

THE CONCLUSION OF INTERNATIONAL AGREEMENTS BY THE EUROPEAN UNION IN THE CONTEXT OF THE ESDP

AUREL SARI*

Abstract Between 2002 and 2007, the Council of the European Union has entered into more than 70 international agreements with third parties pursuant to Article 24 of the Treaty on European Union in order to address various legal and practical matters relating to the conduct of EU crisis management missions in third countries. The purpose of this article is to examine the Council's practice in the implementation of Article 24 of the Treaty and to assess the widely held view that the international agreements concluded under this provision offer conclusive proof of the EU's status as an independent subject of international law. Even though the Council's recent practice does indeed suggest that it concludes international agreements on behalf of the Union as such, this does not lay to rest all uncertainties surrounding the EU's nature as an international legal person.

I. INTRODUCTION

In 1999, the European Council launched the European Security and Defence Policy (ESDP) to enable the EU to respond more effectively to international crises.¹ The purpose of the ESDP is to provide the EU with the institutional basis and the operational capabilities necessary to conduct military and civilian crisis management missions in third countries in pursuit of the Union's foreign policy objectives set out in Article 11 of the Treaty on European Union (TEU).² In the period between 2003 and 2007, the EU has launched 18 crisis management missions in 11 third countries within the

* BA (Durham), LLM (LSE), Doctoral candidate (UCL). Email: A.Sari@ucl.ac.uk. I am grateful to Richard Gardiner and Jörg Kammerhofer for comments on an earlier version of this paper. The responsibility for any shortcomings is mine alone.

¹ For an overview of the ESDP, see TC Salmon and AJK Shepherd, *Toward a European Army: A Military Power in the Making?* (Lynne Rienner, Boulder CO, 2003); RA Wessel, 'The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice' (2003) 8 *Journal of Conflict and Security Law* 265; N Gnesotto (ed), *EU Security and Defence Policy: The First Five Years (1999–2004)* (EU Institute for Security Studies, Paris, 2004); R Keane, 'European Security and Defence Policy: From Cologne to Sarajevo' (2005) 19 *Global Society* 89; S Graf von Kielmansegg, *Die Verteidigungspolitik der Europäischen Union: Eine Rechtliche Analyse* (Boorberg, Stuttgart, 2005); M Trybus and N White (eds), *European Security Law* (OUP, Oxford, 2007).

² These include the preservation of peace and the strengthening of international security, in accordance with the principles of the United Nations Charter, as well as the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental

context of the ESDP.³ These have ranged from advisory missions consisting of less than a dozen experts, to large-scale peacekeeping operations involving several thousands of military personnel. Out of a total of 18 crisis management missions, five were military operations carrying out general peacekeeping and humanitarian tasks.⁴ Four of these operations were authorized by the UN Security Council acting under Chapter VII of the UN Charter to take enforcement action in the performance of their mandate.⁵ In addition, the EU has launched 12 civilian crisis management missions, including seven police,⁶ two rule of law,⁷ one monitoring,⁸ one security sector,⁹ and one border assistance mission,¹⁰ and has undertaken one mixed civilian–military mission.¹¹

The creation of the ESDP has resulted in a sharp increase in the number of international agreements concluded by the Council under Article 24 TEU. This provision enables the Council to enter into international agreements with one or more States or international organizations in order to implement the EU's Common Foreign and Security Policy (CFSP), of which the ESDP forms an integral part. Before the establishment of the first ESDP mission in March 2002, the Council has concluded only two agreements pursuant to Article 24 TEU,¹² both of which related to the *EU Monitoring Mission (EUMM)* in the Western Balkans,¹³ an EU crisis management mission preceding the creation of the ESDP. Since March 2002, however, the Council has entered into more

freedoms. See E Denza, *The Intergovernmental Pillars of the European Union* (OUP, Oxford, 2002) 129–33.

³ See F Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations' in Trybus and White (n 1) 61; N Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues' in *ibid* 102.

⁴ Council Joint Actions 2003/92/CFSP of 27 Jan 2003 [2003] OJ L34/26 (*Concordia*); 2003/423/CFSP of 5 June 2003 [2003] OJ L143/50 (*Artemis*); 2004/570/CFSP of 12 July 2004 [2004] OJ L252/10 (*Althea*); 2006/319/CFSP of 27 Apr 2006 [2006] OJ L116/98 (*EUFOR RD Congo*); 2007/677/CFSP of 15 Oct 2007 [2007] OJ L279/21 (*EUFOR Tchad/RCA*).

⁵ SC Res 1484, 30 May 2003 (*Artemis*); SC Res 1575, 22 Nov 2004 (*EUFOR Althea*); SC Res 1671, 25 Apr 2006 (*EUFOR RD Congo*); SC Res 1778, 25 Sept 2007 (*EUFOR Tchad/RCA*).

⁶ Council Joint Actions 2002/210/CFSP of 11 Mar 2002 [2002] OJ L70/1 (*EUPM*); 2003/681/CFSP of 29 Sept 2003 [2003] OJ L249/66 (*Proxima*); 2004/847/CFSP of 9 Dec 2004 [2004] OJ L367/30 (*EUPOL Kinshasa*); 2005/797/CFSP of 14 Nov 2005 [2005] OJ L300/65 (*EU COPPS*); 2005/826/CFSP of 24 Nov 2005 [2005] OJ L307/61 (*EUPAT*); 2007/369/CFSP of 30 May 2007 [2007] OJ L139/33 (*EUPOL AFGHANISTAN*); 2007/405/CFSP of 12 June 2007 [2007] OJ L151/46 (*EUPOL RD Congo*).

⁷ Council Joint Actions 2004/523/CFSP of 28 June 2004 [2004] OJ L228/21 (*EUJUST Themis*); 2005/190/CFSP of 7 Mar 2005 [2005] OJ L62/37 (*EUJUST Lex*).

⁸ Council Joint Action 2005/643/CFSP of 9 Sept 2005 [2005] OJ L234/13 (*AMM*).

⁹ Council Joint Action 2005/355/CFSP of 2 May 2005 [2005] OJ L112/20 (*EUSEC RD Congo*).

¹⁰ Council Joint Action 2005/889/CFSP of 12 Dec 2005 [2005] OJ L327/28 (*EU BAM Rafah*).

¹¹ Council Joint Action 2005/557/CFSP of 18 July 2005 [2005] OJ L188/46 (*EU Civilian–Military Supporting Action to AMIS II*).

¹² EU–FRY, 25 Apr 2001 [2001] OJ L125/2; EU–FYROM, 31 Aug 2001 [2001] OJ L241/2. Subsequently, a similar agreement was also concluded with Albania: EU–Albania, 28 Mar 2003 [2003] OJ L93/50.

¹³ Council Joint Action 2000/811/CFSP of 22 Dec 2000 [2000] OJ L328/53, as extended and amended.

than 70 international agreements with third parties under Article 24 TEU for the purposes of the ESDP.

The launch of the ESDP and the resulting flurry of treaty-making activity have presented the EU with new opportunities 'to assert its identity on the international scene'.¹⁴ Several commentators have accordingly suggested that the Council's practice in this area now 'definitely confirms' that the EU constitutes an international legal person.¹⁵ At the same time, the need to enter into a significant number of agreements within a relatively short period of time has exposed certain procedural weaknesses in Article 24 TEU. The purpose of this article is to offer an overview of the international agreements concluded in the context of the ESDP, to discuss the Council's recent practice relating to the implementation of the provisions of Article 24 TEU, and to assess whether the question of the EU's international legal personality has in fact become moot as a result of recent developments, as the emerging academic consensus seems to suggest.¹⁶

II. INTERNATIONAL AGREEMENTS CONCLUDED UNDER THE ESDP

The conditions governing the participation of national contingents in an international crisis management operation as well as the conditions governing the deployment of the operation itself are normally regulated in the form of international agreements concluded between the sending States, the host State, and the international organization exercising command and control over the operation.¹⁷ The Council has concluded three types of international agreements under Article 24 TEU to address certain practical and legal matters relating to the conduct of ESDP operations. First, it has entered into so-called status of forces and status of mission agreements with host States to determine the legal position of ESDP operations and their members during their presence in the territory of the host States concerned. Secondly, it has entered into agreements with third States contributing personnel and assets to such operations in order to define the modalities of their respective contributions. Thirdly, it has concluded agreements to regulate the exchange of classified information between the EU and third parties.

¹⁴ Art 2 TEU.

¹⁵ P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford, 2005) 159.

¹⁶ For other works on this subject, see G de Kerchove and S Marquardt, 'Les accords internationaux conclus per l'Union européenne' (2004) 50 *Annuaire Français de Droit International* 803; D Thym, 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 *ZaöRV* 863; RA Wessel, 'The EU as a Party to International Agreements: Shared Competences? Mixed Responsibilities?', forthcoming in A Dashwood and M Maresceau (eds), *The Law and Practice of EU External Relations—Salient Features of a Changing Landscape* (CUP, Cambridge, 2008).

¹⁷ For the UN's practice in this field, see RCR Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (Martinus Nijhoff, Dordrecht, 1991); M Bothe and T Dörschel, 'The UN Peacekeeping Experience' in D Fleck (ed) *The Handbook of the Law of Visiting Forces* (OUP, Oxford, 2001) 487.

A. Status of Forces and Status of Mission Agreements

Status of forces agreements (SOFAs) and status of mission agreements (SOMAs) are bilateral or multilateral treaties that define the legal status of military forces and civilian personnel deployed abroad with the consent of the host State.¹⁸ They typically deal with such issues as the entry and departure of foreign personnel, the carrying of arms, taxation, the settlement of claims, and the exercise of criminal jurisdiction over members of the visiting force or mission. The Council has entered into separate status agreements under Article 24 TEU with Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia (FYROM), Georgia, the Democratic Republic of the Congo (DRC), Indonesia, and Gabon in order to determine the legal position of certain ESDP missions.¹⁹ The status of the remaining missions has been addressed either in the form of an exchange of letters not based on Article 24 TEU,²⁰ or by extending to them the application, *mutatis mutandis*, of existing legal arrangements negotiated by an EU Member State or by third parties.²¹ In the case of one operation, the Council has not entered into any kind of status arrangement with the host State concerned at all.²²

With one exception, all status agreements concluded by the Council under Article 24 TEU include provisions governing the exercise of civil and criminal jurisdiction by the local authorities over members of EU crisis management missions, as well as provisions concerning their entry and departure, freedom of movement, means of transport, and communications in the territory of the host State. More recent agreements are more sophisticated, however, insofar as they regulate a broader range of matters and do so in greater detail than most of their predecessors. The status agreements negotiated by the EU are in most respects similar to the status agreements concluded in recent years by other international actors, such as the UN, except for one key difference. In contrast to current international practice in this area, the EU has adopted the negotiating position that all members of its crisis management missions should benefit from treatment equivalent to that accorded to diplomatic agents

¹⁸ DW Bowett, 'Military Forces Abroad' (1997) 3 Encyclopaedia of Public International Law 388. For a comprehensive treatment of the subject, see Fleck (n 17).

¹⁹ EU–BiH, 4 Oct 2002 [2002] OJ L293/2 (*EUPM*); EU–FYROM, 21 Mar 2003 [2003] OJ L82/46 (*Concordia*); EU–FYROM, 11 Dec 2003 [2004] OJ L16/66 (*Proxima*); EU–Georgia, 3 Dec 2004 [2004] OJ L389/42 (*EUJUST Themis*); EU–DRC, 1 Sept 2005 [2005] OJ L256/58 (*EUPOL Kinshasa*); EU–Indonesia, 9 Sept 2005 [2005] OJ L288/60 (*AMM*); extended by EU–Indonesia, 28 Feb 2006 [2006] OJ L71/55 and EU–Indonesia, 15 Sept 2006 [2006] OJ L273/9; EU–Gabon, 16 June 2006 [2006] OJ L187/43 (*EUFOR RD Congo*). In the case of two operations, the EU and the host States concerned agreed to extend the application of earlier status agreements to the operations in question: see recital (11) of Joint Action 2005/355/CFSP (n 9) (*EUSEC RD Congo*) and Art 11(1) of Joint Action 2005/826/CFSP (n 6) (*EUPAT*).

²⁰ See n 84.

²¹ eg SC Res 1671 of 25 Apr 2006 provided that the agreement governing the status of the UN Mission to the Democratic Republic of the Congo (MONUC) of 4 May 2000 (on file with the author) shall apply to *EUFOR RD Congo*, the EU's most recent military operation in the DRC.

