International Law Before the Courts: the EU and the US Compared

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Against the background of a broadly shared perception of the US and the EU as very different kinds of international actors and a related assumption that the US Supreme Court and the EU Court of Justice treat international law very differently, this article examines the approaches of the Court of Justice and the US Supreme Court to the internalization of international law between 2002 and 2012. The perception of the US in recent decades has been as a frequently unilateralist and exceptionalist actor in international relations, with the Supreme Court remaining resistant to law which emanates from outside the American legislative process, or which lacks a clear domestic imprimatur as applicable US law. The EU, by contrast, is perceived as having a greater commitment to multilateralism and to the development and observance of international law, and the case-law of the Court of Justice has until recently been generally viewed—with its WTO jurisprudence seen as an exception—as actively contributing to that image through its embrace and internalization of international law norms. The analysis over a ten-year period of the case law of the two courts dealing with international law suggests, however, that, rather than a simplified picture of the Supreme Court as the skeptical judicial arm of an internationally exceptionalist United States and the CJEU as the welcoming judicial arm of an open and internationalist European Union, there are a great many more commonalities between the approaches of the two courts than conventional depictions acknowledge.

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INTRODUCTION

This article assesses the reception and internalization by the highest courts of the EU and the US—the Court of Justice of the European Union (CJEU) and the US Supreme Court respectively—of international law norms over the decade 2002–2012. The premise from which the article proceeds is that there is widely perceived to be a sharp difference between the EU and the US, including between their highest courts, with regard to their attitudes toward international law and institutions. The results of a survey of the case law from 2002 through 2012, however, reveal a significantly more nuanced and differentiated account of the engagement of the CJEU and the Supreme Court with issues of international law than the conventional accounts would suggest.

The general perception of the US, at least since the Second World War, and despite changes of administration, is as a powerful, self-interested and often unilateralist actor in international affairs. The US is perceived as an actor who, despite its regular resort to the use of international law as a tool of foreign policy, is generally resistant to the proposition that it should be subject to international law norms, is often unwilling to enter multilateral international agreements, and, even when it enters such agreements, is reluctant to internalize them (by which I mean giving these agreements domestic legal effect). The perception is that the US generally rejects subjection to external, as opposed to domestic mechanisms of accountability and adopts an unapologetically pick-and-choose approach to international law and institutions, determined by its changing domestic political interests. And while the US—particularly as its administration
changes from Republican to Democrat—chooses at times to participate in the drafting and shaping of multilateral international agreements such as the Rome Statute on the International Criminal Court, the UN Convention on the Rights of Persons with Disabilities, the Kyoto Protocol to the UN Framework Convention on Climate Change, and the UN Arms Trade Treaty, the effort to influence international norms is often combined with a decision not to submit to those norms once they are adopted. Many treaties in whose drafting the US participates are not signed by the US; even when signed, they are not always submitted to the Senate for ratification; even when submitted for ratification, they are not always taken up for a vote; even when taken up for a vote, they regularly fail to reach the necessary two-thirds majority for ratification; and, finally, even when ratified, their domestic effect is often blocked by the courts, regardless of whether a declaration of non-self-execution has been attached by the Senate.

The EU, by comparison, is generally perceived and officially presents itself as an actor that is simultaneously a creature, supporter, and promoter of international law and institutions. In official communications, the EU regularly and explicitly identifies itself as an organization that is based upon respect for international law and institutions, promotes multilateralism and transnational cooperation, and is a faithful adherent to the international rule of law. Far from rejecting the external imposition of international norms, the EU is often one of the lead actors sponsoring, signing, ratifying, and promoting the adoption of international agreements. The terms of the EU’s constituent treaties, as well as many of its Court’s rulings similarly profess a commitment to the observance of and support for international law and institutions. Article 21(1) of the Treaty on European Union, as revised by the Lisbon Treaty in 2009, declares that the EU’s action on the international scene is to be guided by respect for the principles of the UN Charter and international law, and that it shall promote multilateralism within the UN framework.1

Against the background of this starting premise about contrasting stances of the US and the EU toward the issue of support for

1. Article 21 (1) of the Treaty on European Union stipulates:

The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

international law and institutions, this article takes a systematic look at the approaches of the CJEU and the US Supreme Court to the internalization of international law over the past decade. The aim of the comparative analysis of the practice of the two courts is to scrutinize more closely the basis for the perception that, while the Supreme Court has been broadly resistant to the invocation and application of international law and has blocked its internalization within the US legal system in various ways, the CJEU, on the contrary, has—with the exception of some well-known and anomalous cases like the WTO agreements—been largely open to and positive in its embrace and enforcement of international legal norms.²

I take CJEU as the comparator for the US Supreme Court, rather than the supreme courts of EU Member States, since the polities under comparison for the purposes of this article are the US and the EU, rather than the US and various European states. A separate analysis could certainly be done comparing the approach of the US Supreme Court and that of the UK Supreme Court, for example, to the internalization of international law, or indeed of any other individual member state. But the Supreme Court-CJEU comparison has been chosen for the purposes of this article because the two systems are so often compared, as international actors, from the point of view of their size, their international influence and their federal structure. The Supreme Court-CJEU comparison is also apt in view of the fact that within the EU system, it is no longer the national supreme courts, but rather the CJEU that determines the status and the legal effects of treaties entered into by the EU—including the provisions of so-called ‘mixed agreements’ concluded by the EU and the Member states jointly—within member states. The reality is that as EU treaty-making power has grown, the exclusive treaty-making competence of member states has correspondingly declined, and it is the CJEU which authoritatively interprets the legal effects and status of the treaties to which the member states agree within the EU framework. Finally, it is clear that the CJEU understands itself to function as a constitutional court for the European Union, comparable in many respects to the US Supreme Court.³

The case law of the two courts dealing with international law from 2002–2012 has been analyzed as the sample decade for this purpose. One of the principal reasons for choosing this period is that until two decades ago, the European Union possessed limited powers in the field of

international relations. Under the founding treaties, the European Communities enjoyed competence mainly in the fields of trade and aid, and although the CJEU interpreted its external powers more broadly than this by using a doctrine of implied powers,\textsuperscript{4} it was not until after the Maastricht Treaty in the 1990s—supplemented by developments in the subsequent Amsterdam, Nice, and Lisbon Treaties—that the EU gained more extensive and explicit international relations powers. As a consequence, the case law of the CJEU dealing with international law issues has become much more extensive since the enactment of those treaties, and consequently is more easily comparable to that of the US Supreme Court.

A preliminary question is whether in fact the judicial internalization of international law (as opposed to, say, the rate of ratification of international treaties or an attempted assessment of whether states abide by international legal commitments) represents a good measure of some significant aspect of a polity’s support for international law. One possible argument against this proposition is the fact that certain states (the United Kingdom, for instance) are broadly international-law-abiding, even though their dualist approach means that their courts do not generally internalize international treaties. A second argument is that the attitude of courts toward the internalization of international law does not tell us enough about the approach of the state or polity without also knowing what the attitude of the other political branches toward the internalization of international law is, and how they interact with the role of the judiciary in this respect. Nevertheless, an assessment of the degree of judicial internalization of international law on the part of the US Supreme Court and the CJEU is clearly pertinent to the question of the support of their respective legal and political systems for international law for the following reasons.

In the first place, unlike the UK or other explicitly dualist constitutional systems, the US Constitution itself mandates the internalization at least of international treaties, since Article VI provides that treaties made by the US are part of the supreme law of the land and binding on the judiciary. To that extent, the practice of the Supreme Court in following that mandate (or not) yields relevant information about the willingness of the judiciary to have international law applied as part of US law. In the EU, on the other hand, while the founding treaties are silent on the domestic judicial applicability of international law, other than to provide that international treaties adopted by the EU are binding upon the EU and the Member States, the practice of the CJEU from early on was to deem such

\textsuperscript{4} The foundations for this doctrinal development were laid in Case 22/70, Comm’r v. Council, 1971 E.C.R. 263.
treaties, once ratified, to be "an integral part" of EU law.\(^5\) Given this clear and early choice by the CJEU—a choice which, according to some commentators was consistent with the monist view implicit in the EU's founding treaties\(^6\)—to take an active part in promoting the judicial internalization of international law, and to apply international law as an integral part of EU law, an analysis of the continuing practice of the CJEU in this respect provides a relevant measure for evaluating the role of the EU judiciary in supporting the enforcement of international law. In each case, an analysis of the practice of the two courts provides a measure of the support of the highest branches of the judiciary, rather than of the other political branches of the state, for treating international law as part of domestic law.\(^7\)

Q. Has the court accorded treaties primary or direct effect (self-executing status) within the internal legal order?

The Supreme Court dealt with international treaties in fifteen cases.\(^8\) Of these, it addressed the issue of direct enforceability or self-execution just twice, and it denied direct enforceability in both of these cases.\(^9\) The Court recognized the primacy of international treaties in principle in these two cases, but denied the direct effect of the treaty provisions in question.

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6. See Enzo Cannizzaro, The Neo-Monism of the European Legal Order, in INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION 35, 57 (E. Cannizzaro et al. eds., 2011) (arguing that "the European legal order is among the völkerrechtstitischen contemporary legal orders . . . The founding Treaties thus seem to enshrine an idealistic view of international law, conceived of as the realm of universal values and legality" and refers to "the adoption in the founding Treaties of a monist model . . ."). Similarly, Pieter Jan Kuijper argues that the Treaty of Rome "made the fundamentals of the hierarchical relationship" between international agreements and EU law "quite clear." Pieter Jan Kuijper, It Shall Contribute to ... the Strict Observance and Development of International Law: The Role of the Court of Justice, in THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE LAW 589, 591 (2013).
7. Mario Mendez has suggested that a measure of the support of the EU political branches can be found in part in the submissions made by the Commission, Council, Parliament, and Member States to the CJEU in cases in which international law is invoked to challenge legislation. See MARIO MENDEZ, THE LEGAL EFFECTS OF EU AGREEMENTS (2013), chs. IV–VI.
I. METHODOLOGICAL CHALLENGES

A meaningful comparison of the positions of the US Supreme Court and the CJEU with regard to their approaches to the internalization of international law within their respective legal orders is not a straightforward task, even when limited to a ten-year time period. All such comparisons are fraught with questions about differences of political and institutional context, as well as of culture and history, and this one is no exception. Six significant differences between the two courts, which bear on the nature of the comparison in a range of ways, will be identified here.

First, the Supreme Court has a long record of engagement with international law spanning more than two centuries, while the CJEU has been in existence for just over 60 years. Inevitably, the Supreme Court's approach has evolved significantly over the years and throughout different phases of US history. The EU (initially the European Communities), on the other hand, did not engage seriously with international law or with issues of foreign policy and international relations other than in a limited, sectoral context—that is, primarily in the fields of trade and aid—for the first four decades of its existence, from 1952–1992. It is only since the Maastricht Treaty came into force in 1993 that there has been a more robust emphasis on EU foreign policy, and this emphasis has brought with it a concomitantly wider and more regular engagement by the CJEU with issues of international law. This first difference between the two systems is one of the reasons why the recent decade 2002–2012 was chosen for the purposes of the comparison.

