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Abstract:

International law principles enable a rationalisation of the values to which the Union order aspires as a collective political and legal commitment amongst the Member States. The doctrine of Union law supremacy, which parallels that of international law supremacy, emphasises the overriding character of Union legal demands as a set of values and objectives over those of purely domestic origin. A common view that the Union legal order is sui generis or municipal in character fails to explain the directing character of the values underlying the Union project including its legal order.

In this article I therefore explore and defend the view that the Union legal order is essentially one of international law. A central contention in this regard is that the supremacy of Union law obligations within the Member States is based on the principle of the supremacy of international law obligations over those originating in the domestic arena. The intensive rationalisation of this principle by the Court of Justice within its case law manages the intrusive domestic legal effects of the values and ideals found in the Union Treaties and illustrates the evolutionary character of the Union project.

Essay

EUROPEAN UNION LAW AS INTERNATIONAL LAW

Timothy Moorhead*

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1. Introduction

The potential conflicts and collisions of systems that can in principle occur as between Community and Member States do not occur in a legal vacuum, but in a space to which international law is also relevant.¹

I will explore two strands of inquiry in this article. The first concerns an interrogation of the proposition that the activities of the Court of Justice form an expression of the doctrine of the supremacy of international over domestic legal rules. This doctrine has traditionally been subject to a number of qualifications peculiar to individual States, relating for example to the ability of a later domestic legislative provision to set aside an earlier conflicting rule of international law.² In the Union setting however, qualifications associated with the doctrine have gradually diminished within Member States. These developments have been paralleled by an increase in the reach and influence of the supremacy doctrine where Union as opposed to 'traditional' international law demands are concerned. The 'strength in depth' of the [Union supremacy] doctrine is evident in relation to the variety of legal effects that have emerged within the Court's judgments in relation to Union laws, the broadening of conditions relating to the 'justiciability' of Union legal rules and finally concerning the location of jurisdictional authority to decide upon the scope of the doctrine which arguably now lies *de jure* and *de facto* with the Court of Justice.

A second strand of inquiry concerns a counter-intuitive feature of the defended international law character of Union legal ordering. Notwithstanding the Court's apparently complex and expansive development of the supremacy doctrine giving effect to the legal demands of the Treaties, the Court of Justice has in fact adopted a restrictive approach to their articulation. The reason for this is that the values or objectives of the Union are open-ended. They are therefore subject to a medium or long-term process of realisation that takes place within a shifting and often charged political environment. As a result, the Court has consistently qualified and 'managed' the legal potential of the objectives set out in the Treaties so as to ensure the continued viability of Union legal demands within the Member States and hence that of the entire Union project.³

The article will be structured as follows. I will consider first arguments for and against the international law character of the Union order, affirming the former position. Next, I will attempt to show that Union law, while rooted in the principles and practices associated with international law, represents a significant evolution of these principles. This is evident both in relation to the removal of qualifications previously applicable to international law effects in the domestic setting as well as in the location of the jurisdictional authority to determine these effects. Finally, I will consider how and why, notwithstanding these developments, the Court of Justice – and hence domestic courts when applying Union legal demands – have in fact adopted a markedly restrained approach towards their articulation given the profound political implications of a 'fully integrated' Europe mandated under the Treaties as a matter of international law.

¹ N MacCormick, *Questioning Sovereignty* (Oxford University Press, Oxford 1999) 120.

² The *lex posteriori derogat lex priori* principle, whose application (and rejection by the Court of Justice) in the context of a Union law demand was considered in *Case 106/77 Italian Finance Administration v Simmenthal* [1978] ECR 629.

³ For example by limiting the circumstances in which direct effects may arise.

2. THE UNION: INTERNATIONAL, SUI GENERIS OR MUNICIPAL TYPE OF LEGAL ORDER?

The prevailing view concerning the nature of the European Union legal order is that it is *sui generis* in character given the institutional characteristics it shares with both international and municipal orders.⁴ According to this view, it is said that the extensive regulatory scope, legislative and adjudicatory independence and rule of law character of the Union order all indicate its unique character which represents a departure from ordinary principles of international law. It is generally agreed that the *origins* of the European Union (originally the European Communities) are to be found in public international law.⁵ However, the international law basis of the Union as a dynamic, evolutionary body of 'governmental' institutional practices has been called into question by both the Court of Justice and academic commentators. In its *Van Gend en Loos* judgment the Court refers to the Union as a *new* type of international legal order.⁶ Similar positions have been taken by Member State courts.⁷ Academics have also sought to distinguish Union from international law, focussing upon the alleged constitutionalisation of Union legal demands. As Weiler notes,

[m]ost commentators focus on the legal doctrines of supremacy of European law, the direct effect of European law, implied powers and pre-emption, and on the evolution of the protection of fundamental human rights as hallmarks of this "constitutionalisation".⁸

Weiler himself questions whether the distinction between international and constitutional legal ordering is a relevant one, suggesting instead that:

[a]ssuming the distinction between an international and a constitutional order makes any sense at all . . . we would prefer to focus on the following features that distinguish the European legal order from public international law: the different hermeneutics of the European order, its system of compliance, which renders European law in effect a transnational form of "higher law" supported by enforceable judicial review, as well as the removal of traditional forms of state responsibility from the system.⁹

⁴ See for example J H H Weiler and U R Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass' (1996) 37 *Harv.Int'l L.J.* 411.

