
The Legal Personality of the European Union

Philippe de SCHOUTHEETE and Sami ANDOURA *

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European treaties are notorious for legal ambiguities and internal contradictions resulting from precarious compromises between opposing views. The matter of the legal personality of the European Union is a good example of this and, given its potential importance, it is worthy of some attention.

1. What the treaties say

The words ‘European Union’ began to circulate widely in the mid seventies when the Belgian Prime Minister, Leo Tindemans, was tasked to draft a report on the concept.¹ He described the Union as a “*new phase in the history of the unification of Europe*” to be achieved by a “*qualitative change*” resulting from strengthened institutions bringing together the various strands of intergovernmental cooperation and community matters. But it is only through the treaty of Maastricht, in 1992, that the concept was introduced in the European legal order.

The ‘Treaty on European Union’² (the official title of the treaty of Maastricht) does indeed establish a European Union as a “*new stage in the process of creating an ever closer union among the peoples of Europe*” (article A, now article 1 TEU) and gives it as one of its objectives “*to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy*” (article B, now article 2 TEU).

Common sense suggests that in order to assert identity on the international scene one needs, first, to be recognised as an international legal entity. And to implement a common foreign policy, one obviously needs the ability to act, to contact and to contract with other international actors. Such was not the view that prevailed at Maastricht. Some considered that giving legal personality to the Union would compromise national sovereignty in foreign affairs. Others considered that it might impinge on the legal personality of the Community.

* Philippe de Schoutheete is Director of European Studies at Egmont — Royal Institute for International Relations, and former Belgian Representative to the EU. Sami Andoura is Research Fellow at Egmont — Royal Institute for International Relations, European Affairs Programme. This comment does not in any way represent a position of the institution to which they belong. Developments have been covered until 1st April 2007.

¹ See the ‘European Union’ Report by Mr. Leo TINDEMANS, Prime Minister of Belgium, to the European Council. *Bulletin of the European Communities*, Supplement 1/76, p. 12.

² Treaty on European Union, *Official Journal* C 325, 24 December 2002.

Together they agreed, with little debate, that the Union would not have legal personality and that position, however contradictory, was not disputed.³

In the negotiations that were to lead to the treaty of Amsterdam, the inherent contradiction in the position taken at Maastricht was widely recognised. The report of the Reflection Group preparing the intergovernmental conference stated that “*the fact that the Union does not exist is a source of confusion outside and diminishes its external role*”. The European Parliament and the Irish and Dutch presidencies suggested that the Union should have legal personality, preferably absorbing the legal personalities of the three existing Communities.⁴ Those proposals found majority support but they failed in front of determined British and French opposition.

However the same treaty deepened the paradox by giving the Union a form of treaty-making power. It introduced what are now articles 24 and 38 TEU which allow agreements to be concluded in the field of common foreign and security policy (title V) and in the field of police and judicial cooperation (title VI). Those agreements are negotiated by the Presidency and concluded by the Council. The Council is an institution of the Union, not an intergovernmental conference, and it is therefore the Union, not a conglomeration of member states, which is bound by those agreements. Even if article 24 TEU foresees the possibility for a member state to request a national ratification procedure in exceptional cases,⁵ and even if Declaration 4 annexed to the treaty specifies (unnecessarily) that the same article does not imply a transfer of competence, the fact remains that member states, while refusing formally to recognise the legal personality of the Union, were giving it a form of treaty-making power which is one of the main characteristics of international legal personality.⁶

The treaty of Nice, which some have called “*the culmination of confusion*”⁷, made the implicit ambiguity even more apparent by adding two modalities to article 24. Paragraph 3 indicates that, in given circumstances, an agreement can be approved in Council by a qualified majority. Paragraph 6 states the obvious in saying that agreements concluded bind the institutions of the Union. Both paragraphs cannot be explained without implying the existence of a legal entity having the capacity to conclude agreements which bind the institutions and, in some cases, even the member states who voted against it.

Such was the situation when the European Convention met in Brussels in the spring of 2002. One of its first decisions was to create a working group on legal personality, chaired by Giuliano Amato, which delivered its final report⁸ on 1 October. Its main conclusion was “*that there was a very broad consensus (with one member against) that the Union should in*

³ See for instance J. CLOOS *et al.*, *Le traité de Maastricht* (Bruxelles, Bruylant, 2nd Ed. 1994), p. 165 : “*L’Union n’a pas la personnalité juridique internationale*”; and V. CONSTANTINESCO *et al.*, *Traité sur l’Union Européenne* (Paris, Economica, 1995), p. 89 : “*L’Union ne s’est pas vu reconnaître par ses fondateurs la qualité de sujet de droit international*”.