Second, even while the Supreme Court is a much older court than the CJEU, the constitutional framework within which it operates has changed far less than that within which the EU Court functions. The EU Treaties have been amended on many occasions since the Coal and Steel Treaty was first signed in 1952. Both the international relations powers of the EU as a whole, as well as the specific jurisdiction of the Court over these external relations have been changed and expanded in various ways under the Single European Act (1986) and the Maastricht (1993), Amsterdam (1997), Nice (2001), and Lisbon (2007) Treaties in turn. The constitutional

10. The decade 2002–2012 has been chosen as the sample period not only because it is more manageable than a longer period, but also because the EU since that time has acquired more competences as an international actor, which is likely to have affected the case load of the Court on international law issues. The study is seeking to capture whether the contrasting perceptions of the attitude of the Supreme Court and the CJEU towards the internalization of international law are borne out by the relatively recent practice of the two courts.

11. This is well captured in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David Sloss et al. eds., 2011) [hereinafter INTERNATIONAL LAW IN THE U.S. SUPREME COURT].
framework of US foreign relations has never been formally amended, changing only according to the practice of the various branches of government. As will be noted towards the end of the article, the fact that the US is a much older and more stable constitutional system raises the possibility that the differences between the practices of the CJEU and the Supreme Court may be explained in part by reference to the different stages of the process of integration (or federation) of the polity in which the two courts find themselves.

Third, the process for appointing judges to the two courts is very different. While the appointments process to the US Supreme Court is highly politicized and potential justices are subject to intense public scrutiny, the procedure for appointing judges to the CJEU is quite the opposite. Until a few years ago, the process was entirely opaque and not subject to any kind of oversight. With one judge allocated per member state, each state would nominate its judicial candidate to the CJEU without any EU coordination or scrutiny. There were and still are no requirements beyond the bare minimum stated in the EU Treaty, namely that candidates must possess the “qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence.”12 The individual members of the Court are nominated by each state entirely according to its own selection procedure without interference of any kind from the EU, and the candidates nominated are then appointed by ‘common accord’ of all of the Member State governments. Until the adoption of the Lisbon Treaty in 2007, the CJEU was chosen in accordance with this extremely informal method of selection without appraisal from anyone other than each individual nominating government.13 Since the Lisbon Treaty came into force, there has been a small, but not insignificant change, with the establishment of a panel of experts, including former CJEU judges and national Supreme Court judges, to scrutinize the nominees put forward by the Governments.14 Some candidates have already been rejected by this new panel,15 although the deliberations of the panel, despite the presence of

one member who is chosen by the European Parliament, are entirely secret. In this sense, it is a far cry from the open, closely scrutinized and highly political nomination and appointment process to the US Supreme Court. It seems likely that the different appointment processes and the different kinds of appointees to the two courts have an impact on the respective approaches of the two courts to key questions concerning the foreign policy and the international legal obligations of the EU and the US. We might expect judges of the US Supreme Court to be more cautious about their uses of international law if they have been questioned about this within the appointments process.

Fourth, the lack of dissenting opinions in the Luxembourg court, the collegiate nature of the judgments and the formalistic style of judicial reasoning is very different from the richly textured, individualized, and often colorful opinions of the Supreme Court justices. This means not only that the style and content of CJEU rulings are often minimalist and give little insight into the reasons animating the Court's conclusions or the sense of any debate which may have occurred during the secret deliberations, but also that, in stark contrast to the Supreme Court, where the views of individual judges are pored over and minutely dissected, we have almost no idea of the views of individual CJEU judges—who are generally also quite circumspect in their extra-judicial writings—on any particular issue of international law.

A significant part of the reason for this may be the fact that judicial appointments are not for life, but only for a six-year term subject to renewal. Many judges are repeatedly renewed, and, although there is as yet little evidence of political considerations influencing decisions not to renew, there is a lively debate in the political science literature as to whether the evidence indicates that the CJEU is politically constrained in its decision-making by the preferences of Member State governments.


16 In the US Senate hearings on recent Supreme Court appointments, nominees such as Elena Kagan, John Roberts, and Sonia Sotomayor were questioned about their views on the use of foreign and international law.

17 For a discussion of these differences, and an attempt to look behind them, see MITCHEL DE S.-O.-I. E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (Oxford University Press, 2004)

18 Francis Jacobs, a former Advocate General at the ECJ, has commented that there have been some "apparently arbitrary" decisions not to re-appoint sitting judges. Francis Jacobs, Advocates General and Judges in the European Court: Some Personal Reflections, in DAVID O'KEEFFE & ANTONIO BAVASSO, JUDICIAL REVIEW IN EUROPEAN LAW (Kluwer, 2000).

There is also a path-dependent dimension to the formalistic reasoning of the CJEU, since the original Court at the time of its establishment in the early 1950s was deliberately modeled on the French Conseil d'Etat, which adopts a similarly impersonal, formulaic, and minimalist style.

An alternative source of information about the judgments of the CJEU, however, is the reasoning of the Advocates General, who generally express themselves with greater freedom and openness, and whose styles and perspectives vary. Nevertheless, it is not always easy to determine whether or to what extent the Court has been influenced by the opinion of the Advocate General in any particular case, since the Court only rarely cites or refers to the Advocate General's opinion. The result is that, in the absence of any such citation, these opinions are, at best, a weak source of understanding of the position adopted by the Court on a given issue. It should also be mentioned in this context that the CJEU, unlike the US Supreme Court, does not accept amicus briefs, thus removing an additional potential source of input into EU judicial rulings. The collegiate, formal style of CJEU rulings and the lack of input by NGOs and other amici might lead us to expect a more cautious use of international law by the Court than by the less constrained judges of the Supreme Court.

Fifth, the idea of separation of powers is firmly part of US constitutional law, and discourse and is the subject of robust and ongoing debate in the field of foreign policy in particular, with the Supreme Court itself regularly joining in the debate on the nature of its role vis-à-vis the other branches of government in the area of foreign relations. Conversely, there is no clear notion of separation of powers (as opposed to a rather vague concept of "institutional balance") in the EU context, and, with


20. See Lee F. Peoples The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities (2008) SYRACUSE J. INT'L. L. & COM. (analyzing the extent to which the opinions of the Advocates General cite foreign law); see also supra note 15 (offering a general discussion of the extent to which the opinions of the AGs counterbalance the minimalism of the Court).

21. The CJEU does not accept or use amicus briefs in direct actions other than from the EU institutions or a Member State or in certain circumstances in which a third party "can establish an interest in the result of a case submitted to the Court of Justice." See Art. 40 of the Statute of the Court of Justice. As far as preliminary references from national courts are concerned, Article 23 of the statute of the Court does not permit third party interventions other than from specified institutions, agencies or Member States, but there is a possibility for third party briefs to be submitted in cases where the third party has already been granted rights of intervention before the domestic court from which the reference has been made.

the exception of an ongoing debate about an increased role for the European Parliament in the EU's Common Foreign and Security Policy (CFSP), there has been little discussion of the appropriate relationship between the roles of the various EU institutions in the field of international relations. Although the CJEU is formally excluded from the field of the CFSP by Article 24(1) of the Treaty on European Union, this exclusion has not prevented the Court from ruling regularly on issues that are central to EU international relations and on the place of international law within the EU legal order. There has not been any significant political or academic debate on the proper role of the Court vis-à-vis other political and governmental branches in the field of international relations, perhaps because the exclusion of the Court from the field of CFSP has been taken as a sufficiently clear constitutional answer to the broader question. This lack of a lively debate on the appropriate role of the CJEU in relation to foreign policy might suggest that the EU Court considers itself to be somewhat freer than the US Supreme Court to decide whether and how to internalize international law within the EU system.

Finally and importantly, the nature and sources of their jurisdiction, and hence the number and nature of the cases and controversies arising before the two courts are quite different. In addition to an express advisory jurisdiction to rule on the compatibility with the EU treaties of any international agreement which the EU proposes to sign, the CJEU through the preliminary rulings mechanism as well as via other forms of


24. Despite Article 24 (1) TEU, the Court under Article 40 of the TFEU has a role in policing the boundary between CFSP and non-CFSP matters, and in accordance with Article 275 TFEU it has the power to review "restrictive measures against natural or legal persons" adopted under the CFSP. TFEU post-Lisbon, supra note 1, art. 40 (C 326/37); TFEU, supra note 12, art. 275.


27. For some prominent examples, see Case 1/94, Opinion Pursuant to Article 228 (6) of the EC Treaty, 1994 E.C.R I-5267, Case 2/94, Opinion Pursuant to Article 228 of the EC Treaty, 1996 E.C.R I-1759, the more recent Case 1/09, Opinion Pursuant to Article 218 (11) TFEU, 2011 E.C.R. I-1137. The preliminary rulings mechanism is set out in Article 267 of the Treaty on the Functioning of the European Union. TFEU, supra note 12, art. 267. An example of a prominent international law case which came before the CJEU by this route is Case C-366/10, Air Transport Association of America & others v. Secretary of State for Energy and Climate Change, 2011 E.C.R. I-13755 [hereinafter Case C-366/10, Air Transport Association].
direct action, Commission enforcement actions, and on appeal from the General Court is regularly asked to rule on the compatibility of EU or Member State legislative and administrative acts with international trade and environmental and other agreements. The Supreme Court hears cases from federal and state courts and has a limited original jurisdiction, but crucially, it has the means to control its docket, in particular by the practice of *certiorari*, as set out in Rule 10 of the Supreme Court Rules. The CJEU, by comparison, does not exercise control over its docket and it has not yet espoused a political-question doctrine, a mootness doctrine, or any other significant devices for limiting the kinds of cases it hears and determines. On the other hand, issues arising in the field which is formally defined as foreign and security policy are excluded, at least in principle, from CJEU jurisdiction by the EU treaty. As will be discussed further below, this major difference in the number of cases involving international law which come before the two courts affects the statistical significance of the quantitative results.

Yet despite these differences between their institutional contexts and methods of functioning, the two courts have much in common in their role as the highest actual (in the case of the Supreme Court) or *de facto* (in the case of the CJEU) constitutional court within a federal or quasi-federal political system. As far as their engagement with international law is concerned, each of the courts regularly hears a range of cases concerning the international relations of the US and the EU, respectively and rules on the interpretation and applicability of international treaties and customary international law across a wide range of fields and issues, often involving the same or similar questions.

29. For one of the first prominent examples of a Commission enforcement action against a Member State for violating an international agreement in a field other than trade (marine pollution), see Case C-239/03, Commission v France (Etang de Berre), 2004 E.C.R. I-9325.

30. A prominent example of an international law case that came before the CJEU by this route is the Kadi I case, Combined Cases C-402/05 P and C-415/05 P, Kadi v. Council and Comm’n, 2008 E.C.R. I-6351, followed by Kadi II, C-584/10 P, C-593/10 P and C-595/10 P, judgment of 18 July, 2013, and a stream of further litigation challenging targeted economic sanctions originating from the UN Security Council.

