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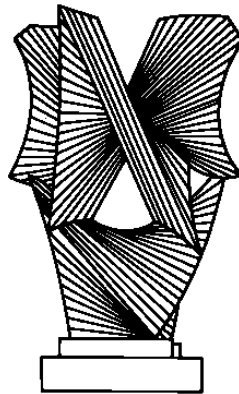
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UNIVERSAL EXCEPTIONALISM IN INTERNATIONAL LAW

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Universal Exceptionalism in International Law

Anu Bradford and Eric A. Posner¹

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Abstract. A trope of international law scholarship is that the United States is an “exceptionalist” nation, one that takes a distinctive (frequently hostile, unilateralist, or hypocritical) stance toward international law. However, all major powers are similarly “exceptionalist,” in the sense that they take distinctive approaches to international law that reflect their values and interests. We illustrate these arguments with discussions of China, the European Union, and the United States. Charges of international-law exceptionalism betray an undefended assumption that one particular view of international law (for scholars, usually the European view) is universally valid.

Among international lawyers, it has long been conventional wisdom that the United States acts differently from other states. In the nineteenth century, it kept to itself, refusing to participate in the wars and alliances that preoccupied European powers. In the twentieth century, it arrogated for itself the role of global leader. After World War II, the United States was the primary force behind the construction of all the major international institutions—the United Nations, including its human rights regime, the GATT/WTO trade system, the development and financial institutions such as the World Bank and the International Monetary Fund, and the security arrangement embodied by NATO. With the collapse of the Soviet Union, the United States was transformed from one of two superpowers into the sole hyperpower.

And yet the United States has, throughout this entire period, showed ambivalence about international law. More than any other state, the United States put financial and diplomatic resources into advancing human rights; yet it refused to ratify most of the major human rights treaties, and has committed major human rights violations, including torture in its operations against Al Qaida. It promoted the trade system yet has from time to time engaged in protectionist measures. It hosts the United Nations and is its largest dues-payer, yet it has violated the UN Charter by launching wars without Security Council approval and frequently has been in arrears on its dues. It helped negotiate a number of important treaties—including the Law of the Sea Convention, the Rome Statute, which created the International Criminal Court, and the Vienna Convention on

¹ Assistant Professor of Law and Kirkland & Ellis Professor of Law, University of Chicago Law School. Thanks to Daniel Abebe, Gabby Blum, Curtis Bradley, William Burke-White, Ruoying Chen, Tom Ginsburg, Jack Goldsmith, Katerina Linos, Darryl Robinson, Joel Trachtman, and participants in a seminar at Queen’s University, for helpful comments, and to Charles Woodworth and Hanna Chung for research assistance.

Treaties—and then refused to ratify them. It has resisted numerous efforts to strengthen the laws of war and to ban weapons such as landmines.²

In recent years, scholars have searched for explanations for this apparently distinctive stance toward international law. The usual political-science theories of state behavior assume that states act in roughly the same way. They might have different capacities and populations, but they all seek to maximize their security (as the realists argue) or to enhance national welfare (as rational institutionalists argue). So the recent literature has sought explanations for America's distinctive international behavior in unique attributes of the United States.

The most common explanation today appeals to a long line of literature on “American exceptionalism.” This literature, which goes back to Alexis de Tocqueville's *Democracy in America*, holds that the United States is different from all other countries.³ In Tocqueville's time, the United States was the only large country with authentic democratic institutions. Today, most countries are democracies but the United States remains distinctive among them. Ideologically, the United States is more committed to democracy (as opposed to rule by the elites), equality of opportunity (as opposed to equality of outcomes), individualism (as opposed to collectivism), and the free market. Culturally, Americans are more religious, more skeptical of authority, more militaristic, and more patriotic.⁴ Institutionally, the country is more decentralized, more legalistic, and more open to democratic participation.⁵

How might American exceptionalism explain America's international behavior? One argument is that Americans believe that the United States, as the preeminent nation, perhaps one with a unique mission to promote freedom and democracy, cannot be required to submit to international institutions.⁶ Another is that Americans are less liberal than people in other countries, and so they oppose international legal change that

² For the bill of particulars, see, e.g., Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 1 (Michael Ignatieff ed., 2005); Harold Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1480-83 (2003); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 *LEIDEN J. INT'L L.* 579, 604-05 (2006); Peter Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, 79 *FOREIGN AFF.* 9, 9-13 (Nov./Dec. 2000).

³ See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield and Delba Winthrop eds., 2000).

⁴ See generally SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996).

⁵ See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 *N.Y.U. L. REV.* 1971, 1993-95 (2004).

⁶ See Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 *EUR. J. INT'L L.* 677, 688 (2004); LIPSET, *supra* note 4, at 289; Steven G. Calabresi, *The Role of the Judge in the Twenty-First Century*, 86 *B.U. L. REV.* 1335, 1396-97 (2006).

liberalizes international relations to a degree beyond that of which Americans approve.⁷ Other explanations appeal to distinctive attributes of American political institutions—for example, federalism and the high bar for ratifying treaties.⁸

In this paper, we attack the premise of these arguments. The American stance toward international law is not distinctive or exceptional—or, put differently, the United States is no more exceptional than any other powerful country. When creating international norms, powerful nations characteristically advance interpretations of international law that reflect their values and advance their interests. Similarly, powerful nations’ willingness to ratify or comply with international norms hinges on the consistency of those norms with their values and interests. This type of “exceptionalism” is therefore not the exclusive preserve of one state. Today, the United States, China, and the European Union (“EU”) advance conflicting interpretations of international law. During the Cold War, the United States and the Soviet Union did the same.⁹ The focus on American exceptionalism blinds scholars to the similar behavior occurring elsewhere.¹⁰

We further argue that international law is best understood as an overlapping consensus of the otherwise “exceptional” views of the great powers. At the core are legal norms to which virtually every nation considers itself bound. Outside the core, there is a conflict. In this area of conflict, nations make inconsistent claims as to the meaning of international law. It is a significant mistake for scholars to accept the claims of any one nation as to the meaning of international law in this disputed area. It is also a mistake to dismiss a nation’s interpretation of a treaty (for example) as automatically wrong. As long as nations disagree about the meaning of treaties and other sources of international law, the content of international law remains unsettled.

This argument is not entirely new, though it seems to have been forgotten. Hans Morgenthau’s influential realist treatise, *Politics Among Nations*, notes in passing that all nations interpret or “misinterpret” international law so as to advance their ends, but he

⁷ See Ignatieff, *supra* note 2; Calabresi, *supra* note 6, at 1337-38, 1389-92); Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT’L L.J. 403-04 (1992); cf. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995).