⁴ On this whole debate see N. NEUWAHL, A Partner with a troubled personality, *European Foreign Affairs Review*, Vol. 3, 1998.

⁵ On this particular issue, see the public intervention of M. PIRIS at the European Convention, Working Group III “Legal personality”, Working Document III, Meeting of 26 June 2002. <http://european-convention.eu.int/docs/wd3/1953.pdf>

⁶ See also R. PASSOS & S. MARQUARDT in G. AMATO, H. BRIBOSIA and B. DE WITTE, *Genesis and Destiny of the European Constitution* (Bruylant, Bruxelles, 2007), p. 883.

⁷ G. MILTON & J. KELLER-NOËLLET, *The European Constitution* (London, John Harper Publishing, 2005), p. 22.

⁸ Document CONV 305/02 of 1 October 2002.

future have its own explicit legal personality. It should be a single legal personality and should replace the existing personalities". It stated that giving the Union a legal personality additional to those that now exist would not go far enough in providing the clarification and simplification necessary in the Union's external relations. It underlined that explicit conferral of a single legal personality on the Union does not *per se* entail any amendment, either to the current allocation of competences between the Union and the Member States or to the allocation of competences between the current Union and Community.

This important report had far reaching consequences, including on the 'pillar' structure of the treaties, and therefore on the general structure of the Constitutional treaty.⁹ Its conclusions were ratified by the Convention and translated into article 6 of the draft treaty transmitted to the European Council in July 2003: "*The Union shall have legal personality*".¹⁰ In due course that short text became article I-7 of the treaty signed in Rome on 29 October 2004. It is completed by article IV-438 which says "*The European Union established by this Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community*". This combination "*ended the separate legal personality of the European Community: from now on there would be only one legally recognised organisation (the "European Union") with a single legal personality*".¹¹

This would indeed put an end to the long story of ambiguity and internal contradiction which we have described above. But, as we all know, that treaty has not entered into force and is not likely to do so in its present form. Until that constitutional dilemma is solved, we remain therefore in the previous uncertain situation.

2. What International Law says¹²

The easiest way for an international organisation to acquire international legal personality is to include a specific mention to that effect in its constitutional charter. This was done for the three treaties establishing the European Communities in the 50s.¹³ As we have seen above, the Maastricht and following treaties refrained from doing this in the case of the European Union.

However it has long been accepted in international public law that legal personality can also be implicitly conferred to an international organisation. The traditional basis for this is an advisory opinion concerning the United Nations delivered more than fifty years ago by the International Court of Justice (ICJ).¹⁴ After having analysed the UN Charter and subsequent treaties, the practice of the organisation and its duties and obligations, the Court concluded that the members of the UN "*by entrusting certain functions to it, with the attendant duties*

⁹ See G. AMATO, H. BRIBOSIA and B. DE WITTE, *Genesis and Destiny of the European Constitution*, Bruylant, Bruxelles, 2007, p. 202-204.

¹⁰ Document CONV 850/03 of 18 July 2003.

¹¹ G. MILTON & J. KELLER-NOËLLET, *op.cit.*, p. 54.

¹² For further developments on this point see F. DEHOUSSE and S. ANDOURA, La personnalité juridique de l'Union européenne : Le débat qui n'existait pas, in Ch. FRANCK & G. DUCHENNE (dir.), *L'action extérieure de l'Union européenne, Actes de la XIe Chaire Glaverbel d'études européennes (2005-2006)* (Louvain-la-Neuve, Academia-Bruylant, 2007), on which this contribution draws extensively.

¹³ Cf. art.205 (1) EC Treaty; art.6 first para. ECSC Treaty; and art.184 Euratom Treaty.

¹⁴ Reparation for Injuries Suffered in the Service of the United Nations, International Court of Justice, Advisory Opinion of 11 April 1949, *ICJ Reports* (1949).

and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged”.

The question arising, therefore, is whether the reasoning held by the ICJ in 1949 concerning the UN can and should be extended today to the European Union. In the opinion of the Court, the rights and duties of an international entity such as the Union depend on its “*purposes and functions as specified or implied in its constituent documents and developed in practice*”. We have analysed above the purposes and functions of the Union in the international sphere, and we will examine the practice subsequently.

There is little doubt that in tasking the Union “*to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy*” the signatories of the Maastricht treaty gave it a *purpose* which implied international legal personality. What identity could it assert if it had no personality? Similarly when allowing the Council of the Union to conclude agreements in the field of common foreign and security policy (title V) and in the field of police and judicial cooperation (title VI) the signatories of the Amsterdam treaty confirmed that the Union had a form of treaty-making power, a *function* which implies international legal personality. The first condition posed by the Court (*purposes and functions*) seems therefore to be clearly satisfied in the case of the Union.