31. A slight exception to this has occurred in the context of the preliminary reference procedure from domestic courts. In the 1980s, the CJEU began (and has continued) to use a range of arguments to deny jurisdiction or refuse to give a ruling, such as that the litigation is fictitious, or that it cannot provide a useful answer to the domestic court. See e.g. Case C-428/93, Monin Automobiles, 1994 E.C.R I-1707; Case C-361/97, Nour v. Burgenlandische Gebietskrankenkasse, 1998 E.C.R I-3101, ¶ 15.

32. For exceptions to this exclusion, see supra note 22.
II. CONVENTIONAL PERCEPTIONS OF THE APPROACHES OF THE CJEU AND THE SUPREME COURT TOWARDS INTERNATIONAL LAW

The general perception, at least until quite recently has been that the CJEU, in keeping with the foreign policy approach of the EU more generally, has been open to the reception and domestic application of international law and is supportive of the European Union's commitment to the "faithful observance" of international law.33 This commitment, which for some time had been expressed in official documents and statements of the EU, is now formally incorporated into Article 3(5) of the Treaty on European Union; Article 21(1) TEU elaborates on this.34 Even after three years of acute economic and political crisis, the emphasis placed by EU leaders on the EU's support for multilateralism and fidelity to the international rule of law had not declined, as is evident from a speech of Commission President José Manuel Barroso in 2010:

Multilateralism is an aim of the Treaty; it's then what we call rightly a constitutional goal of Europe. We could say that the positive effects of the international rule of law and of multilateral institutions are part of the European Union's DNA. . . . Europe represents an aspiration: a world ruled by law, and not by force; a world where rights are more important than strength; a world where major powers tackle global problems in concert, and not unilaterally.35

A classic statement of the contribution of the CJEU to this "constitutional goal of Europe" was provided by Christiaan Timmermans just over a decade ago, while he was Deputy Director General of the European Commission's legal service and before he became a judge on the CJEU. Timmermans wrote that, after a cautious start during which the European Community had to decide how to define its relationship to international law,

the Community legal system has demonstrated a fairly open and receptive attitude towards international law. This more positive

34. "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." TEU post-Lisbon, supra note 1, art. 3 (5) art. 21 (1).
approach is also due to developments in the European Court's case law in recent years. It could be argued that the operation of the Community legal system enhances the possibilities for compliance with international law and more generally that the evolution of the Communities' external relations, also on the basis of a rule-oriented approach, contributes to strengthening the position of international law and the international legal system.\textsuperscript{36} 

The reputation of the CJEU to which Timmermans referred at that time may well have been warranted. Despite repeated amendments and revisions, the EU Treaties have not, unlike the US Constitution, specified what effect international treaties should have within the EU legal order, other than to stipulate generally that treaties concluded by the EU are binding on the institutions of the EU and its Member States.\textsuperscript{37} Nevertheless, in some of its earliest case law dealing with international agreements, the CJEU adopted what has been called an "automatic incorporation" approach to such treaties,\textsuperscript{38} deeming them to be part of the EU legal order and finding their provisions to be enforceable in domestic and EU courts at the suit of individuals.\textsuperscript{39} In this way, treaties, one of the most important sources of international law, were from an early stage treated by the Court as a presumptively integral part of the new European legal order, enjoying primacy over secondary EU law.\textsuperscript{40} Even if the dimension of this case law, which then generated the most extensive commentary, was that which subsequently departed from the basic automatic-incorporation approach, namely the Court's decision to rule out the direct judicial enforceability of the GATT/WTO agreements,\textsuperscript{41} the

\textsuperscript{36} C. Timmermans, The EU and Public International Law, 4 EUR. FOREIGN AFFAIRS REV. 181 (1999).

\textsuperscript{37} This is now contained in TFEU, supra note 12, art. 216 (2) (C 326/144).

\textsuperscript{38} MENDEZ, supra note 7, at 11–34.


\textsuperscript{40} On the primacy of international treaties over EU law, see Case C-61/94, Comm'n v Germany, 1996 E.C.R I-3989, ¶ 52 (International Dairy Agreement).

\textsuperscript{41} In its GATT/WTO jurisprudence, the CJEU has effectively rejected the direct judicial enforceability of the GATT and WTO agreements, with a few exceptions such as where EU legislation expressly mentions the agreements or was adopted in order to give effect to them. See Case 24/72, International Fruit Co. v Produktionskampf voor Groenten en Fruit, 1972 E.C.R. 1219; Case C-280/93, Germany v Council, 1995 E.C.R. I-4973; Case C-149/96, Portugal v Council, 1999 E.C.R. I-8395. See in particular Case 21-24/72 International Fruit Co. v Produktionskampf voor Groenten en Fruit, 1972 E.C.R. 1219; Case C-280/93, Germany v Council, 1995 E.C.R. I-4973; Case C-149/96, Portugal v Council, 1999 E.C.R. I-8395. The main reason given by the Court for its refusal to give direct effect to the WTO agreements is that the nature of its dispute resolution system deliberately leaves room for political negotiation. On the other hand, it seems probable that the Commission could use the procedure under Article 258 TFEU to bring proceedings against a Member State for infringing GATT/WTO obligations. TFEU, supra note 12, art. 258 (C 326/160).
general approach of the CJEU to international treaties was to treat them as fully part of the EU legal order, judicially enforceable at the suit of litigants and enjoying supremacy over EU laws.

Further, this embrace of treaties as a central part of the EU legal order was accompanied by a relatively open approach to customary international law as part of EU law. By using a range of doctrinal devices, such as the principle of consistent interpretation and the treatment of international legal principles as part of the general principles of EU law, as well as attributing direct effect to a wide range of international association, partnership, trade, and cooperation agreements entered into by the EU, the Court seemed open to incorporating international law directly as part of EU law. In all, its approach to international legal obligations appeared to be one of active engagement, with the Court positioned as an agent to ensure compliance on the part of the EU and its Member States (indeed, most obviously, ensuring compliance by the Member States) with the EU's international obligations.

The US Supreme Court, on the other hand, has generally been seen as being considerably more ambivalent about the judicial internalization of international law in recent decades. Apart from the publicity generated around the debate within the Court since the appointment of Antonin Scalia in 1986 about the legitimacy and appropriateness of the Supreme Court citing foreign law when interpreting the Constitution, the Court has also adopted what is generally perceived to be a highly restrictive stance towards the enforceability or "self-executing" nature of international treaties, particularly in a prominent series of cases on the Vienna Convention on Consular Relations, as well as toward the rulings of international courts and tribunals on those treaties. The applicability of customary international law in US courts has been restricted significantly in cases concerning the Alien Tort Statute. More generally, there is an


extensive literature (both positive and critical) on US unilateralism and
exceptionalism in relation to international law, as well as a US academic
literature that is skeptical of the legitimacy of international law. One of
the critical claims of the exceptionalism literature is that the US supports
international treaties and laws and promotes a compliant, rules-based
approach to international law primarily in order to bind and constrain
other states, even while it resists the application of those rules and
principles of international law to itself whenever they are perceived as
working to its detriment. More moderate appraisals of the approach of the
Supreme Court and other US courts to international law have suggested
that US courts tend to situate international law firmly within the American
constitutional law framework, working from a “fundamental postulate”
that “the Constitution prohibits the government from delegating
governmental authority over US citizens to officials who are not directly or
indirectly accountable exclusively to the American electorate.”

The general perception of the US in recent decades has therefore been
that it is, for better or for worse, an exceptionalist and often unilateralist
actor in international relations, with the Supreme Court remaining resistant
to law which emanates from outside the American democratic process, or
which lacks a clear domestic imprimatur as applicable US law. The EU, on
the other hand, has expressly presented itself as an actor and a system
committed to multilateralism and to the development, support, and
observance of international law, and the case-law of the CJEU has until
recently been broadly viewed—with WTO jurisprudence seen as an
exception—as actively contributing to shaping that image through its
embrace and internalization of international law norms.

1659 (2013).

46. See, e.g., AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (M. Ignatieff ed., 2005); H.
Koh, On American Exceptionalism, 55 STAN. L. REV. 1479 (2003); Jed Rubenfeld, Unilateralism and
Constitutionalism, 79 N.Y.U. L. REV. 1971 (2004). For an argument that all nations are to some extent
“exceptionalist” in relation to international law, see A. Bradford & E. Posner, Universal Exceptionalism
in International Law 52 HARV. J. INT’L L. 1 (2011); Sabrina Safrin, The Un-exceptionalism of US
Exceptionalism, 41 VAND. J. TRANSNAT’L L. 1307 (2008). For an argument that the EU is itself
exceptionalist in its approach to international law, see Magdalena Ličková, European Exceptionalism in
International Law, 19 EUR. J. INT’L L. 463 (2008). See also Georg Nolte & Helmut Philipp Aust,

1175 (2007); JEREMY A. RABKIN, THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD
WELCOME AMERICAN INDEPENDENCE (American Enterprise Institute, 2004). For a measured
assessment of the place of international law in the U.S. legal system, including its treatment by the
courts, see CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE US LEGAL SYSTEM (Oxford
University Press, 2013)


49. See supra note 41.
In the remainder of the paper, the question of the "internalization of international law" is parsed into a series of further questions, which are then used to analyze a survey of all the cases which have come before the two courts over the ten year period 2002–2012 raising issues of international law.

III. INTERNALIZATION OF INTERNATIONAL LAW

The question of the courts' approach to the internalization of international law, or to the extent to which international law should be applicable within the domestic legal system, can be subdivided into a range of more specific questions, which allow closer scrutiny of the case law:

(1) Has the court accorded treaties primacy or direct effect (self-executing status) within the internal legal order?

(2) What status and effect does the court give to rules and principles of customary international law in the internal legal order?

(3) Does the court defer or pay attention to: (i) the interpretation of treaties or custom by the courts of other signatory states or (ii) the interpretation of treaties or custom by international courts and tribunals?

(4) Does the court attempt to construe or interpret domestic law in accordance with international law?

(5) Does the court cite or give effect to other principles and norms of international law apart from treaties and custom (for example, decisions produced by international organizations or general principles of international law)?

A. The data sample—international law cases, 2002–2012

A Westlaw search of US Supreme Court judgments for the ten years from 2002–2012 using a range of international law search terms produced forty-two relevant results. In other words, allowing for the inevitable subjectivity involved in selection, after excluding all of the results in which

50. There were initially 220 hits, using a variety of search terms including international law, law of nations, treaty, treaties, and convention. Many of these mentioned the term in passing, or in a way that was irrelevant to the case (for example, the mention of international law did not figure in the reasoning of the court, or the term "convention" referred to something other than a treaty), and the forty-two cases in which international law was at least somewhat relevant to the main arguments in the case were selected. The rule to determine relevancy was this: only cases in which international law clearly played some role in the interpretation or application of the law in the decision of the court were selected.
the terms were either used only in passing, were considered irrelevant to the Court's reasoning, or appeared only in dissenting opinions,\textsuperscript{51} there were forty-two judgments in which international law issues featured in the reasoning of the decision.\textsuperscript{52} Seven of these cases concerned the implementation and application of international treaties in US law, six concerned rulings of the International Court of Justice on Vienna Convention on Consular relations issues, another six concerned the laws of war (customary international law as well as treaty) and US habeas corpus issues, four dealt with foreign state immunity, four with jurisdiction and extraterritoriality, one concerned the relevance of international law principles and the Convention against Torture to the issue of refugee return, and there were seven other miscellaneous cases.