⁵ '[t]he origins, powers and objectives of the three Communities are all to be found in international treaties.' J F McMahon, 'The Court of the European Communities: Judicial Interpretation and International Organisation' (1961) 37 *Brit.YB Int'l L* 320, 329. Weiler and Haltern have noted that, '[t]here is no doubt that the European legal order started its life as an international organisation in the traditional sense, even if it had some unique features from its inception.' J H H Weiler and U R Haltern (n 5) 419.

⁶ The Court stated in its *Van Gend en Loos* judgment that 'The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.' Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁷ For domestic cases that have affirmed the *sui generis* character of the Union legal order, see J H H Weiler and U R Haltern (n 5) 421.

⁸ J H H Weiler and U R Haltern (n 5) 411, 420 citing G F Mancini, 'The Making of a Constitution for Europe' (1989) 26 *CMLR* 595 and E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 73 *AJIL* 1.

⁹ *Ibid.*

A further consideration militating against the international law character of the Union order is its 'governmental' institutional framework and associated conferred powers. In this regard, the Treaties provide for a supranational institutional framework empowered to both legislate and provide legally binding adjudication¹⁰ in relation to the various economic and social objectives they contain. The institutional practices of the Union moreover directly impact on individuals' rights and obligations within the domestic arena. Accordingly, Mark Jones notes that,

. . . there are two relevant, fundamental distinctions between the objectives of Community Law and those of more traditional international law. First, the legal position of individuals is modified not just by the Treaties themselves, but also by the exercise of *governmental powers* conferred upon the Community institutions by the Treaties. Second, the Treaties and the powers they confer are concerned with modifying the legal position of individuals over an extremely wide range of economic and social activities.¹¹

Weiler also highlights the Union's institutional structure as being characterised not by ' . . . general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter (the Treaties) and constitutional principles.'¹² Do then these features of the Union legal order noted by Weiler and Jones undermine the claim that the jurisdiction conferred under the Treaties can be understood in terms of international law principles? In short, does the directly applicable and supreme character of Union laws, its governmental institutional framework, wide ranging jurisdiction, and claimed rule of law basis underline its *sui generis* or even municipal law character? I will contend that these features do not in fact compromise the Union orders' essentially international law basis.

3. THE UNION AS INTERNATIONAL LEGAL ORDER

The claim defended is that the Union order is properly understood as a species of international law notwithstanding its developed institutional structure and extensive jurisdictional scope. The intrusive nature of the Union legal order within Member State jurisdictions does not require any departure from established international law principles. The supremacy of Member States' legal obligations arising as a matter of international law, can fully explain the domestic legal effects of Union laws and hence the relationship between Union and domestic legal orders. To make out these claims requires that I counter the arguments raised above – concerning the supremacy and direct applicability of Union laws on the one hand and the sophisticated governmental institutional framework underlying Union governance on the other – and offer a credible affirmation of its international law quality. Dealing with each of these points in turn.

First, the *sui generis* character of the Union legal order is attributed to the supremacy and direct effect doctrines which relate in turn to the overriding character of Union over domestic legal demands and the ability of individuals to rely upon or invoke Union legal demands before domestic courts. Do these features however actually represent a departure from established international law principles? For Spiermann,

¹⁰ Arts 267 and 258 TFEU.

¹¹ M L Jones, 'The Legal Nature Of The European Community: A Jurisprudential Analysis Using H L A Hart's Model of Law and A Legal System' (1984) 17 Cornell Int'l L.J. 1, 28 (emphasis in original).

¹² J H H Weiler, 'The Transformation of Europe' (1991) 100 Yale L.J. 2403, 2407.

‘There is however no doubt that under international law, a national court, being an organ of the State, is obliged to reach decisions that are in accordance with the international obligations of the State . . .’¹³ furthermore, ‘. . . in modern international law, interests in the subject matter governed by a rule normally breed rights (to lay claims and bring actions) on the basis of the rule, also for individuals.’¹⁴

The fact that domestic courts are bound in effect to uphold Union laws and that these laws are capable of modifying the legal rights or obligations of individuals before domestic courts does not of itself represent a principled departure from international law principles. It may be replied to this that while the ‘defining’ legal doctrines, of Union law supremacy and direct effect, are entirely familiar to international law, their expansive character within the Union setting does in fact represent a significant advance in jurisdictional authority associated with international law regimes. This is correct; however, the expansive character of the Union jurisdiction does not however of itself compromise the Union’s international law pedigree unless we can find a principled justification of the distinction between municipal and international jurisdictions based upon the extent of jurisdictional authority alone. Given that there is no inherent limitation on either the scope or subject matter of international law agreements, such a justification for maintaining a principled distinction between the Union order and international law is likely to fail.

