The Reparation for Injuries Case Revisited: The Personality of the European Union

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I. Introduction

The advisory opinion given by the International Court of Justice in 1949 and concerning the "Reparation for Injuries Suffered in the Service of the United Nations" (hereinafter "the Reparation Case") undoubt-

J.A. Frowein and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, 331–361.

edly constitutes a leading case on the legal personality of international organizations. In its decision, the Court considered that the functions and rights conferred to the United Nations by its constituent instrument were such that they necessarily implied the attribution of international personality to the organization. This case, dealt with by the ICJ 50 years ago, has certainly not lost its relevance. It is therefore not by accident that the Reparation Case is frequently referred to in writings[1] devoted to the current legal issue relating to the legal status of the European Union.

The establishment of the European Union by the Treaty of Maastricht of 7 February 1992, as modified by the Treaty of Amsterdam signed on 2 October 1997, has indeed been the subject of a number of articles which address the question of the international personality of this entity. Although the Treaty on European Union does not expressly recognize the personality of the Union, it contains provisions which reinforce the identity, if not the personality, of the European Union. It seems therefore appropriate to explore this question in the light of the learning which may be derived from the Reparation Case, keeping in mind that the issue exceeds the European level and has to be addressed in a broader context relating to the personality of intergovernmental organizations.

1. Organizations and International Personality

Today, it is stating the obvious to say that international organizations are subjects of international law. This assertion, whose accuracy is gen-

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1 See J. Klabbers, "Presumptive Personality: The European Union in International Law", in: M. Koskenniemi (ed.), *International Law Aspects of the European Union*, 1998, 231 et seq., (233); D. Vignes, "L'absence de personnalité juridique de l'Union européenne: Amsterdam persiste et signe", *Liber Amicorum Seidl-Hohenveldern*, 1998, 757 et seq., (769); A. Dashwood, "External Relations Provisions of the Amsterdam Treaty", *CML Rev.* 35 (1998), 1019 et seq., (1040); J.-C. Gautron et L. Grard, "Le droit international dans la construction de l'Union européenne", Written presentation (to be published) made at the Symposium of the SFDI, 1999, 26-27; A. Pliakos, "La nature juridique de l'Union européenne", *RTDE* 29 (1993), 187 et seq., (211); P. Des Nerviens, "Les relations extérieures", *RTDE* 33 (1997), 801 et seq., (806); G. Maganza, "Réflexions sur le Traité d'Amsterdam; contexte général et quelques aspects particuliers", *A.F.D.I.* 43 (1997), 657 et seq., (669).

erally accepted, does not, however, disclose what is an international organization. In this respect, no definition of the term "international organization" is to be found in a treaty[2]. Legal writings may nevertheless offer some guidance and it is useful to refer to the definitions given by G. Fitzmaurice: "a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity"[3]; or, more recently, by P. Reuter and J. Combacau: "an entity which has been set up by means of a treaty concluded by States to engage in co-operation in a particular field and which has its own organs that are responsible for engaging in independent activities"[4]. By using the common denominator of these definitions, an international organization may be described as an autonomous entity, set up by a constituent instrument, which expresses its independent will through common organs and has a capacity to act on an international plane.

If we accept that capacity to operate on an international level is part of the definition of any international organization, and that such capacity does equate with international personality (a view taken by the Court in the Reparation Case[5]), it is legitimate to maintain that international personality is a necessary attribute of an international organization[6]. This does not at all imply some fetishist attraction for the concept of international personality. Legal personality simply reflects the autonomy of the organization and its ability to act on its own. That explains why it is possible to draw a line between international organizations and other bodies or fora set up by states, which are not entrusted with tasks they fulfil independently through their own organs. Usually, a meeting of states parties to a treaty or a conference of states constitute examples of such fora which may be characterized as a mere juxtaposition of organs of states, acting only in the capacity of agents of the

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2 The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations took a minimalist approach on the subject. See article 2 para. 1 lit.(i): "For the purposes of the present Convention...(i) 'international organization' means an intergovernmental organization".

3 Report on the Law of Treaties, *ILCYB* (1956 II), 108.

4 *Institutions et relations internationales*, 3rd edition, 1985, 278, as quoted in *ILCYB* (1985 II), 106.

5 See below, 338.

6 R. Jennings and A. Watts (eds), *Oppenheim's International Law*, 1992, 19, footnote No. 20.

states concerned. But it is unwise to generalize in this matter. A particular entity may evolve and develop into a real organization, as may be illustrated by discussions on and developments relating to the legal status of entities such as the former GATT[7] or the OSCE[8]. Likewise, there is no obstacle to the establishment of a small organization whose task it is to assist the implementation of a treaty[9] and it is also possible to set up a conference with precise and independent functions, even for a limited period of time[10].

2. Sources of the Personality of International Organizations

An international organization is not the result of a spontaneous generation. It is created by other subjects of international law, mostly by states[11], and normally by means of a treaty[12]. It is therefore necessary to examine the constituent treaty establishing a new entity to verify whether the founding states actually wanted to set up an organization possessing an international personality distinct from the member states. The constituent act may thus be considered as the source of the international personality of the organization. However, this generally accepted approach is not unanimously shared[13]. F. Seyersted opts for an

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7 J. Jackson, *World Trade and the Law of GATT*, 1969, 119 et seq.

8 H. Schermers and N. Blokker, *International Institutional Law*, 3rd edition, 1995, 21.

9 P. Szasz, "The Complexification of the United Nations System", *Max Planck UNYB* 3 (1999), 1 et seq., who notes that "if a body created by a treaty has a full set of organs and its own international personality then it should be characterized as an IGO" (page 17).

10 Ibid., 50-51 (referring to Preparatory Commissions established to ease the birth of a new intergovernmental organization) : "Prepcoms can be established by a treaty ... When so established, they are potentially full-fledged though temporary IGOs, having legal personality, privileges and immunities, their own secretariat, etc."

11 Its is however not excluded that an organization might be set up by other subjects of international law. See F. Rousseau, "Joint Vienna Institute'- Brèves remarques relatives à la création de l'Institut commun de Vienne", *RGDIP* 99 (1995), 639 et seq.

12 See however the case of the OSCE whose legal foundations cannot be found in a treaty.

13 See K. Zemanek, "The Legal Foundations of the International System", *RdC* 266 (1997), 23 et seq., (88-89).

objective test to be made from the viewpoint of general international law. According to this author, an international convention is not "the crucial test ... of international personality. Intergovernmental organizations, like States, come into being on the basis of general international law when certain criteria exist, and these necessary criteria do not include a convention"[14]. Those criteria are met when international organs are created which may assume obligations on their own.