In addition to the search for international law cases decided by the Supreme Court, a search was conducted of all of the petitions filed before the Supreme Court that raised a substantial question of international law.\textsuperscript{53} The reason for this extended search was to obtain a better sense of the comparison in the number and types of international law questions being brought before the two courts, given that the Supreme Court's jurisdiction is largely discretionary while the CJEU's is not. The Supreme Court receives approximately $10,000$ petitions for a writ of certiorari each year, and the Court grants and hears oral argument in only about eighty cases. Based on a number of combined database searches, it seems that approximately 223 petitions raising substantive questions of international law came before the Supreme Court, in addition to the forty-two cases the Court decided.\textsuperscript{54} Of the petitions which were denied, approximately half

\textsuperscript{51} References to international law in dissenting opinions have been excluded from the search of US case law just as references to international law in the opinions of Advocates General have been excluded from the search of CJEU case law. This is because the aim of the article is to compare cases in which international law clearly played a relevant role in the interpretation or application of the law in the decision of the court in the case at hand, and this cannot necessarily be said of cases in which international law featured only in the dissenting opinions or the opinions of the Advocate General.

\textsuperscript{52} Cases concerning the relationships between US states, or between the US and Indian tribes which are regulated by treaty, and cases concerning the citation of foreign law, in particular the ECHR, have been also excluded.

\textsuperscript{53} This search was conducted on Bloomberg US Law Week, which reports on all cases filed before the Supreme Court and edits them according to topic and subtopic. The results were cross-checked against a search of Westlaw, which is less useful as a primary search engine for this purpose, since Westlaw does not edit petitions according to topic or provide a summary of questions in the petition or the lower court decision from which the petition arises, making it significantly more difficult to determine which petitions actually raise questions of international law.

\textsuperscript{54} According to a search conducted on Bloomberg US Law Week for the ten-year period 2002–2012, the Supreme Court received 137 petitions for certiorari which raised a substantive international law issue, and it denied the petition in 126 of these cases. For the remaining eleven, six were vacated (to be decided in light of a Supreme Court precedent), four were decided, and one was affirmed. Given the limitations of the Bloomberg database used, these results were cross-checked against a Westlaw database search, which suggested that approximately a further eighty-six petitions involving international law cases were brought to the Supreme Court during this period.
concerned foreign sovereign immunity, and the next three most common sets of issues were questions arising under the Hague Convention on child abduction, questions of torture and ill-treatment, and questions of international humanitarian law.

A search of the EU database for CJEU judgments (not including the General Court, which is the EU court of first instance)\textsuperscript{55} from the last ten years using the same general range of international law search terms (although not identical terms, since the two courts do not use identical language in dealing with international law) produced 124 relevant judgments.\textsuperscript{56} A much larger number of judgments during that period in which some reference was made to international law were excluded from the group of 124 for a range of reasons. First, cases involving the European Convention on Human Rights (ECHR) were not included in the results unless they also referred to some other provisions or principles of international law. The decision to exclude this large batch of cases was based on the very specific nature of the EU's relationship to the ECHR and the CJEU's past practice of citing the ECHR. To include them would have added a significant number of cases to the results, which would arguably skew the general comparison with the US Supreme Court, since that comparison is designed to appraise the general approach of the two Courts to international law. A second large batch of cases which was not included in the results, unless they raised an additional substantive point of international law, was the case-law dealing with EU bilateral association, cooperation, partnership, and trade agreements. These are fairly specific, technical and often repetitive cases dealing with factual issues arising under this particular set of EU agreements, having very little connection with broader or more general international law issues and having no obvious counterpart in US law. Other cases excluded from the search results include cases concerning bilateral conventions between Member States or bilateral tax conventions with third states, the Brussels Convention on Jurisdiction and Recognition of Judgments, the Schengen Implementing Convention, and other frequently occurring agreements concerning highly technical issues such as the 1975 Customs Convention on the international transport of goods under cover of TIR Carnets. Many other judgments, in which international law was mentioned only in passing,

\textsuperscript{55} The bulk of the cases raising international law issues come before the CJEU by means of the preliminary reference procedure, Commission enforcement actions, and opinions on the compatibility with EU law of international agreements. The General Court does not have jurisdiction over any of these cases, but only over direct actions, which are the source of a much smaller set of the international law cases coming before the CJEU on appeal.

\textsuperscript{56} The initial number of hits from a search using the terms international law, customary law, international convention, international treaty, international agreement, customary international law, and covenant, was 839, although some of these were overlapping.
contained insufficient substantive discussion of international law issues to merit inclusion in the survey.

One notable difference between the types of cases heard by the CJEU and the Supreme Court is that the CJEU hears many cases dealing with very specialized and detailed international agreements, such as the International Convention establishing the Harmonized Commodity Description and Coding System, which underscores the daily engagement with international trade and commercial law issues of the EU and the CJEU. However, these technical trade cases certainly do not make up the bulk of the CJEU's rulings on international law matters. On the contrary, the cases decided from 2002 through 2012 concern a wide variety of international agreements and principles, including the Berne Convention on Copyright (concerning protection for artistic and literary works), the Aarhus Convention (concerning access to justice in environmental matters), the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, the Chicago Convention on International Civil Aviation, the Geneva Refugee Convention, the Kyoto Protocol to the UN Framework Convention on Climate Change, the UN Charter, the UN Convention on Illicit Traffic in Narcotic Drugs, the UN Convention on Contracts for the International Sale of Goods, the Trade Related Intellectual Property Rights Agreement, various other World Trade Organization Agreements, various ILO Conventions, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, the Hague Convention on Child Abduction, and a range of EU Association Agreements, amongst many others. Thus, despite the difference in the overall number of cases involving international law coming before the two courts, due to the discretionary treatment of certiorari petitions by the Supreme Court, the fact that the CJEU deals with many more cases involving international commercial law than the Supreme Court, and the fact that the CJEU regularly confronts challenges to Member State action for violation of international law, the two courts also find themselves facing many of the same kinds of legal issues and international law norms.

In the next part, a summary is provided of the findings drawn from the survey of 124 CJEU cases and forty-two Supreme Court cases concerning issues of international law during the ten-year period 2002–2012, organized according to the five questions posed above. These summaries will be followed by a brief qualitative analysis of the information.
B. The approach of the Court of Justice (124 cases):

Q. 1 Has the court accorded treaties primacy or direct effect within the internal legal order?

Out of ninety-eight cases in which the CJEU has dealt with international treaties, the court addressed the direct enforceability, or self-executing nature, of treaty provisions in fourteen cases, and ruled that the treaty provision should be directly enforced in three of these.\(^{57}\) It denied the direct enforceability of treaty provisions in eleven cases.\(^{58}\)

The CJEU dealt with the issue of primacy or supremacy in sixteen cases. While the Court gave effect to the primacy of international treaties over EU secondary legislation in nine of these sixteen cases, it ruled in four of the nine that there was no conflict between the treaty and EU law,\(^{59}\) and in the other five cases, the EU legislation in question had been intended to give effect to the treaty or the law being challenged for incompatibility with the treaty was a member state law.\(^{60}\) In the remainder

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61. Case C-228/06 Soysal v. Germany, 2009 E.C.R. I-1031 (concerning the compatibility of a
of the sixteen cases, the Court recognized the primacy of international treaties in principle but the provision in question was either deemed irrelevant to the case or unsuitable for direct application. In all, therefore, there was no case involving an acknowledged conflict in which the CJEU gave primacy to a treaty over a provision of internal EU law where the internal law had not intended to implement the treaty.

Q.2 What status and effect has the court given to rules and principles of customary international law in the internal/EU legal order?

Customary international law (CIL) was cited by the CJEU in twenty-one cases. In two of these cases, the Court invoked and drew on CIL, concerning principles of state responsibility in the context of loss or damage to property in international air transport on the one hand, and principles of sovereignty over airspace in the context of aviation emissions on the other, to read EU legislation in conformity with CIL. In twelve cases, the Court declared that EU law was already in conformity and in seven cases, the principle of CIL was deemed irrelevant.

Q. 3(i) Does the court defer or pay attention to the interpretation of treaties or custom by the courts of other signatory states?

The CJEU engaged in treaty interpretation in seventy-one cases, which overlap to some extent with the eleven cases in which it referred to the rules on interpretation of international law contained in the Vienna
Convention on the Law of Treaties. In no case did the Court cite or make reference to an interpretation of the treaty in question by the courts of other signatory states.

Q. 3(ii) Does the court defer or pay attention to the interpretation of treaties or custom by international courts and tribunals?

The CJEU referred to decisions of international courts or tribunals in nine cases, three of which were decisions of the International Court of Justice and six of which were rulings of the WTO dispute settlement body.

Q. 4 Did the court construe EU law in accordance with international law (the "harmonious interpretation" principle)?

The CJEU interpreted EU law in the light of international law in fifty-six cases, including international law sources, such as the Arhus Convention; Berne Convention for the Protection of Literary and Artistic Works; Montreal Convention on International Air Carriage; the Geneva Convention for the Protection of Refugees, the TRIPS, GATS, Anti-Dumping, and other WTO agreements; the Convention on the Rights of the Child; the Cartagena Agreement; the Harmonized System (Customs)

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66. See Case C-37/00, Weber v. Universal Ogden Services, 2002 E.C.R. I-2013, ¶ 34; Case C-347/10, Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen, 2012 E.C.R. (following the ruling of the ICJ in the North Sea Continental Shelf cases of 1969 concerning the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea); Case C-326/164, Air Transport Association, supra note 26 (the CJEU draws on the Nicaragua case of the ICJ and the Lotus case of the Permanent Court of International Justice in relation to state sovereignty over airspace and the high seas).


68. The principle of harmonious interpretation in EU law has been articulated many times by the CJEU, and, in the context of international law, it specifies that the EU must respect international law and hence EU law should be interpreted in the light of international law. See, eg., C-286/90, Poulsen v. Diva Navigation, 1992 E.C.R. I-6019, ¶ 9.
Convention; Paris Convention on Industrial Property Protection; a range of bilateral investment treaties; the Vienna Convention on the law of treaties; the Convention on Biological Diversity; and various others. In thirty-seven of these cases, the Court used international law to support its interpretation of a provision of EU law; in the remaining nineteen cases, the Court declared it a requirement in principle for EU law to be construed in harmony with the norm of international law. In many of these nineteen cases, the EU legislation in question made express reference to the provisions of international law, such as the Geneva Refugee Convention, a UN Security Council Resolution, the Aarhus Convention, and the Berne Convention on Copyright, and indicated a legislative intent to comply with or implement the provisions in question. In three of the cases, the Court stated that the principle of harmonious interpretation would not be appropriate if the interpretation in conformity with international law would run counter to the EU law’s object and purpose.