Does then the Union’s governmental institutional character suggest the *sui generis* character of its legal order? In terms of the ability of domestic institutions to control or manage Union institutional demands, these demands are far-reaching by comparison with those arising under international law treaties generally. In addition, it is correct to say that the scope and claimed rule of law basis of these demands does represent a serious challenge to the jurisdictional claims of domestic orders. Finally, the ability to authoritatively interpret the substantive meanings of the Treaties being vested in a supranational judicial institution¹⁵, the Court of Justice, is arguably a departure from the historically accepted prerogative of domestic executive or judicial branches of signatory states to do so.¹⁶ These features once again do not in my view undermine the Union’s international law pedigree, for the following reasons.

Any claim as to the ‘distinctiveness’ of the Union order as a result of its ‘governmental’ institutional structure including legislative, executive¹⁷ and

¹³ O Spiermann, ‘The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order’ (1999) 10 EJIL 763, 770.

¹⁴ Ibid.

¹⁵ Although recourse to international tribunals is now more common in relation to individual Treaty agreements. See for example the remit of the WTO tribunals to provide authoritative rulings on the GATT agreements.

¹⁶ So for example, in relation to practices of US courts, Morgenstern has noted that, ‘[...] a treaty, as part of the law of the land can be interpreted by the courts, but great weight will be given to the view of the executive.’ F Morgenstern, ‘Judicial Practice and the Supremacy of International Law’ (1950) 27 Brit.YB Int’l L. 42, 79. The view that within the domestic setting, it is the executive as opposed to the judicial branch that may provide authoritative rulings on a Treaty’s meaning has however been called into question by the European Court of Human Rights judgment in *Chevol v France*, 2003-III Eur. Ct. H.R. 159 where it was held that the determination of rights arising under public international law must, in order to comply with fundamental procedural guarantees contained in Article 6 of the European Convention on Human Rights, be made by the judicial as opposed to executive branches of States.

¹⁷ The executive activities of the Union are shared by the Commission, which is the dominant institution in this regard, and the Council of Ministers.

adjudicatory branches does not mean that its international law character is somehow altered. This would require acceptance of the proposition that, at a certain degree of institutional complexity, an international legal order loses its character as such. This proposition however confuses the core characteristics of international legal order with those of legal orders generally. The distinguishing features of international legal orders are a focus on the achievement of specific objectives or a commitment to the realisation of more broadly drawn social welfare outcomes within a limited jurisdictional sphere or a combination of both possibilities, by a number of cooperating States by way of Treaty agreements.

Legal orders as a generic category are evidenced by the existence of an institutional governmental framework operating in legislative, executive and judicial capacities and governed by values associated with the rule of law. To the extent that an institutional order possesses these features, it will be regarded as a 'developed' legal order. The fact that an international legal order which by definition pursues specified and jurisdictionally contained objectives, does so by means of an institutional framework which shares features with developed, rule of law legal orders does not mean that it has departed from its international law basis. The Union order involves institutional practices collectively directed to the achievement of the objectives contained in the Union Treaties. These are the establishment of the common market and the gradual harmonisation of the social and economic policies of the Member States under the overall rubric of closer European integration. The fact that these objectives are supported by complex institutional structures governed by rule of law principles certainly gives an impression of a municipal-type order. However this can be seen as evidence of the extent to which the Member States have been willing to obligate themselves *as a matter of international law* to the realisation of these objectives.

Next, it is fully in accordance with international law principles that a supranational institution in the Court of Justice and not domestic constitutional courts should possess authority to adjudicate on the substance, status and scope of Union law obligations. Member States may not agree with the results where this extends Union legal demands beyond what they see as the competences conferred by the Treaties. However, there is no doubt that as a matter of international law, this is precisely the institutional role conferred on the Court by the Treaties. As Weiler notes, ' . . . the European Court, in adopting its position on judicial *Kompetenz Kompetenz*, was not following any constitutional foundation but rather an orthodox international law rationale.'¹⁸ Moreover, domestic courts have on the whole recognised the final authority of the Court of Justice to rule on the legal demands arising under the Treaties, thereby accepting the supreme character of the body of Union obligations and rights in accordance with the principle of international law supremacy.¹⁹

¹⁸ J H H Weiler and U R Haltern (n 5) 411, 415.

¹⁹ In Hartian terms, the recognition of the various international law features of the Union order – Union law supremacy and direct effects as well as the authority of the Court of Justice as the final arbiter of the scope, meaning and legal effects of Union legal norms – has emerged as a Rule of Recognition within Member State legal orders. See Jones, 'The Legal Nature of the European Community'. Interpretations of the effects of Union laws by the Court of Justice will apply as binding legal authority across all the Member States, see the Advocate General's opinion in Cases C-10/97 *Ministero delle Finanze v IN.CO.GE. '90 Srl* [1998] ECR I-6307.

Finally, the fact that the Union possesses legislative competence in relation to the matters set out in the Treaties does not support an argument that the Union is closer to a municipal or *sui generis* order than one of international law *simpliciter*. The fact that the Union may enact directly applicable laws that (as such) take automatic effect within the Member States undoubtedly represents a significant advance upon the ability of international law norms to take domestic legal effects. In this regard, the Treaties transfer legislative authority to the institutions created under the Treaties themselves in order to achieve the aims they contain. We may accordingly assume that the Member States are empowered as a matter of international law to confer this authority. It is counter-intuitive to suppose that the resulting obligations arising as a matter of Union legislation, and equivalent in status to the Treaty articles as far as domestic orders are concerned, are not themselves norms of international law.²⁰ The legislative competences of the Union rather evidence a supranational competence to create legal obligations that possess the character of international law. That is, they are supreme over all aspects of domestic legal ordering and operate in the service of the ideals or objectives found in the Treaties.