The two views just expressed appear *prima facie* to be opposed. In fact, they may, or rather should, be reconciled. On the one hand, the Members States are the founding fathers of the institution. It means that their will, as expressed in the constituent treaty, cannot be easily disregarded. But the treaties establishing international organizations are often prudent on the question of personality and, except in a few instances[15], are silent or limit themselves to the recognition of a capacity in the municipal law of Member States. In this context, it is necessary to scrutinize the content of the constituent treaty to assess whether an international personality may be substantiated by, or deducted from, actual rights and obligations conferred to the organization. To this extent, we may subscribe to the statement according to which the "constitutive instrument setting up an organization, and containing its constitution, must be the primary source of any conclusions as to the status, capacities and powers of the organization concerned"[16]. By saying that, we do not endorse a subjective approach based solely on the will of the drafters of the treaty. On the contrary, an assessment based on the provisions of the constituent treaty may also be described as an objective test. Once the treaty is concluded, it leads its own life. States are not free to lay down the law; their acts and conduct do not escape the conse-

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14 F. Seyersted, "International Personality of Intergovernmental Organizations. Do their Capacities really depend upon their Constitutions ?", *IJIL* 4 (1964), 1 et seq., (53).

15 See e.g.: Section 13 of the Agreement of 27 September 1945 concerning the establishment of an European Central Inland Transport Organisation ("Every member Government shall recognise the international personality and legal capacity which the Organisation possesses"), UNTS Vol. 5 No. 35; article 176 of the United Nations Convention on the Law of the Sea of 1982 ("The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes").

16 Statement by Mr. Fitzmaurice, representative of the UK Government, in the oral proceedings relating to the Reparation Case: *Pleadings, Oral arguments, Documents*, 1949, 116.

quences to be drawn from them by international law. For example, the drafters of a treaty establishing an organization vested with a real competence to act at international level, would with great difficulty, avoid that international personality be granted to it. As P. Reuter put it: "quand une organisation a reçu un minimum d'autonomie et une vocation assez stable et assez large pour prétendre à une action propre, il est normal de considérer, sauf stipulation contraire clairement indiquée par ses fondateurs, que ces derniers ont voulu l'habiliter à prendre part à la vie internationale"[17].

This also means that the insertion, in the constituent treaty, of a mere provision affirming the international personality of the organization concerned has a declaratory effect. While such provision would certainly not be easily disregarded, it would not be sufficient *per se* to guarantee the recognition of such personality if it is not supported by a minimum of rights conferred to it. Legal personality is a "thoroughly formal concept"[18]; or, to express this idea by using the existentialist "leitmotiv" quoted by R.J. Dupuy as regards international organizations "l'existence précède l'essence"[19], and the mere assertion of their personality is like an empty shell[20]. The key factor controlling the international

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17 P. Reuter, *La Communauté européenne du Charbon et de l'Acier*, 1953, 118, as quoted by M. De Soto, "Les relations internationales de la Communauté européenne du charbon et de l'acier", *RdC* 90 (1956), 29 et seq., (39) (unofficial translation of the quoted extract: "Whenever an organization has been granted a minimum of autonomy and has been assigned goals stable and large enough to let it expect to act on its own, it is logical to assume, except if otherwise clearly expressed by its founding members, that these had the intention to entrust it to be a full member of the international community").

18 H. Kelsen, *General Theory of Law and State*, 1946 (translation), 250. "La notion de personnalité juridique a un caractère purement formel": Id., "Théorie du droit international public", *RdC* 84 (1953), 6 et seq., (101). See also, Klabbers, see note 1, 244.

19 R.J. Dupuy, "Le droit des relations entre les organisations internationales", *RdC* 100 (1960), 457 et seq., (532). According to Dupuy, "l'on ne peut tirer nulle conséquence d'une personnalité affirmée à l'avance. (...) la capacité réelle, concrète, dont une organisation est investie par un traité, est la mesure de sa personnalité", ibid., 532-533.

20 See H. Hahn, "Euratom: The Conception of an International Personality", *Harv. L. Rev.* 6 (1956-1957), 1001 et seq., (1045-1046).

personality of organizations is the actual rights and competences given to them[21].

3. The Reparation Case

We may turn now to the Reparation Case and examine the reasoning developed by the ICJ. At this stage two preliminary remarks will be made:

- In this case, the international personality of the United Nations was not the subject of the question addressed to the Court. The legal questions which the General Assembly decided to submit to the Court[22], following a proposal of the representative of Belgium, concerned the capacity of the United Nations to bring an international claim against the responsible government of a non Member State, with a view to enabling the Secretary-General to obtain reparation for injuries suffered by agents of the organization[23]. In fact neither the personality of the organization nor, to a certain extent[24], its capacity to bring a claim were really disputed. This was even regretted by the representative of the United Kingdom in his statement before the Court[25].
- The personality of the United Nations was nevertheless addressed in the written and oral statements made by some governments in the form of a preliminary question, a rather doctrinal one, to be logically answered before considering the capacity of the organization. On this matter, reference was made to the absence of an express provi-

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21 "The proof of the presence of an international personality then appears to be identical with the proof of international rights and obligations incumbent on the entity", see Hahn, above, 1045.

22 See ICJ Reports 1949, 174 et seq., (175).

23 For the context and historical background of the case, see the statement of Mr. I. Kerno (United Nations) in the oral proceedings relating to the Reparation Case, *Pleadings, Oral arguments, Documents, 1949*, 50 et seq.

24 While the capacity to bring a claim in respect of the damage caused to the United Nations was unanimously recognized by the Court, four Judges voted against the decision of the Court to recognize such capacity in respect of damage caused to the victim or to a person entitled through him.

25 "It is in one sense regrettable that the Court has not had before it someone to argue that the United Nations does not possess the capacities which we are discussing", Statement of Mr. Fitzmaurice, ibid., 111.

sion to this effect in the Charter. A proposal had, however, been made at the San Francisco Conference with a view to recognizing the international personality of the United Nations[26] but it was not retained. According to the report of the Subcommittee IV/2/A on "The Juridical status of the Organization": "As regards the question of international juridical personality, the Subcommittee has considered it superfluous to make this the subject of a text. In effect, it will be determined implicitly from the provisions of the Charter taken as a whole"[27]. It is interesting to note that on this particular point, the report of the Chairman of the United States delegation to the San Francisco Conference gives another light. While the Subcommittee made reference to the provisions of the Charter "taken as a whole", the report of the United States delegation took a more pragmatic approach mainly focused on "practice". The report stated that article 43 of the Charter, dealing with the conclusion of agreement by the Security Council, gives an answer "so far as the power to enter into agreements with States is concerned", and added: "International practice, while limited, supports the idea of such body being a party to agreements. No other issue of 'international personality' requires mention in the Charter. Practice will bring about the evolution of appropriate rules so far as necessary"[28].

In its advisory opinion of 1949, the Court stated that before answering the question of the capacity of the United Nations to bring an international claim, it had to enquire "whether the Charter has given the organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the organization possess international personality?"[29]. International personality is thus identified with the possession of rights and has first to be recognized in relation to Member States. These are the subjects of international law primarily concerned with the personality of the organization. After having made its statement according to which the

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26 The proposal made by the delegation of Belgium reads as follows: "L'Organisation possède la personnalité internationale avec les droits qui en découlent": Statement of Mr. Kaeckenbeeck (Belgium) in the oral proceedings relating to the Reparation Case, ibid., 96.

27 XIII Documents of the UNCIO, San Francisco, 1945 , 817, quoted in: *Digest of International Law*, prepared by M. Whiteman, 13 (1968), 12.

28 Statement of Mr. Fitzmaurice in the oral proceedings relating to the Reparation Case, ibid.,118. See also *Digest of International Law*, see above, 12.