⁸ See Oona Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1307-12 (2008).

⁹ Some distinctive doctrines of the Soviet view included, at various times, (1) the right to repudiate treaty obligations after a socialist revolution; (2) the right to intervene to assist a socialist revolution; (3) the right to intervene in capitalist countries that fail to protect workers’ rights. See generally KAZIMIERZ GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES AND DIPLOMATIC PRACTICE* (1970); TARJA LÄNGSTRÖM, *TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW* 50–117 (2003).

¹⁰ A typical view is that Europeans, unlike the Americans, do not have the power to pursue their values in international law because they are too weak. See, e.g., Stanley Hoffman, *American Exceptionalism: The New Version*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 2, at 225-26. We disagree with this premise.

makes an exception for “codifications,” which we reject.¹¹ States offer self-interested interpretations of codes and treaties just as they do for customary international law, which was the focus of Morgenthau’s discussion. Lassa Oppenheim’s treatise on international law notes, but rejects, attacks on the universality of international law by commentators who argued that distinctive Soviet and German versions of international law existed between the two world wars. “These and similar intrusions of national policies into the sphere of International Law are essentially transient,” Oppenheim argues.¹² We argue, by contrast, that disagreements about international law among the great powers are persistent and of great significance, although, as noted, a core of overlapping consensus does exist.

This paper describes the different “exceptionalisms” of the United States, China, and the EU. For each state, we trace their “exceptional” international behavior to their “exceptional” domestic interests, values, and institutions. While it is sometimes assumed that the European position on international law is in fact the correct position on international law,¹³ we argue that, in fact, the European position is just one among many approaches to international law that reflect a mixture of national self-interest and national (as opposed to universal) values. The United States looks less distinctive when compared to the world as a whole, than when it is compared only to the European democracies. Each exceptionalist state advances a particular version of international law that must be judged on its merits against some standard of morality; the accusation of exceptionalism is a straw-man attack.¹⁴

Our argument is descriptive, not normative. We do not argue that any country’s view of international law is the correct one.

I. CONCEPTUAL DISTINCTIONS

A. Universalism and Exceptionalism

By *universalism*, we refer to the view that the rules of international law apply to all states. By *exceptionalism*, we refer to the view that the values of one particular country should be reflected in the norms of international law. By *exemptionalism*, we

¹¹ See HANS J. MORGENTHAU & KENNETH W. THOMPSON, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 298-99 (Knopf 6th ed. 1985).

¹² L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 56 (H. Lauterpacht ed., 8th ed. 1955).

¹³ See, e.g., our discussion of Michael Ignatieff’s views, *infra* Part I.B.

¹⁴ In the modern legal literature, the lone example of this view that we have found is Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT’L L. 1307 (2008), who argues that the American stance to international law is not exceptional. Our argument builds on her work. Some skepticism about the usefulness of the notion of American exceptionalism in international law can also be found in Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT’L L.J. 323 (2009).

refer to the claim that the rules of international law, or of certain international treaties, should apply to all states except for one particular state.¹⁵

At one time, international law consisted of a set of contracts involving (usually) pairs of states, along with some general norms of customary international law that were derived from state practice and the official statements of governments and other state institutions. Occasional multilateral treaties would address the resolution of military conflicts involving multiple states such as the Napoleonic and Crimean Wars. In the twentieth century, all this changed. Although states continued to enter bilateral treaties, they increasingly established fora—notably, the United Nations—for negotiating treaties involving issues of global concern, including the laws of war, human rights, protection of the environment, trade, and regulation of the seas. All states would be invited to send delegates to these conventions, and the expectation was always that the treaty obligations would be the same for all states, large and small, rich and poor.

These practices have helped established a presumption of universalism. Once a global problem is identified, it is understood that an international solution binding all states should be sought. To be sure, states may continue to negotiate bilateral and regional agreements to address narrow cross-border and regional problems, but these agreements, though numerous, must be consistent with states' obligations under multilateral treaties.

We use the term exceptionalism to refer to the attitude of a state that believes that it is a model or leader in international relations because of its unique attributes. The state may hold that its institutions are the best in the world, or that it has a historical mission—and for these reasons, the state's commitments should be the world's as well. Exceptionalism does not imply exemptionalism. An exceptional state may choose to comply with the rules of international law with which it disagrees. If it does violate the rules of international law, or some of those rules, it argues that those rules are inconsistent with international law properly understood. In doing so, it typically claims that some alternative rules should apply to all states equally, including itself. Thus, exceptional states need not abandon universalism, and indeed they rarely do. The exceptional state need not take the next step of exemptionalism, and argue that the rules apply to all other states but not itself. As we will see, this distinction is crucial; exceptional states are often accused of exemptionalism, in most instances inaccurately.

To understand this difference, compare two arguments often made about the United States' attitude toward international law. Some people argue that the United States

¹⁵ Ignatieff, *supra* note 2, at 4. The term is his.

should be exempted from certain types of international criminal jurisdiction because America sends soldiers around the world to promote democracy and keep the peace.¹⁶ This argument is exemptionalist. The United States has not made this argument; instead, it has sought safeguards on criminal jurisdiction—such as the precondition of Security Council authorization before the International Criminal Court can launch investigations—that ensure that no state that takes proper steps to uphold the international order will find its citizens in an international court. Thus, the United States has not argued that it ought to be exempted from the rules.¹⁷ Instead, it has insisted—consistent with exceptionalism—that American norms and practices should provide the basis for international law.

Exceptional states—which are always great powers, although not all great powers are exceptional states—characteristically advance universalistic views of international law that embody those states’ exceptional norms. We can distinguish two stages at which this occurs. First, exceptional states attempt to influence the development of international norms during treaty negotiations, so that international law reflects their values and interests. Exceptional states are hardly alone in this respect, but because of their greater power, they are more often successful, generating resentment among other states. Second, exceptional states attempt to influence the development of international norms at the stage of compliance. They often assert interpretations of existing treaty obligations that reflect their values and interests, in some cases following up these interpretations with actions that other states regard as violations of international law. Again, normal states do this as well, but exceptional states are far more aggressive and successful.

B. The Standard View: American Exceptionalism and European Universalism

Consider this seeming paradox: the United States has been the leader in advancing human rights around the world since 1945, and yet at the same time it has both violated human rights itself and coddled tyrants who violate rights. The United States led the way with the Universal Declaration of Human Rights, the United Nations, and the International Covenant for Civil and “Political Rights, and has put economic and military pressure on human-rights violating states—far more than any other state has. But it has also, to quote Michael Ignatieff,

¹⁶ See Benvenisti, *supra* note 6, at 688, 696-99; see also 147 Cong. Rec. S10,042 (Oct. 2, 2001) (statement of Sen. Helms) (supporting a bill aimed at hindering the International Criminal Court, because the United States “owes it . . . to our men and women representing this country, both in the military and in civilian agencies,” as they “get ready for a long campaign against global terrorists,” to protect their actions from U.N. “second-guessing”).