²² The operation in question was operation *Artemis* in the DRC.

under the Vienna Convention on Diplomatic Relations of 1961.²³ Given that the privileges and immunities of diplomatic agents are broader than the privileges and immunities normally conferred on members of peace support operations, this negotiating strategy runs counter to the growing emphasis on the accountability of peace support operations, and has been questioned within the Union.²⁴

B. Third Country Participation Agreements

The EU has made it clear from the very beginning that it welcomes contributions by interested third parties to ESDP crisis management missions, and that it would invite third parties to participate in such missions on a case-by-case basis.²⁵ To date, more than 20 third States have contributed personnel and assets to crisis management missions conducted by the EU, many of which have since become Member States of the Union. In the great majority of cases, the Council has concluded international agreements pursuant to Article 24 TEU with the third countries concerned in order to determine the conditions of their participation in ESDP missions. The Council has entered into such agreements with Albania,²⁶ Argentina,²⁷ Bulgaria,²⁸ Chile,²⁹ Croatia,³⁰ Cyprus,³¹ the Czech Republic,³² Estonia,³³ FYROM,³⁴ Hungary,³⁵ Iceland,³⁶ Latvia,³⁷ Lithuania,³⁸ Switzerland,³⁹ Morocco,⁴⁰

²³ 18 Apr 1961, 500 UNTS 95.

²⁴ For details, see A Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice', forthcoming in (2008) 19 EJIL.

²⁵ Annex 1 to Annex IV (Presidency Report on the ESDP) to Helsinki European Council Presidency Conclusions, 11 and 12 Dec 1999, 25.

²⁶ EU–Albania, 7 Mar 2005 [2005] OJ L65/35 (*Althea*).

²⁷ EU–Argentina, 9 June 2005 [2005] OJ L156/22 (*Althea*).

²⁸ EU–Bulgaria, 9 Jan 2003 [2003] OJ L239/41 (*EUPM*).

²⁹ EU–Chile, 25 July 2005 [2005] OJ L202/40 (*Althea*).

³⁰ EU–Croatia, 4 Oct 2007 [2007] OJ L270/28.

³¹ EU–Cyprus, 10 Dec 2002 [2003] OJ L239/2 (*EUPM*); EU–Cyprus, 1 Oct 2003 [2003] OJ L253/23 (*Artemis*).

³² EU–Czech Republic, 11 Dec 2002 [2003] OJ L239/8 (*EUPM*); EU–Czech Republic, 23 June 2003 [2003] OJ L229/39 (*Concordia*).

³³ EU–Estonia, 18 Dec 2002 [2003] OJ L239/26 (*EUPM*); EU–Estonia, 28 July 2003 [2003] OJ L216/61 (*Concordia*).

³⁴ EU–FYROM, 30 June 2006 [2006] OJ L188/10 (*Althea*).

³⁵ EU–Hungary, 13 Dec 2002 [2003] OJ L239/20 (*EUPM*).

³⁶ EU–Iceland, 10 Dec 2002 [2003] OJ L239/5 (*EUPM*).

³⁷ EU–Latvia, 12 Dec 2002 [2003] OJ L239/17 (*EUPM*); EU–Latvia, 14 Oct 2003 [2003] OJ L313/79 (*Concordia*).

³⁸ EU–Lithuania, 11 Dec 2002 [2003] OJ L239/11 (*EUPM*); EU–Lithuania, 9 Sept 2003 [2003] OJ L234/19 (*Concordia*).

³⁹ EU–Switzerland, 11 Dec 2002 [2003] OJ L239/14 (*EUPM*); EU–Switzerland, 14 July 2004 [2004] OJ L354/78 (*Proxima*); EU–Switzerland, 22 Dec 2004 [2005] OJ L20/42 (*Althea*); EU–Switzerland, 22 Dec 2005 [2005] OJ L349/31 (*AMM*); EU–Switzerland, 10 Aug 2006 [2006] OJ L276/111 (*EUFOR RD Congo*).

⁴⁰ EU–Morocco, 1 Feb 2005 [2005] OJ L34/47 (*Althea*).

New Zealand,⁴¹ Norway,⁴² Poland,⁴³ Romania,⁴⁴ Russia,⁴⁵ Slovakia,⁴⁶ Slovenia,⁴⁷ Turkey,⁴⁸ and Ukraine.⁴⁹ However, not all participation agreements concluded under Article 24 TEU have been published in the Official Journal of the EU,⁵⁰ including agreements concluded with Brazil, Brunei, Canada, Hungary, Malaysia, Singapore, South Africa, Thailand and the Philippines.⁵¹

Successive third country participation agreements concluded by the Council have followed the same basic pattern. The agreements oblige participating third States to associate themselves with the provisions of the Council Joint Action establishing the ESDP mission in question, and impose on them a duty to ensure that their personnel act in conformity with the Joint Action and related instruments, such as the operation plan. In addition, they extend the application of the status agreements negotiated between the EU and the host State to the personnel made available by participating third States, and contain provisions concerning the chain of command, the waiver of certain claims, the protection of classified information, and financial matters. Generally speaking, the purpose of third country participation agreements is to ensure that the participation of third States in ESDP missions is subject to the same or similar conditions as the participation of EU Member States. Since EU Member States contributing personnel and assets to an ESDP mission are already bound by the relevant internal legal instruments relating to that mission, it is not necessary for the Council to

⁴¹ EU–NZ, 4 May 2005 [2005] OJ L127/28 (*Althea*); EU–NZ, 3 Oct 2007 [2007] OJ L274/18 (*EUPOL AFGHANISTAN*).

⁴² EU–Norway, 19 Dec 2002 [2003] OJ L239/32 (*EUPM*); EU–Norway, 9 Sept 2004 [2004] OJ L354/86 (*Proxima*).

⁴³ EU–Poland, 24 Feb 2003 [2003] OJ L64/37 (*EUPM*); EU–Poland, 15 Oct 2003 [2003] OJ L285/44 (*Concordia*).

⁴⁴ EU–Romania, 16 Dec 2002 [2003] OJ L239/23 (*EUPM*); EU–Romania, 7 Nov 2003 [2003] OJ L120/6 (*Concordia*).

⁴⁵ EU–Russia, 24 July 2003 [2003] OJ L197/37 (*EUPM*).

⁴⁶ EU–Slovakia, 31 July 2003 [2003] OJ L239/44 (*EUPM*); EU–Slovakia, 19 Dec 2003 [2004] OJ L12/54 (*Concordia*).

⁴⁷ EU–Slovenia, 18 Dec 2002 [2003] OJ L239/29 (*EUPM*).

⁴⁸ EU–Turkey, 20 Dec 2002 [2003] OJ L239/35 (*EUPM*); EU–Turkey, 4 Sept 2003 [2003] OJ L234/23 (*Concordia*); EU–Turkey, 10 Sept 2004 [2004] OJ L354/90 (*Proxima*).

⁴⁹ EU–Ukraine, 23 Dec 2002 [2003] OJ L239/38 (*EUPM*); EU–Ukraine, 8 July 2004 [2004] OJ L354/82 (*Proxima*).

⁵⁰ Pursuant to Art 13(1)(f) of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, international agreements concluded under Art 24 TEU shall be published in the Official Journal, subject to the exceptions laid down in Arts 4 and 9 of the Regulation. See also Art 17(1)(h) of Council Decision 2004/338/EC, Euratom of 22 Mar 2004 adopting the Council's Rules of Procedure [2004] OJ L106/22, as amended.

⁵¹ See Council doc 11550/03, List of 'A' Items for 2522nd meeting of the Council (General Affairs and External Relations), 18 July 2003, 3; Council Doc 12321/05, Council Decision concerning the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and Brunei, Singapore, Malaysia, Thailand, and the Philippines, 4 Oct 2005.

enter into participation agreements with those Member States pursuant to Article 24 TEU.⁵²

C. Exchange of Classified Information Agreements

Following the launch of the ESDP, the Council has established a comprehensive security system covering the Council, the Council General Secretariat and the Member States with the aim of safeguarding classified information held by the EU from espionage, compromise or unauthorized disclosure.⁵³ Where there is a permanent or occasional need for the exchange of classified information between the EU and third States or international organizations, the Council's security regulations expressly direct the Council to draw up agreements or memoranda of understanding with the third parties concerned to define the reciprocal rules on the protection of the information exchanged.⁵⁴ The Council has entered into the first international agreement of this kind with NATO,⁵⁵ and has subsequently concluded similar agreements under Article 24 TEU with Bosnia and Herzegovina,⁵⁶ Bulgaria,⁵⁷ Croatia,⁵⁸ FYROM,⁵⁹ Iceland,⁶⁰ Norway,⁶¹ Romania,⁶² and Ukraine.⁶³ In essence, the contracting parties to these agreements undertake to protect and safeguard classified information provided or exchanged by the other party, and to develop detailed security arrangements to this end. The cooperation and assistance agreement concluded between the EU and the International Criminal Court in 2006 pursuant to Article 24 TEU also contains detailed procedures on the release of EU classified information by the EU to an organ of the Court.⁶⁴

III. EXPERIENCES IN THE IMPLEMENTATION OF ARTICLE 24 TEU

The Council has gained considerable experience in recent years in the implementation of the provisions of Article 24 TEU as a result of the ESDP. Two points in particular merit attention. First, the procedure laid down in Article

⁵² By contrast, the UN does conclude such agreements with its Member States: see UN Doc A/46/185, Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-keeping Operations, 23 May 1991.

⁵³ Council Decision 2001/264/EC of 19 Mar 2001 adopting the Council's security regulations [2001] OJ L101/1, as amended.

⁵⁴ Sec. XII, Council Decision 2001/264/EC.

⁵⁵ EU-NATO, 14 Mar 2003 [2003] OJ L80/35.

⁵⁶ EU-BiH, 5 Oct 2004 [2004] OJ L324/16.

⁵⁷ EU-Bulgaria, 25 Apr 2005 [2005] OJ L118/53.

⁵⁸ EU-Croatia, 10 Apr 2006 [2006] OJ L116/74.

⁵⁹ EU-FYROM, 25 Mar 2005 [2005] OJ L94/39.

⁶⁰ EU-Iceland, 12 June 2006 [2006] OJ L184/35.

⁶¹ EU-Norway, 22 Nov 2004 [2004] OJ L362/29.

⁶² EU-Romania, 22 Apr 2005 [2005] OJ L118/48.

⁶³ EU-Ukraine, 13 June 2005 [2005] OJ L172/84.

⁶⁴ EU-ICC, 10 Apr 2006 [2006] OJ L115/50.

24 TEU has turned out to be too clumsy for the purposes of planning and implementing international crisis management missions. Secondly, there is a clear and continuing need to enter into informal arrangements with third parties in this context, in addition to concluding international agreements based on Article 24 TEU.

A. Efforts to Streamline Article 24 TEU

The terms of Article 24 TEU require two successive decisions by the Council to conclude an international agreement: one decision to authorize the Presidency to open negotiations with the State or international organization concerned, and a second decision to approve the resulting text on a recommendation from the Presidency. The first few ESDP missions launched by the EU have demonstrated that this requirement of two successive Council decisions is time-consuming and renders Article 24 TEU a ‘cumbersome tool for negotiating agreements with third parties’.⁶⁵ This was particularly evident in the case of the first ESDP mission, the *EU Police Mission (EUPM)* in Bosnia and Herzegovina, where the EU had to open parallel negotiations with a large number of contributing third States during the early stages of the planning process in order to determine the conditions of their participation in the mission in time. The Council’s early experiences in the implementation of Article 24 TEU have thus shown that the negotiation of separate participation agreements with each third State for every ESDP mission is a lengthy process that is difficult to finalize in time, especially during operations of short duration.⁶⁶ The participation agreement concluded between the EU and Cyprus for operation *Artemis* in the DRC, which was signed shortly after the operation had officially terminated, offers a striking example in this respect.⁶⁷

In response to these difficulties, the Council decided to streamline the decision-making process under Article 24 TEU by concluding framework participation agreements with third States and adopting model agreements to be used as negotiating templates by the Presidency. On 23 February 2004, the Council authorized the Presidency to open negotiations with certain third countries to establish a permanent legal framework for their participation in future EU crisis management missions based on a generic ‘framework participation agreement’.⁶⁸ The conclusion of framework participation agreements eliminates the need to negotiate separate participation agreements

⁶⁵ Council Doc 11206/03, Lessons from the planning of the EU Police Mission in Bosnia and Herzegovina (EUPM), 14 July 2003, 8–9.

⁶⁶ Council doc 6040/04, Draft Framework Participation Agreement–Report, 6 Feb 2004, 1.

⁶⁷ EU–Cyprus (*Artemis*) (n 31).

⁶⁸ 2562nd Council meeting (General Affairs), 23 Feb 2004, v. See Council doc 6040/04 (n 66). The third countries concerned were Bulgaria, Canada, Iceland, Norway, Romania, Russia, Turkey, and Ukraine.

for each new ESDP operation with those third States that are parties to these framework agreements, and thus considerably reduces the administrative burden facing the Council. However, so far the EU has entered into framework participation agreements with only seven third countries,⁶⁹ two of which have since become Member States of the EU. This suggests that the full potential of these instruments has not yet been attained.