To sum up, the allegedly municipal features of the Union legal order identified by Weiler and Jones *inter alia* do not represent a principled departure from the international law character of the Union. Any principled distinction between international and municipal law does not rely on the presence or otherwise of developed institutional structures. Nor does it depend on whether institutions created under international agreements possess sovereign powers transferred from domestic jurisdictions beyond some (un)defined level. Nor finally does the distinction depend on the scope or status of legal effects promulgated and adjudicated upon by supranational institutions. The key elements of an international legal order are that all legal demands arising thereunder prevail over all domestic regulation and directed to the achievement of defined objectives set out in Treaty agreements among a collectivity of States, including the possibility of the independent institutional promotion of these objectives through the exercise of conferred powers. At this point, the question remains however as to whether the expansive character of the Union's legal jurisdiction adds something to our understanding of the operation of international law and specifically of the role of supranational courts charged with determining the legal effects of a highly intrusive international law jurisdiction.

4. THE EXPANSIVE CHARACTER OF THE UNION'S INTERNATIONAL LAW JURISDICTION

The Court of Justice possesses competence under the Treaties and hence as a matter of international law to ensure that ' . . . in the interpretation and application of the Treaties the law is observed'²¹ The Court therefore determines the status and scope

²⁰ In this respect, Weiler's contention in relation to the direct effects of Union laws that these '[...] reversed the normal presumption of public international law [that] . . . if the state fails to bestow the rights [conferred by Treaty], the individual cannot invoke the international obligation, unless internal constitutional or statutory law, to which public international law is indifferent, provides for such a remedy' is contradictory. If internal law were entirely independent of international law then it could not possibly allow the invocation of international law obligations before domestic courts unless these are said to operate as two wholly independent and distinct jurisdictions. This is plainly not the case. Indeed it is the very incorporation of Union law obligations within domestic orders that underlies the viability of the Union's legal jurisdiction. J H H Weiler, 'The Transformation of Europe' (1991) 100 Yale L.J. 2403, 2413-2414.

²¹ Art 19 TEU.

of the legal obligations that flow from the application of Union laws and hence the legal effects deriving from the doctrine of Union law supremacy. The Court's institutional role conferred under the Treaties represents a significant transfer of jurisdictional authority, previously associated with domestic courts, to determine the legal effects of international law norms. This jurisdictional transfer has been 'reflected back' to domestic courts, with the Court counter-intuitively *increasing* the authority of domestic courts by enabling them to act as de facto 'Union courts' thereby exercising a constitutional power of review over all norms of domestic origin in light of all Union law requirements.²²

In seeking to promote the substantive aims and objectives found in the Treaties, and in according these a supreme status over domestic law, the Court self-evidently acts as an international tribunal. In this regard, a feature of the Treaties that has allowed the development of a nuanced and hence viable portrayal of the supremacy doctrine by the Court of Justice is that the Treaties contain a combination of aspirational objectives relating to European integration and precise or 'hard' legal rights and obligations designed to put these aspirations into effect. This has allowed the affirmation of a regulatory framework within the Member States that factually supports the Union's underlying integrationist values while at the same time permitting these values to possess a direct legal influence as interpretive authority over all areas of legal regulation that possess a connection with the Treaty objectives. This brings us to closer consideration of the legal effects taken by Union legal rules.

4.1 Justiciability Factors I: The Legal Effects of Union Norms

The legal effects taken by Union norms within the Member States depend on a number of factors, some of which, for example in relation to issues of justiciability also apply in the determination of the legal effects of laws of domestic origin. These factors may be summarised as follows. The first is whether a legal standard concerns subject matter that is *suitable* for judicial determination, a test of institutional suitability. This includes the questions of the legislator's intent (the Member States where the Union Treaties are concerned), the subject matter under consideration (which subjects are properly the subject of judicial as opposed to executive or legislative determination), as well as broader issues relating to the role of the judiciary in a rule of law system of governance.²³ Second, whether a measure provides sufficient linguistic certainty (in identifying legal rights or obligations), the test of linguistic suitability. Third, whether further implementing measures are needed in order to put a measure into effect, the test of (un)conditionality.²⁴ In each of these areas, a single, definitive test is impossible to identify. What may be

²² R v Secretary of State for Transport ex p Factortame [1989] 2 CMLR 353.

²³ A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (The Bobbs-Merrill Company, Inc. Indianapolis, New York, 1962).

