally, D. Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 *Common Mkt. L. Rev.* 17 (1993).

[FN4]. Treaty Establishing the European Coal and Steel Community, April 18, 1951. Art. 6.; Treaty Establishing the European Economic Community, March 25, 1957, Art. 210; Treaty Establishing the European Atomic Energy Community, March 25, 1951. Art. 184. The Constituent treaties of the three communities are contained in *I European Union: Selected Instruments Taken from the Treaties*. Vols. I-II. Luxembourg: Office for Official Publications of the European Communities, 1995.

[FN5]. Lisa J. McIntyre, *Law in the Sociological Enterprise* 38 (Westview Press 1994).

[FN6]. *Id.*, at 32, 33.

[FN7]. *Id.*, at 85.

[FN8]. See W. Benedek, *Diz Rechtsordnung des GATT aus Völkerrechtlicher Sicht* 256-258 (1990); H.G. Schermers and N.M. Blokker, *International Institutional Law* 978-979 (3rd ed. 1995).

[FN9]. Derek Bowett, *The Law of International Institutions* 339 (4th ed. 1982) accurately states that 'it is permissible to assume that most organizations created by a multilateral intergovernmental agreement will, so far as they are endowed with functions on the international plane, possess some measure of international personality in addition to the personality within the systems of municipal law... [t]he possession of such international personality will normally involve, as a consequence, the attribution of power to make treaties, of privileges and immunities, of power to contract and to undertake legal proceedings...'

[FN10]. This approach has been developed by F. Seyersted, Objective International Personality of International Organization, *Nordisk Tidsskrift for International Ret.* 1-112 (1964).

[FN11]. Advisory Opinion, I.C.J. Reports, 174, 178-179 (1949).

[FN12]. Article 2(5) of the UN Charter provides:

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

[FN13]. Supra note 11 at 179.

[FN14]. Schermers and Blokker, supra note 8 at 979.

[FN15]. Louis Henkin, R.C. Pugh, Oscar Schachter, H. Smit, *International Law: Cases and Materials* 354-355 (3rd ed. 1993).

[FN16]. Bowett, supra note 9 at 335; I. Brownlie, *Principles of Public International Law* 677, 680 (1990); M. Ramamontaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 *British Yearbook of International L.* 111, 147 (1970); Henkin et al., supra note 15 at 356; Schermers and Blokker, supra note 8 at 979.

[FN17]. Bowett, supra note 9 at 337.

[FN18]. Schermers and Blokker, supra note 8 at p. 981.

[FN19]. U. Everling, *Reflections on the Structure of the European Union*, 29 *Common Mkt. L.Rev.* 1053, 1061 (1992); D. Curtin, supra note 3 at 27; A. Barav and C. Philip, *Dictionnaire juridique des communautés européennes*. 1142 (Presses Universitaires de France 1993); M.R. Eaton, *Common Foreign and Security Policy in Legal Issues of the Maastricht Treaty*, supra note 2 at 224; P.S.R.F. Mathijssen, *A Guide to European Union Law* 5 (Sweet and Maxwell 6th ed. 1995) (noting that the EU has political rather than legal significance).

[FN20]. Treaty on European Union and Final Act, Feb. 7, 1992, Art. A, [29 I.L.M. 247](#), 255 1992.

[FN21]. J. Cloos, G. Reinesch, G. Vigres and D. Weyland, *Le Traité de Maastricht* 115-116 (Bruylant 2d.ed. 1994) (An explicit reference to a federal goal was removed from the treaty text during the final stages of Maastricht negotiations. An earlier draft, of June 18, 1991, still contained an explicit statement to a federal goal. The French text referred to a 'processus graduel menant à une union à vocation fédérale'. However, the "F-word", as referred to by the British press, was opposed by the British, who took it to imply increasing centralization; whereas in states arranged according to a federalist model it is, in fact, taken to imply the opposite.

[FN22]. Ibid at 115.

[FN23]. Treaty on European Union and Final Act, Article A, supra note 20 at 255.

[FN24]. Treaty on European Union and Final Act, Article B, supra note 20 at 255.

[FN25]. Treaty on European Union and Final Act, Article B, supra note 20 at 255.

[FN26]. Treaty on European Union and Final Act, Article 3B, supra note 20 at 257.

[FN27]. Treaty on European Union and Final Act, supra Article C, note 20 at 255.

[FN28]. Treaty on European Union and Final Act, Article E, *supra* note 20 at 256.

[FN29]. Treaty on European Union and Final Act, Article D, *supra* note 20 at 255-256.

[FN30]. Treaty on European Union and Final Act, Article J.8(2), *supra* note 20 at 326.