29 ICJ Reports 1949, 174 et seq., (178).

subjects of law "are not identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community", the Court referred to the principles and purposes of the United Nations as contained in the Charter and stated: "but to achieve these ends the attribution of international personality is indispensable".

In a sense, this statement could have been sufficient for the purposes of the case. Most certainly, this would have been a short statement. But usually the existence of powers or the capacity of an organization, and not the issue of its personality, is the controlling consideration in cases involving international organizations[30] and international tribunals may satisfy themselves with the assumption that the organization concerned possesses personality without devoting long discussion to it. However, the Court did not only state that international personality of the United Nations was necessary to achieve the objectives assigned to the organization; it also found evidence of this in the Charter by mentioning the following relevant factors: existence of organs and tasks; obligation for members to give assistance to the organization in action undertaken by it and to respect decisions taken; recognition of legal capacity and privileges in municipal systems of members; conclusion of international agreements. In fact, the Court confirmed the view of the Subcommittee IV/2/A of the Conference of San Francisco. It would indeed have been superfluous to insert in the Charter an article on the international juridical personality of the United Nations; such determination could be made on the basis of the provisions of the Charter taken as a whole.

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30 See E. Lauterpacht, "The Development of the Law of International Organization by the Decisions of International Tribunals", *RdC* 152 (1976), 377 et seq., (403-413), who refers *inter alia* to the ERTA Case (ECJ, Case 22/70 of 31 March 1971) where the Court of Justice of the European Communities, on the basis of article 210 of the European Treaty, declared that this provisions "means that in its external relations the Community enjoys the capacity to establish contractual links with non-Member States over the whole extent of the field of objectives defined in Part One of the Treaty", *ILR* 47 (1974), 278 et seq., (304). See also The Case concerning the Jurisdiction of the European Commission of the Danube, Advisory Opinion, 1927, PCIJ, Series B, No.14, where the Court observed (page 63) that: "Although the European Commission exercises its functions 'in complete independence of the territorial authorities and although it has independent means of action and prerogatives and privileges which are generally withheld from international organizations, it is not an organization possessing exclusive territorial sovereignty"; and later (page 64) mentioned: "As the European Commission is not a State, but an international institution with a special purpose...".

The Court found confirmation of its conclusion in the practice of the United Nations, "in particular the conclusion of conventions to which the organization is a party". In its view, it would be difficult to see how an agreement such as the Convention on the Privileges and Immunities of the United Nations of 1946, creating rights and duties between each of the signatories and the organization, "could operate except upon the international plane and as between parties possessing international personality". The importance of practice, which also was underlined in the report of the Chairman of the United States delegation to the San Francisco Conference, is easily understandable. Given the fact that international personality reflects a capacity to act at international level, it is preferable to receive confirmation that this capacity has actually been exercised, especially when the rights conferred upon an organization are not clearly spelled out. This may for example, concern the rules governing the treaty-making power of the organization, when they are not clearly defined in the constituent instrument. On this issue, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations recognizes the input of the practice. According to its article 6, the capacity of an organization to conclude a treaty is governed by the rules of that organization, these "rules" being defined in article 2 para. 1 lit.(j), as referring to "the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization". This cannot be understood as suggesting that a rule may be based on a practice *contra legem*. This is certainly not the intention of the Vienna Convention which, in its preamble, states that the practice of organization "should be in accordance with their constituent instruments". The practice is useful to confirm a capacity to act, but it cannot replace it. To justify a capacity to act, instead of referring to the practice, it is preferable to make use of implied powers, which seem admitted by the Vienna Convention in its preamble: "Noting that international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes".

In concluding its development on the question of personality, the Court admitted that the organization "was intended to enjoy, and is in fact exercising and enjoying rights which can only be explained on the basis of the possession ... of international personality". Therefore "it must be acknowledged that its Members, by entrusting certain functions to it, ..., have clothed it with the competence required to enable those functions to be effectively discharged". As we may observe, the attention drawn by the Court to the exact intention of the drafters of the

Charter is not particularly developed in its reasoning. When the will of the states is taken into account, it is a reasonable, objective one, logically deduced from, or presumed on the basis of, an examination of the Charter and confirmed by the practice of the organization.

4. The Legal Personality of the European Union

a. "Administrative Unions" and the European Union

The concept of "Union" is not unknown in the law of international organizations. The term was used to designate the first institutions set up by states, i.e. the so-called "administrative unions"[31]. The establishment of those unions, described as international entities possessing international organs[32], together with the creation of river commissions, led to the development of the law of international organizations[33]. At the time those entities were set up, their international personality was disputed. Some authors took the view that they did not constitute an entity distinct from the participating states but a "fiction"[34], an expression used for designating the common exercise by states of certain rights[35]. It is only in the twentieth century that the international personality of intergovernmental organizations was recognized, at least in most of the legal writings. The creation of the League of Nations, the predecessor of the

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31 On this subject, see R. Wolfrum, "International Administrative Unions", *EPIL* Instalment II (1995), 1041 et seq.

32 "Entité internationale pourvue d'organes internationaux": A. Rapisardi-Mirabelli, "Théorie générale des Unions", *RdC* 7 (1925), 340 et seq., (361).

33 The term "Union" was sometimes used in the doctrine as a generic expression designating all forms of associations of states: administrative unions, river commissions, confederations of states, unions of states and the League of Nations, see Rapisardi-Mirabelli, see above, 363 et seq.

34 It is difficult to deny that, in some cases, this approach was justified on the basis of international practice. See for example the wording contained in article 17 of Annex 16 B (dated 24 Mars 1815) to the Closing Act of the Vienna Congress of 9 June 1815, concerning the members of the Central Commission for the river Rhine: "... les membres devant être regardés comme des agents des Etats riverains chargés de se concerter sur leurs intérêts communs, ..." (*Les Actes du Rhin*, Strasbourg, 1957, 8).

35 See e.g. J. Basdevant, "La conference de Rio-de-Janeiro de 1906", *RGDIP* 15 (1908), 209 et seq., (221).

United Nations and the first universal political organization, contributed largely to it[36].

The administrative unions were instituted in the nineteenth century to fulfil technical, non-political aims[37]. Their goals are far removed from the objectives assigned to the European Union by the Amsterdam Treaty[38]. In fact, the European Union and the entities which qualify to be described as administrative unions[39] are poles apart, except in the common use of the word "union". The political dimensions of the European Union even seem to exceed the range of functions one would expect an organization to fulfil. In other words, its nature would be closer to a confederation[40], a federation or a union of states, than to an international organization. Indeed, given the federalist project on which it is based, at least at its origin, the European Union could be regarded as part of an evolutionary process possibly leading to a form of (con)federation of states. However, as noted by the German Federal Constitutional Court in its decision of 12 October 1993[41], this process is not yet completed. Furthermore, it is wise to be prudent in this matter and not to follow too easily our natural inclination, faced with unknown or new forms of organizations, to have recourse to the model of the state, the primary subject of international law. As an illustration of

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36 The international legal personality of the League of Nations was expressly recognized in the *modus vivendi* of 1926 concluded between the League and Switzerland.