On 13 September 2004, the Council adopted two model agreements on the participation of third States in military and civilian crisis management missions conducted by the EU,⁷⁰ and authorized the Presidency to open negotiations on the basis of these model agreements with those participating third States which have not entered into a framework participation agreement with the EU.⁷¹ This was followed by the adoption of an EU Model SOFA concerning the legal status of EU military operations on 23 May 2005,⁷² and an EU Model SOMA concerning the legal position of EU civilian missions on 18 July 2005.⁷³ In both cases, the Council authorized the Presidency to open negotiations with prospective host States based on the relevant model status agreement in order to define the legal position of EU missions present in their territory.⁷⁴

Both the model participation agreements and the model status agreements are conceived as permanent negotiating mandates for the purposes of Article 24 TEU. This means that the Council has entitled the Presidency to open negotiations with third States on the basis of the relevant model agreement without the need to seek a fresh mandate from the Council in each specific case. As a result, only one Council decision approving the resulting text is necessary, which should considerably reduce the time required to conclude third country participation agreements and status agreements under the ESDP. To date, the Council has entered into six agreements based on the model participation agreement for civilian crisis management operations,⁷⁵ and has concluded one agreement based on the EU Model SOFA and one based on the

⁶⁹ EU–Bulgaria, 24 Jan 2005 [2005] OJ L46/50; EU–Canada, 24 Nov 2005 [2005] OJ L315/21; EU–Iceland, 21 Feb 2005 [2005] OJ L67/2; EU–Norway, 3 Dec 2004 [2005] OJ L67/8; EU–Romania, 22 Nov 2004 [2005] L67/14; EU–Turkey, 29 June 2006 [2006] OJ L189/17; EU–Ukraine, 13 June 2005 [2005] OJ L182/29.

⁷⁰ Council Doc 12047/04, Draft model agreement on the participation of a third State in an European Union military crisis management operation, 3 Sept 2004; Council Doc 12050/04, Draft model agreement on the participation of a third State in an European Union civilian crisis management operation, Sept 2004.

⁷¹ 2603rd Council meeting (General Affairs and External Relations), 13 Sept 2004, 10.

⁷² Council Doc 8720/05, Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State, 18 May 2005.

⁷³ Council Doc 10564/05, Draft Model Agreement on the status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), 27 June 2005.

⁷⁴ 2659th Council Meeting (General Affairs and External Relations), 23 May 2005, 10; 2674th Council Meeting (General Affairs and External Relations), 18 July 2005, 21.

⁷⁵ EU–Switzerland (AMM) (n 39); Council Doc 12321/05 (n 51).

EU Model SOMA.⁷⁶ Since the model participation agreements and the model status agreements constitute permanent negotiating mandates to the Presidency, the Council considers that their disclosure would undermine the EU's position in future negotiations with third States. The Council has accordingly denied public access to these documents.⁷⁷

B. The Need for Informal Arrangements

In addition to international agreements concluded pursuant to Article 24 TEU, various technical, administrative and practical arrangements have also been drawn up under the ESDP. The arrangements in question fall into two groups: those that merely implement or supplement agreements formally concluded on the basis of Article 24 TEU, and those that constitute independent instruments. As regards the first group, all status agreements entered into by the Council between 2002 and 2007 have called for the mandatory conclusion of supplementary arrangements to address certain specific questions, such as communications, medical services, host-nation support, or the procedures for the settlement of claims.⁷⁸ They have also entitled or directed the head of mission or the force commander of the ESDP missions concerned to enter into additional supplementary arrangements with the host State's administrative authorities in order to settle other operational, administrative and technical matters.⁷⁹ Similarly, some early third country participation agreements have provided for the mandatory conclusion of supplementary arrangements with contributing third States to deal with financial matters,⁸⁰ while more recent third country participation agreements authorize the High Representative for the CFSP to enter into any necessary technical and administrative arrangements with the competent authorities of the contributing third State.⁸¹

The second group consists of arrangements that are independent instruments in the sense that they do not implement or supplement international agreements based on Article 24 TEU. Most of the arrangements falling into

⁷⁶ EU–Indonesia (*AMM*) (n 19); EU–Gabon (*EUFOR RD Congo*) (n 19). Further agreements based on the EU Model SOFA shall be negotiated with Chad and the Central African Republic in accordance with Art 12 of Council Joint Action 2007/677/CFSP (n 4).

⁷⁷ Council doc 11697/05, Confirmatory application made by Mr Aurel Sari (35/c/04/05), 16 Sept 2005, 4–5.

⁷⁸ eg Art 8(6), EU–FYROM (*Proxima*) (n 19); Art 16, EU–FYROM (*Concordia*) (n 19); Art 15(6), EU–Gabon (*EUFOR RD Congo*) (n 19). Such mandatory supplementary arrangements could be classified as *pacta de contrahendo*, assuming that their parties are the same as those of the original agreement. See U Beyerlin, 'Pactum de contrahendo und pactum de negotiando im Völkerrecht?' (1976) 36 *ZaöRV* 407.

⁷⁹ The EU–BiH (*EUPM*) (n 19), agreement called for the conclusion of practical arrangements between the contracting parties to the agreement, rather than between the head of mission and the local administrative authorities. Provisions to this effect were also included in the status agreements for the *EUMM* (see n 12).

⁸⁰ eg Art 6(2), EU–Poland (*EUPM*) (n 43); Art 6(3), EU–Norway (*Proxima*) (n 42).

⁸¹ eg Art 6, EU–Chile (*Althea*) (n 29); Art 19, Annex I, EU–Switzerland (*EUFOR RD Congo*) (n 39).

this group have taken the form of an exchange of letters signed by the High Representative for the CFSP and the competent third party. For example, on 17 March 2003, the High Representative for the CFSP and the Secretary General of NATO have signed a series of arrangements tied together by a framework agreement, known collectively as the 'Berlin Plus' agreement, whereby NATO has granted the EU access to its collective planning capabilities and to certain pre-identified operational assets and capabilities for the purposes of ESDP crisis management missions.⁸² Other exchanges of letters have taken place concerning the invitation to launch ESDP missions,⁸³ their status in the territory of host States,⁸⁴ the release of NATO assets for specific EU military operations,⁸⁵ the participation of third States in ESDP missions,⁸⁶ the transfer of EU classified information to international organizations and to contributing third States,⁸⁷ and the EU's support to the African Union.⁸⁸ In addition, in at least one case the signature of a status agreement concluded between the EU and a third State was executed through an exchange of letters.⁸⁹

Many of the arrangements falling into the second group address matters that are normally dealt with in international agreements concluded pursuant to Article 24 TEU. It seems likely that administrative arrangements were preferred over international agreements in these cases for their procedural and substantive flexibility, which makes them particularly suitable as temporary measures and in circumstances requiring immediate action.⁹⁰ For instance, considering the impending accession of Cyprus, the Czech Republic, Hungary, Lithuania, Poland and Slovenia to the EU, the Political and Security Committee⁹¹ decided in December 2003 that the participation of these countries in the EU police mission in FYROM (*Proxima*) should be regulated informally by exchanges of letters, rather than through the conclusion of

⁸² See M Reichard, 'Some Legal Issues Concerning the EU–NATO Berlin Plus Agreement' (2004) 73 *Nordic Journal of International Law* 37; M Reichard, *The EU–NATO Relationship: A Legal and Political Perspective* (Ashgate, Aldershot, 2006) 273–310. The text of the 'Berlin Plus' agreement is classified, but see EU–NATO Declaration on ESDP (2003) 42 ILM 242 and the Appendix to Annex VII to the Presidency Report on the ESDP (Nice), 13 Dec 2000, 58.

⁸³ eg recital (1), Council Decision 2003/202/CFSP of 18 Mar 2003 [2003] OJ L76/43.

⁸⁴ Such exchanges of letters took place concerning *EUJUST Lex*, *EU BAM Rafah* and *EU COPPS*.

⁸⁵ eg recital (13), Council Joint Action 2004/570/CFSP (*Althea*) (n 4).

⁸⁶ eg Council doc 14578/06, EUPOL KINSHASA: exchange of letters between the EU and the Republic of Mali, 27 Oct 2006.

⁸⁷ eg Council doc 11247/06, Release of Operation EUFOR RD Congo related EUCI–Exchange of letters between the EU and the Republic of Turkey, 4 July 2006.

⁸⁸ Recital (15), Council Joint Action 2005/557/CFSP (*EU Supporting Action to AMIS II*) (n 11).

⁸⁹ EU–FYROM (*Concordia*) (n 19) 50.

⁹⁰ See C Lipson, 'Why are Some International Agreements Informal?' (1999) 45 *International Organization* 495.

⁹¹ The Political and Security Committee forms part of the Council structure and is responsible for the day-to-day management of the CFSP and ESDP. In particular, the Committee exercises political control and strategic direction of EU crisis management operations under the authority of the Council in accordance with Art 25 TEU.

formal third country participation agreements pursuant to Article 24 TEU.⁹² Similarly, an exchange of letters took place between the High Representative for the CFSP and the Ambassador of Mali in order to determine, on an ad hoc basis, the details of Mali's participation in the EU police mission in the DRC (*EUPOL Kinshasa*) pending the conclusion of a formal international agreement under Article 24 TEU.⁹³

Not only do informal administrative arrangements avoid time-consuming procedures and offer greater confidentiality than international agreements based on Article 24 TEU, but in some circumstances there is simply no need to record understandings reached between the parties on the ground on practical matters in the form of binding international agreements. The conclusion of informal supplementary and administrative arrangements is therefore likely to remain a permanent feature of the ESDP.

C. Is the Council's Practice Compatible with the TEU?

The Council's practice relating to the implementation of Article 24 TEU raises certain questions concerning its compatibility with the terms of the TEU. First, it is worth noting the prominent role that the High Representative for the CFSP has assumed in the negotiation of international agreements under Article 24 TEU. The majority of Council Joint Actions establishing ESDP crisis management missions have authorized the High Representative to assist the Presidency in the negotiation of status agreements and third country participation agreements by conducting these negotiations on its behalf.⁹⁴ In effect, the High Representative has thus taken on the role foreseen for the European Commission under Article 24 TEU in the area of the ESDP. This development is unsurprising, given that the High Representative is better placed to conduct negotiations with third parties in this policy area than the Commission. The sidelining of the Commission does not constitute an infringement of its prerogatives, however, since Article 24 TEU merely entitles the Council to seek the Commission's assistance without imposing an obligation on it to do so in specific cases. Consequently, nothing prevents the Council from authorizing the High Representative to assist the Presidency by conducting negotiations with third parties on behalf of the Presidency; in particular, as Article 18(3) TEU expressly provides that the Presidency shall be assisted by the High Representative in representing the Union in matters coming within the CFSP.⁹⁵ Moreover, since Article 24 TEU merely provides that international agreements 'shall be concluded by the Council' without

⁹² Council doc 15944/03, *EUPOL Proxima*: legal basis for the contribution of Acceding States, 10 Dec 2003.

⁹³ Council doc 14578/06 (n 86).

⁹⁴ eg Art 9(6) and Art 13(1), Council Joint Action 2003/681/CFSP (*Proxima*) (n 6); Art 10(3), Council Joint Action 2006/319/CFSP (*EUFOR RD Congo*) (n 4).

⁹⁵ See also de Kerchove and S Marquardt (n 16) 808; Thym (n 16) 871.

specifying which body should sign these agreements on its behalf, the Council is free to delegate this task to the High Representative.⁹⁶

Secondly, the informal nature of supplementary and administrative arrangements does not imply that they cannot be binding under international law. Whether a particular informal arrangement concluded for the purposes of the ESDP constitutes a non-binding instrument or a binding international agreement drawn up in simplified form depends, in the first place, on the question of whether or not the parties to the arrangement possess the capacity to assume legal commitments under international law and, secondly, whether or not they actually intended to do so, as evidenced by the form, terms and circumstances of the arrangement in question.⁹⁷

As regards the first requirement, on the EU's side most informal arrangements were signed by the High Representative for the CFSP. Bearing in mind that the High Representative acts under the authority of the Council⁹⁸ and that the Council enjoys the capacity to conclude international agreements under Article 24 TEU, it is certainly possible that, by signing the informal arrangements in question, the High Representative has entered into legal commitments on behalf of the Council.⁹⁹ For instance, the exchange of letters between the High Representative and the Turkish Foreign Minister of 28 June 2006 regarding the exchange of classified information refers to the need 'to put into place an *ad hoc* understanding . . . between the European Union and the Republic of Turkey',¹⁰⁰ which shows that the High Representative did not act in his own capacity when he signed this document.¹⁰¹ As regards the second requirement, the terms and circumstances of the publicly available informal arrangements do not demonstrate a clear and manifest intent by their parties to enter into legal relations, though some arrangements do not exclude the existence of such intentions either.¹⁰² Thus, the exchange of letters

⁹⁶ This fact is apparently overlooked by Reichard, who argues that only the Presidency may sign international agreements under Art 24 TEU. See Reichard (2004, n 82), 58–60 and (2006, n 82), 138–41, 298–300, and 348.