Q.5 Did the court cite other principles and norms of international law apart from treaties and custom?

The CJEU referred to other norms and principles in just twelve out of 124 cases, mostly involving UN Security Council Resolutions, International Civil Aviation Authority Resolutions, and International Labor Organization Conventions. Occasional reference was made to non-binding international law sources, such as the OECD Model Convention on Double Taxation.

69. There may be many other cases involving consistent or harmonious interpretation in which the CJEU does not cite the international law provision, or acknowledge that it is seeking a harmonious interpretation. See, e.g., C-310/06 FTS Int'l, 2007 E.C.R. 1-6749 (described by MENDEZ supra note 7 as an example of “unacknowledged” consistent interpretation or muted dialogue, to use the term of Marco Bronckers, where there is no reference to the WTO or the rulings of its dispute settlement bodies, but it seems clear that these rulings are influencing the judgment of the CJEU). There are also some important cases in which the CJEU insists on the interpretation of national law, rather than EU law, in the light of international agreements, most notably Case C-240/09, Lesoochranárské zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, 2011 E.C.R. 1-1255, in which, having rejected the direct effect of provisions of the Aarhus agreement as part of EU law, the CJEU insisted on the interpretation of national remedial law in accordance with Article 9 (3) of Aarhus.

C. The approach of the US Supreme Court (forty-two cases)\(^1\):

\(Q. 1\) What status and effect has the court given to rules and principles of customary international law in the internal legal order?

Customary international law was cited by the Supreme Court in seven cases. In one case, \textit{Hamdan v. Rumsfeld}, concerning the laws of war, the Court used CIL to inform the interpretation of a US statute and to construe it in conformity with international law.\(^2\) In three cases, the Court declared that US law was already in conformity with custom,\(^3\) and in one case the principle of customary international law concerning the reservation of matters internal to a ship to the authority of the flag state was deemed not to be of relevance.\(^4\)

\(Q. 2(i)\) Does the court defer to or pay attention to the interpretation of treaties or custom by the courts of other signatory states?

The Court interpreted treaties in ten cases and, in four of these, it referred to the interpretation adopted by the courts of other signatory states.\(^5\)

\(Q. 2(ii)\) Does the court defer or pay attention to the interpretation of treaties or custom by international courts and tribunals?

The Court referred to decisions of international courts in seven cases, although in four of these the rulings of the International Court of Justice (ICJ) were said to deserve only "respectful consideration."\(^6\) In three of the seven cases, the Court relied on international rulings—by the ICJ, the

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\(^{1}\) References to international law in dissenting opinions are not counted in the statistics.


\(^{4}\) \textit{Spector}, 545 U.S. at 135-36 (on the applicability of provisions of the Americans with Disabilities Act which might conflict with international legal safety requirements).


\(^{6}\) These were the cases concerning the right to consular notification under the Vienna Convention on Consular Relations. \textit{Torres v. Mullin}, 540 U.S. 1035 (2003); \textit{Sanchez-Llamas v. Oregon}, 548 U.S. 331 (2006); Medellin v Texas 552 U.S. 491 (2008), and \textit{Leal Garcia v. Texas}, 131 S. Ct. 2866 (2011).
Q. 3 Did the court construe domestic law in accordance/harmony with international law (the Charming Betsy\textsuperscript{78} principle)?

The Court construed US law in harmony with international law following the Charming Betsy principle in six cases.\textsuperscript{79} In five of these six cases, the exception being Hamdan, the Court used international law mainly as support for an existing interpretation of US law. In one case, the Supreme Court expressly rejected the appropriateness of using the Charming Betsy principle.\textsuperscript{80}

Q. 4 Did the court cite or give effect to other principles and norms of international law apart from treaties and custom?

The court cited other norms and principles of international law in two cases.\textsuperscript{81}

IV. QUANTITATIVE ANALYSIS

The first point that should be emphasized here is that the options for a proper quantitative analysis are limited, both by the nature and quantity of the data involved. While it is possible to describe and categorize the way international law was used within a case, it is difficult to place this information on an ordinal scale. Further, even if it were possible, the size of the data assembled for the period of ten years is too small for the

\textsuperscript{77} Alaska, 545 U.S. at 89 (citing the ICJ); Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366, 367–68, (2009) (citing the Iran-US Claims Tribunal); Hamdan, 548 U.S. at 610 (citing the ICTY and International Military Tribunal at Nuremberg).

\textsuperscript{78} The Charming Betsy principle, which is derived from the case of Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804), maintains that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”


\textsuperscript{80} “Because we are not deciding that the FSIA bars petitioner’s immunity but rather that the Act does not address the question, we need not determine whether declining to afford immunity to petitioner would be consistent with international law.” Samantar v. Yousef, 560 U.S. 305, 325 n. 14 (2010), (ruling that the Foreign Sovereign Immunities Act does not govern the immunity of individuals, but only of states).

application of the most basic methods of descriptive statistics, and predictive statistics are not feasible.

Nevertheless, despite these statistical limitations, there are some interesting observations to be made on the basis of a straightforward comparison of the two sets of figures. One striking feature of the findings is the roughly similar proportion of judgments of each court from the relevant period in which international law was internalized and applied. This observation should be qualified by the recognition that the forty-two cases decided by the Supreme Court were selected from a much larger range of petitions (approximately 265) raising questions of international law, while the international law cases (excluding the groups of EU-specific cases mentioned at footnote 49) decided by the CJEU within the same period were not selected or filtered by the Court. Nevertheless, the cases chosen for decision by the Supreme Court cover a spectrum of different issues and areas, and they range across controversial political questions, as well as relatively prosaic and fairly technical issues. While there are some clear differences between the kinds of cases decided by each court—for example, the Supreme Court deals with more cases involving the laws of war than the CJEU, and the CJEU deals with many more cases than the Supreme Court involving international trade—the data sample also indicates a broad range of comparable cases arising before each court. This includes cases involving issues of copyright protection under the Berne Convention, child abduction under the Hague Convention, extraterritorial application of antitrust and aviation regulations, the law of the sea governing state sovereignty over land, claims for damages involving accidents during flight under the Warsaw Convention, and refugee claims invoking the Geneva Convention, which allows for a meaningful comparison from the perspective of their approach to the internalization of international law in these groups of cases.

To begin with the status and effect of treaties, there is no significant difference between the proportion of the cases in which the two courts considered and denied the direct judicial enforceability of treaty provisions. For the ECJ, this was in eleven out of fourteen cases, and the cases in which a treaty provision was held to be directly enforceable were ones in which the court found there was no conflict between the treaty provision and the internal EU law, or the provision was being enforced

82. Note, however, that the CJEU, despite the limits on its jurisdiction over issues pertaining to the “common foreign and security policy,” has recently begun to decide some important questions dealing with the laws of war. On the meaning of an “internal armed conflict,” although decided subsequent to the time period studied in this article, see Case C-285/12, Aboubacar Diakitë v. Commissaire général aux réfugiés et aux apatrides, judgment of 30 January 2014.

against a member state. For the Supreme Court, the direct judicial enforceability of a treaty provision was rejected in each of the two cases in which it was raised and where there would have been a conflict between the domestic law in question and the international treaty. As far as the primacy of treaties over legislation is concerned, there is a difference in the number of cases arising before the two courts: the question of the primacy of treaties was accepted in principle by the Supreme Court in two of the sixteen cases involving treaties, although it was not given effect in those cases; while the issue of primacy was raised before the CJEU in sixteen of ninety-eight cases involving treaties, and the Court recognized the primacy of international treaties over EU legislation in nine of these sixteen, although in none of these cases did the court acknowledge a conflict between the treaty and the EU legislation.

The picture is similar as far as customary international law is concerned: there is no significant difference between the proportion of cases in which customary international law was cited (twenty-one out of 124 for the CJEU, and seven out of forty-two for the Supreme Court), nor in the proportion of these cases in which customary law was used to interpret domestic law (2 out of 21 for the ECJ, and 1 out of 7 for the Supreme Court) or the proportion of cases in which domestic law was said to be already in conformity with CIL (12 of 21 for the CJEU and 3 of 7 for the Supreme Court).

The CJEU did not refer in any case to the interpretations of international treaties or international law by the courts of other states, while the Supreme Court did so in four cases. The Supreme Court also cited more frequently to judgments of international courts or tribunals (seven of forty-two for the Supreme Court and nine of 124 for the CJEU).

Finally, as far as the use of the "harmonious interpretation" or "Charming Betsy" principle is concerned, the proportion of international law cases in which this interpretative approach was used by each court is broadly similar. The CJEU construed EU law in harmony with international law in sixteen of 124 cases, used international law to confirm or support its interpretation of EU law in thirty-seven of 124 cases, and it rejected the appropriateness of harmonious interpretation in just three of

85. See supra note 9.
86. See supra notes 63, 73.
88. See supra notes 66, 76, 77.
124 cases. The Supreme Court construed domestic law in the light of international law in six of forty-two cases, using international law to confirm or support its interpretation of domestic law in five of these cases, and it rejected the appropriateness of the Charming Betsy principle in only one case.

V. Qualitative analysis

These numbers are interesting in themselves, even if they do not indicate the context or substantive significance of the various cases involved. Many of the cases dealt with international law issues which were not particularly controversial and attracted little attention beyond those directly interested in the case, while there was a small number of very high-profile cases with significant political stakes. These latter cases deserve closer analysis, not least because they are generally cases in which international law norms are at odds with important domestic laws or policies and hence can be seen as outer-limit test cases for the courts' willingness to enforce compliance with international law. At the same time, as the cases studied above suggest, a more systematic account of the CJEU and the Supreme Court's approach to the internalization of international law for the ten years 2002–2012 surprisingly reveals a picture of the two courts as superficially similar. Nonetheless, to complement the quantitative picture, a more substantive analysis of some of the most salient of the cases is also needed.

A. US Supreme Court

Beginning with the Supreme Court, there are three main clusters of well-known case law within the sample of forty-two. These are the cases dealing with the Vienna Convention on Consular Relations (VCCR), those dealing with the Alien Tort Statute, and a group of post-9/11 cases dealing with the laws of war. The VCCR cases—encompassing a line of rulings from Breard to Sanchez-Llamas and Medellin (including three separate Supreme Court rulings in the Medellin litigation)—probably fit best with the conventional view of the US and its courts as resistant to the acceptance or imposition of international obligations. This is because the Supreme Court in those cases refused to give effect to—and more specifically, to order any remedy for violation by the US of—Article 36 of the Vienna Convention on the right to consular notification for foreign nationals who have been arrested. The Court in Medellin rendered a particularly forceful ruling with respect to whether international treaties

89. See supra note 70.
90. See supra note 42.
could be treated as self-executing, introducing something akin to a strong presumption against self-execution. Further, the Supreme Court decided that domestic courts do not have an obligation to comply with the judgment of the International Court of Justice, which had ruled that the US courts should "review and reconsider" Medellin's case following the violation of his consular notification rights. According to the Supreme Court, this was because the judgments of the ICJ are not self-executing and merely create an obligation on the United States under Article 94 of the UN Charter to comply. This group of Supreme Court rulings reflects a judicial determination to prevent various international law measures—whether the VCCR, the UN Charter, or the rulings of the ICJ—from becoming part of domestic law without unambiguous Congressional action.