¹⁷ The United States does benefit from its veto in the Security Council, and in this sense one might argue that it seeks a system in which other states are bound to norms that it can avoid—*de facto*. We discuss this argument in Part V.C.

supported rights-abusing regimes from Pinochet's Chile to Suharto's Indonesia; sought to scuttle the International Criminal Court, the capstone of an enforceable global human rights regime; maintained practices—like capital punishment—at variance with the human rights standards of other democracies; engaged in unilateral preemptive military actions that other states believe violate the UN Charter; failed to ratify the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women; and ignored UN bodies when they criticized U.S. domestic rights practices.¹⁸

Of course, many other countries have engaged in the same practices; what makes the United States exceptional is that it also is a global human rights leader.

There are in fact three strands of American exceptionalism. First, the United States negotiates human rights treaties but ratifies them subject to reservations that cut back on the scope of its obligations, fails to ratify them, or ratifies but violates them.

For instance, Ignatieff argues that the United States' decision to attach conditions to its ratification to the International Covenant on Civil and Political Rights, a major human rights treaty, betrays exemptionalism.¹⁹ However, as Jack Goldsmith has pointed out, virtually all western states have acted similarly; usually it is the authoritarian states that do not bother to add reservations to human rights treaties which they then ignore.²⁰ Ignatieff also notes that when the United States ratifies human rights treaties, it typically provides that the provisions of the treaties are not binding as a matter of domestic law. However, this is a difference of form, not substance: because in many of these states international treaties do not enter domestic law without an independent legislative act, the use of explicit provisions saying as much are unnecessary.

So if the United States is exemptionalist in Ignatieff's sense, then so are many other states. In fact, Ignatieff defines exemptionalism so broadly that it loses its meaning. In the narrow sense in which we use it, none of the examples discussed by Ignatieff count as exemptionalism, because in none of these examples did the United States claim that rules should apply to others and not to itself. What is distinctive about the United States is that it rejected rules favored by other states, refused to compromise, and instead argued that all states (including the United States itself) should be subject to the rules that the

¹⁸ Ignatieff, *supra* note 2, at 2.

¹⁹ *Id.* at 5-6.

²⁰ Jack L. Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 2d 365 (1998).

United States preferred. This is classic exceptionalism, not exemptionalism. As we will see, other states engage in similar exceptionalist behavior.

Second, the United States condemns enemies for human rights violations that the United States itself commits, and turns a blind eye to friends who engage in the same behavior. This point has been made most forcefully in the international law literature by Harold Koh, who calls this type of exceptionalist behavior the use of double standards.²¹ However, the use of double standards is not distinctive behavior of exceptionalist states. Indeed, double standards compromise exceptionalism: The exceptionalist state believes that its institutions embody the best rules and those rules should apply to all, equally. Double standards are better seen as the result of pragmatism (at best) or inconsistent preferences (at worst), and characterize the behavior of *all* states, not just exceptionalist states. A state that seeks to advance human rights finds that this policy conflicts with other interests—including trade and security. The state might be willing to compromise its ideals in order to satisfy the demands of interest groups, or inconsistent public preferences. It might believe that in some settings security will advance human rights more than a consistent line on human rights. When the United States applies double standards, it simply acts like any other state.²²

Third, American courts do not pay much attention to foreign judicial rulings when interpreting U.S. constitutional law and, more generally, American constitutional norms are outside the international mainstream, or at least the mainstream of developed and democratic states.²³ The judiciaries in foreign democracies are more likely to cite foreign courts than American courts are. And most states have constitutionalized positive or social rights—including rights to health care, to work, and to education—while the United States has not. Most democratic states have also rejected the death penalty and have weaker protections for speech and religious association than the United States does. This refusal to go along with other democratic states can be seen as another manifestation of American exceptionalism—here, within the realm of judicial behavior and constitutionalism.

Of course, not all states are democratic. A large minority of states are authoritarian, and many formally democratic states are either not democratic—the elites pull the strings behind the scenes—or are unstable, and cycle between democracy and dictatorship. The question arises why Ignatieff compares the United States to other democratic states, and indeed he clearly has in mind the major European democracies, plus Australia, Canada, and New Zealand, plus a handful of other places such as India and South Africa. These states amount to less than a quarter of the nearly 200 states in

²¹ Koh, *supra* note 2, at 1485-87.

²² We will provide evidence with respect to Europe and China, *infra*, in Parts II and III.

²³ Ignatieff, *supra* note 2, at 4; Calabresi, *supra* note 6, at 1405-06.

existence. Ignatieff himself admits that he understands American exceptionalism against the practices of democratic states.²⁴

After a survey of possible reasons for American exceptionalism, Ignatieff concludes that the most plausible explanation is that Americans are just not strongly committed to liberalism.²⁵ Assuming his diagnosis is correct, here again Ignatieff does not pause to consider whether international law in fact embodies liberalism as he understands it—that is, liberalism understood on the European social-democratic model. The answer is surely no. Consider the top twenty most populous states in the world (in order): China, India, the United States, Indonesia, Brazil, Pakistan, Bangladesh, Nigeria, Russia, Japan, Mexico, the Philippines, Vietnam, Germany, Ethiopia, Egypt, Turkey, Iran, the Democratic Republic of Congo, France. Aside from the ambiguous case of the United States, only two states that embody European-style liberalism—Germany and France—make it on the list, and only in the second half of it. Most of the states—China, Pakistan, Bangladesh, Nigeria, Russia, Vietnam, Ethiopia, Egypt, Iran, Congo—are not liberal at all.²⁶ Iran is an authoritarian theocracy. China, Vietnam, and Russia are also authoritarian regimes.

Only a person who identifies European norms with world norms could say that the United States' wavering commitment to liberalism—if that is the case—explains its exceptionalism. This mistake—the confusion of European norms and universal international norms—is central to the claim of American exceptionalism. On this view, European norms reflect the universal norms of international law. We have not seen a defense of this view; it seems to be merely assumed.²⁷

²⁴ *Id.* at 4-5.

²⁵ *Id.* at 20. See Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 2, at 147, 150 (giving a related argument that emphasizes American institutions and institutional history).

²⁶ They are all classified as not free or partly free in Freedom House's 2010 survey. See Freedom House, *Freedom in the World 2010: Global Data*, http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Tables_and_Graphs.pdf (last visited Jan. 31, 2010).