37 See M. Dendias, "Les principaux services internationaux administratifs", *RdC* 63 (1938), 242 et seq., (271).

38 See article 2 of the Treaty on European Union.

39 On the usefulness of the concept of the administrative union to characterize current existing technical organizations (such as the International River Commission, Fishery Commission, International Commodity Agreements, United Nations Specialized Institutions or the Sea-Bed Authority), see Wolfrum, see note 31.

40 See A. Pliakos, see note 1, 189 et seq.; P. Reuter, " 'Confédération et fédération': 'Vetera et nova'", *Mélanges Rousseau*, 1974, 199 et seq.

41 For the text of the decision in English, see *ILM* 33 (1994), 388 et seq., in particular page 424: "The term "European Union" may indeed suggest that the direction ultimately to be taken by the process of European integration after further amendments to the Treaty is one which will lead towards integration, but in fact the actual intention expressed does not confirm this... In any case, there is no intention at the moment to establish a "United States of Europe" comparable in structure to the United States of America".

this inclination, it is interesting to note that, due to its ambitious political role, which went beyond the functions normally carried out at that time by any other organization, the League of Nations, was considered by some authors to be a confederation of states[42].

b. The Provisions of the Treaty on European Union

aa. Structure

The European Union, established by the Treaty of Maastricht of 1992[43], is "founded on the European Communities, supplemented by the policies and forms of cooperation established by [the] Treaty [on European Union]"[44]. Its creation was initiated[45] by the Single European Act of 1986 which gave shape to the European Political Cooperation, an intergovernmental mechanism operating outside the community institutions. In 1997, the Treaty of Amsterdam did not really innovate; rather it followed the structure put in place by the Treaty of Maastricht and built on three so-called "pillars": the first is based on the institutional and legislative framework set up by the Treaties of Rome and the Treaty of Paris establishing the European Communities (consisting of three international organizations: the European Community, the European Coal and Steel Community and the European Atomic Energy Community); the second pillar is constituted by the provisions on Common Foreign and Security Policy; the third pillar refers to the Police and Judicial Cooperation in Criminal matters. While the first pillar represents the normal functioning of the European Communities, the two others have recourse to a separate set of provisions to which the Community rules are not applicable, except when otherwise provided.

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42 See Dendias, see note 37, 323-324.

43 "...the high Contracting Parties establish among themselves a European Union" (article 1).

44 Article 1.

45 One of the objectives of the Contracting Parties to the Single European Act was "to transform relations as a whole among their States into a European Union": preamble, 1st paragraph; see also article 1: "The European Communities and European Political Cooperation shall have as their objective to contribute together to making concrete progress towards European unity."

bb. Objectives

According to article 2, the Union has four objectives "to promote economic and social progress", "to assert its identity on the international scene", "to strengthen the protection of the rights and interests of the nationals of its Member States" and "to maintain and develop the Union as an area of freedom, security and justice".

The Treaty on European Union also lays down substantial obligations protecting principles common to the Member States, which belong to the competence of the Union proper. As provided in article 6 para. 1, the "Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of laws". A breach by a Member State of those principles may lead to the suspension of "certain of the rights deriving from the application of [the] Treaty"[46]. Pursuant to article 46, the Court of Justice has jurisdiction to control the respect of those fundamental rights by the European institutions.

cc. Institutions and Membership

In accordance with article 3, the Union is "served by a single institutional framework". The European Council is a proper organ of the Union. It is composed of Heads of State or government and the President of the Commission, and is entrusted with the task of defining the general policy of the Union. Apart from this organ, the Union makes use of the institutions set up by the Community treaties (European Parliament, Council, Commission, European Court of Justice, Court of Auditors) under the conditions provided for in the Treaty[47]. As regards membership, article 49 provides that "any European State... may apply to become a member of the Union", admission to the European Communities now being only possible through the Union.

dd. Common Foreign and Security Policy

The Common Foreign and Security Policy (Title V) is the core function given to the Union. Its main objectives are to safeguard the common values, interests, independence and integrity of the Union, to preserve peace, strengthen international security and security of the Union, and

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46 Article 7.

47 Article 5.

to promote international cooperation[48]. It also includes the possible setting up of a common defence, subject to the decision of the European Council. While carrying out its functions under the provisions on CFSP, the Union has at its disposal various legal instruments: common strategies[49], defined by the European Council and implemented by the Council, joint actions[50] (where specific situations require an operational action by the Union), and common positions (defining the position of the Union as regards a particular question "of a geographical or thematic nature"[51]). Joint actions and common positions are adopted by the Council and the Members States are bound to conform their actions accordingly[52]. In this respect, the Amsterdam Treaty[53] introduced a qualified majority voting in the decision making process within the Council for certain decisions[54]. A Member State may, however, oppose such voting "for important reasons of national policy". For decisions to be taken unanimously, a mechanism of "constructive abstention" is provided according to which a Member State abstaining in a vote "shall not be obliged to apply the decision, but shall accept that the decision commits the Union"[55].

In the implementation of the CFSP, the conclusion of agreements with states or international organizations is expressly contemplated by article 24 of the Treaty. In this case, the Presidency may be authorized to open negotiations by the Council and the agreement is concluded by the Council, in both cases acting unanimously.

As regards matters falling within the CFSP, the Union is represented by the Presidency which is responsible for the implementation of decisions taken and expresses the position of the Union in the international

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48 Article 11.

49 Article 13.

50 Article 14.

51 Article 15.

52 Arts 14 para. 2, and 15.

53 For an overview of the changes brought by the Amsterdam Treaty to the provisions on CFSP, see e.g. Dashwood, see note 1, 1028 et seq.; F. Dehousse, "After Amsterdam: A Report on the Common Foreign and Security Policy of the European Union", *EJIL* 9 (1998), 526 et seq.; J. Charpentier, "L'amélioration des mécanismes de la PESC", in: *Le Traité d'Amsterdam: Réalités et perspectives*, 1999, 117 et seq.

54 It concerns decisions relating to the implementation of a common strategy, joint action or common position (article 23 para. 2).

55 Article 23 para. 1.

area. The Presidency is assisted by the High Representative of the CFSP, a function exercised by the Secretary-General of the Council[56]. In principle, expenditures relating to CFSP are charged to the budget of the European Communities, except for operational expenditures arising from operations having military or defence implications, which are charged to the Member States. When expenditures are charged to the budget of the European Communities, they are subject to the budgetary rules and procedure set by the Treaty establishing the European Community.

ee. Police and Judicial Cooperation in Criminal Matters

The provisions on Police and Judicial Cooperation (Title VI) intend to promote the objective of the Union "to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States". In these matters, the Council, acting unanimously, may choose between different instruments: common positions ("defining the approach of the Union to a particular matter"[57]); framework decisions for the purpose of approximation of the laws and regulations of Members States and decisions for any other purpose (both decisions are binding but do not possess direct effect); and conventions, the adoption of which is recommended to the Member States.[58] Certain provisions on the CFSP are also applicable to Title VI, such as article 18 relating to the role of the Presidency in representing the Union[59], and article 24 concerning the conclusion of agreements[60].

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56 Article 18.