The position taken by the Court in 1949 is not disputed. Brownlie,¹⁵ analysing that opinion, describes three criteria which determine the existence of international legal personality:

- a permanent association of States equipped with organs: which the Union undoubtedly is;
- a distinction in terms of legal powers and purposes between the organisation and its member states: asserting the identity of the Union on the international scene is a purpose which is clearly distinct from that of the member states;
- the existence of legal powers exercisable on the international plane: articles 24 and 38 TEU provide such legal powers.

Similarly Dailler and Pellet¹⁶ indicate that an organisation has international legal personality as soon as it is tasked with some “*missions qui impliquent une capacité d’action autonome dans les relations internationales*”. It would be difficult to argue that a common foreign and security policy can be implemented without a capacity for autonomous action.

After clarifying the principles we should analyse the practice.

But before examining the practice of the European Union in the field of international relations it is worth underlining the limits which international public law sets on the legal personality of international organisations. An important point is underlined by the advisory opinion of the ICJ quoted above when it makes the distinction between States who “*possess the totality of international rights and duties recognised by international law*” and Organisations whose rights and duties depend on their purpose and function. The point can be formulated in another way by saying that by acquiring international legal personality an organisation acquires the *capacity* to act in the international sphere, but it does not acquire the *competence* to do so. That competence depends on its constituent texts and varies therefore from one organisation to another. When Declaration 4 annexed to the treaty of

¹⁵ I. BROWNLIE, *Principles of Public International Law*, 6th edition (Oxford University Press, 2003), p.649

¹⁶ P. DAILLER and A. PELLET, *Droit International Public*, 7th edition (Paris, L.G.D.J., 2002), p. 596.

Amsterdam¹⁷ says that articles 24 and 38 TEU (which give the Union the *capacity* to conclude agreements) does not imply a transfer of *competence*, it states the obvious, applying a general rule of international law, and is therefore redundant, like so many other declarations attached to European treaties.

Similarly the existence of international legal personality has no relation, positive or negative, to the intergovernmental or the supranational character of the organisation concerned. Many intergovernmental organisations of the UN family (UNESCO, WHO, FAO, etc.) have international legal personality, as do the World Bank and the IMF. The Universal Postal Union has it also;¹⁸ it was founded in 1874 at a time when the concept and the word ‘supranational’ would have been meaningless.

3. Legal Personality of the EU in Practice

The purpose, and importance, of international legal personality is to enable an entity to communicate and operate with other international actors on an equal basis. Practice is therefore important. It is difficult, and would be rather absurd, to deny international legal personality to an entity which is recognised by other international actors as having it. Practice translates into two specific characteristics: the capacity to contract agreements with other international actors (*treaty-making power*) and the capacity to entertain bilateral diplomatic relations with those international actors (*active and passive right of legation*). Those two criteria can be taken into consideration in order to assess the level of international recognition of the European Union as a legal personality.

Treaty-Making Power

Crisis management in the Balkans and elsewhere has been a privileged field of activity for the treaty-making power attributed to the Union by article 24 TUE. These agreements have been concluded either with countries such as Bosnia and Herzegovina, Macedonia, Indonesia or the Democratic Republic of Congo where the Union was operating, or with third countries, such as Switzerland, Chile, Morocco or New Zealand, participating in peacekeeping operations led by the Union. More than sixty such agreements have been concluded.

We can take as an example the agreement concluded on 4 October 2002 on the activities of the European Union Police Mission in Bosnia and Herzegovina.¹⁹ Its signature had been approved on 30th September 2002 by a Council decision based on article 24 TEU. The parties are the European Union and Bosnia and Herzegovina “*together hereinafter referred to as the Participating Parties*”. Article 4 specifies that “*EUPM shall be granted the status equivalent to that of a diplomatic mission*” and that “*EUPM personnel shall be granted all privileges and immunities equivalent to that of diplomatic agents granted under the Vienna Convention on Diplomatic Relations of 18 April 1961*”. Similar clauses concern technical and administrative staff and locally hired auxiliary personnel. Article 6 indicates that the EUPM

¹⁷ Declaration No. 4 annexed to the Final Act of the Amsterdam Treaty, which reads as follows: “The provisions of Articles J.14 and K.10 of the Treaty on European Union and any agreement resulting from them shall not imply any transfer of competence from the Member State to the European Union” (these articles were subsequently renumbered articles 24 and 38 TUE).