Nevertheless, despite the controversy surrounding this line of judgments and the hostile approach to the judicial—or indeed executive—enforcement of international law that they are widely seen to represent, it has also been suggested that the Medellin judgment has been misread by lower courts, and that there is an array of other ways in which international treaties such as the VCCR continue to be enforced before US courts. These include what the authors refer to as "indirect enforcement," "defensive enforcement," and "interpretive enforcement" via the Charming Betsy doctrine. They also note a growing executive practice since the Medellin ruling of attaching declarations of self-execution to treaties, which overcomes the judicial presumption established in that case and opens the way for application of treaties as US law. In other words, the negative impact of the Supreme Court's Medellin decision on the practice of judicial internalization of international law may be less marked than had initially been assumed. Nevertheless, it is clear that the Supreme Court rulings on the VCCR in themselves, however they may be interpreted by lower courts, represent a judicial stance which is distinctly resistant to the internalization of international law.


93. For other commentators who similarly highlight the significance of the Charming Betsy doctrine and even suggest that the distinction between self-executing and non-self-executing treaties is superfluous, see Rebecca Croootof, Note, Judicious Influence: Non-self-executing Treaties and the Charming Betsy Canon, 120 YALE L.J. 1784 (2011); see also Sonia B. Gree, Currency of Law: Customary International Law and the Battle for Same-Sex Marriage in the United States, 14 U. PA. J.L. & SOC. CHANGE 53 (2011).

94. Hathaway, McElroy & Solow, supra note 92, at 98; C. Vázquez, n. 91
The second well-known cluster of Supreme Court cases relevant to the internalization of international law concerns the Alien Tort Statute (ATS). As with the consular relations cases, the Court has been perceived in the alien tort cases to have resisted the integration of international law (and most notably, international human rights law) within US law. Nevertheless, although the cases have significantly limited the extraterritorial scope of the statute and the range of international law norms to which it can be said to refer, the Supreme Court did not reject outright the use of contemporary international law as part of the ATS. While the Court narrowed the scope of the ATS in comparison to the expansive approach adopted in the earlier Filartiga case, it nevertheless confirmed that the 18th century statute could still be used to bring tort actions for violation of customary international law norms, including contemporary international law norms which did not exist and were not contemplated at the time the statute was adopted. The Court's subsequent ruling in Kiobel has since sharply limited the extraterritorial application of the statute, a move which, although unquestionably restricting the human rights impact of the legislation very considerably, is not out of line with international trends requiring some domestic link to ground extraterritorial human rights to civil or criminal jurisdiction. Ultimately, while the Supreme Court clearly set out to limit the reach and scope of the Alien Tort Statute as it had previously been interpreted by the District Court in Filartiga, it did not entirely block the internalization of international law and the Court accepted the integration of modern international law norms as part of the ATS.

The third high-profile group of Supreme Court cases dealing with international law over the decade 2002–2012 concerned the availability of habeas corpus and the extraterritorial extension of constitutional protections in the US conflict against Al Qaeda. In Hamdan, which concerned whether the trial by military commission of a Yemeni national

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97. Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013). For a comparative analysis of domestic regimes of universal criminal jurisdiction, see Maxim6 Langer, The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, 105 AM. J. INT'L L. 1 (2011). For an argument that civil jurisdiction should have a similar reach to criminal jurisdiction, see Brief for The European Commission as Amici Curiae in Support of Neither Party, Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013) (No. 10-1491) (stating "these internationally recognized justifications for universal jurisdiction, although typically articulated in the criminal context, also contemplate and support a civil component where limited, as here, to the circumstances that could give rise to universal criminal jurisdiction."). The brief goes on to cite examples from EU states, which permit victims to file claims for civil compensation within criminal proceedings based on universal jurisdiction.
held in Guantanamo was lawful, the Court ruled that the Uniform Code of Military Justice and the Authorization for the Use of Military Force permitted the President to establish military commissions only where justified under the international laws of war.\textsuperscript{99} The majority of the Court ruled that the procedures established would violate Common Article 3 of the Geneva Conventions, and the plurality of four judges also took the view that Article 75 of Protocol I to the Geneva Convention, which the US had not ratified, was applicable to the US as customary international law. Similarly, in \textit{Hamdi}, the Court invoked and applied the Third Geneva Convention and the “established principle of the law of war that detention may last no longer than active hostilities” to question the legality of the government’s continued detention of a citizen as an “enemy combatant.”\textsuperscript{100}

These groups of cases indicate a range of approaches taken by the Supreme Court with respect to different kinds of international law claims in a variety of high-profile and politicized cases involving international law-based challenges to cogent US interests. They range from firm resistance to the direct enforcement of a ruling of the ICJ in \textit{Medellin}, to a highly circumscribed affirmation of the role of contemporary customary international law as part of the Alien Tort Statute, to the integration of elements of the laws of war into US law in post 9/11 detention cases.

Apart from these three high-profile groups of cases, the Supreme Court issued a range of other interesting, though less widely-known rulings involving international law, in which—as indicated in the quantitative analysis above—the Court interpreted provisions of international treaties, applied the Charming Betsy presumption that domestic law should be read in conformity with international law, and cited the case law of other states’ courts and international tribunals on questions of international treaty and customary law. For instance, in a series of cases on foreign sovereign immunity, the Supreme Court interpreted the Foreign Sovereign Immunities Act as having been intended to codify international law on sovereign immunity as it stood at the time.\textsuperscript{101} In \textit{Golan v. Holder}, the Court applied the Charming Betsy principle to the Berne Convention on Copyright to require the same enhanced copyright protection for foreign

\begin{itemize}
\item \textsuperscript{99} Hamdan, 548 U.S. at 48-72.
\item \textsuperscript{100} Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).
\item \textsuperscript{101} Samantar v. Yousef, 560 U.S. 305, 320 (2010); Permanent Mission of India to the United Nations v. City of New York, 555 U.S. 193, 199 (2007); Republic of Austria v. Altman, 541 U.S. 677 (2004). In Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. at 17 (2009), the Court interpreted the statutory exception to state sovereign immunity introduced by the Terrorism Risk Insurance Act 2002 (TRIA) as having been intended to comply with the government’s international obligations under international law, and specifically under the Algiers Accords.
\end{itemize}
authors as for US authors, and to the UN Convention on Psychotropic Substances when interpreting the Controlled Substances Act and its interaction with the Religious Freedom Restoration Act. The Court applied the 1958 Convention on the Territorial Sea in *Alaska v. US* in order to determine that waters within a juridical bay should be deemed internal waters, applied the 1929 Warsaw Convention on international air transport in *Olympic Airways v. Husain* to deem a death an “accident” within the meaning of the Convention, and looked to the case law of other states’ courts when interpreting the Hague Convention on Child Abduction with respect to whether the right to consent to a child’s state of residence amounts to a custody right in *Abbott*.

Further, the various individual members of the Supreme Court do not each take a consistent stance towards the internalization of international law across cases, but instead adopt various approaches depending on the issue in question. In sum, the approach of the US Supreme Court with regard to the internalization of international law has been far from one-dimensional over the decade 2002–2012, and despite the trenchant judgment in the high-profile *Medellin* case, the overall body of case law concerning international law, including the most salient and politically controversial cases, cannot readily be described as either resistant to or open to the internalization of international norms.

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105. Olympic Airways v. Husain, 540 U.S. 644, 649 (2004) (majority and the dissenting judges disagreeing as to the relevance and underlying factual similarity of the judgments of other jurisdictions, including the UK and Australia, on the meaning of accident under the terms of the Convention).
107. In U.S. v. Santos, 553 U.S. 507 (2008), for example, the majority of the Court chose not to interpret the US statute on money laundering in conformity with the UN Convention against Transnational Organized Crime, but instead interpreted the statute more leniently so as not to convict the defendant in that particular case while the dissenting judges—Justices Alito, Breyer, Kennedy, and Roberts—argued that the domestic statute ought to have been construed so as to comply with the US’s international obligations under the Convention. Similarly, in *Pasquantino v. U.S.*, 544 U.S. 349, 373 (2005), Justices Ginsburg and Breyer dissented from the opinion of the majority which upheld the application of a U.S. criminal prosecution for fraud based on a smuggling scheme to evade Canadian import taxes. In their dissent they argued that this was a case of extraterritorial criminal enforcement, and that the majority in reaching their conclusion had ignored the impact of a tax treaty between Canada and the U.S. See generally, Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT’L L. 273 (2006); Ryan C. Black et al., *Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court’s Use of Transnational Law to Interpret Domestic Doctrine*, GEO. L.J. (2014).
B. The Court of Justice of the European Union

While the CJEU, just as the Supreme Court, has heard many mundane cases involving interpretations and applications of international law, the European Court has also given judgment in a stream of high-profile cases, in particular over the last five years, involving issues such as extraterritorial climate change regulation, UN anti-terrorist sanctions, liability for marine pollution and for violation of international trade rules. It is striking that, in contrast to the embrace of international law by the CJEU in earlier decades described above, several of these more recent cases have displayed a much more cautious approach by the Court to the internalization of international law. Indeed, the cases in which the Court has continued to be receptive to international law in recent years are primarily those in which international law was being enforced against Member State law, rather than EU law.

When the CJEU gave its now-famous Kadi I judgment in 2008, invalidating (at least provisionally) EU regulations that were adopted to implement binding UN Security Council resolutions, most of the reactions to the case by academics and members of the human rights community were positive. The Court’s ruling that international law could not be given effect within the EU legal order if it violated the EU’s basic values and principles, including due process, even if the international law in question was a UN Security Council Resolution or the UN Charter itself, was met with widespread praise. Critical comments from a minority of observers, who were surprised by the strong emphasis in the Court’s judgment on the EU’s constitutional autonomy from the international legal order and the Court’s lack of engagement with international law norms in the case were strongly rebutted by others who applauded the CJEU’s challenge to the Security Council’s lack of due process in its anti-terrorist regime. However, a series of significant rulings by the CJEU, some given

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108. These cases include WTO-related cases such as Joined Cases C-120/06 P and 121/06 P, FIAMM and Others v. Council & Comm’n, 2008 E.C.R. I-6513; Case C-188/07, Commune de Mesquer v. Total France SA, 2007 E.C.R. I-4501[hereinafter Case C-188/07, Commune de Mesquer]; Case C-308/06, Intertanko v. Sec’y of State for Transp., 2008 E.C.R. I-4057; Combined Cases C-402/05 P and C-415/05 P, Kadi v. Council and Comm’n, 2008 E.C.R. I-6351; Case C-326/16, Air Transport Association, supra note 28.