57 Article 34 para. 2 (a).

58 It may be noted that Title VI attaches more importance to the development of the cooperation between competent authorities of Member States, directly or through the European Police Office (Europol), than to an action of the Union itself. The Union is less present in the third pillar than in the provisions relating to the CFSP. The term "Union" appears 32 times in Title V and 6 times in Title VI.

59 Article 37.

60 Article 24.

Some components of the former third pillar have been moved into the Community area by the Treaty of Amsterdam. This proximity[61] between Title VI of the Treaty on European Union and matters falling within the competence of the European Community also explains why the Court of Justice exercises increased jurisdiction in matters relating to the third pillar[62]. It may review the legality of decisions adopted by the Council or rule on disputes between Member States relating to acts adopted by the Council. The Court may also have jurisdiction to give preliminary rulings on questions relating to acts adopted under this Title, raised in a case pending before a municipal court of a Member State, subject to a declaration accepting its jurisdiction, to be made by the Member State concerned[63]. As far as expenditures are concerned, those are charged to the budget of the Communities, except if the Council decides otherwise.

c. The Legal Personality of the European Union and the Reparation Case

Opposing doctrinal views have been expressed concerning the existence of the Union as a juridical entity. For some authors, the Union is an intergovernmental mechanism ensuring common political action among the Member States and it does not possess international capacity[64]. The legal personality of the Union is recognized by others, with a variable intensity (from implicit personality[65] to a "softer" personality designated by such terms as "presumptive personality"[66] or "personnalité

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61 In this respect, it is also worthwhile to note that, according to article 42, the Council may decide that action in areas covered by the third pillar "shall fall under Title IV of the Treaty establishing the European Community".

62 See A. Albors-Llorens, "Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam", *CML Rev.* 35 (1998), 1273 et seq.

63 Article 35.

64 See Pliakos, see note 1, 211, Vignes, see note 1.

65 See Charpentier, see note 53; P. Des Nerviens, see note 1, 807; Maganza, see note 1, 669; G. Hafner, "The Amsterdam Treaty and the Treaty-Making Power of the European Union. Some critical comments", *Liber amicorum*, see note 1, 257 et seq., (283).

66 See Klabbers, see note 1, 249-252.

virtuelle"[67]), or is cautiously left in abeyance while awaiting an answer which would be given by future practice[68].

In this context, the relevance of the Reparation Case to the European institutions should not pose any problem. These institutions were created by treaties concluded under international law and their status is defined by this legal order. It is therefore legitimate to confront the European Union with the leading case dealing with the international personality of organizations. It may also be added that this approach is not new. The Reparation Case has already been referred to in the past, when questions were raised concerning the legal personality and external powers of the European Coal and Steel Community and of the European Community[69].

aa. Preparatory Work and Lack of Express Provision Recognizing the Personality of the Union

In the proceedings relating to the Reparation Case, reference was made to the lack of a provision in the Charter granting international personality to the United Nations and to the discussions held on this subject during the San Francisco Conference. As regards the European Union, it is common knowledge that the issue of the personality of the Union was discussed in the negotiations, in particular during those leading to the Amsterdam Treaty. Prior to the signature of the Amsterdam Treaty, proposals were made respectively by the Irish Presidency and later by the Dutch presidency. While, under the Irish proposal, the Union would have been granted international and internal legal capacity in addition to those of the three Communities, the proposal of the Dutch Presidency, following the approach of the Commission, proposed to set up a "single legal personality for the Union" which would have replaced and succeeded the existing personalities of the three Communities. The fact that these proposals were not retained is sometimes[70] considered as constituting a clear indication that the intention of the drafters was not to accept the personality of the Union. In this respect, it is also noted that, when the Council decided, in its Decision 93/591 of 8 November

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67 See Gautron et Grard, see note 1, 67.

68 See Dashwood, see note 1, 1038 et seq.

69 See e.g. P. Pescatore, "Les relations extérieures des Communautés européennes", *RdC* 103 (1961), 29 et seq.; De Soto, see note 17, 36 et seq.

70 See: "Intervention de D. Vignes", in: *Le Traité d'Amsterdam*, see note 53, 125; Klabbers, see note 1, 238.

1993[71], to change its name into the "Council of the European Union" and that political declarations adopted under the CFSP would be "made in the name of 'the European Union'", it also recorded a declaration stating that the European Union had no legal personality at international level[72].

However, the absence in the Treaty on European Union of a provision recognizing expressly the personality of the Union is generally not considered as constituting *per se* an obstacle to the existence of such personality. The main argument[73] invoked in support of this assertion is that the international personality of organizations is rarely expressed in their constitutive instruments[74] and that the absence of such provision in the United Nations Charter did not prevent the ICJ in its opinion of 1949 from affirming the personality of the United Nations[75]. Opinions nevertheless differ on the existence of a legal capacity which the Union would actually possess.

bb. (Non) Existence of a Legal Capacity to Act at International Level

If we apply the method followed by the ICJ in the Reparation Case to the European Union, we may find that the Union has been assigned goals, purposes (article 2) and principles (article 6); that it is equipped with functions, organs, and necessary means (common strategies, joint actions, common positions ...); that the position of Member States in relation to the Union requires them to conform their actions to decisions taken by the Union, sanctions being expressly contemplated in

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71 Decision "concerning the name to be given to the Council following the entry into force of the Treaty on European Union" (it means after the Maastricht Treaty but before the Treaty of Amsterdam), OJEC No. L 281 of 16 November 1993, page 18.

72 "Ce changement ne modifie nullement la situation juridique actuelle, à savoir que l'Union européenne ne jouit pas de la personnalité juridique sur le plan international. Il n'affecte pas non plus la désignation des parties signataires d'un instrument international produisant des effets juridiques, question qui devra être tranchée cas par cas": Text of the declaration quoted in Vignes, see note 1, 759, footnote No. 4.

73 See Hafner, see note 65, 267, who also argues that the insertion of an express provision could not be a decisive factor since it would only have a declaratory effect.

74 Pliakos, see note 1, 211.

75 See Vignes, see note 1, 769; Gautron and Grard, see note 1, 73.

case of breach of the common principles defined in article 6; that membership of third states is provided for (article 49) and that the conclusion of agreement is contemplated (arts 24 and 38).

Following an approach similar to the one contained in the written statement of the government of the United Kingdom in the Reparation Case, it is also tenable to maintain that the language used in the Treaty on European Union does not seem to be consistent with the characterisation of this institution as "a mere assemblage, a sort of association, of States and the rights and duties of the [Union under the Treaty] as vesting in the individual Members jointly and severally"[76]. Several extracts of the treaty may be quoted in this respect: "The Union shall set itself the following objectives", and among them: "to assert its identity on the international scene" (article 2); the Union "shall be served by a single institutional framework" and "shall ... ensure the consistency of its external activities" (article 3); "The Union shall respect fundamental rights" and "shall provide itself with the means necessary to attain its objectives" (article 6); "The Union shall define and implement a common foreign and security policy" (article 11)[77]; "The Union shall ... foster closer institutional relations with the WEU" (article 17); "the Presidency shall represent the Union" (article 18). On the basis of the provisions of the treaty, the Union appears therefore as an institution "in detachment from its members", entrusted with a capacity to act on international level.