²⁴ These factors are equally applicable in the domestic setting regarding the suitability of domestic norms for judicial application. Carlos Vazquez has noted therefore that '[t]hese questions are not unique to treaties. The lack of "judicially discoverable and manageable standards" is often cited as bearing on whether statutory or constitutional provisions are judicially enforceable.' C Vazquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 AJIL 695, 714 (footnote omitted). In this regard, Vazquez, in considering factors that US courts have looked to in deciding whether Treaty provisions are 'self-executing' and hence give rise to enforceable individual rights, has noted that '[...] courts have examined under the "self-execution" rubric various concepts that are not unique to treaties. These include matters such as whether the claim is justiciable, whether the litigant has standing, and whether the litigant has a right of action'. Ibid 711.

observed is that justiciability requirements may vary according to the *type* of legal effects taken (by Union laws). As a result, the Court's portrayal of the justiciability of Union norms and their consequent legal effects has been central to its development of the supremacy doctrine.²⁵

In this regard, the Court has maximised the impact of Union law over domestic orders, by developing a variety of possible legal effects attributable to binding Union laws. These include direct effect in the 'narrow'²⁶ sense of freestanding, individually enforceable rights, legality review effects and finally indirect or interpretive effects. Cumulatively these legal possibilities have been allied to an evolutionary and complex expression of the supremacy doctrine by the Court and hence the fullest possible expression of the underlying values of the Treaties by Union and domestic courts. In relation to 'direct effects'²⁷, the most intrusive of Union law effects, the Court stated in *Becker* that Union provisions must be 'sufficiently precise and unconditional' to give rise to enforceable individual rights.²⁸ For the legality review effects of Union norms to arise, these conditions will generally not need to be met²⁹ providing that an 'identifiable conflict' between Union and domestic provision(s) is present.³⁰ Finally, in relation to the interpretive effects of Union laws, we find that criteria of linguistic certainty do not play any part in determining whether these effects arise.³¹ This enables the broad concerns of European integration, set out in the opening Treaty articles to create legal effects.

4.2 Justiciability Factors II: Linguistic Certainty, Political Questions and the Intent of the Member States

²⁵ In his analysis of the self-executing / non self-executing distinction set out in US court judgments relating to the internal applicability of Treaty norms, Carlos Vazquez notes that, '[...] the self-execution "doctrine" addresses at least four distinct types of reasons why a treaty might be judicially unenforceable. First, a treaty might be judicially unenforceable because the parties [...] made it judicially unenforceable. This is primarily a matter of intent. Second, a treaty might be unenforceable because the obligation it imposes is of a type that, under our system of separated powers, cannot be enforced directly by the courts. This branch of the doctrine calls for a judgment concerning the allocation of treaty-enforcement power between the courts and the legislature. Third, a treaty might be judicially unenforceable because the treaty makers lack the constitutional power to accomplish by treaty what they purported to accomplish. This branch of the doctrine calls for a judgement about the allocation of legislative power between the treaty makers and the lawmakers. Finally, a treaty provision might be judicially unenforceable because it does not establish a private right of action and there is no other legal basis for the remedy being sought by the party relying on the treaty'. *Ibid* 722-3.

²⁶ A broad understanding of direct effectiveness refers to the invocability of Union norms in a domestic context so as to create legal effects that fall short of the direct conferral of rights. On the difference between broad and narrow definitions of direct effect, see Craig and de Burca, *EU Law* (3rd edn, Oxford University Press, Oxford, 2003) 178 ff.

²⁷ In the 'narrow' sense of the recognition of freestanding Union rights, enforceable by individuals before domestic courts.

²⁸ Case 8/81 *Becker v Finanzamt Munster-Innenstadt* [1982] ECR 53 para 25 of the judgment.

²⁹ See inter alia, Case C-129/94 *Ruiz Bernaldez* [1996] ECR I-1829. For contrary judicial dicta, see the Court's judgment in *CIA*, which suggested that in order for the legality review (exclusionary) effects of a directive to arise in a horizontal situation, the conditions for direct effect must be met. Case C-194/94 *CIA Security International SA v Signalson SA* [1996] ECR I-220.

³⁰ See K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *E L Rev*.

³¹ Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, particularly paras 24 and 25 in which the Court held that the Treaty competition rules prohibiting abuse of a dominant position in the market had to be interpreted in light of the overall objectives of the Treaty contained in the opening articles which affirmed the promotion of the common market amongst the Member States.

Within the context of the determination of the legal effects of Treaty norms by domestic courts generally, the linguistic clarity of a provision of international law will often be linked to the question of whether the substantive topic raised is one suitable for determination by courts as opposed to other institutional branches. For example, Vazquez has suggested that in relation to the treatment of Treaty rules by US courts, ‘precatory’, ‘hortatory’ or aspirational provisions will not be self-executing as they evidence a commitment to achieve certain objectives in the political arena as opposed to an intention to confer legally enforceable rights:

“Precatory” treaty provisions are deemed judicially unenforceable not because of the parties’ (or anyone’s) intent, but because what the parties agreed to do is considered in our system of separated powers, a “political” task not for the courts to perform.³²

For the Court of Justice, the determination of whether a norm reveals a ‘political’ question that is as such not suitable for judicial enforcement requires a broader judgment, one that addresses its role in relation to both the other Union institutions as well as the Member States. In addition, for the Court, so far as the legal effects of the aspirational provisions of the Union Treaties are concerned, the distinction between vaguely worded aspirations and those that are ‘sufficiently precise’, relates as noted above, to the *type* of legal effect produced as opposed to being determinative of the question of *whether* legal effects may arise. The proposition that all objectives of the Union project are capable of creating legal effects is supported by the first articles of the Treaties. These objectives are worded in *mandatory* terms. Article 3 (3) TEU for example states that:

The Union *shall* establish an internal market. It *shall* work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It *shall* promote scientific and technological advance. It *shall* combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men; solidarity between generations and protection of the rights of the child. It *shall* promote economic, social and territorial cohesion, and solidarity among Member States. It *shall* respect its rich cultural and linguistic diversity and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.³³

This wording evidences an intention on the part of the Member States, that the overall objectives of the Union – in addition to the precise regulatory demands arising under Treaties and associated secondary legislation, should be able to create legal effects notwithstanding that these objectives undeniably fall under the heading of ‘political questions’. Moreover, from the perspective of the Court of Justice, the political objectives found in the Treaties are precisely those matters to which the ‘hard’ or precise legal provisions of the Treaties are directed to achieving. *All* legal regulation arising under the Treaties is directed in some way to the achievement of the social, economic and political ideals, of European integration. For the Court of Justice therefore, as well as domestic courts, the institutional considerations relevant to whether a Union law is justiciable require a reformulation of the political tasks

³²C Vazquez, ‘The Four Doctrines of Self-Executing Treaties (1995) 89 AJIL 695, 712.

³³ Art 3 TEU (emphases added).

doctrine noted by Vazquez above and based on received notions of the separations of powers between the courts and other domestic governmental branches.

Union law effects within the domestic setting entail a modified understanding of the separation of powers doctrine, one that seeks the constitutionalisation of the body of Union laws through the activities of domestic courts. Such practices redefine the domestic judicial role in relation to the other governmental branches and are in contrast to the manner in which domestic courts have determined the internal legal effects of international treaties outside the Union context. Here, domestic courts seized with questions of international law will focus exclusively on the separation of powers doctrine embodied within the constitutional settlement of the State concerned without considering how international law measures may themselves qualify or alter that settlement.³⁴ Finally, in relation to questions of intent, the Court of Justice does not consider the intentions of the Member States in assessing the legal effects of the Union provisions it is called on to interpret and apply. Instead it will assess the language of a provision in light of the overall purposes of the Treaties. In this regard, a 'general' interpretive assumption is that all individual Union measures are intended by the Member States collectively to fit within the overall scheme of the Union legal order, which is based on the achievement of the Treaty objectives.

In sum, the suggestion that: 'Where the line is drawn between "precatory" [and hence judicially unenforceable] and "obligatory" [and hence judicially enforceable] treaty provisions is a matter of domestic constitutional law'³⁵ is revised in the Union setting. This revision concerns on the one hand the ability of the Court to authoritatively determine the meaning of Union Treaty provisions and secondary Union laws, and on the other its active constitutionalisation of Union norms within the domestic arena.³⁶ This evolution of the doctrine of international law supremacy by the Court of Justice in upholding the supremacy of Union over domestic legal requirements does not represent a decisive break from the Union's international law basis but rather expresses illustrates an organic expression of principles of international law.

To sum up these points, we may say that all the Member States, whether monist or dualist in their approaches to international law have duly incorporated, according to the terms of their respective constitutions, the Union legal order as a directly applicable system of supreme legal rules that exists alongside laws of domestic

³⁴ For these reasons, Marc Amstutz, speaking of the Court's practices in relation to the interpretive effects taken by Directives notes that 't]he thoroughly courageous decision to intervene at the level of the rules governing legal reasoning (where the link between text setting and text interpretation is made) and – propter unitatem juris – extend the law-making powers of the national judiciaries beyond the contra legem boundary drawn by long-established legal theory (and thus into the legislative sphere defined mirror wise by the same legal tradition) is [...] a socially adequate (albeit also highly risky) alternative strategy.' M Amstutz, 'Marleasing and the Emergence of Interlegality in Legal Reasoning' (2005) 11 ELJ 766, 777-8.

³⁵ C Vazquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 AJIL 695, 713.

³⁶ In this regard, Jones has noted that, '[...] the Court consistently has resisted arguments by the national governments that, in accordance with the practice of international law, the question of penetration [of Union laws within the domestic setting] is to be determined by national constitutional law. The practices of Member States vary considerably and, therefore, any solution based on the provisions of traditional national constitutional law will not ensure the full and uniform application of Community Law in all the Member States'. M L Jones, 'The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A.Hart's Model of Law and a Legal System' (1984) 17 Cornell Int'l L.J. 1, 45 (footnotes omitted).

origin. The fact of incorporation does not however *conclude* the legal effects of Union norms, a fact illustrated by the gradual evolution of the doctrine of Union law supremacy by the Court of Justice and its corresponding acceptance within the Member States. The evolving quality of Union law effects within the Member States highlights the potential inherent in the Union jurisdiction within Member States. In practice, this potential has been far from realised as a result of an attitude of restraint by the Court of Justice towards the legal demands arising under the Treaties. Reasons for this restraint are explored in the following section.