²⁷ See, e.g., Ignatieff, *supra* note 2; Rubinfeld, *supra* note 5 (describing European “universalism”). Rubinfeld emphasizes Europeans' faith in “international consensus” as a source of legal validation and authority. He also explains how Europeans are committed to the “universalistic view” of constitutional law and international human rights law, favoring supranational legal and political institutions because “most important legal and political principles [...] transcend national boundaries and indeed exists to check national governments.” See *id.* at 1975-76, 2005-06. Peters, *supra* note 2, describes American exceptionalism against a background of global constitutional values that look suspiciously European. See also Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 117 (2005) (“We Europeans share this intuition: the international world will be how we are. And we read international law in the image of our domestic legalism.”); JURGEN HABERMAS, THE DIVIDED WEST 161 (2006) (describing Europeans' continuing commitment to the Kantian cosmopolitan order and contrasting that with American preference for hegemonic liberalism post 9/11).

C. Multiple Exceptionalisms

Against the conventional wisdom, we propose an alternative hypothesis. We argue that great powers typically advance a view of international law that embodies their own normative commitments but are presented as universal commitments. During the cold war, there were two exceptional states—the United States and the Soviet Union—and each advanced a universalistic vision of international law. Today, there are three exceptional states—the United States, the EU,²⁸ and China—and each advances a distinctive vision of international law.

American exceptionalism. The United States believes that international law should promote free markets and liberal democracy. Military force may be used by any country against threats to this order.

European exceptionalism. Europeans believe that international law should advance human rights (including positive or economic rights) and social welfare. Europeans reject the unilateral use of military force. Instead of resorting to military force, states should pool their sovereignty in international institutions that can resolve disputes.

Chinese exceptionalism. China takes the strictest line on sovereignty and contests the use of military force against independent states. China also believes that international law should impose less burdensome obligations on poor countries. According to China, economic growth (at least, in poor countries) should take precedence over human rights.

The core of international law consists of the overlapping claims of these three states. “Unexceptional” (or what we will call “normal”) countries usually do not bother to advance distinctive visions of international law because they do not have the power to affect the development of international law. These states mostly take the law as given and try to modify it along the margin to suit their interests. There are some exceptions. In the nineteenth century, the United States, while it was still weak, advanced a distinctive view of international law, which may have influenced the development of international law.²⁹ More often, weaker countries form blocs that advance a distinctive vision. For instance, the non-aligned block that was active during the cold war has fallen in line behind China, which by virtue of its power and size, is the natural leader of poorer countries. Brazil has emerged as the leader of the G20, a coalition of the developing countries in the WTO, which advances the developing country stance in the WTO negotiations with notable collective clout. In addition, exceptional states often try to persuade normal states to sign

²⁸ The EU is not technically a state and would better be described a quasi-state. However, we will refer to it as a state for simplicity.

²⁹ See OPPENHEIM, *supra* note 12, at 52.

on to their particular exceptionalist view. The United States championed the negative rights embedded in the ICCPR and the former Soviet Union championed the positive rights embedded in the ICESCR; both examples reveal two exceptional states trying to convince normal states to adopt their respective worldviews.³⁰ Similarly, the EU often requires normal states to subscribe to the EU's vision of international law as a condition for signing a trade agreement or acceding to the EU.

In the remainder of this paper, we will flesh out these arguments. For each state, we will (1) describe its distinctive international legal vision; (2) explain the source of this vision in domestic public opinion and institutional structure; and (3) show that states are exceptional in the same way that the United States is exceptional.

II. EUROPEAN EXCEPTIONALISM: THE PACIFIST SOCIAL WELFARE MODEL

A. European Exceptionalism Defined

1. Human Rights

The EU maintains a strong commitment to international human rights. Because all EU members have ratified all of the major international human rights treaties, one might think that the EU's position on human rights reflects universal values. However, the EU's position is distinctive. The EU has its own Charter of Fundamental Human Rights, which in turn reflects in part human rights norms developed by the European Court of Justice. These norms are, in fact, broader than those embodied in international treaties; they also vary in some respects from the norms advanced by the other major states.

The most distinctive human rights commitment of the EU is its opposition to capital punishment.³¹ The EU has sponsored multiple resolutions at the UN Commission of Human Rights³² and at the UN General Assembly,³³ calling for a moratorium or

³⁰ MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS* 221-29 (2004).

³¹ Article 2 of the EU Charter of Fundamental Human Rights provides, "Everyone has the right to life" and, "No one shall be condemned to the death penalty, or executed." See Charter of Fundamental Human Rights of the European Union, 2000 O.J. (C 364) 1. All EU member states have signed the 13th Protocol of the 2003 European Convention of Human Rights, which commits the signatories to the permanent abolition of death penalty in all circumstances.

³² See, e.g., U.N. Economic and Social Council, Commission on Human Rights, 56th Sess., 66th mtg. at 7-19, U.N. Doc. E/CN.4/2000/SR.66 (Dec. 21, 2000), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G00/136/03/PDF/G0013603.pdf>; U.N. Economic and Social Council, Commission on Human Rights, 55th Sess., 58th mtg. at ¶¶ 38-44, U.N. Doc. E/CN.4/1999/SR.58 (Oct. 19, 1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G99/132/70/PDF/G9913270.pdf>.

³³ See, e.g., Memorandum by the European Union at the 54th United Nations General Assembly 10 (Sept. 21, 1999), http://www.consilium.europa.eu/uedocs/cmsUpload/memo_en_99.pdf (last visited Aug. 17, 2009); European Union, *EU Welcomes UN Vote Calling for a Global Moratorium on the Death Penalty*, EU/NR 118/07 (Nov. 16, 2007),

outright abolition of capital punishment. The EU also discourages the death penalty through its bilateral relations: It has criticized the US for including reservations in international human rights treaties to preserve the death penalty,³⁴ and filed amicus curiae briefs in cases where the US Supreme Court has considered the suitability of capital punishment for juvenile or mentally retarded criminal offenders.³⁵ The EU has further required the US to sign a treaty guaranteeing that it will not seek death penalty in murder cases which involve a request for extradition from an EU member state.³⁶

But not all of the EU's positions on human rights are so broad. The American commitment to freedom of speech and political association is stronger than the European view. European human rights norms do not prohibit the suppression of parties and certain types of derogatory speech protected by the American first amendment. Some American criminal law protections (such as the exclusionary rule) have no counterpart in European courts. As we will discuss later, China endorses a much stronger right to development than the EU does. On China's view, poor countries may abrogate other rights for the sake of alleviating poverty and maintaining order; the EU does not believe that the right to development can trump civil and political rights. While Europeans would argue that China is simply giving less weight to those other rights than it should, a more accurate description is that there is disagreement as to the relative weights of the right to development and other rights when they conflict.