The lack of personality of the Union has also been invoked on the basis of the limited institutional autonomy it enjoys under the Treaty. The Union is served by an institutional framework that does not belong properly to it but rather to the European Communities. The same may be said about the budget. There is no budget as such of the Union since expenses are charged to the Community budget or to the Member States[78]. However, the use by the Union of the institutions of the Community is not *per se* a reason to deny its autonomy. In this regard,

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76 *Pleadings, Oral arguments, Documents*, 1949 (Reparation Case), 30.

77 In this respect, it has been observed that, in article 11, para. 1, of the Treaty ("The Union shall define and implement a CFSP..."), the words "and its members States" (contained in the Treaty of Maastricht) have been deleted by the Treaty of Amsterdam, what underlines the autonomy of the Union. See Dashwood, see note 1, 1029, who adds: "When acting within the framework of Title V TEU, the Member States do not have an identity separate from the Union".

78 Vignes, see note 1, 757.

we may refer to the example of the Treaty of 8 April 1965, which merged the European institutions without resulting in a merger of the three Communities. The same applies to the fact that expenses are normally charged to the budget of the European Communities. As regards the possible appropriation of expenses of the Union to its Member States, we may simply note that this does not really depart from the practice of international organizations.

The analogy between the Reparation Case and the situation of the Union must probably be handled cautiously. The personality of the United Nations in 1949 was largely admitted. On the contrary, the personality of the Union is disputed. The intention of the drafters of the Treaty on European Union was not clearly expressed and some doubts have been expressed in this respect. However, the absence of a clear intention does not seem to be an obstacle to international personality if the entity concerned actually exercises functions on an international plane. An enlightening example of this is given by the Organization for Security and Cooperation in Europe. The OSCE, formerly the Conference on Security and Cooperation in Europe, has not been set up by a treaty but by a political instrument. In 1994 when its name was changed from "Conference" to "Organization", it was expressly mentioned in the Declaration of Budapest that this modification did not affect the legal nature of the institution. However, the OSCE has been recognized within the United Nations as a regional arrangement under Chapter VIII of the Charter[79], has been granted the status of observer in the General Assembly of the United Nations[80] and its international personality now seems commonly accepted.

cc. Treaty Making Power of the Union

If the personality of the Union seems tenable, its capacity to conclude international agreements raises difficulties. Article 24 does not mention the Union as a party to agreements concluded and addresses only the question of their binding effect on Member States. Furthermore, if we consider the context of this provision, we may note that the conclusion

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79 In its Resolution A/RES/47/10 of 28 October 1992, the General Assembly took note of the declaration of the Participating States of the CSCE according to which this constituted a regional arrangement under Chapter VIII of the Charter.

80 The CSCE has been granted the status of observer in 1993 by Resolution A/RES/48/5 of 13 October 1993.

of agreements is not referred to in article 12 listing the means given to the Union to pursue its objectives. The lack of capacity of the Union in this matter would also be confirmed by the declaration appended to the Final Act of the Amsterdam Treaty according to which: "the provisions of articles J. 14 [now article 24] and K. 10F [now article 38] and any agreements resulting from them shall not imply any transfer of competence from the Member States to the Union"[81].

On the other hand, it has been argued that this provision would serve no purpose if the agreement concluded did not bind the Union[82]. In this regard, it may be noted that article 24 is placed in Title V entrusting the Union with the task of defining and implementing its common foreign and security policy and that it would not be in line with the principle of effectiveness to confer upon the Union this task and, at the same time, to provide for the conclusion of agreements on behalf of Member States in this precise area of competence. Article 24 also envisages agreement with international organizations and the provision may be read together with article 17, which contemplates "closer institutional relations" between the Union and the WEU. This is confirmed by the Protocol in article J. 7 (now 17) annexed to the Amsterdam Treaty which reads as follows: "The European Union shall draw up, together with the Western European Union, arrangements for enhanced cooperation between them, within a year from the entry into force of the Treaty of Amsterdam".

The last sentence of article 24 reads as follows : "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". This provision has to be read, keeping in mind the particularities of the European legal system, as illustrated by article 300 para. 7 of the European Community Treaty according to which agreements concluded by the European Community are binding upon the institutions and the Member States. This latter provision does not mean that the Member States are contracting parties to agreements concluded by the Community but rather that, within the

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81 See Hafner, see note 65, 270. In support of this position, which identifies the Union as a mere agent of the Member States, article 20 of the European Community Treaty, is also quoted. This provision, relating to the assistance the citizens of the Union may expect abroad, refers only to the Member States. See Pliakos, see note 1, 212.

82 Charpentier, see note 53; see also Hafner, see note 65, 283.

European legal order, they have the obligation to respect it. If we assume that agreements under article 24 would be concluded by the Union, it would mean that the Member States are not, as regards third parties, "parties" to the conventions and that Member States making the declaration provided for under article 24 would not be accountable in the European internal legal order. As noted by G. Hafner, such situation could lead to problems in cases where the Union would be bound by an agreement but, due to its non binding effect upon some Member States, would not be able to implement it[83].

The above mentioned explanation is plausible but leaves two issues unexplained, i.e. the reference to the requirements of constitutional procedure in the last sentence of article 24 of the European Union Treaty, and the declaration attached to the Amsterdam Treaty according to which arts 24 and 38 and "any agreements resulting from them shall not imply any transfer of competence from the Member States to the Union".

The expression used in the last sentence of article 24 gives the impression that, contrary to agreements concluded under article 300 of the European Community Treaty, agreements under article 24 of the European Union Treaty have to be submitted by Member States to their internal constitutional procedures relating to the conclusion of treaties. If this is the case, it would imply that the Member States would be actually parties to the agreements. The same reasoning applies to the provision stating that other Member States "may agree that the agreement shall apply provisionally to them". The provisional application has a precise meaning in international law. According to article 25 of the 1969 Vienna Convention on the Law of Treaties a treaty "is applied provisionally pending its entry into force" with respect to the State concerned. In order to preserve a treaty making power of the Union, another interpretation could be suggested according to which the last sentence of article 24 would be considered as an exception to the normal rule, drafted for cases where an agreement would touch upon sensitive matters on which the capacity of the Union is not clearly established under the terms of the treaty. The French wording of this sentence could support this explanation since it does not refer to the requirements of a constitutional procedure but to "les règles constitutionnelles" (Constitutional provisions); an expression which could be understood as addressing substantive questions rather than procedural ones. An example of such sensitive matters is given in article 17 con-

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83 See Hafner, see note 65, 275.

cerning the development of institutional relations with the WEU "with a view to the possibility of the integration of the WEU into the Union". Pursuant to this provision, a decision in favour of such integration has to be recommended by the European Council to the Member States for adoption, "in accordance with their respective constitutional requirements".