4.3 The Restrictive Expression of Union law demands by the Court of Justice

The ability of the Court of Justice to promote the Treaty aims depends on the extent to which its conclusions regarding the supremacy of Union over domestic law are accepted by domestic courts. In this regard, Union law supremacy represents a 'value' whose promotion and articulation by the Court of Justice and recognition by domestic courts is crucial to realisation of the Union project.³⁷ In common with the Court's challenge to the incumbent role of domestic courts under pre-existing separation-of-powers arrangements, the Court's presentation of the supremacy of Union law represents an invitation or challenge to domestic judicial practices regarding their treatment of international legal norms. This does not mean that the international law character of Union legal obligations is somehow qualified. However, the need to ensure uniform Union law effects while developing the Treaty aims has required the careful 'management' of the (supremacy) doctrine by the Court of Justice

Given the character of the legal obligations set out in the Treaties, backed by an independent and sophisticated institutional framework, a significant untapped potential exists in relation to the domestic effects of Union laws as a matter of international law. The legal obligations placed on the Member States under the Treaties are in fact *more* extensive than the portrayal of these obligations by the Court of Justice. The Court has in fact offered a moderate and limited expression of Union legal demands. In relation to the *pace* and *extent* of European integration, the Court has vouchsafed the continued development of the Union by remaining responsive to a political imperative that concerns the *acceptability* of its legal demands within the Member States.

The Court of Justice has been faced not only with ensuring that ' . . . in the interpretation and application of the Treaties the law is observed'³⁸ but also with the need to maintain the viability and indeed survival of the Union's intrusive international law jurisdiction. Recognising that the full import of the Treaties' legal demands would be unacceptable to the Member States and hence practically unenforceable, the Court has therefore developed the doctrine of Union law supremacy by reference to what it deems institutionally *possible*. While this has entailed an expansive engagement by domestic courts by comparison with other legal demands of international law origin, the Court's articulation of the Treaty demands has at the same time been consistently restrained. It has advanced the doctrine of Union law supremacy in incremental steps, consistently maintaining a limited view of the legal obligations found in the Treaties.

³⁷ Famously in its Van Gend and Costa judgments.

³⁸ Art 19 TFEU.

The Court of Justice's allegedly dynamic and extensive approach to Treaty interpretation then obscures the fact that the legal possibilities represented by the Treaties as a matter of international law are in fact diminished by political, legal and jurisdictional concerns that prevent their full expression. The Court's case judgments reveal a 'thin' interpretive approach to the principle of international law supremacy where the legal effects of the Treaties are concerned. The articulation of Union law demands by the Court therefore represents as noted above, a *managed*, challenge to the jurisdictional expectations of domestic courts. In addition, as pointed out by Spiermann, given that the Member States have signed up to a project of international cooperation in the Union Treaties that has clear potential to challenge incumbent notions of State sovereignty, the Court has highlighted the relevance of *State* sovereignty in developing the Treaties' legal effects, an approach he traces to the Court's judgments in *Costa* and *Wilhelm*³⁹:

... as in *Costa v ENEL*, in *Wilhelm*, state sovereignty was treated as a key ingredient of treaty interpretation, essentially because the Court by then had recognised such a strong position of national law in regulating market structures that the Treaty was binding only within the context of national law, thus making precedence an appropriate synonym of [the international law principle of] *pacta sunt servanda*.⁴⁰

The recognition of domestic legal regulation and hence the *potential* for conflict between Union and domestic law by an international tribunal is, as pointed out by Spiermann, unusual from an international law perspective given that, '[f]rom the point of view of international law, there can be no conflict between a treaty rule and a national law rule, for the rules do not belong to the same system.'⁴¹ The Court has affirmed, in Spiermann's view, a 'national lawyers' perspective on the relationship between international (Union) and domestic law, a perspective that prioritises what he terms the international law of co-existence.⁴² This approach emphasises (the role of) domestic sovereignty in defining a States' international law obligations without recognising the possibility of an *unconditional* joint limitation of sovereignty, a possibility which is an established feature of what Spiermann terms the international law of co-operation.⁴³ Under the former approach, the emergence of the Union doctrines of supremacy and direct effect indeed evidence a 'new' kind of legal order but only by reference to what Spiermann terms a 'narrow' understanding of international law.⁴⁴ This however neglects possibilities found within the international law of cooperation which represents a more credible understanding of

³⁹ Case 14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR-I. For consideration of the judgment in this case, see J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press, Oxford, 1993) 265-6.

⁴⁰ O Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 EJIL 763, 785.

⁴¹ *Ibid* at 773 citing Article 27 of the Vienna Convention on the Law of Treaties according to which: '[m]unicipal law may not be invoked as a justification for failure to perform international obligations'. Vienna Convention on the Law of Treaties (adopted 23rd May 1969, entered into force 27th January 1980) 1155 UNTS 331.

⁴² '[T]he ahistorical idea of international law embraced by the Court of Justice in *Van Gend en Loos* and *Costa* was the international law of coexistence.' *Ibid* at 779.

⁴³ '[...] as an international lawyer will know, when compared to other parts of the international law of cooperation, there is nothing new about direct effect and nothing innovative about precedence.' *Ibid* 787.