¹⁸ This has been recognised by judgments of the administrative court of the ILO. See for instance *Case Zayed* (Nos 4 and 5) Judgement No 1013 of the administrative court of the ILO. See <http://www.ilo.org>.

¹⁹ OJ L 293/2 of 29 October 2002. The Council decision approving the agreement bears number L 293/1.

may display the flag of the European Union on its main headquarters in Sarajevo, and otherwise as decided by the Head of Mission. It seems difficult to deny that Bosnia and Herzegovina recognizes the European Union as an international actor with legal personality.

We can also look at the agreement concluded on 25 July 2005 on the participation of the Republic of Chile in the European Union military crisis management operation in Bosnia and Herzegovina.²⁰ It is concluded between the European Union and the Republic of Chile “*hereinafter referred to as the Parties*”. Chile associates itself with Joint Action 2004/570/CFSP of 12 July 2004²¹ on the European Union military operation in Bosnia and Herzegovina and shall ensure that its forces and personnel participating in the EU operation undertake their mission in conformity with that Joint Action. Any necessary technical and administrative implementation arrangement shall be concluded between the Secretary-General of the Council of the European Union and the appropriate authorities of the Republic of Chile. Disputes concerning the interpretation or application of the agreement “*shall be settled by diplomatic means between the Parties*”.

In the agreement concluded on 1 September 2005 with the Democratic Republic of Congo on the status and activities of the European Union police mission²² (EUPOL Kinshasa) we find similar clauses on diplomatic immunity, diplomatic status for the agents, flying the EU flag on headquarters and solving disputes between parties by diplomatic means.

Many more examples can be found in the *Official Journal of the European Union*.

The fact is that EU practice makes generous use of the treaty-making power granted by article 24 TEU and that all sorts of countries across the world accept its capacity to conclude such agreements. This is also the case for international organisations such as the International Penal Court²³, NATO²⁴ or the ACP countries, which have concluded agreements with the European Union.

Agreements have also been concluded on the basis of article 38 TEU, *e.g.* with Iceland and Norway on the application of certain provisions of the Convention of 29 May 2000 on mutual assistance in criminal matters.²⁵ Other agreements are based both on articles 24 and 38, *e.g.* an agreement with the United States on extradition and mutual legal assistance in criminal matters²⁶ in which article 2.1 specifies that “*‘Contracting Parties’ shall mean the European Union and the United States of America*”. Here again there is no doubt that the European Union is recognised as a ‘party’, *i.e.* an international actor with treaty making power. But in the delicate field of title VI, the elements of ambiguity and legal uncertainty present in the treaties, *e.g.* the possibility offered by article 24 TEU for member states to request national ratification procedures, have cast some doubt on the full capacity of the Union and led to requests for more direct implication of the member states.

The Right of Mission

²⁰ OJ L 202/40 of 8 August 2005. The Council decision approving the agreement bears number L 202/39.

²¹ OJ L 252/10 of 28 July 2004.

²² OJ L 256/62 of 1 October 2005.

²³ OJ L 115 of 28 April 2006.

²⁴ OJ L 80 of 27 March 2003.

²⁵ OJ L 26/3 of 29 January 2004.

²⁶ OJ L 181/25 of 19 July 2003.

The European Community has entertained for a considerable number of years a network of representations staffed by the Commission. They enjoy diplomatic status and are normally led by an official with the rank and courtesy title of ambassador. There are more than a hundred of these and they cover most of the world. The Council has two representations accredited to the UN in New York and Geneva. Reciprocally one of the biggest diplomatic corps in the world is accredited to the European institutions in Brussels, representing all sizes of countries, from Andorra to China.

In practice this active and passive diplomatic network serves both for Community matters and European Union activities such as the common foreign and security policy. The Commission website indicates that Delegations play an increasing role in the conduct of the Common Foreign and Security Policy (CFSP), providing regular political analysis, contributing to the policy-making process, providing support and assistance to the other institutions and actors of the EU, including the High Representative for CFSP, who can rely on their logistical support when on mission and to whom all their policy reports are copied.²⁷

The ‘diplomatic means’, to which we have seen that many agreements concluded by the Union refer for the settlement of disputes, are to a large extent to be found in that network. Not exclusively however because a parallel network of “special representatives” has also been developed.