At times the EU's commitment to human rights conflicts with its international law obligations. In 2001, the Al Qaida and Taliban Sanctions Committee, an organ of the UN Security Council, placed the Saudi businessman Yassin Abdullah Kadi on a list of individuals associated with Al Qaida. Under the Security Council resolution that established the Sanctions Committee in 1999, all states have a legal obligation to freeze the assets of the individuals on the Sanctions Committee's list, including Kadi. The EU adopted a regulation to implement the UN resolutions that called for the freezing of

http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=91&Itemid=58 (last visited Aug. 17, 2009).

³⁴ See European Union, EU Demarche on the Death Penalty, Presented to the US Administration, arts. 6-7 (May 10, 2001), http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=1959&Itemid=26.

³⁵ European Commission, *Background: EU Policy against the Death Penalty 2* (Sept. 2008), <http://www.eurunion.org/DPBackground-9-08.doc> (last visited Aug. 17, 2009). See, e.g., *Medellin v. Texas*, 129 S. Ct. 290 (2008); Brief for the European Union and Members of the International Community as Amici Curiae Supporting Petitioner, *Maharaj v. McDonough*, 549 U.S. 1072 (2006); Brief for the European Union and Members of the International Community as Amici Curiae Supporting Petitioner, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

³⁶ John R. Schmidt, *The EU Campaign against the Death Penalty*, 49(4) SURVIVAL 123, 127 (2007-2008). See Peter Finn, *Germany Reluctant to Aid Prosecution of Moussaoui*, WASH. POST, June 11, 2002, at A1 (reporting on Germany's threat to withhold evidence if the accused, Moussaoui, may be punished with the death penalty).

terrorist funds, including those of Kadi.³⁷ Kadi subsequently challenged this regulation before the European Court of Justice (“ECJ”). In 2008, the ECJ ruled that the Sanctions Committee’s designation of Kadi did not bind the EU’s member states.³⁸ The process established by the Sanctions Committee offended fundamental human rights norms under European law. Kadi did not have an adequate opportunity to challenge the placing of his name on the Committee’s list, the ECJ held. Accordingly, European countries could not freeze Kadi’s assets without violating Kadi’s due process rights and, consequently, European law.

The ECJ’s judgment (indirectly) challenged provisions of international law aimed against a major problem of international security and undermined the authority of the UN Security Council. Declaring that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty,”³⁹ the ECJ elevated the human rights guarantees enshrined in EC Treaties and general principles of European law above the UN-generated norms to fight terrorism.⁴⁰ This was perceived as a departure from the EU’s customary role as a staunch supporter of international law and the integrity of the UN.⁴¹

2. Social Welfare

The EU has sought to maintain a high level of what it calls “social protection,” sometimes at the expense of its international law obligations. The EU insists on its right to keep foreign products out of its market on grounds of food safety and other health policy concerns, precaution in the field of biotechnology, cultural diversity and other social welfare rights, even when doing so violates EU’s obligations under international trade law.⁴²

³⁷ Council Regulation 881/2002, 2002 O.J. (L 139) 9 (EC).

³⁸ Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council of the EU*, 2008 E.C.R. I-06351, at ¶ 5, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>.

³⁹ *Id.* at ¶ 5.

⁴⁰ *See id.* The ECJ went on to add that even though the EU constitutional norms and the UN Charter exist on a separate plane (consistent with the dualist view of international law), if they were to be classified within the same hierarchy of norms within the EU’s legal order, UN Charter would be subordinate to the EC Treaties and the general principles of law. *See id.* at ¶¶ 305–08.

⁴¹ Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, at 4–5, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321313 (last visited Aug. 17, 2009). Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council of the EU*, Opinion of Advocate General Poiares Maduro, at ¶ 38 (Jan. 16, 2008), available at http://curia.europa.eu/en/content/juris/c2_juris.htm (follow “C-402/05 P” hyperlink; then follow “C-402/05 P” hyperlink next to “Opinion”).

⁴² Sophie Meunier & Kalypso Nicolaidis, *The European Union as a conflicted trade power*, 13 J. EUR. PUB. POL. 906, 922 (2006).

The EU's pursuit of social policies that conflict with trade liberalization has led to challenges in the WTO. Most prominent, the EU's social welfare objectives clashed with its WTO obligations when the EU sought to prohibit the importation of hormone-treated beef into the EU. Following a complaint from the US, the WTO Dispute Settlement Body ruled that the EU's ban was not based on scientific evidence, and hence not justified under the relevant WTO rules.⁴³ Similarly, the EU sought to restrict US, Argentine, and Canadian imports of agricultural and food products that contained genetically modified organisms ("GMOs"). The WTO Dispute Settlement Panel found the EU's restrictions were contrary to its obligations under the WTO.⁴⁴ Despite these rulings against the EU, the EU has remained reluctant to modify its domestic policies, preferring to violate international trade law and endure WTO-authorized trade sanctions.

Trade conditionality offers an effective instrument for the EU to export its social welfare model abroad.⁴⁵ In derogation from the principle of most-favored-nation (non-discrimination among trading partners), the WTO allows developed countries to set up preferential tariff schedules to developing countries under the Generalized System of Preferences (GSP). The EU uses its GSP system to foster its preferred social policies in the beneficiary countries: It rewards countries that ratify the main international conventions on human rights, labor standards and sustainable development and punishes countries that do not.⁴⁶ For instance, in 1997 the EU withdrew Myanmar's GSP privileges because of Myanmar's forced labor practices. Similarly, Belarus lost its GSP status in 2007 for persistent violations of labor rights, including rights to organize and to engage in collective bargaining.⁴⁷ The United States similarly uses the GSP scheme to advance its distinctive view of international law. Thus, resorting to trade conditionality as an instrument to advance one's exceptionalist agenda is not a prerogative of a single state—yet the set of values that the GSP scheme is used to promote differs depending on the identity of the exceptionalist state that extends conditional preferences to its trade partners.

⁴³ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 (1994), http://www.wto.org/english/docs_e/legal_e/15-sps.pdf (last visited Aug. 18, 2009); Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

⁴⁴ Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, at Part VIII, §§ 8.14, 8.18, 8.34, 8.38 (Sept. 29, 2006).

⁴⁵ Meunier, *supra* note 42, at 913.

⁴⁶ Jan Vanderberghe, *On Carrots and Sticks: The Social Dimension of EU Trade Policy*, 13 EUR. FOREIGN AFF. REV. 561, 570 (2008).