⁴⁴ Thus, Spiermann notes in relation to the doctrine of Union law direct effects that, '[b]y neglecting the international law of co-operation, the Court ended up with a narrow idea of international law, which explains how the Court could assume that international law is unfamiliar with the idea of direct effect and the involvement of the individual.' *Ibid* 779.

international law principles and one which can account fully for the features of the Union legal order explored above.

The international law obligations found in the Treaties then have been presented by the Court, not as a limitation on and corresponding transfer of domestic sovereignty that automatically takes precedence over domestic law, but instead as effects that occur strictly within the context of (competing) domestic legal demands. It is this engagement with domestic legal concerns by the Court of Justice that is remarkable, in Spiermann's view, from a (true) international law perspective. The Treaties have never been used as a platform to challenge failures by the Member States to meet the obligations arising as a matter of international law to *positively* promote the aims that they contain.⁴⁵ The Court's approach has rather secured the co-operation of domestic courts in expressing these demands. This in turn has promoted the acceptance of Union requirements by domestic institutional actors generally and served to manage conflicts between Union and domestic governmental activities as well as 'internal' constitutional conflicts that may arise from an 'over empowerment' of domestic courts.⁴⁶

5. CONCLUSIONS

How do these conclusions assist in understanding the role of the Court of Justice as a court of international jurisdiction charged with promoting the values of the Union? I have argued that two essentially competing currents have informed the Court's articulation of Union law demands. The first concerns the legal commitments present as a matter of international law within the Union Treaty agreements. The Union Treaties represent a binding commitment under international law to profoundly restructure of Member States' governance around the ideals of an integrated European Union. The second concerns the fact that the full realisation of the objectives contained in the Treaties cannot realistically be achieved through the immediate assertion of legal demands alone given that even a limited expression of the overall Treaty objectives entails an acceptance of supranational legal authority previously unknown within the Member States.

The Court of Justice has therefore evolved the principle of Union law supremacy and hence the values of European integration through a consistently creative expression

⁴⁵ In this regard Spiermann notes that the Court has tended to focus on discriminatory practices as constitutive of the economic freedoms, as opposed to barriers to trade that may not be discriminatory (although in recent years that Court has increasingly allowed challenges to substantive impediments to trade that are not directly discriminatory, maintaining however the requirement that they must operate in an indirectly discriminatory manner towards goods / workers / services from other States so maintaining a necessary cross border element). He notes in this regard that '[t]he content of a ban on nationality discrimination is purely negative, saying that the state is not allowed to treat aliens in any way worse than its own national. The EEC Treaty thereby opened a door. But in order to generate a real opportunity for aliens to go through that door, it was arguably necessary, or at least conducive to the objective of making a common market to supplement the negative ban on discrimination with various positive principles; or to put it more crudely, to offer the aliens a pat on the back when they appeared on the doorstep.' *Ibid* 781-2.

⁴⁶ Either internally within Member States or in the relationship between the Union and the Member States. See on these issues, R Rawlings, 'Legal Politics: The United Kingdom and Ratification of the Treaty on European Union (Part One)' [1994] PL 214; A M Burley and W Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 45; K J Alter, 'Who are the 'Masters of the Treaty'?: European Governments and the European Court of Justice' (1998) 52 *International Organization* 121; D Nicol, *EC Membership and the Judicialisation of British Politics* (Oxford University Press, Oxford, 2001).

of its jurisdiction. Domestic courts have been persuaded to cede a ‘corresponding’ jurisdiction – to decide the limits and qualification of the supremacy of Union law – to the Court. This has paradoxically provided domestic courts with a derivative Union jurisdiction that embraces the Court’s reading of the supremacy doctrine, empowering domestic judicial actors to a degree that arguably redefines the separation of powers amongst domestic governmental branches in favour of the judiciary.⁴⁷ In sum, the Court’s exercise of an international law jurisdiction has triggered a constitution restructuring of domestic judicial authority.

Understanding the Union order as one of international law explains the *ideal* possibilities found in the Treaties as guiding factors in relation to Union institutional practices. The Treaties provide a perennial invitation to the Member States and Union institutions to pursue the ideal of an integrated Europe and to enhance and develop their commitment to a Kantian vision of European legal ordering that this commitment implies.⁴⁸ The almost unlimited potential of the Union project to effect, as a matter of the international law, an institutional restructuring of the Member States allied to the commitments signed up to in the Treaties has meant that the Court has necessarily developed the ideals of European integration in a qualified and limited fashion.

⁴⁷ M Amstutz, ‘Marleasing and the Emergence of Interlegality in Legal Reasoning’ (2005) 11 ELJ 766.

⁴⁸ ‘According to Kant, the states must finally enter into a cosmopolitan constitution due to the constant wars and “form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful federation under a commonly accepted international right.’ J Přibáň, ‘The Juridification of European Identity, its Limitations and the Search of EU Democratic Politics’ (2009) 16 Constellations 44 citing I Kant, ‘On the Common Saying: “This may be true in Theory but it does not apply in Practice”’ in G H Reiss (ed), H.B.Nisbet (trans), Kant’s Political Writings (Cambridge University Press, Cambridge 1971) 90.