The treaty of Amsterdam created a High Representative for CFSP who is also Secretary General of the Council. The first High Representative, Javier Solana, has developed a high political profile and created an important diplomatic tool. He has personally participated actively in a great number of diplomatic activities, attempting to resolve crises, taking the floor in the UN Security Council, representing the Union in the Quartet which has been trying to solve the Israeli-Arab conflict. One of the instruments at his disposal is the appointment of ‘special representatives’ of the Union in specific regions, most frequently in cases of crisis: Middle East, Great Lakes, Macedonia, Kosovo, Moldova, Afghanistan, South Caucasus, etc. In practice these representatives make use of the infrastructure of the local EC representations and, by all accounts, relations are correct and fruitful, even when tension prevails in Brussels between Commission and Council services.²⁸ In many cases ‘special representatives’ have been highly influential and well respected, but *stricto sensu* they do not automatically have diplomatic status. Local authorities have been known to underline the point by depriving them of perks such as special number plates for their cars. Nevertheless they are quite numerous, well accepted and efficient. Together with the EC representations, they constitute, in a pragmatic way, a quasi-diplomatic service of the Union.

4. Conclusion

There is little doubt that the European Union has implicitly acquired an international legal personality. It fulfils the conditions set by international law, in particular the International Court of Justice, for the recognition of this status. And international practice has confirmed it: a large number of states have concluded, in recent years, international agreements with the Union and accepted its representatives. In 1996, the Reflection Group preparing the

²⁷ http://ec.europa.eu/comm/external_relations/delegations/intro/role.htm

²⁸ In Macedonia the special representative is simultaneously head of the EC delegation.

Amsterdam negotiations said that the Union “*did not exist*” on the international scene. That would no longer be true today. The Union is a recognised actor in its own right.

Nevertheless the ambiguities of the treaty texts, combined with the fact that member states had not, before the Constitutional treaty, been able to agree on formal recognition of that personality, can create a potential element of legal uncertainty. This can lead, at times, to sincere doubts about the capacity of the Union to bind its member states, as has been the case in some negotiations on matters of police and justice. It can also be used by our negotiating partners in order to gain a tactical advantage by casting doubt on the legal status of the Union.²⁹ In both cases it is detrimental to our interests.

The working group chaired by Giuliano Amato during the Convention proposed by far the best solution, namely the formal recognition of the international legal personality of the Union and the absorption by the Union of the legal personality of the European Community. This translated into articles I-7 and IV-438 of the Constitutional Treaty. It is very much to be hoped that those clauses will survive in whatever institutional solution is elaborated to solve the present constitutional impasse.

If we accept, as we think we all must, that the European Union has, today, an implicit legal personality when acting in fields of its competence, formal recognition of that fact should not prove impossible to achieve. We would not be creating a new legal situation, but simply recognising an existing one.

It might seem utopian to suggest such a course given past opposition of some countries, notably Britain, to the European Union’s legal personality. But the last official debate on the matter took place in the Convention in 2002 and many things have changed since then. As indicated above the Union has, in the last few years, concluded dozens of international agreements and sent special representatives to many parts of the world. It is no longer realistic to deny that the Union has in fact become an international actor. Pragmatism imposes recognition of that fact.

Misgivings could well be diminished if three points mentioned above were made sufficiently clear:

- international legal personality is not the first step towards the emergence of a super-state: the UN has had it for over half a century and nobody in his right mind has ever suggested it was becoming a super-state;
- international legal personality has no influence on the competence of the organisation which acquires it: the competence of an organisation results from its constituent documents, irrespective of the existence or otherwise of legal personality;
- international legal personality has no relation to the intergovernmental or supranational character of the organisation which acquires it: several intergovernmental organisations have it and others do not.

It could well be argued that a treaty text recognising legal personality and simultaneously reasserting some of these points would give more guarantees to those who fear the

²⁹ Questioning the legal status of your interlocutor in order to gain tactical advantage and, if possible, extract concessions is a classic diplomatic ploy, fully mastered by Talleyrand, notably in his dealings with the smaller German princes. More recently the Soviet Union used it, or at least attempted to use it, for many years in its relations with the nascent European Community.

consequences of this step than simply letting the future be fashioned by implicit and informal developments. By nature these are difficult to control.

The absence of a treaty clause would of course in no way diminish the existing implicit legal personality of the Union, now recognised worldwide and disputed only by a small minority of member states. The situation would develop as it has done in the past few years with additional evidence in the form of new treaties concluded with more partners. But the situation would be much less satisfactory than that resulting from the constitutional treaty. As the Convention working group indicated, “*it would not go far enough in providing the clarification and simplification necessary in the Union's external relations*”. Some ambiguities would remain and the coexistence of two legal personalities, the European Union and the European Community, would be an embarrassment, contradicting the fundamental unity of purpose which, ever since Maastricht, we have been trying to give to the different branches of the European process.

Philippe de Schoutheete is Director of European Studies at EGMONT - Royal Institute for International Relations, and former Belgian Representative to the EU

Sami Andoura is researcher at the European Affairs Programme and deputy Editor-in-chief at EGMONT