⁹⁷ See F Münch, 'Non-binding Agreements' (1969) 29 ZaöRV 1; FS Hamzeh, 'Agreements in Simplified Form—Modern Perspective' (1968–1969) 43 BYIL 179; M Rotter, 'Die Abgrenzung zwischen völkerrechtlichem Vertrag und ausserrechtlicher zwischenstaatlicher Abmachung: Zu Art. 2(1)a der Vienna Convention on the Law of Treaties' in R Marcic et al (eds), *Internationale Festschrift für Alfred Verdross zum 80. Geburtstag* (Fink, München, 1971) 413; O Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 AJIL 296; A Aust, 'The Theory and Practice of Informal International Instruments' (1986) 35 ICLQ 787, especially 800–4; M Nash (Leich), 'International Acts not Constituting Agreements' (1994) 88 AJIL 515; R Jennings and A Watts, *Oppenheim's International Law* (Longman, London and New York, 1996) 1199–203. cf *Opinion 1/75, OECD Local Cost Standard* [1975] ECR 1355, 1356. See also K Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581.

⁹⁸ Art 26 TEU.

⁹⁹ For a different view, see Reichard (n 96).

¹⁰⁰ Council doc 11247/06 (n 87) 3.

¹⁰¹ In fact, Council doc 11247/06 (n 87) states that the High Representative acted on the instructions of the Council.

¹⁰² On the difficulties involved in construing the intentions of the parties to an informal international instrument, see J Klabbers, *The Concept of Treaty in International Law* (Kluwer

between the High Representative and the Turkish Foreign Minister of 28 June 2006 employs the term 'will' as well as the term 'shall', and is understood both to 'enter into force' and to 'take effect'. The possibility cannot be excluded, therefore, that at least some informal arrangements adopted in the context of the ESDP constitute binding international agreements.¹⁰³

In any event, even those supplementary and administrative arrangements that do not appear to constitute binding international agreements adopted in simplified form are not necessarily devoid of all legal effects.¹⁰⁴ For instance, an exchange of letters between the High Representative for the CFSP and a prospective host State wherein the latter formally invites the EU to conduct a crisis management mission in its territory expresses that State's consent to the presence of foreign military and civilian personnel within its borders. Even if the exchange of letters were not considered a binding international agreement, it nonetheless renders the presence of foreign personnel in the territory of the host State lawful under international law.¹⁰⁵ Similarly, a supplementary arrangement concluded between an EU crisis management mission and the administrative authorities of the host State to regulate the settlement of claims brought against that mission is evidently intended to have legal effects.¹⁰⁶ The same goes for the understanding recorded in an exchange of letters between the High Representative and the Secretary General of NATO on 18 November 2004, whereby an EU crisis management operation (EUFOR *Althea*) became a legal successor to NATO's SFOR operation in Bosnia and Herzegovina.¹⁰⁷ Some of the relevant arrangements may be regarded as expressing unilateral binding commitments,¹⁰⁸ such as exchanges of letters in which the host State undertakes to grant the EU mission and its personnel certain privileges and immunities,¹⁰⁹ or exchanges of letters in which third States participating in an

Law, The Hague, 1996) 65–95; C Chinkin, 'A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States' (1997) 10 *Leiden Journal of International Law* 223.

¹⁰³ However, the simultaneous use of terminology normally found in treaties *and* in non-binding agreements in one and the same instrument could also indicate that the contracting parties hold divergent views as to whether or not the instrument in question is legally binding. For an example of such a disagreement, see JH McNeill, 'International Agreements: Recent US–UK Practice Concerning the Memorandum of Understanding' (1994) 88 *AJIL* 821.

¹⁰⁴ See Schachter (n 97) 301; Aust (n 97) 807–12; H Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 *EJIL* 499. For a critical assessment of this position, see Klabbers (n 102), esp 97–119.

¹⁰⁵ eg Letter from the Vice Prime Minister of Israel addressed to the High Representative of the CFSP concerning *EU BAM Rafah*, 23 Nov 2005 (on file with the author).

¹⁰⁶ Art 15(6), EU–Gabon (*EUFOR RD Congo*) (n 19).

¹⁰⁷ UN docs S/2004/915 and S/2004/916 of 19 Nov 2004.

¹⁰⁸ See Jennings and Watts (n 97) 1187–96.

¹⁰⁹ eg Letter from the Prime Minister of Iraq addressed to High Representative of the CFSP concerning *EUJUST Lex*, 26 May 2005 (on file with the author); exchange of letters between the High Representative and the Special Representative of the UN Secretary-General in Kosovo during the second half of 2006 concerning the extension of the privileges and immunities of the United Nations Mission in Kosovo (UNMIK) to the EU Planning Team for Kosovo (*EUPT Kosovo*) (on file with the author).

EU crisis management mission undertake to bear the costs of their participation in the mission.¹¹⁰

By concluding administrative and supplementary arrangements, the Council is by-passing the procedures laid down in Article 24 TEU for the conclusion of international agreements in the area of the CFSP. This does not pose any difficulties as long as the arrangements concerned are truly non-binding instruments, since Article 24 TEU is only concerned with the negotiation and conclusion of binding international agreements.¹¹¹ However, the question arises whether the Council may conclude informal arrangements that produce significant legal effects, or in fact constitute binding international agreements, without basing itself on the provisions of Article 24 TEU. It is useful to recall the case of *France v Commission* in this context.¹¹² In that case, France brought an action before the European Court of Justice seeking a declaration that an agreement signed between the European Commission and the Government of the United States in the area of competition law was void because, amongst other things, the Commission lacked the competence to conclude the agreement. Having found that the text in question amounted to an international agreement within the meaning of the Vienna Convention on the Law of Treaties of 1986,¹¹³ the Court held that the Commission could not derive from Article 228 [now 300] of the European Community (EC) Treaty a power to enter into international agreements, because this infringed the competence of the Council to conclude such agreements under Article 228 and contravened the principle laid down in Article 4(1) [now 7(1)] EC Treaty whereby each institution shall act within the limits of the powers conferred on it by the Treaty.¹¹⁴ The Court also added that the Commission could not derive such a competence from practice either, since 'a mere practice cannot override the provisions of the Treaty'.¹¹⁵ The Court accordingly annulled the act, whereby the Commission concluded the agreement concerned.

¹¹⁰ Council doc 9627/07, EUPOL KINSHASA: Exchange of letters between the EU and Canada, 14 May 2007; Council doc 9628/07, EUPOL KINSHASA: Exchange of letters between the EU and Turkey, 14 May 2007.

¹¹¹ See S Marquardt, 'The Conclusion of International Agreements under Article 24 of the Treaty on European Union' in V Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (TMC Asser, The Hague, 2001) 333, 339. It has been suggested that Art 24(3) TEU lays down a special rule entitling the Council to conclude administrative arrangements: HCH Hofmann, 'Agreements in EU Law' (2006) 31 *European Law Review* 800, 811. However, this view is mistaken in as much as Art 24 TEU as a whole applies to 'international agreements' as the term is understood in public international law, without distinguishing between different types of agreements, while Art 24(3) TEU simply deals with a procedural question of internal decision-making.

¹¹² Case C-327/91, *France v Commission* [1994] ECR I-3641. See N Burrows, 'No General External Relations Competence for the Commission' (1995) 20 *European Law Review* 210; AJ Riley, 'The Jellyfish Nailed? The Annulment of the EC/US Competition Cooperation Agreement' (1995) 16 *European Competition Law Review* 185.

¹¹³ 21 Mar 1986 (1986) 25 *ILM* 543.

¹¹⁴ Case C-327/91 (n 112) paras 18–39; cf Opinion of Advocate General Tesauro [1994] ECR I-3641, paras 18–27.

¹¹⁵ Case C-327/91 (n 112) paras 32–7.

The Council's position under the TEU differs in certain key respects from that of the Commission in the case of *France v Commission*. First, the Council does enjoy the competence to enter into international agreements for the purposes of the CFSP. The conclusion of binding informal arrangements not based on Article 24 TEU does not, therefore, violate the principle of conferred powers, since the Council cannot be considered to be acting *ultra vires* in concluding such arrangements.¹¹⁶ Secondly, since the Council is the only institution that is competent to enter into international agreements under the CFSP, the conclusion of binding informal arrangements cannot infringe the competences of the other institutions either. Consequently, the Council's practice does not raise substantive concerns, but merely a procedural question,¹¹⁷ namely, must all agreements necessary for the purposes of the CFSP be based on Article 24 TEU, or is the Council entitled to circumvent this provision in order to enter into binding arrangements informally?

Given that the conclusion of all supplementary and administrative arrangements is based on an authorization by the Council, it may be presumed that, by agreeing to these authorizations, the representatives of the Member States of the EU have accepted the possibility that informal arrangements may produce significant legal effects or even constitute binding international agreements in simplified form. As the European Court of Justice has confirmed in *France v Commission*, a 'mere practice' cannot override the provisions of the EC Treaty as a matter of Community law.¹¹⁸ However, the provisions of the TEU dealing with the CFSP do not form part of Community law, but are part of public international law pure and simple.¹¹⁹ The interpretation of these provisions, including Article 24 TEU, is therefore subject to the rules of treaty interpretation as set out in the Vienna Convention on the Law of Treaties of 1969 (VCLT),¹²⁰ and not to the rules of interpretation applied by the European Court of Justice to Community law measures.¹²¹ The general rule of interpretation laid down in Article 31 of the VCLT suggests that the Member States' support within the Council for the conclusion of binding informal arrangements should be regarded as subsequent practice in

¹¹⁶ Even though Art 7 of the EC Treaty does not apply to the Council's activities under the CFSP, the international law principle of attributed or conferred powers imposes similar restrictions on the Council in this policy area as Art 7 does under the EC Treaty. See J Klabbers, *An Introduction to International Institutional Law* (CUP, Cambridge, 2002) 60–81.

¹¹⁷ See E Osieke, 'The Legal Validity of *Ultra Vires* Decisions of International Organizations' (1983) 77 AJIL 239, 243–7.

¹¹⁸ Case C–327/91 (n 112) para 36.
¹¹⁹ cf Denza (n 2) 1–32; R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 CMLRev 337, 366–79. The Court of First Instance has recently affirmed that the CFSP and Community law constitute two 'separate legal orders', see Case T–306/01, *Ali Yusuf v Council and Commission* [2005] ECR II-3533, para 156; and Case T–315/01, *Kadi v Council and Commission* [2005] ECR II-3649, para 120.

¹²⁰ 23 May 1969, 1155 UNTS 331.

¹²¹ Nevertheless, it has been suggested, wrongly, that the VCLT should not play 'any role' in the interpretation of the TEU. See U Everling, 'Reflections on the Structure of the European Union' (1992) 29 CMLRev 1053, 1064.

the application of the TEU.¹²² This subsequent practice demonstrates that not all international agreements necessary for the implementation of the CFSP have to be based on Article 24 TEU, and thus sanctions the Council's practice of concluding binding supplementary and administrative arrangements using a simplified procedure that bypasses the technical aspects of Article 24 TEU.¹²³

IV. THE INTERNATIONAL LEGAL PERSONALITY OF THE EU: BEYOND REASONABLE DOUBT?

Whether or not the EU is an international organization that benefits from international legal personality has been the subject of a long-running debate in the academic literature. Since the adoption of the Amsterdam Treaty, the debate has centred mainly on the interpretation of Article 24 TEU, in particular on the question of whether or not the Council concludes international agreements pursuant to this provision on behalf of the EU as such. Those commentators who have analysed the Council's treaty practice since 2001 have argued that the international agreements concluded by the Council pursuant to Article 24 TEU do indeed confirm the international legal personality of the EU. The trend of academic opinion therefore seems to be swinging firmly in favour of the view that the EU constitutes an independent subject of international law. Nevertheless, certain doubts about the nature of the EU as an international legal person do remain, as the Council's treaty practice merely seems to be shifting the terms of the debate onto different legal territory.

A. The Notion of International Legal Personality

An international legal person is an entity that is subject to rights and duties under international law and possesses the capacity to enter into legal relations with other subjects of international law.¹²⁴ Various theories have been put forward to explain the attribution of international legal personality to international organizations,¹²⁵ yet in the final analysis all modern theories derive

¹²² On the notion of subsequent practice, see A Aust, *Modern Treaty Law and Practice* (CUP, Cambridge, 2000) 194–5.