109. For an overview of many of the early academic reactions to the Kadi I ruling, see Sam Poli and Maria Tzanou, The Kadi Rulings: A Survey of the Literature, 28 Y.B. EUR. L. 533 (2008). The CJEU has since given a similar ruling in Kadi II, which was a challenge brought by the same applicant after he was relisted by the UN Security Council Sanctions Committee, and by the EU in turn, immediately following the Kadi I ruling. See Case C-584/10 P, C-593/10 P and C-595/10 P, Commission v Kadi, judgment of 18 July, 2013.


111. See, e.g., PIET EECKHOUT, EU EXTERNAL RELATIONS LAW 414, 2nd Ed., 2012; Joris Larik, Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in
shortly before and others since the Kadi I judgment, have by now lent support to the arguments of the minority that the Kadi case, in addition to having mounted a robust and welcome challenge to the UNSC terrorist listing system, represented an important stage and a change in tone in the Court’s approach to international law.\footnote{112} No longer did the GATT/WTO case law in which the CJEU had persistently denied the direct enforceability of provisions of the GATT and WTO agreements seem like an anomaly to be explained by the peculiarities of the international dispute settlement system established by that regime,\footnote{113} but rather it was to be viewed alongside a series of judgments in which the CJEU has restricted or denied the invocability and enforceability of a range of other international law agreements and norms. In place of the early embrace of international law, which included an automatic incorporation approach to the provisions of international treaties,\footnote{114} as well as an apparently expansive doctrine of the functional succession of the EU to international agreements signed by the Member States,\footnote{115} and a willingness to enforce EU international commitments directly through the judicial process (at least vis-à-vis Member State action), a rather different approach is evident in more recent cases which concern challenges to EU action. Apart from the Kadi ruling, other notable rulings in this vein include Intertanko on the Convention on the Law of the Sea and the Marpol Convention,\footnote{116} Commune de Mesquer on the Convention on Civil Liability for Oil pollution,\footnote{117} the Aviation Emissions case on the Chicago Convention on


\footnote{113}{The leading cases are Case 21-24/72, International Fruit Company v Produktschap voor Groenten en Fruit, 1972 E.C.R 1219 [hereinafter Case 21-24/72, International Fruit Company]; Case C-149/96, Portugal v Council, 1999 E.C.R. I-8395; Case C-280/93, Germany v. Council, 1994 E.C.R. I-4973 (setting out circumstances in which those agreements could be invoked, where the EU had intended to implement them or expressly referred to them in legislation). These have been followed by many others, including Case C-351/04, Ikea Wholesale, 2007 E.C.R. I-7723; Case C-377/02 Van Parys v. BIRB 2005 E.C.R. I-1465; Joined Cases C-120/06 P and 121/06 P, FIAMM and Others v. Council & Comm’n, 2008 E.C.R. I-6513 (on rulings of the WTO dispute settlement system).}

\footnote{114}{Case 181/73, Haegeman v. Belgian State, 1974 E.C.R. 449.}

\footnote{115}{In Case 21-24/72, International Fruit Company, supra note 113, the CJEU articulated a theory of functional succession of the EU (then the EC) to international agreements signed by the Member States.}

\footnote{116}{Case C-308/06, Intertanko v. Secretary of State for Transport, 2008 E.C.R. I-4057. For commentary, see Piet Eckhout, The Queen on the application of Intertanko and Others v. Secretary of State for Transport, judgment of the Court of Justice (Grand Chamber) of 3 June 2008, 46 COMMON MKT. L. REV. 2049 (2009).}

\footnote{117}{Case C-188/07, Commune de Mesquer, supra note 108}
Civil Aviation, and the Kyoto Protocol to the UN Framework Convention on Climate Change.\textsuperscript{118} In a variety of ways, these cases show the Court adopting a more cautious and restrictive approach to the internalization of international law than was evident in its earlier case law.\textsuperscript{119} Greater emphasis is now placed on the constitutional autonomy of the EU,\textsuperscript{120} the doctrine of functional succession of the EU to the international obligations of the Member States is being narrowly interpreted,\textsuperscript{121} and a range of other more stringent conditions on the entry into EU law of international law norms has been set.\textsuperscript{122} In each of these cases (\textit{Kadi, Intertanko, Commune de Mesquer,} and \textit{Aviation Emissions}), the CJEU blocked the application of a range of international treaties, which were being invoked to challenge EU laws.\textsuperscript{123}


\textsuperscript{119} For some of the recent literature commenting on this now undeniable trend in the ECJ’s case law, see the collection of essays in \textit{RAMSES WESSEL & STEVEN BLOCKMANS, BETWEEN AUTONOMY AND DEPENDENCE: THE EU LEGAL ORDER UNDER THE INFLUENCE OF INTERNATIONAL ORGANIZATIONS} (2013), in particular those contributed by Jan Wouters & Jed Odermatt, Jan Willem Van Rossem, and Christina Eeckes. See also the collection of essays in \textit{INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION} (Enzo Cannizzaro et al. eds., 2012) [hereinafter Cannizzaro et. al., \textit{EUROPEAN UNION}] and Jan Klabbers, \textit{The Validity of EU Norms Conflicting with International Obligations}, in id. at 111; Jan Willem Van Rossem, \textit{The EU at Crossroads: A Constitutional Inquiry into the Way International Law is Received Within The EU Legal Order}, in id. at 59; Ramses A. Wessel, \textit{Reconsidering The Relationship Between International Law and EU Law: Towards a Content-based Approach?}, in id. at 7.

\textsuperscript{120} For discussion of the court’s emphasis on the autonomy of EU law, see Bruno de Witte, \textit{European Union Law: How Autonomous is its Legal Order?}, 65 \textit{ZOR} 141, 150 (2010); Jan Willem Van Rossem, \textit{The Autonomy of the EU. More is Less?}, in BETWEEN AUTONOMY AND DEPENDENCE 13 (Ramses A. Wessel & Steven Blockmans, eds., 2013).

\textsuperscript{121} The earlier and apparently flexible doctrine of functional succession articulated in Case 21-24/72, International Fruit Company, \textit{supra} note 113 has since been confined by the Court in Case C-188/07, Commune de Mesquer, \textit{supra} note 108; Case C-301/08 Bogiatzi, \textit{supra} note 70; Case C-326/164, Air Transport Association, \textit{supra} note 28. For a critique of the Court’s narrow approach to the doctrine of functional succession, see Jan Wouters, Jed Odermatt & Thomas Ramopoulos, \textit{Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law} (Leuven Ctr. for Global Governance Studies, Working Paper No. 96, 2012); see also Brian F. Havel & John Q. Mulligan, \textit{The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme}, 37 \textit{AIR & SPACE L.} 3 (2012).

\textsuperscript{122} For a critique of some of these conditions, see Cannizzaro, \textit{supra} note 6, at 35–58; Enzo Cannizzaro, \textit{International Law in the EC Legal Order: The Contribution of the Intertanko Case}, available at http://www.scienzegiuridiche.uniroma1.it/sites/default/files/docenti/cannizzaro/intertanko-case.pdf (last visited Feb. 1, 2014).

\textsuperscript{123} However, in the Aviation Emissions case, Case C-326/164, Air Transport Association, \textit{supra} note 26, the CJEU did allow customary international law and the EU-US Open Skies Agreement to
While these developments do not necessarily support a strong conclusion that the CJEU has become generally resistant to the application or skeptical of the value of international law, they certainly suggest that earlier accounts of EU judicial openness to the enforcement of international law should be significantly qualified. The CJEU has undeniably become more concerned over the past decade with the internal constitutional unity of the EU and the external autonomy of its legal order from the international legal order. Many of the cases decided over the past ten or more years show a court that is careful to protect the room for manoeuver and discretion of the legislative—and indeed the executive—branches (in the case of international trade agreements) of the EU, far more so than of the legislative branches of the Member States, and to protect its own institutional role and autonomy in relation to other international organizations and their rules.

There seem to be a number of different reasons for this evolution. In the first place, the extent to which the EU—and, in turn, the CJEU—engages with international law has grown significantly as the competences and powers of the EU have expanded, and so also has the variety of international norms and their subject matter. The instances in which the Court engages with international law are no longer mainly occasions for the CJEU to insist on the enforcement against the Member States of regional and bilateral trade agreements concluded by the EU, nor are they primarily symbolic occasions to highlight the EU’s open international character as a legal system. Instead, the international law cases coming before the Court have increasingly raised and highlighted tensions between the way in which the EU has approached important public policy issues—whether on climate change, marine pollution or biotechnology—and the treatment of those same issues under other bodies of international law or by other international organizations. Perhaps most crucially, they no longer concern only, or mainly, the enforcement of international law against Member States, but instead also involve challenges to EU legislation for non-compliance with a range of international treaties, such as the UN Convention on the Law of the Sea and the Marpol Convention, the

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125. For a notable case decided after the reference period for the data included in this article, in which the CJEU declared that the provisions of the UN Convention on the Rights of Persons with Disabilities—despite the fact that it is a treaty concerned with the human rights of individuals—did not contain provisions which were unconditional or sufficiently precise to enable them to be used to challenge or assess the validity of the definition of “disability” in EU Directive 2000/78, see Case C-363/12, Z. v. A Gov’t Dep’t, judgment of 18 Mar. 2014, ECLI:EU:C:2014:159, ¶¶ 84–90 (2014), available at http://curia.europa.eu/juris/liste.jsf?num=C-363/12.

126. See MENDEZ, supra note 7.
International Civil Aviation Convention, the Warsaw Convention on International Air Carriage, the UN Convention on Biological Diversity and the Kyoto Protocol to the UN Framework Convention on Climate Change, and customary international law norms. In many of these cases in which the Court prevents the successful invocation of international norms, we see that its reasoning reflects and supports the submissions made by the EU institutions and sometimes Member States intervening in the litigation.\footnote{127}{For a more detailed analysis of the influence of Member State and EU institutions' submissions to the court, see id. chs. IV–VI. See also supra note 21.}

In the second place, the Court's preoccupation during the first few decades of the EU's existence was with strengthening the internal constitutional system and emphasizing the primacy of EU law over national law. Apart from its famous line of case-law, beginning with \textit{ERTA},\footnote{128}{Case 22/70, Comm'n v. Council (ERTA), E.C.R. 263 (1971).} affirming the external law-making competences of the EU, the Court paid significantly less attention to the relationship between EU law and international law than to the relationship between EU law and national law. Nevertheless when it did turn to the relationship between EU and international law, the terms of its rulings, many of which concerned the enforcement of international agreements against Member States, suggested a broadly monist and hierarchical conception of this relationship.\footnote{129}{See Cannizzaro, supra note 6; Kuijper, supra note 6.} The picture of the EU and its legal system, which the Court seemed to be shaping in the first four decades of its existence, was of a "new legal order" of constitutional law on the internal level, with a clear primacy of EU law over national law, but an open and internationalist legal order on the external level, with primacy of international law and international agreements signed by the EU over EU legislation and Member State legislation. Since that time, however, it seems that the expansion of the activities of the EU, and the expansion and growth of its international engagement in recent decades in particular, have led the Court to rethink and revise aspects of this picture. The stream of case law dealing with international law over the past decade or more, much of which concerns international-law-based challenges to EU legislation and action, reflects a more cautious and qualified embrace of international law, and a more robust and pronounced emphasis on the constitutional autonomy of the EU vis-à-vis the international legal order.