As regards the declaration annexed to the Amsterdam Treaty, this could be understood as depriving the Union of the competence to conclude any agreement on its behalf. Another approach, more respectful towards the legal personality of the Union, would be that the purpose of the declaration is to underline that article 24 is a formal provision which cannot be in itself the basis of a competence to conclude an agreement. It has to be used to implement existing substantive competence and no extension of competence could be based on it or on the agreements concluded pursuant to it[84].

dd. The Practice of the Union

Before concluding on those points, it is important to consider the practice of the Union and see if it may furnish any confirmation or invalidation as regards the existence of international rights to the benefit of the Union. Since its creation, the Union has certainly affirmed its identity and visibility on the international area. The expression "Union" is commonly used, e.g. in the numerous political statements and declarations which are expressly made "on behalf of the Union" in various fora and international organizations. A further evidence of the recognition of the Union may be seen in article 1 (f) of Annex 10 (Agreement on Civilian Implementation) to the General Framework Agreement for Peace in Bosnia and Herzegovina, signed in Paris on 14 December 1995, which refers to the "tasks set forth to ... European Union"[85]. Likewise, Representatives of States are accredited to the Union rather than to the Communities[86]. So far, this does not affect the legal position of the European Community as party to multilateral agreements or member of organizations.[87] But this complex situation may lead to confusion. As an illustration, we may note that the 1999 report of the Secretary-

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84 Id., 272.

85 *ILM* 35 (1996), 87.

86 Dashwood, see note 1, 1040.

87 For example, in the United Nations, the European Community possesses an observer status.

General of the United Nations[88] on the recent developments on the (so-called) Straddling Fish Stocks Agreement of 1996 refers to the European Community as a party to the United Nations Convention on the Law of the Sea of 1982 and to nine regional fishery organizations. The decision of the Council of the European Union of 8 June 1998 to ratify the Straddling Fish Stocks Agreement is also mentioned but reference is made twice to the "ratification" of this agreement "by the European Union"[89].

In fact, the main area of activity of the Union is devoted to the CFSP and Police and Judicial Cooperation. As regards the CFSP, according to information available on the website of the Council[90], about a hundred common positions have been adopted from 1993 to 1999 and the figure is approximately the same for joint actions. These cover a wide range of topics, from sanctions, actions of the Union in the Balkans, disarmament, crisis concerning third countries. In 1999, two common strategies were adopted concerning, respectively, Russia and the Ukraine. As far as Police and Judicial Cooperation is concerned, about thirty joint actions have been adopted. Apart from those decisions, a number of instruments called "declaration", "recommendation", "resolution", "programme", "conclusions", "report", "action plan" have also been adopted. If we consider the contents of the common positions and joint actions adopted, it is manifest that those instruments are not only relevant to the Member States within the European system but also address the relations between the Union and the outside world, for example by defining the policy of the Union towards third countries[91] and by tak-

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88 See Doc. A/54/461 of 15 October 1999, paras 61 and 62.

89 The Decision 98/414 of the Council refers to an "instrument of ratification" deposited "on behalf of the European Community" (OJEC L 189 of 3 July 1998).

90 See also: F. Fink-Hooijer, "The Common Foreign and Security Policy of the European Union", *EJIL* 5 (1994), 171 et seq., (179-184); Dashwood, see note 1, 1030 et seq.; Koskenniemi, see note 1, 30-39; Klabbers, see note 1, 250-251.

91 For example, the common position on Rwanda of 12 July 1999 or on Afghanistan of 25 January 1999, where the Union defines its policy in its dialogue with the government of the states concerned; the joint action of 28 November 1997 on anti-personnel landmines: "The Union is committed to the goal of total elimination of anti-personnel landmines worldwide..."(art. 1); "The Union shall seek to promote, in all appropriate fora ... all efforts likely to contribute" to those objectives and "shall focus attention on those

ing some commitments in this respect, or by cooperating with other international organizations[92].

As regards the treaty-making power of the Union, the practice gives so far no conclusive evidence. Before the inclusion of article 24 in the European Union Treaty, on 5 July 1994, the Memorandum of Understanding on the European Union Admistration of Mostar[93] was signed by the Presidency of the European Union, for the "Member States of the European Union acting within the framework of the Union in full association with the European Commission". This expression would seem to reflect a commitment taken on behalf of the states rather than on behalf of the Union. But the provisions of the agreement designate clearly the European Union as the entity responsible for the administration of the city of Mostar. This uncertainty surrounding the modalities of signature concerning the Union may also be explained by the novelty of this institution. In 1954, when an association agreement between the ECSC and the United Kingdom was concluded, it was first negotiated by the High Authority acting as a common proxy of the Member States and signed by the High Authority and the six member states[94]. At that time, Member States were under the impression that external relations were still within their competence.

Reference may also be made to the exchange of letters between the European Union and Norway, Austria, Finland and Sweden on information and consultation procedure during the period preceding accession, which accompanied the treaty, signed on 26 July 1994, between the Member States of the European Union and those four states, concerning their accession to the European Union[95]. For the rest, the Union has adopted political instruments such as: a Joint Declaration between the

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third countries which continue the irresponsible supply and indiscriminate use of anti-personnel landmines" (article 3).

92 For example, the decision of 22 November 1996 on the implementation of the joint action on the Great Lakes Region, whereby the European Union "requests the WEU to examine as a matter of urgency how it can, for its part, contribute to the optimum use of the operational resources available"; the common position on Rwanda of 12 July 1999 which states that "in implementing this Common Position, the European Union will cooperate closely with the UN, OAU and other interested organizations"; the Common Position on Afghanistan of 25 January 1999 which records the commitment of the Union to support the action of the United Nations.

93 *Tractatenblad*, 1994, No. 183.

94 See De Soto, see note 17, 59 and 70-72; Dupuy, see note 19, 550-553.

95 OJEC C 241 of 29 August 1994, page 399.

European Union and Australia signed on 26 June 1997[96]; a Joint Declaration on Political Dialogue between the European Union and Mercosur of December 1995[97]; a Joint Statement between the European Union and Canada on Small Arms and Anti-personnel Mines of 17 December 1998 followed by a Statement of 2 September 1999 on Small Arms and Light Weapons[9899].

The relations between the Union and the WEU have seen some recent developments. Pursuant to article 17 of the Treaty on European Union and the Protocol relating to this article, the European Union and the WEU have drawn up the "Arrangements for enhanced cooperation between the European Union and the Western European Union". Surprisingly, those arrangements were not adopted in the form of an agreement between the two organizations but received a parallel but separate approval within both institutions in May 1999.[100] In a declaration adopted at the European Council held in Cologne on 3 and 4 June 1999, the members of the Council declared that they were "resolved that the European Union shall play its full role on the international stage" and that they were intending "to give the European Union the necessary means and capabilities to assume its responsibilities regarding

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96 The Joint Declaration has been signed on 26 June 1997, for Australia, by the Minister for Foreign Affairs of Australia and, for the European Union, by the President of the Council and Minister for Foreign Affairs of the Netherlands. It concerns economic matters, the multilateral trade system, human rights and the fight against crime (Bulletin EU, June 1997, 1.4.103).

97 The Joint Declaration was made at the occasion of the conclusion of the Interregional Framework Cooperation Agreement between the European Community and its Member States, on the one side, and the Southern Common Market and its Party States, of the other side, opened for signature in Madrid between 15 and 31 December 1995. OJEC No.L 69 of 19 March 1996.

98 See website of the European Union (Europa) : http://ue.eu.int/pesc

99 A press release HR/4265 of 9 January 1996, issued by the UNHCR, also refers to the signature of the same day in Geneva of a financing agreement for deployment of human rights observers in Burundi between the UNHCR and the European Union.