¹²³ Cf H Neuhold, 'Organs Competent to Conclude Treaties for International Organizations and the Internal Procedure Leading to the Decision to be Bound by a Treaty', in K Zemanek (ed), *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (Springer, New York, 1971) 195, 266; S Engel, "'Living" International Constitutions and the World Court' (1967) 16 ICLQ 865, 909–10. In addition, a teleological interpretation could be made to similar effect along the lines of the Separate Opinion of Judge Spender, *Certain Expenses of the United Nations* (1962) ICJ Rep 182.

¹²⁴ I Brownlie, *Principles of Public International Law* (OUP, Oxford, 2003) 57; Jennings and Watts (n 97) 119–20.

¹²⁵ On the development of the notion of the international legal personality of international organizations, see B Faßbender, 'Die Völkerrechtssubjektivität internationaler Organisationen' (1986) 37 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht 17; DJ Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1995–6) 36 Virginia Journal of International Law 275.

the legal personality of international organizations from their constituent or related instruments, and thus ultimately from the consent and will of their creators.¹²⁶ An organization's constituent instrument may confer international legal personality on it either explicitly or by implication. For example, Article 281 EC Treaty provides that the European Community 'shall have legal personality'. The European Court of Justice and most commentators have interpreted this provision, somewhat uncritically perhaps, to endow the Community with international, rather than domestic, legal personality.¹²⁷ Likewise, Article I-7 of the failed Constitutional Treaty¹²⁸ and the new Article 46A inserted into the TEU by the Treaty of Lisbon declare that the 'Union shall have legal personality'.¹²⁹ By contrast, the EU's current constituent instrument, the TEU in its Nice version, does not confer legal personality on the Union in express terms. The academic debate over the EU's international legal status has accordingly revolved around the question of whether it does so by implication.

The leading authority for the implicit attribution of international legal personality is the *Reparation for Injuries* case,¹³⁰ where the International Court of Justice (ICJ) considered the international legal personality of the UN. Since the actual terms of the UN Charter do not address this matter, the

¹²⁶ See HG Schermers and NM Blokker, *International Institutional Law* (Martinus Nijhoff, The Hague, 1995) 976–82; P Sands and P Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell, London, 2001) 470–5; Klabbers (n 116) 52–7; CF Amerasinghe, *Principles of the Institutional Law of International Organisations* (CUP, Cambridge, 2005) 77–86; ND White, *The Law of International Organisations* (MUP, Manchester, 2005) 68–9; D Akande, 'International Organizations' in MD Evans (ed), *International Law* (OUP, Oxford, 2006) 277, 282. This also applies to the theory of objective or inherent legal personality advanced by F Seyersted, *Objective International Personality of Intergovernmental Organisations: Do Their Capacities Really Depend upon Their Constitutions?* (Krohn Bogtrykkeri, Copenhagen, 1963). Essentially, for Seyersted the key question is whether an international organization, in the sense that he defines the concept, has in fact been established by its creators.

¹²⁷ Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263, paras 13–14, eg D McGoldrick, *International Relations Law of the European Union* (Longman, London and New York, 1997) 29; DR Verwey, *The European Community, the European Union and the International Law of Treaties* (TMC Asser, The Hague, 2004) 19; P Koutrakos, *EU International Relations Law* (Hart Publishing, Oxford, 2006) 8–9; but see I MacLeod, ID Hendry, and S Hyett, *The External Relations of the European Communities* (OUP, Oxford, 1996) 29–36.

¹²⁸ Treaty Establishing a Constitution for Europe, 29 Oct 2004 [2004] OJ C310/1. This provision too is understood to refer to legal personality under international law. See M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 CMLRev 1347, 1350; M Martin and I Lirola, 'External Action of the European Union After the Constitutional Setback' (2006) 2 European Constitutional Law Review 358. See also European Convention doc CONV 305/02, Final Report of Working Group III on Legal Personality, 1 Oct 2002.

¹²⁹ Art 1(55), Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 Dec 2007 [2007] OJ C306/1. The Treaty of Lisbon was formally signed by the Heads of State and Government of the Member States of the EU on 13 Dec 2007 at Lisbon. The Treaty has not yet entered into force.

¹³⁰ *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174. See M Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations' (1970) 44 BYIL 111.

Court set out to determine whether the Charter nevertheless gave the UN characteristics that entailed the attribution of legal personality to it under international law. The Court found that the UN 'was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane'.¹³¹ In reaching this conclusion, the Court had regard to the functions of the UN, the fact that the Charter equipped it with organs having special tasks, and that the UN in certain respects occupied a position in detachment from its Member States, partly as a result of enjoying and exercising the capacity to enter into treaties with them. Having thus established that the UN constitutes a subject of international law, the Court inferred from this that the UN 'must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties',¹³² such as the capacity to bring international claims.

B. The EU as a Subject of International Law: Maastricht

Applying the Court's reasoning in the *Reparation* case, the EU may be considered as a subject of international law provided that it constitutes a corporate entity distinct from its Member States that is capable of exercising and enjoying, and does in fact exercise and enjoy, such functions and legal capacities on the international level as to demonstrate the intention of its creators to attribute international legal personality to it.¹³³

The EU certainly did not fit this description under the Maastricht Treaty.¹³⁴ Not only did the Maastricht Treaty show no obvious signs that its founders intended the EU to exercise legal capacities on the international plane, but it is doubtful whether the Union occupied a position of sufficient detachment from its Member States in the first place. Whereas the Maastricht Treaty seemingly ascribed a separate legal existence to the EU in the area of foreign and security policy in so far as it made the Union and its Member States jointly responsible to define and implement the CFSP,¹³⁵ it left the execution of the CFSP almost entirely to the Member States with the Council playing

¹³¹ *ibid* 179.

¹³² *ibid* 182.

¹³³ Cf Brownlie (n 124) 649. Whereas in the *Reparation* case the ICJ referred to the exercise of functions and the enjoyment of rights, rather than legal capacities (see n 131), it is clear from the context of the relevant passage that the Court was referring to rights enjoyed by the UN as a result of the exercise of its treaty-making capacity. Effectively, it is the existence of such legal capacities which serves as proof of the conferral of legal personality, rather than the specific treaty rights and obligations arising out of the exercise of those capacities.

¹³⁴ Treaty on European Union [1992] OJ C191/1.

¹³⁵ Art J.1(1), Maastricht Treaty. Apparently, this distinction between the Union and its Member States was meant to underline the intergovernmental character of the CFSP, see F Fink-Hooijer, 'The Common Foreign and Security Policy of the European Union' (1994) 5 EJIL 173, 177.

essentially a procedural role. Most revealingly, the Maastricht Treaty directed the Union to pursue the objectives of the CFSP by two means: by 'establishing systematic cooperation between Member States in the conduct of policy' and by 'gradually implementing joint action . . . in the areas in which the Member States have important interests in common'.¹³⁶ Even though the Council was meant to serve as a forum for systematic cooperation and was empowered to adopt binding decisions concerning joint actions,¹³⁷ systematic cooperation and joint actions were both conceived as processes engaging the Member States, not as instruments belonging to the Union as such.¹³⁸

The predominant role played by the Member States in the CFSP rendered the legal nature of the Union deeply ambiguous under the Maastricht Treaty. On the one hand, the overall coordinating role played by the Council and some of the language employed in the Treaty may have suggested that in certain respects the Union was more than just a centre for harmonizing the actions of its Member States in the attainment of their common ends.¹³⁹ On the other hand, the Maastricht Treaty did not invest the Union with international legal capacities, and in various places simply seemed to equate the Union with its Member States. The objective to safeguard the Union's 'common values' and to act as a 'cohesive force in international relations', for example, was clearly aimed at the Union *qua* an association of States, rather than *qua* single legal entity.¹⁴⁰ Indeed, this ambiguity has led the German Federal Constitutional Court to conclude that the Maastricht Treaty employed the term Union 'as a name for the Member States acting in concert, not as an independent legal entity'.¹⁴¹ Whilst some authors have argued that the EU amounted to an international legal person,¹⁴² the majority of commentators have accordingly

¹³⁶ Art J.1(3), Maastricht Treaty.

¹³⁷ Art J.2 and Art J.3, Maastricht Treaty.

¹³⁸ Under the Maastricht Treaty, the concept of a 'joint action' continued to refer to collective action taken by the Member States, just as it did in Art 30 of the Single European Act (SEA) [1987] OJ L169/1. This is illustrated by the fact that early Council instruments adopting joint actions were labelled 'Council decisions concerning joint action', where the term 'Council decision' referred the binding legal act and the envisaged 'joint action' merely constituted to the subject of the decision, eg Council Decision 94/790/CFSP of 12 Dec 1994 concerning the joint action on continued support for European Union administration of the town of Mostar [1994] OJ L326/2. ¹³⁹ Cf *Reparation for Injuries* (n 131) 178–9.

¹⁴⁰ Art J.1(2) and Art J.1(4), Maastricht Treaty.

¹⁴¹ *Maastricht-Urteil* (1993) BVerfGE 89, 155, 195; (1994) 33 ILM 388, 428–9; [1994] 1 CMLRev 57, 94–5. See SC Monaghan, 'European Union Legal Personality Disorder: The Union's Legal Nature Through the Prism of the German Federal Constitutional Court's Maastricht Decision' (1998) 12 *Emory International Law Review* 1443, especially 1486–92.

¹⁴² eg G Ress, 'Ist die Europäische Union eine juristische Person?' (1995) 30 *Europarecht* (Beiheft 2) 27; O Dörr, 'Zur Rechtsnatur der Europäischen Union' (1995) 30 *Europarecht* 334; A von Bogdandy and M Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union' (1996) 2 *European Law Journal* 267, 284–6; RA Wessel, 'The International Legal Status of the European Union' (1997) 2 *European Foreign Affairs Review* 109; J Klabbers, 'Presumptive Personality: The European Union in International Law' in M Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer, The Hague, 1998) 231; C Busse, *Die völkerrechtliche Einordnung der Europäischen Union* (Heymanns,

either taken the view that the Union did not constitute an entity distinct from its Member States, or that the Maastricht Treaty in any case did not establish the Union as an independent subject of international law.¹⁴³

C. The Capacity to Conclude Treaties: Amsterdam

The Amsterdam Treaty completely overhauled the provisions of the TEU dealing with foreign policy and security matters.¹⁴⁴ Amongst other things, the Treaty imposed an obligation on the Member States to ‘support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity’, clarified the nature and role of joint actions and common positions, introduced qualified majority voting in certain circumstances, and created the position of the High Representative for the CFSP.¹⁴⁵ Because of these changes, the sense of the Union’s detachment from its Member States in the area of the CFSP has increased considerably, though it should be underlined that the Amsterdam Treaty did not remove all ambiguities concerning the legal nature of the Union, and even created new ones.¹⁴⁶

Following the adoption of the Amsterdam Treaty, the focus of the academic debate has gradually shifted from its initial preoccupation with the legal nature of the EU to the question of the Union’s legal qualities, in particular its treaty-making capacity. One of the key innovations of the Amsterdam

Köln, 1999) (arguing that the CFSP, rather than the EU itself, constitutes an international legal person).

¹⁴³ eg Everling (n 121) 1061; D Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) 30 CMLRev 17, 27; H Kirschner, ‘The Framework of the European Union under the Treaty of Maastricht’ (1993–1994) 13 Journal of Law and Commerce 233, 242; Fink-Hooijer (n 135) 177; MR Eaton, ‘Common Foreign and Security Policy’ in D O’Keeffe and PM Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery, London, 1994) 215, 224; T Heukels and J de Zwaan, ‘The Configuration of the European Union: Community Dimensions of Institutional Interaction’ in D Curtin and T Heukels (eds) *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, vol II (Martinus Nijhoff, Dordrecht, 1994) 195, 202–4; T Jürgens, *Die Gemeinsame Europäische Aussen- und Sicherheitspolitik* (Heymanns, Köln, 1994) 329–31; M Pechstein, ‘Rechtssubjektivität für die Europäische Union?’ (1996) 31 Europarecht 137; E Paasivirta, ‘The European Union: From an Aggregate of States to a Legal Person?’ (1997) 2 Hofstra Law and Policy Symposium 37, 45–54; MacLeod, Hendry, and Hyett (n 127), 25; Gosalbo Bono (n 119) 345–7. International relations scholarship has also struggled to come to terms with the nature of the EU as a foreign policy actor, see RH Ginsberg, ‘Conceptualizing the European Union as an International Actor: Narrowing the Theoretical Capability-Expectations Gap’ (1999) 37 Journal of Common Market Studies. 429.

¹⁴⁴ Treaty of Amsterdam, 2 Oct 1997 [1997] OJ C340/1.

¹⁴⁵ Arts 11(2), 14, 15, 23, 26, Amsterdam TEU (consolidated) [1997] OJ C340/145.