\section*{VI. Commonalities and Differences}

Perhaps unsurprisingly, a comparison of the approaches of the US Supreme Court and the CJEU towards the internalization of international law...
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law between the years 2002–2012 reveals a significantly more nuanced picture than conventional assumptions of a skeptical Supreme Court and an internationalist EU Court might suggest.

A. Commonalities in the approaches of the two courts:

In the first place, as detailed above, even though the number of cases dealing with significant questions of international law decided by each of the two courts during that period was very different, in view of the Supreme Court’s control over its docket, both courts in fact chose to internalize international law norms—treaty provisions as well as customary norms, and by interpretative reconciliation much more than by direct enforcement—in roughly the same proportion of the international law cases they heard.\footnote{130}

Secondly, the Supreme Court has not consistently resisted or blocked the internalization of international law and cannot accurately be described as wholly skeptical towards the application of international law as part of US law. While it has unquestionably introduced a strong presumption against the self-executing nature of treaties and has deemed the rulings of the International Court of Justice not to be binding on US courts or states, the Supreme Court has also cited and used international law to influence some aspect of a case quite regularly in situations not involving a direct challenge to US law or policy. However, just as the CJEU has done, the Supreme Court has generally resisted and blocked the internalization of an international norm where it is being used to mount a challenge to US law or policy. Both courts, in other words, have regularly protected their legislature from challenges based on international law.

Thirdly, the approach of the CJEU has changed in recent years from its earlier, exceptionally open approach, which treated international law as presumptively an integral part of EU law and enjoying primacy—at least in principle—over EU legislation, to a considerably more cautious and conditional approach, except in cases in which it is enforcing international law against Member States. Further, unlike the US Supreme Court, which occasionally cites the judgments of other national courts, the CJEU never does so—neither the courts of states within or outside the EU—and only rarely cites the judgments of international courts.

\footnote{130. It should be said that, although the Supreme Court has excluded many potentially important and interesting international law cases by denying certiorari, it does not follow that the comparison undertaken here between the approaches of the CJEU and Supreme Court over a given ten-year period is therefore inapposite. On the contrary, approximately half of the international law cases the Supreme Court has refused to hear concerned the Foreign Sovereign Immunities Act, many of which raised fairly routine questions, and at the same time the Supreme Court granted certiorari in a range of highly controversial and politicized cases involving, \textit{inter alia}, the laws of war.}
To that extent, we can certainly say that the contrast between the approaches of the two courts toward the internalization of international law has been exaggerated, and that far from the Supreme Court being the skeptical judicial arm of an internationally exceptionalist United States and the CJEU being the embracing judicial arm of an open and internationalist European Union, there are many more commonalities between the approaches of the two courts than the conventional depiction acknowledges.

B. Differences in the Approaches of the Two Courts

Nonetheless, there are unquestionably differences between the ways in which the two courts engage with and internalize international law within their respective domestic orders. In particular, the language and reasoning used by the courts to reach their respective conclusions about the role and applicability of international law is quite different. Even while it has imposed a set of conditions for the reception of international treaties, including those concluded by the EU and by the Member States, into the EU legal order, the European Court nevertheless has continued to declare that international treaties concluded by the EU or to which the EU has succeeded are “an integral part” of EU law. Further, customary international law is more and more frequently interpreted and applied by the Court as an “integral part” of EU law. Finally, the CJEU, unlike the US Supreme Court, plays a role in insisting on the enforcement by the member states (as opposed to the EU itself) of international agreements entered by the EU.

The language of the US Supreme Court, by comparison, is much more qualified. The Supreme Court does not describe international law as an integral part of US law, despite the language of Article VI of the US Constitution. Even in cases such as Hamdan, which by comparison with Medellin, has been seen as a strong contemporary example of the Supreme Court’s openness to the application of international law, the language of the majority opinion justifies the relevance of international humanitarian law to the case by focusing on the intention of Congress, in enacting

131. Of course, the one treaty to which the EU had unequivocally succeeded, the General Agreement on Trade and Tariffs, was not in fact treated by the EU as integral part of EU law, Case C-21-24/72, International Fruit Co. v Produktschap voor Groenten en Fruit, E.C.R. 1219 (1972).


Article 21 of the Uniform Code of Military Justice, "that the President and those under his command should comply with the laws of war."134 The Supreme Court, much more consistently and overtly than the CJEU, has opposed the application of an international law norm or decision as part of domestic law in the absence of implicit or explicit domestic legislative approval.

Similarly, while the Charming Betsy principle is presented by the Supreme Court as a canon of statutory interpretation reflecting the assumed intention of the legislature not to violate international law, the principle of harmonious interpretation of EU law in the light of international law is said by the CJEU to follow from the primacy of international law over EU legislation135 and, more generally, from the obligation of the EU to respect international law in the exercise of its powers.136 The Supreme Court thus links the internalization of international law to congressional intent, whereas the CJEU links it to a broader obligation on the EU (an obligation introduced by the European Court) to comply with international law. The Supreme Court's judicial discourse on the internalization of international law hence fits with a political discourse on US sovereignty and independence within which international law is understood as a voluntarily accepted instrument of US law and policy,137 while the CJEU's fits with an official EU discourse of the EU as a committed adherent to and promoter of international law and multilateralism.138

Apart from these differences in judicial discourse and the self-understandings of the two polities, it has also been suggested that there is a difference between the US court's exclusion of international law to protect state prerogatives in criminal justice in the Medellin line of case law, and the CJEU's exclusion of international law to protect EU legislative powers in various cases. Thus in rulings such as Intertanko and the Aviation Emissions case, the CJEU blocked the application of international norms to facilitate the EU legislature in pressing for higher anti-pollution standards than the international lowest common denominator,139 while in targeted

134. Hamdan, 538 U.S. at 593.
138. See supra notes 33 and accompanying text.
139. See Joanne Scott & Lavanya Rajamani, EU Climate Change Unilateralism, 23 EUR. J. INT'L L. 469 (2012) (suggesting that the CJEU may be adopting a more resistant approach towards certain international legal rules and institutions with a view to promoting more multilateralism and ultimately
sanctions cases such as Kadi, the CJEU was seeking to protect due process standards against repressive international executive action in the form of a Security Council resolution. According to this argument, the CJEU, while resisting the internalization of certain international law norms, is in fact supporting the EU legislature's efforts to develop international law in a different direction, whereas the Supreme Court's exclusion of international law is rarely prompted by its desire to support or promote international initiatives by the US Congress or executive branch. Yet while there is some force to this argument as far as certain rulings of the European Court are concerned, there are various other rulings, including the WTO cases, which cannot so easily be explained in this way, and in which the CJEU resisted the internalization of international law for similar reasons to those presumably animating many of the Supreme Court's rulings, for example, to protect the EU's legislative freedom to pursue its economic or other domestic interests, or to preserve the constitutional autonomy of the Court or other EU institutions.

CONCLUSION

One hypothesis that might be advanced in light of the findings of this article is that these similarities reflect the beginnings of a predictable convergence between the path recently taken by the CJEU and that of the US Supreme Court at a much earlier time in its history. In other words, the European Court, as the highest court of a relatively young quasi-federal system, may simply be making an inevitable move away from the initial openness to international law of a new and weak legal and political system towards a more robust assertion of its constitutional autonomy and a significantly more conditional treatment of the place of international law. There is no doubt that the discourse and approach of the CJEU has changed over time and that some of the major cases of the last decade or so suggest that the European Court is as much concerned about the constitutional autonomy and authority of EU law and of the Court itself as it is about the openness of the EU system to the international legal order and the enforcement of international law as EU law. In this sense it has come closer than it was in the first decades of European integration to the position of the US Supreme Court in protecting US sovereignty and to developing stronger international law norms).

140. See, e.g., Ramses A. Wessel, Reconsidering the Relationship Between International Law and EU Law: Towards a Content-Based Approach?, in INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION 7 (Cannizzaro et al. eds., 2012).
141. See supra note 113.
142. For an account, see INTERNATIONAL LAW IN THE U.S. SUPREME COURT, supra note 11.
the democratic authority of the legislature to determine whether any particular provision of international law should be treated as US law.

Does this suggest that the CJEU is destined to follow the Supreme Court down the path of robust assertion of the external sovereignty of the polity from the international legal order and to condition the entry of international law into the EU constitutional system increasingly on the will of the legislature? For now, the answer seems to be in the negative. This is partly because, despite the European Court’s ever more vocal assertion of the constitutional autonomy of the European Union from the international legal order, the EU nevertheless remains quite a different and much less politically unified entity than the United States. Not only do the member states of the EU retain significant powers in international relations, but the EU remains very much an international organization in its relations with the outside world, even while in its internal dimensions it operates as a quasi-federal political system. Perhaps more importantly, the answer is negative because the EU continues to assert and project quite a different image of itself as an international actor than the US does, emphasizing its commitment to multilateralism and to the international rule of law, and the rulings of the European Court, for all their conditionality towards international law in recent years, clearly reflect the Court’s awareness of this image and role. What seems evident, however, is that the early decades of enthusiastic internalization of international law by the European Court, underpinned by an assumed hierarchy of international law over EU legislation, will increasingly be tempered by greater caution about the domestic role and applicability of international law. The Court’s interest in enforcing international law against the Member States and in showcasing the EU’s status as a model international actor committed to collective international action, rather than robust self-interest, has more recently been eclipsed, although certainly not eliminated, by its interest in asserting the constitutional authority and autonomy of EU law. And while this development highlights certain parallels in the trajectory of the CJEU and that of the US Supreme Court with regard to their approaches to the internalization of international law, the differences in the discourse of the two courts—and of the political systems of which

143. See, e.g., Jan Wouters, Jed Odermatt & Thomas Ramopoulos, The Status Of The European Union at the United Nations after the General Assembly Resolution of 3 May 2011 (Leuven Ctr. for Global Governance Studies, July 2011) available at http://ghum.kuleuven.be/ggs/publications/opinions/opinions10_wouters_odermatt_ramopoulos.pdf (describing the resistance encountered by the EU in its attempt to gain enhanced observer status at the UN General Assembly). 144. For an example of official representations of the EU’s internationalist character and orientation, see the recent European Parliament Resolution and Report on the EU as a Global Actor: Its Role in Multilateral Organizations, A7-0181 (2011). For the CJEU’s reflection of this orientation, see its assertion that the EU is bound by international law and that the powers of the EU institutions are constrained by it. Supra notes 135-136.
they are part—about the place of international law and the source of its authority within domestic law, indicate that a simplistic convergence narrative would be misleading. Rather, the CJEU, like the European Union system of which it is a part, seems engaged in the difficult task of trying to shape a distinctive relationship between the European legal order and the international legal order, which is neither one of simple hierarchy nor one that prioritizes political sovereignty and independence, but one that acknowledges the unique place of international law within EU law and of the EU within the international legal order. It remains to be seen whether such a distinctive intermediate path can successfully be shaped.