⁴⁷ *Id.* (citing European Commission, *Promoting core labour standards: Commission grants additional tariff preferences to Sri Lanka and initiates an inquiry into labour rights violations in Belarus* (Jan. 7, 2004), http://trade.ec.europa.eu/doclib/docs/2004/january/tradoc_115531.pdf (last visited Aug. 17, 2009)).

3. Pooling Sovereignty

The EU sees itself as the “frontrunner” and the “driving force” behind international institutions.⁴⁸ The countries that would later form or join the EU (aside from Germany and other members of the defeated Axis) played an essential role in establishing the post-WWII institutions, including the UN, the WTO and the Bretton Woods institutions. The European Union itself is the outcome of sovereignty-sharing among its 27 members. While the EU does not have a common police force to enforce its law, its member states have submitted to authentic legislative, judicial, and executive institutions that issue legally binding orders that are routinely obeyed. A trope of EU public relations is that if historic enemies on the European continent can pool sovereignty, then so can countries throughout the world.

The Europeans also pooled their sovereignty by establishing a Council of Europe whose membership extends to 47 countries and thus beyond the member states of the EU. The Council of Europe seeks to advance democratic principles and human rights throughout Europe based on the European Convention on Human Rights (“ECHR”).⁴⁹ The Council of Europe also established a European Court of Human Rights, vested with a jurisdiction to hear allegations of violations of the ECHR. Similarly, the EU has participated enthusiastically in the UN human rights committees, forums, conferences,⁵⁰ and has pursued numerous initiatives in the context of the UN Commission on Human Rights.

The EU was also a prime supporter of the International Criminal Court. All 27 members of the European Union have joined the ICC, including those states which

⁴⁸ European Commission, *Communication, The European Union and the United Nations: The choice of multilateralism*, at § 1.1, COM (2003) 526 final (Sept. 10, 2003); see also European Commission, Summary: The European Union and the United Nations: The choice of multilateralism, http://europa.eu/legislation_summaries/foreign_and_security_policy/cfsp_and_esdp_implementation/r00009_en.htm (last visited Aug. 17, 2009).

⁴⁹ See Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 1, Nov. 4, 1950, 213 U.N.T.S. 222, 224, available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>. The rights and freedoms secured by the ECHR include, e.g., the right to life (abolishment of death penalty), the right to a fair hearing, the right to privacy, freedom of expression, freedom of thought, conscience and religion and the protection of property. The ECHR prohibits, e.g., torture and inhuman or degrading treatment or punishment, forced labour, arbitrary and unlawful detention, and discrimination in the enjoyment of the rights and freedoms secured by the Convention.

⁵⁰ These forums and conferences include, for instance, the UN Commission on Human Rights, the Third Committee of the General Assembly, the Commission on the Situation of Women, the World Conference against Racism of 2001, the UN General Assembly Special Session on Children of 2002. The EU is also active in supporting the High Commissioner for Human Rights (UNHCHR). See European Commission, *Communication, The European Union and the United Nations: The choice of multilateralism*, at § 1.1, COM (2003) 526 final (Sept. 10, 2003) supra.

needed to amend their constitutions in order to do so.⁵¹ The Rome Statute is among the numerous multilateral treaties that the EU requires states to sign as a condition for acceding to the EU.⁵² The EU also encourages ratification of the Rome Statute outside of its immediate sphere of influence through accession, including sponsoring annual UN Resolutions supporting the ICC.⁵³

4. Presumptive Pacifism

The EU is skeptical about the use of military force. It sees itself as a “soft,” “moral” or “normative” power that relies on its influence rather than force in maintaining world peace.⁵⁴ European security strategy therefore calls for preventative efforts—including the spreading of democratic ideals, human rights and reduction of poverty—as means to peace and security.⁵⁵ The EU describes “the distinctive European approach” to international peace and security as follows:

[The EU has] worked to build human security, by reducing poverty and inequality, promoting good governance and human rights, assisting

⁵¹ ICC—States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Aug. 17, 2009); see Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INT’L L. 273, 278 (2000) (noting that Germany and France amended their constitutions to adhere to the ICC statute).

⁵² See EUROPEAN COMMUNITIES, CONSILIUM: THE EUROPEAN UNION AND THE INTERNATIONAL CRIMINAL COURT §§ 2, 2.5 (Feb. 2008), http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf (explaining that “[a]chieving the widest participation in the Rome Statute was also an EU objective during the enlargement negotiations and accession phases of the new EU Member States”); see, e.g., European Communities, Consilium: The European Union and the International Criminal Court § 2.1 (Nov. 2007) (lauding Croatia’s support for the ICC and highlighting the EU’s commitment to furthering universal acceptance of the ICC); cf. Council Common Position on the International Criminal Court (June 16, 2003), 2003/444/CFSP, 2003 O.J. (L 150) 67 (EC).

⁵³ See EUROPEAN COMMUNITIES, CONSILIUM: THE EUROPEAN UNION AND THE INTERNATIONAL CRIMINAL COURT § 2.5 (Feb. 2008), http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf; U.N. GAOR, 63rd Sess., 45th plen. mtg. at 10, U.N. Doc. A/63/PV.45 (Nov. 11, 2008); U.N. GAOR, 62nd Sess., 57th plen. mtg. at 27, U.N. Doc. A/62/PV.57 (Nov. 26, 2007); U.N. GAOR, 61st Sess., 56th plen. mtg. at 1, U.N. Doc. A/61/PV.56 (Nov. 20, 2006); U.N. GAOR, 60th Sess., 53rd plen. mtg. at 9, U.N. Doc. A/60/PV.53 (Nov. 23, 2005).

⁵⁴ See Laeken Declaration on the Future of the European Union 273/01 § I (Dec. 15, 2001) (“[The EU is a] power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest. A power seeking to set globalisation within a moral framework, in other words to anchor it in solidarity and sustainable development.”). See generally Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMM. MKT. STUD. 235 (2002).

⁵⁵ COMMISSION REPORT ON THE IMPLEMENTATION OF THE EUROPEAN SECURITY STRATEGY 4, 9, S407/08 (Dec. 11, 2008), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf; COMMISSION REPORT, A SECURE EUROPE IN A BETTER WORLD, EUROPEAN SECURITY STRATEGY 6, 10 (Dec. 12, 2003), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>; An example of this strategy is the EU’s Everything But Arms (EBA) initiative, which grants duty-free and quota-free access to all exports, excluding arms and munitions, from the least developing countries. See Meunier, *supra* note 42, at 917; Council Regulation 416/2001, 2001 O.J. (L 60) 43 (EC) [“EBA initiative”].

development, and addressing the root causes of conflict and insecurity. The EU remains the biggest donor to countries in need. Long-term engagement is required for lasting stabilization [...] These achievements are the results of a distinctive European approach to foreign and security policy.⁵⁶

The core of the European Security Strategy is that military force should only be used as a last resort after all diplomatic means have been exhausted. The EU also rejects the preventive war doctrine, and insists that the UN Security Council authorization must be secured before force is deployed.