¹⁴⁶ While Art J.2(1) of the Maastricht Treaty called upon the Member States to inform and consult one another so that *their combined influence* is exerted as effectively as possible by means of concerted and convergent action, Art 16 of the Amsterdam Treaty modified this provision to refer to the *Union’s influence*. This suggests that the Union’s foreign and security policy stands for joint action by the Member States. The possibility cannot be discounted, however, that this change was intended to serve merely rhetorical aims, see F Dehousse, ‘The IGC Process and Results’ in D O’Keeffe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing, Oxford, 1999) 93, 98–9.

Treaty was the introduction of Article 24 TEU, entitling the Council to conclude international agreements in the implementation of the CFSP. However, the failure of Article 24 TEU to clarify on whose behalf the Council concludes such agreements has given rise to conflicting interpretations in the literature. A large number of authors have argued that the Council acts on behalf of the Member States as their agent.¹⁴⁷ According to this view, the purpose of Article 24 TEU is to lay down a procedure for the collective conclusion of international agreements by the Member States. Others have argued that the Council acts on behalf of the Union as an independent legal entity.¹⁴⁸ According to this interpretation, the Amsterdam Treaty endows the EU with treaty-making capacity, and thus implicitly recognizes that it is capable of acting as an independent subject of international law.

¹⁴⁷ eg J Monar, 'The European Union's Foreign Affairs System after the Treaty of Amsterdam: A "Strengthened Capacity for External Action"?' (1997) 2 *European Foreign Affairs Review* 413, 427; Paasivirta (n 143) 57–9; M Cremona, 'The European Union as an International Actor: The Issues of Flexibility and Linkage' (1998) 3 *European Foreign Affairs Review* 67, 70; NAEM Neuwahl, 'A Partner With a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam' (1998) 3 *European Foreign Affairs Review* 177, 185–6; D Vignes, 'L'absence de personnalité juridique de l'Union européenne: Amsterdam persiste et signe' in G Hafner et al (eds), *Liber Amicorum Professor Seidl-Hohenveldern* (Kluwer, The Hague, 1998) 757, 760; JW de Zwaan, 'The Legal Personality of the European Communities and the European Union' (1999) 30 *NYIL* 75, 100–5; K Lenaerts and E de Smijter, 'The European Union as an Actor under International Law' (1999–2000) 19 *Yearbook of European Law* 95, 130; M Pechstein and C Koenig, *Die Europäische Union* (Mohr Siebeck, Tübingen, 2000) 151–2; D Mahncke, 'Reform of the CFSP: From Maastricht to Amsterdam' in J Monar and W Wessels (eds), *The European Union after the Treaty of Amsterdam* (Continuum, London and New York, 2001) 227, 244; E Regelsberger and U Schmalz, 'The Common Foreign and Security Policy of the Amsterdam Treaty: Towards an Improved EU Identity on the International Scene?' in *ibid* 249, 252–3; Denza (n 2) 176; cf DM Curtin and IF Dekker, 'The EU as a "Layered" International Organization: Institutional Unity in Disguise' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP, Oxford, 1999) 83, 111. See also DT Murphy, 'The European Union's Common Foreign and Security Policy: It is Not Far From Maastricht to Amsterdam' (1998) 31 *Vanderbilt Journal of Transnational Law* 871, 911–2; A Aust, *Handbook of International Law* (CUP, Cambridge, 2005) 480.

¹⁴⁸ eg NM Blokker and T Heukels, 'The European Union: Historical Origins and Institutional Challenges' in T Heukels, N Blokker, and M Brus (eds), *The European Union after Amsterdam: A Legal Analysis* (Kluwer, The Hague, 1998) 9, 27–38; B de Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?', in *ibid* 51, 63–4; S Langrish, 'The Treaty of Amsterdam: Selected Highlights' (1998) 23 *European Law Review* 3, 13–14; A Tizzano, 'La personnalité internationale de l'Union européenne' (1998) *Revue du Marché Unique Européen* 11, 25–8; JC Wichard, 'Wer ist Herr im europäischen Haus?' (1999) 34 *Europarecht* 170, 174; RA Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5 *European Foreign Affairs Review* 507, 527–31; G Hafner, 'The Amsterdam Treaty and the Treaty-Making Power of the European Union: Some Critical Comments' in Hafner et al (n 147) 257, 270–2; Marquardt (n 111); MM Pachinger, *Die Völkerrechtspersönlichkeit der Europäischen Union* (Peter Lang, Frankfurt aM, 2003) 92–103; TM Gütt, *Die Gemeinsame Außen- und Sicherheitspolitik und ihre Bedeutung für die Europäische Union: Rechtspersönlichkeit und Rechtsnatur der EU* (Herbert Utz, München, 2003) 125–35; T Georgopoulos, 'What Kind of Treaty Making Power for the EU? Constitutional Problems Related to the Conclusion of the EU–US Agreements on Extradition and Mutual Legal Assistance' (2005) 30 *European Law Review* 190, 193; R Leal-Arcas, 'EU Legal Personality in Foreign Policy?' (2007) 24 *Boston University International Law Journal* 165.

There is no need to rehearse the arguments advanced by these two opposing camps in any great detail here. It suffices to note the following. On the one hand, neither side has been able to conclusively prove or deny that Article 24 TEU implicitly attributes international legal personality to the Union. Both camps tend to invoke the same legal norms and facts to support their positions, and their respective arguments are often simply countered by the other side with a different interpretation of the same material. Since both camps have raised certain points supporting their position which the other side is unable to refute, the debate has remained inconclusive. For instance, much has been made of the fact that the Union bears sole responsibility for defining and implementing the CFSP under the Amsterdam Treaty.¹⁴⁹ It has been suggested that this renewed emphasis on the EU is difficult to reconcile with the notion that the Council acts on behalf of the Member States. This may be so, yet Article 24 TEU must be interpreted in the light of *all* provisions of the Amsterdam Treaty. These include Article 12 TEU, which enumerates the means whereby the EU shall implement the CFSP without, however, mentioning international agreements: this suggests that international agreements concluded under Article 24 TEU are not instruments of the Union. The contextual interpretation cuts both ways.

Another case in point is the fourth declaration adopted by the representatives of the Member States on signing the Amsterdam Treaty, which proclaims that the provision of Article 24 TEU and any agreements resulting from it 'shall not imply any transfer of competence from the Member States to the European Union'.¹⁵⁰ Some commentators have argued that this declaration demonstrates that the Member States had no intention at all to endow the EU with independent treaty-making capacities. Others have responded to this by pointing out that States normally confer, rather than transfer, legal capacities on an international organization.¹⁵¹ Again, while this is a valid point, it does not prove that the Member States have in fact conferred treaty-making capacities on the Union, but merely leaves open the possibility of such an interpretation. Rather than illuminating the meaning of Article 24 TEU, the declaration thus simply adds another layer to the confusion.

On the other hand, the interpretation of Article 24 TEU has occasionally lacked methodological rigour. During the drafting of the Amsterdam Treaty, the representatives of the Member States discussed the possibility of

¹⁴⁹ Art 11(1) Amsterdam TEU.

¹⁵⁰ Declaration on Arts J.14 and K.10 of the Treaty on European Union, Final Act [1997] OJ C340/131.

¹⁵¹ Cf E Cannizzaro, 'Fragmented Sovereignty? The European Union and its Member States in the International Arena' (2003) 13 *Italian Yearbook of International Law* 35, 38–9. See also D Sarooshi, 'Conferrals by States of Powers on International Organizations: The Case of Agency' (2003) 74 *BYIL* 291. Some have argued that the declaration was really aimed at preventing the so-called *ERTA* effect: Tizanno (n 148) 28. However, since the CFSP does not form part of Community law, the reasoning in the *ERTA* case (n 127, paras 15–8) does not apply to Art 24 TEU. cf Thym (n 16) 900–5; Wessel (n 16).

attributing international legal capacities and personality to the EU in express terms. However, certain Member States were opposed to this idea, and Article 24 TEU was adopted instead. Some commentators have sought to downplay this negotiating background, arguing that the *travaux préparatoires* of Article 24 TEU are neutral in so far as they neither prove nor exclude the attribution of legal personality to the EU.¹⁵² Actually, the *travaux* are far from neutral. Three specific options were considered during the negotiations: the first conferred on the Union all those international legal capacities that are necessary to carry out its functions and explicitly recognized its legal personality; the second provided the Union only with treaty-making capacity without mentioning legal personality; the third option entitled the Council to conclude international agreements on behalf of all of the Member States.¹⁵³ The fact that the final text of Article 24 TEU referred to the constitutional procedures of the Member States and to provisional application—which are the only two elements that were specific to the third option—strongly suggests that the drafters of the Amsterdam Treaty eventually decided that the Council should act on behalf of the Member States.

This result cannot be dismissed on the ground that having recourse to the *travaux préparatoires* of the Amsterdam Treaty constitutes merely a supplementary means of interpretation under the VCLT, as has been suggested by some.¹⁵⁴ The purpose of treaty interpretation is to ascertain the intentions of the parties as expressed in the text of the treaty.¹⁵⁵ Where this textual interpretation leaves the meaning of the treaty ambiguous or obscure, as is the case with Article 24 TEU, reference should be had to the *travaux* in accordance with Article 32 of the VCLT.¹⁵⁶ Not only do the *travaux préparatoires* of the Amsterdam Treaty demonstrate a lack of agreement among the Member States regarding the explicit attribution of legal personality to the EU, but they

¹⁵² Tizanno (n 148) 25.

¹⁵³ Council docs CONF 3850/96, A strengthened external action capability, 24 May 1996, at 10; CONF 3860/96, Progress Report on the Intergovernmental Conference, 12 June 1996, at 36–7; CONF 3860/1/96 ADD1, Draft texts, 13 June 1996, 18–20. The much-quoted Dublin II proposal by the Irish Presidency subsequently dropped the third option in favour of the first two, while noting the lack of unanimity on the subject. See Council doc CONF 2500/96, The European Union Today and Tomorrow, 5 Dec 1996, 88–90.

¹⁵⁴ Blokker and Heukels (n 148) 36–7.

¹⁵⁵ Draft Articles on the Law of Treaties with Commentaries (1966) 2 Yearbook of the International Law Commission 177, 220.

¹⁵⁶ Recourse to the *travaux préparatoires* is itself fraught with ambiguities and is frequently considered controversial. See M Ris, 'Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a Proposed Amendment of Arts 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14 Boston College International Law and Comparative Law Review 111; J Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) 50 Netherlands International Law Review 267; U Linderfalk, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation' (2007) 54 Netherlands International Law Review 133. There can be no doubt, however, that Art 24 TEU presents a prime example of a provision from which no clear and unequivocal meaning can be derived by applying the general rule of interpretation under Art 31 VCLT.

also reveal that the discussions on this matter proceeded on the basis that there was no unanimous support in the Council for the implicit attribution of international legal personality either.¹⁵⁷ Consequently, it requires compelling evidence to establish that the Member States have nevertheless agreed to implicitly attribute international legal personality to the Union in the form of Article 24 TEU, notwithstanding all the signs pointing in the opposite direction.¹⁵⁸ As was already noted, the academic debate on Article 24 TEU has failed to produce such evidence.¹⁵⁹

This partly results from overstretching the analogy between the UN and the EU in applying the *Reparation* case to the latter. In the *Reparation* case, neither the UN's treaty-making capacity nor its status as an independent subject of international law was disputed before the International Court of Justice.¹⁶⁰ By contrast, neither the international legal capacities nor the legal personality of the Union is established. This important difference is often overlooked. For example, it has been suggested that Article 24 TEU must be understood as entitling the Council to conclude international agreements on behalf of the Union because the Council acts as an institution of the EU under the CFSP, not as an organ of the Member States.¹⁶¹ This argument is circular, since the Union's treaty-making capacity is inferred from the presumption that the Union is capable of acting as an independent subject of international law—yet this is precisely what has to be demonstrated in the first place.¹⁶² Besides, nothing prevents the Member States from directing the Council to act on their behalf, as was specifically foreseen in the third option considered during the negotiations of the Amsterdam Treaty. The same goes for the Presidency: even though the Presidency's role is to represent the Union in matters coming within the CFSP,¹⁶³ this has not stopped the Member States from authorizing it to sign the Memorandum of Understanding governing the EU Administration of Mostar on their behalf.¹⁶⁴ Overall, Article 24 TEU does not support the conclusion that the Member States have endowed the EU with treaty-making capacity and thus implicitly conferred international legal personality on it. At best, the Amsterdam Treaty has left this question open for subsequent developments.

¹⁵⁷ Council doc CONF 3850/96 (n 153) 10.

¹⁵⁸ Cf McGoldrick (n 127) 38.