100 In their Bremen Declaration, on 11 May 1999, the WEU Council of Ministers "endorsed the present set of arrangements which had been elaborated in WEU and EU". Within the European Union, the arrangements were approved by a decision of the Council of 10 May 1999.

a common European policy on security and defence"[101]. At the European Council of Helsinki, on 10 and 11 December 1999, the Presidency reported on steps taken to strengthen European policy on security and defence and stated that the measures to be taken "will reinforce and extend the Union's comprehensive external role" and that, in contributing to international peace and security, "the Union will cooperate with the UN, the OSCE, the Council of Europe and other international organizations".[102]

After this overview of the provisions of the European Union treaty and the practice relating thereto, the international personality of the Union seems to be sufficiently evidenced. This personality may firstly be deducted from the articles of the Amsterdam Treaty, which equip the Union with organs and tasks. The relations between the Union and its Member States are defined and, to use the language of the Court in the Reparation Case, the Union "occupies a position... in detachment from its Members". The Union has the capacity to operate on the international plane and has in fact exercised it, principally by taking common positions and joint actions. Those decisions are not only adopted for the internal use of the Union; they may contain commitments towards third states and in this respect are to be considered as unilateral acts. However, this personality is limited, not yet mature, since the competence of the Union to conclude international agreements remains challenged. The treaty-making power of the Union would be consistent with the principle of effectiveness, but the wording of its constituent treaty clearly leaves room for interpretation. The practice is also largely[103] inconclusive and manifests some timidity, or certain would call it "reluctance", to use the potentialities of article 24 of the Union Treaty.

ee. Union and Communities

A further difference between the circumstances of the case dealt with by the ICJ in 1949 and the position of the Union is the existence of the personalities of the three European Communities. Instead of being confronted with the classical hypothesis of the (non) existence of one or-

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101 See Annex III to the Conclusions of the Presidency. This was welcomed in a WEU Ministerial Declaration issued on 23 November 1999.

102 See Annex IV to the Conclusions of the Presidency.

103 Except in the case of accession of new states to the Union if we consider the exchange of letters between the European Union and Norway, Austria, Finland and Sweden of 1994 (see above, 356).

ganization, we are now faced, taking into account the emerging personality of the Union, with a system consisting of various institutions.

In international law, there are cases where organs possess an international personality distinct from the personality of the organization to which they belong. According to the United Nations Convention on the Law of the Sea, the Enterprise, an organ of the International Seabed Authority, has "such legal capacity as is necessary for the exercise of its functions"[104], enjoys privileges and immunities and may enter into agreements with states. This abundance of personalities is not unknown in the European Communities. The European Investment Bank has a legal personality (European Community Treaty, article 266) and the same applies to the European Central Bank[105] (European Community Treaty, article 107). However, the position of the Union is different from this phenomenon of a plurality of personalities within a single organization. In the present case, it is even an opposite situation, i.e. a coexistence of institutions served by a single institutional framework.

Since the European Communities already exist and retain their personalities under their respective constituent instruments, one could think that the specific area of the Union is constituted by the policies and forms of cooperation (CFSP and Police and Judicial Cooperation) supplementing the treaties of Rome and Paris, as modified. This assertion may be true but it is certainly not complete because it overlooks the fact that the Union cannot be easily separated from the European Communities. The Union, as a personality, is not simply juxtaposed to the Communities. On the contrary, the Union superposes itself on the Communities to form an intricate system, whose analogy with the United Nations System would deserve further study[106]. The reality of a system is evidenced by several elements. Firstly, the Community institutions are not absent from the provisions relating to policies and forms of cooperation set up by the Treaty on European Union. This is underlined by the treaty itself which expressly refers to the existence of a single institutional framework. Secondly, the Union is a global entity. This cannot be ignored when dealing with the question of admission of new

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104 See article 13 para. 2 of Annex IV to the Convention.

105 According to the Protocol No. 3 to the Maastricht Treaty, the Bank enjoys privileges and immunities and may participate in international monetary institutions.

106 On the notion of "system" or "families" of international organizations (including the European Union), see Schermers and Blokker, see note 8, 1056-1065.

Member States, since membership of the Union implies admission to the treaties establishing the European Communities. Furthermore, certain Community rules and procedures are applicable to the Union, for example in budgetary matters or in matters relating to the third pillar where the Court of Justice may exercise a limited jurisdiction. Likewise, the system supposes a necessary cooperation between its various components. There is no functional separation[107] between the three pillars and this implies synergy. It also may raise issues of border zones and grey areas. For example, the influence of decisions taken under the CFSP may have impact on commercial matters, as it is expressly regulated under article 301 of the European Community Treaty in the case of sanctions. In such a system, there is a need to develop rules to safeguard the areas of competence allocated to the different institutions. In this respect, article 47 of the European Union Treaty expressly states that the provisions of the Treaty (except those modifying the constituent treaties of the Communities and the final provisions) shall not affect the treaties establishing the European Communities. By virtue of article 46 of the Treaty, this enables the European Court of Justice "to ensure that acts which, according to the Council, fall within the scope ... of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community"[108].

That being said, the Union, as an institution distinct from the Communities, probably has a transitory nature. It reflects the stage reached in the European architecture which could be described as a "federation of institutions" rather than a "Federal Europe". The system is complex, especially for the third states. Those states are not necessarily familiar with the subtleties of the system and may find artificial the division of European institutions in three "pillars". If the Union increases its identity on the international arena, which represents one of its objectives, it would be logical to presume that its personality would absorb the other personalities on which it is, at least partially, founded[109]. It would simply mean that the complex system put in place would be mainly rele-

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[107] See Gautron and Grard, see note 1, 70-71, who e.g. mention the initiatives taken by the Union, in the framework of the CFSP, concerning the reconstruction process in Ex-Yugoslavia and observe that the implementation of these actions was followed up under Community Law.

[108] See para. 16 of the Judgement of the European Court of Justice of 12 May 1998 in Case C-170/96.

[109] See e.g. A. von Bogdandy, "The Legal Case for Unity: the European Union as a Single Organization with a single Legal System", *CML Rev.* 36 (1999), 887 et seq.

vant within the European legal order and that, on an international plane, this system would have a single personality or identity: the European Union.

II. Conclusions

The Treaty on European Union established the Union under international law. The question of the international personality of this new entity has to be addressed within this legal order. If we follow the test adopted by the ICJ in the Reparation Case, the Union, under the provisions of its constituent treaty, has received tasks and may adopt legal decisions binding upon its Member States. This implies that it possesses a personality distinct from them. In practice, decisions adopted by the Union also concern third states or other organizations. This reinforces the credibility of its personality on an international level. However, at this stage, the competence of the Union to conclude treaties cannot be sufficiently demonstrated on the basis of the provisions of the treaty or confirmed by the practice.

The personality of the Union presents the particularity of being part of a system consisting of different institutions. This system is in evolution and may lead to the absorption of the Communities into a single entity under the chapeau of the Union. That would constitute a logical result but such evolution will depend on the will of the Member States and the attitude of the international community. However, in the present circumstances, it is more likely that the present system will survive for a while. It would at least present an interest for the law of international organizations, in particular as regards the functioning of a complex system consisting of a plurality of international personalities.