Despite the pacifist rhetoric, individual EU member states have engaged in military operations in recent years—for example, in the war in Afghanistan, which was authorized by the Security Council. EU members have even used military force without international legal justification. The U.S.-led invasion of Iraq in 2003 violated international law because it did not serve any country’s defensive purposes, and it was not authorized by the UN Security Council. Although France and Germany opposed the invasion, the UK, Italy, Denmark, the Netherlands, Portugal, and Spain (in addition to a number of European countries that acceded to the EU the year following the Iraq invasion) contributed troops to the mission. In 1999, all of the European members of NATO, plus France, went to war against Serbia, again under the leadership of the US. The intervention violated international law: it was not a war of self-defense and it lacked Security Council authorization. NATO characterized the military operation as a humanitarian intervention that was designed to stop the ethnic cleansing Serbs orchestrated against Albanians in Kosovo.⁵⁷ The military alliance stepped in when an individual state (Serbia)—and subsequently the UN Security Council—failed to discharge their responsibilities to protect individuals amid an exceptionally grave, unfolding humanitarian catastrophe.⁵⁸

There are two important observations here. First, the European view on the legality of the use of force is distinctive. The dominant view among the European countries is that military force should be used only as a last resort, ideally (although not necessarily) with Security Council authorization, and in the service of humanitarian

⁵⁶ COMMISSION REPORT ON THE IMPLEMENTATION OF THE EUROPEAN SECURITY STRATEGY, *supra* note 55, at 2.

⁵⁷ Transcript of March 25, 1999 Press Conference by Secretary General, Dr. Javier Solana and SACEUR, Gen. Wesley Clark, <http://www.nato.int/kosovo/press/p990325a.htm> (last visited Aug. 17, 2009). Javier Solana, then the Secretary General of NATO and now the High Representative of the EU’s Common Foreign and Security Policy, justified the bombing as necessary to “stop further humanitarian catastrophe.”

⁵⁸ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, RESPONSIBILITY TO PROTECT xi-xiii (Dec. 2001), *available at* <http://www.iciss.ca/pdf/Commission-Report.pdf> (giving a synopsis of the principles of R2P and the guidelines for determining whether military intervention is justified).

ideals—a point emphasized by Tony Blair in justifying British participation in the Iraq war, and made more generally during the Kosovo intervention. The U.S. and Chinese views, as we will see, differ. Second, the EU has been willing to assert aggressive interpretations of international law in order to justify their position. Thus, the idea that “humanitarian intervention” could be legally justified even without Security Council authorization emerged during the Kosovo intervention.

B. Explaining European Exceptionalism

1. Domestic Policy Preferences: Social Welfare, Human Rights, and Pacifism

European public opinion supports the “social market economy,” a compromise between socialism and laissez-faire capitalism that features a generous safety net, some industrial policy, strong unions, and more intrusive market regulation than one finds in the United States.⁵⁹ Of course, the United States and nearly every other developed country similarly supplies a minimum safety net and regulates the market. But the faith in the role of the government as the provider of social welfare seems to be a more central part of the European identity than it is in most other western countries.

These commitments are reflected in the EU’s trade policy. Although critics allege that the EU’s breach of WTO rules in the cases of beef hormones and GMOs reflect protectionism,⁶⁰ and without doubt the European producers of hormone- and GMO-free products benefit from the EU’s insistence that free trade must occasionally yield to health concerns,⁶¹ the EU has asserted that it is merely responding to European consumers’

⁵⁹ This is often referred to as an “embedded liberalism” compromise. See John G. Ruggie, John Gerard, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 392 (1982); See generally GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990).

⁶⁰ See, e.g., Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, *supra* note 44, at §§ 4.152–53, 4.173–4.180 (outlining the U.S. argument before the WTO, which contrasted the EU’s purported purpose of maintaining food safety with the discriminatory effects of the food safety regulations); Benedetto Della Bedova, *Opinion: Bio-Fueling a Trade War*, WALL ST. J., Aug. 3, 2009, available at <http://online.wsj.com/article/SB10001424052970204313604574328533995657764.html> (giving one former European Parliament member’s opinion that the EU uses environmental protections to disguise protectionism).

⁶¹ European cattle farmers do not use hormones in raising cattle whereas the US beef producers give hormones to ninety percent of their cattle. See Frode Alfnes & Kyrre Rickertsen, *European Consumers’ Acceptance of US Hormone-Treated Beef*, 3(3) EUROCHOICES 18 (2004). Similarly, by restricting the importation of GMO-products to Europe, the EU’s measures adversely affect the US, Argentina, Brazil and Canada, which cultivate ninety percent of the GMOs and food containing GMOs worldwide. Europe’s rules on GMOs and the WTO (Feb. 7, 2006),

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/61&format=PDF&aged=1&language=EN&guiLanguage=en> (last visited Aug. 18, 2009); see also WTO panel rules EU GMO moratorium

concerns about food safety. Public sentiment within the EU is skeptical of GMOs and hormones in food. A 2006 survey of European consumers revealed that 62% of the respondents across the EU were “worried” about the food safety risks posed by GMOs.⁶² A similar opinion poll from 2001 showed 71% of the Europeans do not want GMOs in their food.⁶³ Regarding hormones, a 1998 Eurobarometer survey shows that 54% of those surveyed indicated it important for food safety that food was “100% free from hormones.”⁶⁴ These surveys show that the import-competing industries are not alone in urging the EU to violate WTO law when social policy considerations so warrant.

Turning to reasons behind EU’s human rights advocacy and presumptive pacifism, Europe’s recent history of wars and violence stands prominently among them. The extreme nationalism and the brutality of two world wars implanted revulsion for war and engrained the ideals of human dignity and pacifism deep within the European mindset. The legacy of wars and violence has heightened the EU’s concern for human rights. For instance, large-scale state-sanctioned violence that the Europeans endured partly explains why the opposition to the death penalty is the paramount concern in EU’s external human rights policy.⁶⁵

These experiences have also caused the EU to largely refrain from using military force and pursue peaceful means to solve international disputes. The EU has not established a European army. Rather, it considers itself a “civilian power” that pre-empts military conflicts through institutional engagement and diplomacy. This explains why most EU countries did not share the United States’ concerns about joining the ICC: states that are frequently engaged in military operations abroad are aware that their soldiers might one day be forced to stand a trial before the ICC. This threat was not significant for

illegal (Feb. 8, 2006), <http://www.euractiv.com/en/trade/wto-panel-rules-eu-gmo-moratorium-illegal/article-152341> (last visited Aug. 17, 2009).