¹⁵⁹ In particular, one cannot admit that several Member States resisted the attribution of international legal personality to the EU during the negotiations of the Amsterdam Treaty, yet at the same time propose that they somehow still granted that status to the Union through Art 24 TEU by implication: eg Hafner (n 148) 283. This makes a mockery of the principle of State consent to be bound by a treaty; cf Separate Opinion of Judge Spender (n 123) 196.

¹⁶⁰ eg Written Statement Presented by the Government of the United Kingdom (1949) ICJ Pleadings 23, 26–31. ¹⁶¹ Marquardt (n 111) 341–2.

¹⁶² eg it has been argued that the EU possesses the legal capacity, pursuant to the 'implied powers doctrine', to conclude international agreements on its own behalf without, however, enjoying international legal personality: Georgopoulos (n 148) 191–4.

¹⁶³ Art J.5(1) TEU (Maastricht); Art 18(1) TEU (Amsterdam/Nice).

¹⁶⁴ Memorandum of Understanding on the European Union Administration of Mostar, 5 July 1994 (on file with the author).

D. The Current Legal Framework: Nice

The amendments made to Article 24 TEU by the Nice Treaty call for a more guarded assessment.¹⁶⁵ In addition to rearranging the content of Article 24 TEU over six paragraphs, the Nice Treaty directs the Council to proceed by qualified majority, rather than by unanimity, when an agreement is envisaged to implement a joint action or common position. It has been argued that it is 'not conceivable that agreements concluded by qualified majority, i.e., against the opposition of certain Member States, would nonetheless be concluded on their behalf'.¹⁶⁶ However, the use of qualified majority voting does not necessarily contradict the view that the Council acts on behalf of all the Member States as long as one is prepared to accept as tenable the interpretation that, by agreeing to Article 24 TEU, all Member States have *eo ipso* authorized the Council to negotiate and adopt international agreements on their behalf, subject to their continued right to ultimately refuse to become a party to an agreement in specific cases in accordance with the fifth paragraph of Article 24 TEU.¹⁶⁷ This provision declares that '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 nevertheless apply provisionally.'

It is not immediately clear whether Article 24(5) TEU refers to the binding effect of international agreements on the internal level as a matter of EU law or on the international level as a matter of the law of treaties. Some support for the former view may be derived from Article 24(6) TEU, which provides that international agreements concluded under the conditions set out in Article 24 TEU shall be binding on the institutions of the Union. Since the institutions clearly are not parties to the agreements in question, they are not directly bound by them under the law of treaties, but have to comply with their terms because Article 24(6) TEU provides so. At first sight, Article 24(5) TEU could be interpreted in the same fashion. However, it is widely accepted that the constitutional requirements referred to in that paragraph include those norms of domestic constitutional law that call for the parliamentary approval of international agreements before they may be ratified by the executive of the Member State concerned. It is difficult to see why these constitutional requirements should be considered applicable to international agreements concluded under Article 24 TEU unless the Member States were parties to these agreements. This interpretation is reinforced by the rule concerning the provisional application of international agreements concluded under Article 24 TEU. The provisional application of an international agreement is an act

¹⁶⁵ Treaty of Nice, 26 Feb 2001 [2001] OJ C80/1.

¹⁶⁶ Marquardt (n 111) 344–5. See also Pachinger (n 148) 107–8; Gütt (n 148) 133.

¹⁶⁷ Cf A Mignolli 'Sul *treaty-making power* nel secondo e nel terzo pilastro dell'Unione europea' (2001) 84 *Rivista di diritto internazionale* 978, 983–9.

that takes place on the international level in accordance with the law of treaties.¹⁶⁸ In its original version under the Amsterdam Treaty, the second part of what is now Article 24(5) TEU declared that those Member States which did not make a statement in the Council regarding the need to comply with their constitutional requirements ‘may agree that the agreement shall apply provisionally to them’.¹⁶⁹ Once again, it is difficult to see how the Member States could be competent to decide on the provisional application of an agreement unless they were prospective parties to it.

However, it somewhat complicates matters that the Nice Treaty has omitted the words ‘to them’ from the original version of Article 24(5) TEU. This omission has been interpreted to confirm that it is for the EU, rather than the individual Member States, to decide on the provisional application of international agreements, which would imply that the EU is a party to these agreements in its own right.¹⁷⁰ This argument loses some of its force, however, if one considers that at one stage the draft version of the Nice Treaty expressly provided that the Member States ‘may agree that the agreement shall nevertheless apply provisionally to the Union’,¹⁷¹ but that this wording failed to receive the support of all negotiating Member States and was deleted from the final text. Arguably, Article 24(5) TEU should therefore be understood as enabling those Member States which have not made statements in the Council regarding the need to comply with their constitutional requirements to agree to provisionally apply the agreement in question as between all Member States of the EU, including those that have made such statements, on one side and the third party concerned on the other side.¹⁷² The Member States which have made statements in the Council could then either opt to become parties to the agreement once their constitutional requirements have been met, or they could unilaterally terminate the provisional application of the agreement to them in accordance with Article 25 of the VCLT by notifying the other States and organizations concerned of their intention not to become parties to the agreement.¹⁷³ While this interpretation is certainly tenable, it has to be acknowledged that the amendments introduced to Article 24 TEU by the Nice Treaty do weaken the interpretation that the Council acts on behalf of the Member States. Nevertheless, they hardly offer conclusive proof in favour

¹⁶⁸ Art 25(2) VCLT 1969; Art 25(2) VCLT 1986. See MA Rogoff and BE Gauditz, ‘The Provisional Application of International Agreements’ (1987) 39 *Maine Law Review* 29; R Lefeber, ‘The Provisional Application of Treaties’ in J Klabbers and R Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Martinus Nijhoff, The Hague, 1998) 81; Aust (n 122) 139–41.

¹⁷⁰ de Kerchove and S Marquardt (n 16) 813.

¹⁷¹ Council Doc CONFER 4790/00, Progress report on the Intergovernmental Conference on institutional reform, 3 Nov 2000, 12.

¹⁷² Of course, the provisional application of the agreement in this manner would require the consent of that third party.

¹⁷³ While it seems that there is no subsequent practice on the implementation of Art 24(5) TEU in the area of the CFSP, such practice does exist with regard to agreements concluded under the EU’s third pillar. See n 198.

of the opposite view whereby the Council is said to act on behalf of the Union as an independent legal entity.

E. Subsequent Practice

Given that the academic debate surrounding Article 24 TEU has yielded no conclusive results, a significant number of authors have argued that definite conclusions regarding the international legal status of the EU can only be drawn once the Council has actually begun to implement the provisions of Article 24 TEU in practice.¹⁷⁴ The launch of the ESDP has supplied plenty of such practice, and it seems that a consensus is now emerging in the literature to the effect that the international agreements concluded by the Council since 2001 in the context of the ESDP demonstrate that the Council acts on behalf of the EU under Article 24 TEU, rather than on behalf of the Member States.¹⁷⁵ One of the key arguments put forward in support of this view is that both the internal Council acts adopting international agreements as well as the agreements themselves name the 'European Union' as one of the contracting parties. The Council has consistently approved the agreements negotiated by the Presidency under Article 24 TEU 'on behalf of the European Union', and has specifically authorized the Presidency to designate the person empowered to sign them 'in order to bind the European Union'.¹⁷⁶ Moreover, the titles and preambles of all of the more than 70 agreements concluded by the Council refer to the 'European Union' as one of their parties.¹⁷⁷ Consequently, there can be no doubt that the Council has acted on behalf of the 'European Union' when entering into these agreements, and that the Union has become a contracting party to them.

¹⁷⁴ eg A Dashwood, 'External Relations Provisions of the Amsterdam Treaty' (1998) 35 CMLRev 1019, 1038–41, reprinted in O'Keefe and Twomey (n 146) 201, 218–21; P Gautier, 'The Reparation for Injuries Case Revisited: The Personality of the European Union' (2000) 4 Max Planck UNYB 331, 347–58; NAEM Neuwahl, 'Legal Personality of the European Union—International and Institutional Aspects' in Kronenberger (n 111) 3, 11–20. See also S Peers, 'Common Foreign and Security Policy 1997' (1997) 17 Yearbook of European Law 539, 561–4; Wessel (n 142) 126; M Gavouneli, 'International Law Aspects of the European Union' (2000) 8 Tulane Journal of International and Comparative Law 147, 155–6; L Gard, 'L'Union Européenne, sujet de droit international' (2006) 110 Revue générale de droit international public 337, 352.

¹⁷⁵ Editorial Comment, 'The European Union: A new international actor' 38 CMLRev (2001) 825; Reichard (n 82) 52; de Kerchove and S Marquardt (n 16) 814; M Kleine, *Die Militärischen Komponente der Europäischen Sicherheits- und Verteidigungspolitik* (Nomos, Baden-Baden, 2005) 115–31; Naert (n 3) 101; Tsagourias (n 3) 116–17; Eeckhout (n 15) 159–60; Verwey (n 127) 60–1; Koutrakos (n 127) 409; Thym (n 16) 870–5; Gard (n 174) 352–4; Leal-Arcas (n 148); Wessel (n 16).

¹⁷⁶ eg Council Decision 2004/924/CFSP of 22 Nov 2004 [2004] OJ L389/41.

¹⁷⁷ This may be contrasted with the Memorandum of Understanding on the EU Administration of Mostar (n 164), which named to the 'Member States of the European Union acting within the framework of the Union' as the 'sending party'.

Still, the fact that the agreements were concluded in the name of the 'European Union' does not establish, in and of itself, that the EU enjoys and exercises the capacity to enter into treaties as a separate entity, unless one simply *assumes* that the term 'European Union' refers to a legal entity that is distinct from the Member States and is capable of acting on the international level, rather than being merely a collective name for the Member States. Though perfectly reasonable given the evolution of the Union's role under the CFSP since the Maastricht Treaty, this assumption has to be tested by examining the actual terms of the agreements, in particular by considering whether or not they grant rights to and impose duties on the EU separately from its Member States.

Despite the large number of agreements concluded by the Council since 2001 in the area of the ESDP, only a handful of passages differentiate between the EU on the one hand and the Member States on the other. Status of forces and status of mission agreements are the least instructive group of agreements in this respect, since they confer privileges and immunities directly on EU crisis management missions and their personnel, and not on the EU or the individual national contingents making up those missions. The agreements laying down security procedures for the exchange of classified information are not very helpful either. All agreements falling into this group provide that the term 'EU' shall mean, for the purposes of these agreements, the Council, the Council General Secretariat, and the Commission.¹⁷⁸ While this definition excludes the Member States, certain parts of the agreements continue to refer to the EU in a broader sense.¹⁷⁹ It appears that the EU is a contracting party to these agreements in this broader sense, rather than the Council, the Council General Secretariat and the Commission acting collectively.¹⁸⁰ The only agreement in this group that clearly differentiates between the EU and the Member States is the one concluded with NATO, which authorizes the EU to disclose NATO classified information to its Member States in certain circumstances.¹⁸¹ A similar distinction is drawn in recent third country participation agreements and in framework participation agreements in the form of a clause whereby the 'European Union undertakes to ensure that Member States make a declaration' waiving certain types of claims against the participating third State concerned.¹⁸²

The terms of the international agreements concluded by the Council shed comparatively little light on the legal character of the EU and its relationship

¹⁷⁸ eg Art 3, EU-BiH (n 56). See also Art 2, EU-ICC (n 64).

¹⁷⁹ The preambles of the agreements invoke the objective to strengthen the EU's security in all ways (Art 11 TEU), while Art 6 contrasts the EU with the Council, the Council General Secretariat and the Commission.

¹⁸⁰ This is particularly evident from Art 6, EU-NATO (n 55), which refers to the Council, the Council General Secretariat and the Commission as 'entities of the Parties', thereby distinguishing these entities from the EU as a contracting party.

¹⁸¹ Art 5(a), EU-NATO (n 55).

¹⁸² eg Art 2(6), EU-NZ (n 41); Art 3(6), EU-Turkey (n 69).

with its Member States. Once again, it is useful to recall the *Reparation* case, where the International Court of Justice was able to confirm the UN's detachment from its Members on the ground that it had entered into treaties with them. The practice of the Council under Article 24 TEU is not as clear-cut as that of the UN. Nevertheless, at least some of the relevant agreements seem to treat the EU as an entity that is distinct from its Member States and is capable of bearing rights and duties under international law.¹⁸³ This seems to confirm that the EU is a contracting party to these agreements in its own right, independently from its Member States, and that it must be considered an international legal person as a result.¹⁸⁴ However, the Council's practice in implementing Article 24 TEU should not be understood as retrospectively corroborating the view that the Member States had already conferred international legal personality on the EU by implication under the Amsterdam or Nice Treaty: it should rather be seen as a stage in the gradual evolution of the legal nature and capacities of the EU since its creation at Maastricht, one that *constitutes* the EU as a new subject of international law.