[FN31]. Treaty on European Union and Final Act, Article F(3), *supra* note 20 at 256.

[FN32]. See discussion of the German Constitutional Court, *infra* p. 116.

[FN33]. Treaty on European Union and Final Act, Article J.1(2), *supra* note 20 at 324.

[FN34]. Treaty on European Union and Final Act, *supra* note 20 at 324-327 (The CFSP is governed by Articles J.1-J.11 of the TEU).

[FN35]. Treaty on European Union and Final Act, Article J.1(4), *supra* note 20 at 324.

[FN36]. Treaty on European Union and Final Act, Article J.8(2), *supra* note 20 at 327.

[FN37]. Treaty on European Union and Final Act, Article J.5, *supra* note 20 at 325.

[FN38]. Treaty on European Union and Final Act, Article J.9, *supra* note 20 at 326.

[FN39]. Treaty on European Union and Final Act, Article C, *supra* note 20 at 255.

[FN40]. Treaty on European Union and Final Act, Article J.5(3), *supra* note 20 at 325.

[FN41]. Treaty on European Union and Final Act, Article J.6, *supra* note 20 at 326.

[FN42]. Treaty on European Union and Final Act, Article J.7, *supra* note 20 at 326.

[FN43]. EC 228a.

[FN44]. Treaty on European Union and Final Act, Article L, *supra* note 20 at 329-330.

[FN45]. Treaty on European Union and Final Act, Article J.11, *supra* note 20 at 327.

[FN46]. For recent reviews and assessment of the CPSP practice, see C. Bury and P. Hetch, *Politique étrangère et de Sécurité Commune*, Répertoire communautaire Dalloz October 1996, 7-70; Willaert and C. Marques, *Vers une Politique étrangère et de Sécurité Commune: état des lieux* in *La Conférence intergouvernementale sur l'Union européenne*, 253 et seq. (A. Mattera ed., Editions Clément Juglar 1996); A. Tanca, *La Politique étrangère de Le Sécurité Commune de l'Union Européenne en 1995*, 7 *European J. of I.*, 1993, at 447.

[FN47]. *Id.* at 324. Declarations of the Union are not mentioned in the TEU, but are inherited from practice prior to the Maastricht Treaty.

[FN48]. Treaty on European Union, Article J.3, *supra* note 20 at 324.

[FN49]. Treaty on European Union and Final Act, Article J.3, *supra* note 20 at 324.

[FN50]. *Id.* at 324.

[FN51]. *Id.* at 324-325.

[FN52]. Everling, *supra* note 19; Curtin, *supra* note 19.

[FN53]. Unpublished, cited in Bury and Hetsch, *supra* note 46 at 8.

[FN54]. *Id.*

[FN55]. J. Cloos, G. Reinesch, G. Vignes, J. Wyland, *Le Traité de Maastricht. Genese, Analyse et Commentaires* 112 (Bruylant 1993) (This matter was criticized by the Commission at the time of Maastricht negotiations).

[FN56]. Everling, *supra* note 19 at 1061; Curtin, *supra* note 19 at 27-28; T. Heukels and J. de Zwaan, *The Configuration of the European Union: Community Dimension of Institutional Interaction*, in *Institutional Dynamics of European Integration, Essayes in Honour of Henry G. Schermers*, 195, 202 (D. Curtin and T. Heukels eds. vol. 2 1994 (Martinus Nijhoff 1994); D. Wyatta and A. Dashwood, *European Community Law* 656 (1993).

[FN57]. German Federal Constitutional Court judgment of the Maastricht Treaty of October 12, 1993, [33 I.L.M. 388](#) (1994).

[FN58]. Treaty on European Union and Final Act, *supra* note 20 at 256.

[FN59]. *Id.* at 428-429 (C. II.2.b1-b2).

[FN60]. *Id.* at 429 (C. II.2 b3-b4)

[FN61]. *Id.* at 430 (b5-b6)

[FN62]. Treaty on European Union and Final Act, Article B, *supra* note 20 at 255.

[FN63]. Concluded in Washington on September 28, 1995. Ministry of Foreign Affairs (Jerusalem)/Israel Information Center. The Interim Agreement is partly reproduced in [36 I.L.M. 551](#) (1997), but the above quoted parts have not been reproduced.

[FN64]. See generally, A. Mattera (ed). *La Conference Intergouvernementale sur l'Union Europeenne*. (Paris: Editions Clement Juglar 1996).

[FN65]. Intergovernmental Conference, Amsterdam European Council: Draft Treaty (June 19, 1997). Office for Official Publications of the European Communities. The final Treaty is not yet published, but the text of Article J. 14 corresponds to the final version.

[FN66]. *Supra*, p.52.

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