F. Political Actor or Legal Person?

As an international legal person, the EU is subject to rights and duties under international law separately from its Member States. One of the key consequences of its status as an independent subject of international law is that the EU bears legal responsibility for its conduct should it fail to comply with its international obligations. However, it is precisely in this field that the agreements concluded by the Council since 2001 cast some doubts on the 'actorness' of the Union as a legal person.¹⁸⁵ Two points illustrate the dilemma.

First, all agreements that contain provisions concerning the settlement of disputes arising out of their interpretation or application provide that such disputes shall be settled by diplomatic means.¹⁸⁶ The sensitive subject-matter of the agreements concluded in the context of the ESDP does not necessarily

¹⁸³ Such a distinction between the EU and its Member States is also drawn in certain agreements negotiated in the context of the EU's third pillar using the procedure set out in Art 24 TEU pursuant to Art 38 TEU. Thus, the EU has undertaken to provide for enhanced cooperation between its Member States and the United States in the field of extradition and mutual legal assistance in two treaties drawn up between the EU and the United States: EU-US, 25 June 2003 [2003] OJ L181/27 (extradition); EU-US, 25 June 2003 [2003] OJ L181/34 (mutual legal assistance).

¹⁸⁴ It makes little difference whether the Council's practice is understood as subsequent practice of the Member States within the meaning of Art 31(3)(b) of the VCLT, or as practice of the Council as an organ of the EU. See T Sato, *Evolving Constitutions of International Organizations* (Kluwer Law, The Hague, 1996).

¹⁸⁵ The term is borrowed from European foreign policy analysis, see RH Ginsberg, *The European Union in International Politics* (Rowman & Littlefield, Lanham, 2001) 45ff.

¹⁸⁶ eg Art 14, EU-Georgia (*EUJUST Themis*) (n 19); Art 16, EU-Romania (n 62); Art 16, EU-Gabon (*EUFOR RD Congo*) (n 19).

rule out binding methods of dispute settlement, such as arbitration or adjudication. Indeed, international practice offers several examples of status of forces agreements and other politico-military agreements that provide for compulsory forms of dispute settlement between their parties.¹⁸⁷ The fact that the EU has in all cases preferred bilateral diplomatic negotiations over more formal procedures as a means to settle potential disputes with the other contracting parties indicates that it seeks to avoid the international agreements concluded for the purposes of the ESDP from becoming the subject of legal proceedings. Of course, this in no way affects the legal nature of the commitments undertaken in those agreements, nor does it prevent the EU and the other contracting parties from incurring international legal responsibility should they breach these commitments. What it does mean, however, is that none of the parties may have recourse to legal remedies in order to invoke the responsibility of another party and to resolve disputes relating to the application and interpretation of the agreements.¹⁸⁸ Secondly, the relevant legal instruments provide that the Member States and institutions of the EU as well as the third States contributing personnel to an ESDP mission shall be responsible for answering any claims linked to, from or concerning the personnel they have seconded to the mission.¹⁸⁹ While claims relating to seconded personnel are thus settled directly by the sending States or institutions, claims for damage caused by the headquarters of military operations are covered by a financing mechanism acting on behalf of the contributing States.¹⁹⁰ These arrangements are designed to settle claims arising from EU crisis management missions without invoking the international legal responsibility of the EU itself.

These two examples suggest that the Member States are more content with the EU as a political actor on the international stage than as a legal person: whereas the Union has concluded more than seventy international agreements and conducted 18 crisis management missions in its own name in the period between 2002 and 2007, it has been reluctant, or so it seems, to fully accept the legal consequences of its status as an independent subject of international law. It is unlikely, however, that the Member States and the EU

¹⁸⁷ eg Art VIII, Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-defence (Brussels Treaty) 17 Mar 1948, 19 UNTS 51; Art 46, UN–Congo (UNOC) 27 Nov 1961, 414 UNTS 230; Arts 53 and 54, UN doc A/46/185 (n 52).

¹⁸⁸ The majority of third country participation agreements and all framework participation agreements contain a clause entitling either party to terminate the agreements should the other party fail to comply with its obligation, eg Art 8, EU–Estonia (*Concordia*) (n 33); Art 14, EU–Ukraine (n 69).

¹⁸⁹ eg Art 13(2), Council Joint Action 2003/681/CFSP (*Proxima*) (n 6); Art 2(4), EU–Morocco (*Althea*) (n 40); Art 3(4), EU–Iceland (n 69).

¹⁹⁰ Art 40(4), Council Decision 2004/197/CFSP of 23 Feb 2004 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications [2004] OJ 63/68, as amended. On the financing of military operations, see D Scannell, 'Financing ESDP Military Operations' (2004) 9 *European Foreign Affairs Review* 529.

will be able to indefinitely avoid the question of the Union's sole or joint responsibility for damage or injury caused by its crisis management missions from arising in practice.¹⁹¹ Indeed, should third States or private claimants ever commence proceedings against EU Member States in relation to EU crisis management missions before international judicial bodies, such as the International Court of Justice or the European Court of Human Rights, it would not be surprising to see the Member States concerned arguing that the alleged wrongful conduct that gave rise to the proceedings should be attributed exclusively to the EU, rather than to them.¹⁹²

The extent to which the EU may be held responsible for the acts or omissions of its crisis management missions, and whether it has a sufficient legal interest in acting on their behalf, for instance by presenting international claims,¹⁹³ depends in large measure on the nature of the legal and institutional relationship between the EU and those missions. Whereas peace support operations established by the UN and operating under its effective command and control are subsidiary organs of the Organization,¹⁹⁴ it is unclear whether missions launched in the context of the ESDP should be considered as *de jure* subsidiary organs of the EU, as instrumentalities of the participating States and organizations, or as independent legal entities. Arguments can be found both for and against each of these three positions. For example, the fact that ESDP missions are established by the Council in the form of a Joint Action under Article 14 TEU suggests that a close institutional relationship exists between them and the EU. At the same time, nothing indicates that the operational assets and personnel contributed to ESDP missions by the participating States and organizations are incorporated into the institutional structure of the EU for the purposes and duration of these missions: instead, it appears that such assets and personnel remain the exclusive organs of the respective contributing States and organizations. Still, the fact that the status of forces and

¹⁹¹ On this matter generally, see K Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von friedenssichernden Maßnahmen und Territorialverwaltungen* (Peter Lang, Frankfurt aM, 2004); SR Lüder, *Völkerrechtliche Verantwortlichkeit bei Teilnahme an 'Peacekeeping'-Missionen der Vereinten Nationen* (Berliner Wissenschafts-Verlag, Berlin, 2004); M Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff, Leiden, 2005); K Schmalenbach, 'Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations' (2006) 10 *International Peacekeeping* 33.

¹⁹² Submissions of this nature were made by certain member States of NATO in proceedings before the ICJ and the European Court of Human Rights relating to NATO's armed intervention in Kosovo and the subsequent international administration of the territory, see Oral Pleadings of Canada, CR/99/27, *Legality of Use of Force (Serbia and Montenegro v Canada)* 27 May 1999, 10; Oral Pleadings of France, CR 2004/12, *Legality of Use of Force (Serbia and Montenegro v France)* 20 Apr 2004, 23–5; *Banković and Others v Belgium and 16 Other Contracting States* (2007) 44 EHRR SE5, para 30; *Behrami and Behrami v France and Saramati v France, Germany and Norway* (2007) 45 EHRR SE 10. For a critical analysis of *Behrami* and *Saramati*, see Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' forthcoming in (2008) 8 *Human Rights Law Review*.

¹⁹³ Cf *Reparation for Injuries* case (n 131).

¹⁹⁴ See n 17.

status of mission agreements concluded by the Council confer privileges and immunities directly on ESDP missions and entitle them to enter into contracts and to conclude arrangements with the local authorities could imply that they are not mere instrumentalities of the contributing States and organizations after all, but entities that in some respects lead an independent legal existence. Consequently, the extent of the EU's international legal responsibility for the acts or omissions of ESDP missions and their personnel remains uncertain.¹⁹⁵

V. CONCLUSION

The academic debate concerning the international legal status and nature of the EU has entered a new phase. A review of the Council's treaty practice between 2002 and 2007 reveals that the Council acts on behalf of the 'European Union' under Article 24 TEU, and that the Union has thereby become a contracting party to the more than 70 international agreements concluded by the Council in the context of the ESDP. Most importantly, some of these agreements appear to treat the 'European Union' as a distinct legal entity that is capable of bearing rights and duties under international law separately from its Member States. The Council's practice thus strongly suggests that the EU has acquired the capacity to conclude treaties in its own right, and that this capacity has been recognized by those third States and organizations that have entered into agreements with it. As a result of these developments, the EU must be considered as an independent subject of international law.

In the past, those arguing against the existence of the EU's international legal personality have sometimes been accused of fighting a rearguard action.¹⁹⁶ Scepticism concerning the international status of the EU is likely to become an increasingly unfashionable position now that a consensus is emerging in the literature concerning the interpretation of Article 24 TEU and the Council's recent practice under this provision.¹⁹⁷ However, some doubts

¹⁹⁵ This uncertainty is compounded by the lack of clear rules determining how responsibility should be shared in cases where internationally wrongful conduct is attributable to more than one legal subject, as often happens in complex peace support operations, and by the unresolved question as to whether or not States bear concurrent or secondary responsibility for the acts and omissions of international organizations of which they are members. On the second issue, see I Brownlie, 'The Responsibility of States for the Acts of International Organizations' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, Leiden and Boston, 2005) 355; S Yee, 'The Responsibility of States Members of an International Organization for Its Conduct as a Result of Membership of Their Normal Conduct associated Membership' in *ibid* 435.

¹⁹⁶ Tizanno (n 148) 28 and 40. See also C Tomuschat, 'The International Responsibility of the European Union' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law, The Hague, 2002) 181.

¹⁹⁷ Indeed, the debate surrounding the legal personality of the EU and the interpretation of Art 24 TEU will become obsolete with the entry into force of the Treaty of Lisbon (n 129), which

concerning the legal status and nature of the EU do remain and should not be brushed aside lightly. The Council's efforts to streamline Article 24 TEU and the conclusion of informal arrangements show that the EU's practice in the area of treaty-making is still evolving. In particular, important questions remain unanswered concerning the extent of the Union's legal capacities, its willingness to assume international commitments and legal responsibility, as well as the exact nature of its relationship with its Member States, third parties, and the crisis management missions launched in the context of the ESDP.¹⁹⁸ The debate surrounding the legal character of the EU is thus far from over: its terms are merely shifting onto different territory, in particular the law of international responsibility.

confers legal personality on the EU in express terms and replaces Art 24 TEU with a provision stating that international agreements are concluded by the Union.

¹⁹⁸ Some of these questions were raised by the two agreements signed between the EU and the United States in 2003 on extradition and mutual legal assistance (n 183), see S Marquardt, 'La capacité de l'Union européenne de conclure des accords internationaux dans le domaine de la coopération policière et judiciaire en matière pénale' in G de Kerchove and A Weyembergh (eds), *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne* (Éditions de l'Université de Bruxelles, Brussels, 2003) 179. Even though one of the reasons for negotiating the two agreements under Art 24 TEU, rather than on a bilateral basis between the US and each EU Member State, was to expedite their conclusion, the US insisted on inserting a provision into both agreements whereby the EU agreed to ensure that its Member States confirm, in written agreements exchanged between themselves and the US, the undertakings entered into by the EU in the two agreements (Art 3(2)(a) EU-US on extradition, Arts 3(2)(a) and 3(3)(b) EU-US on mutual legal assistance). As noted by Marquardt (ibid 192–3), this appears to call into question the EU's capacity to enter into binding commitments. At the very least, it displays considerable distrust on part of the US as to whether the Member States will comply with agreements concluded under Art 24 TEU. Moreover, it is peculiar that most Member States have submitted the two agreements for parliamentary approval even though they do not consider themselves to be (prospective) parties to them. One explanation for this apparent inconsistency is offered by the relevant German legislation: the German Government considered that the two agreements became binding on Germany as a matter of international law following their signature in accordance with the procedure laid down in Art 24 TEU and therefore sought parliamentary approval for their 'binding effect' (*Bindung*) on Germany, rather than for the agreements as such. See Bundestag Drucksache 16/4377, 23 Feb 2007 <<http://dip.bundestag.de/btd/16/043/1604377.pdf>>. See also Avis n° 368.976, Conseil d'État (France) 7 May 2003 <<http://www.conseil-etat.fr/avisag/368976.pdf>>; Rapport n° 252 (2002–3) présenté par M. Pierre Fauchon au nom de la commission des Lois <<http://www.senat.fr/rap/102-252/102-252.html>>; Avis du Conseil d'État (Luxembourg) 25 Sept 2007 <<http://www.ce.etat.lu/html/47612.htm>>, all accessed on 1 Nov 2007.