⁶² See EUROPEAN COMMISSION, SPECIAL EUROBAROMETER 238: Risk Issues 47 (Feb. 2006), http://ec.europa.eu/public_opinion/archives/ebs/ebs_238_en.pdf (last visited Aug. 17, 2009).

⁶³ See EUROPEAN COMMISSION, EUROBAROMETER 55.2: Europeans, science, and technology 40 (Dec. 2001), <http://ec.europa.eu/research/press/2001/pr0612en-report.pdf> (last visited Aug. 17, 2009).

⁶⁴ See EUROPEAN COMMISSION, EUROBAROMETRE 49: La Securite des Produits Alimentaires 15 (Sept. 3, 1998), http://ec.europa.eu/dgs/health_consumer/library/surveys/eb49_fr.pdf (last visited Aug. 17, 2009); see also Jayson L. Lusk, Jutta Roosen, & John A. Fox, *Demand for Beef from Cattle Administered Growth Hormones or Fed Genetically Modified Corn: A Comparison of Consumers in France, Germany, the United Kingdom, and the United States*, 85 AM. J. AGRIC. ECON. 16, 23 (2003) (reporting that, on a scale of 1 (not concerned) to 5 (very concerned), French, German and UK consumers reported average levels of concern of 4.54, 4.38 and 4.20 regarding the use of hormones in livestock production).

⁶⁵ See Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 126–27 (2002). The death penalty was outlawed in several European countries in the immediate aftermath of the WWII, following the wave of executions of innocent civilians without a trial. Other European countries kept capital punishment on their books but refrained from enforcing the punishment. See Schmidt, *supra* note 36, at 125.

most EU states, which are rarely involved in international military conflicts.⁶⁶ Only the UK and France, both with extensive military capacities, initially expressed reservations about the ICC but assented to the other EU members' joint position in the end.⁶⁷

This explanation of the presumptive pacifism of Europe should not, however, be taken too far. Britain and France used considerable violence to prevent the loss of their colonies after World War II. Britain fought a war in Malaysia. France fought wars in Indochina and North Africa. Both countries participated in an ill-fated attack on Egypt in 1956. Despite the absence of a European army, all the major European countries have maintained large armies. They participated in the 1999 Kosovo War, the 1991 Gulf War, the war in Afghanistan, and (many of them, above all Britain) the 2003 Iraq War. European countries also did not make the promotion of democracy and human rights a priority in international relations until relatively recently—at best, the last two decades.

Thus, European pacifism is a rational response to the current global distribution of military power as it is a reflection of a European ideology. Europeans remain hostile towards unilateral use of force simply because Europeans have no capacity to engage in unilateral military action themselves.⁶⁸ Insisting on multilateralism ensures that Europeans have a vote on whether and when US troops are dispatched to fight for international peace and security. The relatively benign U.S. hegemony (in European eyes) also enables Europeans to embrace pacifism: as long as the United States keeps the world peace, Europe does not need spend money on armies and take the risks of war.⁶⁹ Europeans are content with watching from the sidelines when Americans engage in wars, preferring to expand their social welfare system with the funds they save while abstaining from the role of a global policeman.

2. Institutional Structure

The European countries have had disproportionate influence over the creation of current multilateral institutions. The voting power in the existing institutions, including the UN and Bretton Woods institutions, reflects the distribution of power in the world following WWII: The EU member states hold two of the five permanent and two of the ten nonpermanent seats in the UN Security Council. Similarly, the EU (together with the US) wields disproportionate influence in the IMF and the World Bank. In light of this, the EU's enthusiasm for preserving existing institutional cooperation is hardly surprising.

⁶⁶ See Rabkin, *supra* note 51, at 279.

⁶⁷ *Id.*

⁶⁸ Robert Kagan, *Power and Weakness*, 113 POL. REV. 3, 14 (2002).

⁶⁹ See, e.g., *id.* at 8.

The EU has been successful in incorporating its vision into many multilateral arrangements, including treaties as diverse as the TRIPs Agreement, Landmines treaty, the Rome Statute, and the Kyoto Protocol. The EU's "hybrid" institutional structure helps the EU to shape international agreements and institutions towards its preferences.⁷⁰ The EU often bargains as a single entity, enjoying the leverage of the biggest trading block in the world.⁷¹ However, when it comes time to vote, the EU casts 27 votes on the matter. The EU can also refrain from making commitments, using the argument that the European Commission negotiates as a constrained agent of the member states.⁷² For instance, the Commission can resist demands to remove agricultural protection by saying that it cannot secure the backing of the French farmers for the proposal. Presenting the "French problem" as an "EU problem," the French farmers' demands suddenly enjoy the bargaining power of a trading block speaking on behalf of 500 million consumers.⁷³ The EU may therefore be more eager to join an international agreement than other states because its bargaining tactics give member nations more power to affect the agreement's content.

The EU's own experience with integration may explain why the EU strongly advocates the pooling of sovereignty internationally. The long experience with integration in Europe has eroded the rhetorical power of "sovereignty"—the notion, deeply entrenched in the United States and China that any loss of authority to supranational institutions is an intolerable affront to the dignity of a state. The EU also considers itself to be a thriving example of how international conflicts can be overcome and how countries can peacefully co-exist and prosper. As we discuss below, in comparing the EU to the United States, European countries have a less populist form of democracy than the United States does, and so lacks populist skepticism of remote bureaucracies.⁷⁴ European experience with fascism in the Second World War left the Europeans skeptical of popular democracy. An important function of international law is therefore to act as an antinationalist force by checking national sovereignty and guarding

⁷⁰ See generally Meunier, *supra* note 42 (discussing how the EU is a power in trade and through trade).

⁷¹ See *id.* at 908. Currently there are 27 members in the EU: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Member states of the EU, http://europa.eu/abc/european_countries/eu_members/index_en.htm (last visited Aug. 17, 2009).

⁷² Meunier, *supra* note 42, at 909. See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 INT'L ORG 427, 434 (1988) (explaining two-level bargaining when a constrained agent negotiates on behalf of a principal).

⁷³ Rabkin, *supra* note 51, at 275.

⁷⁴ Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1975 (2004) (contrasting American "democratic constitutionalism with European "international constitutionalism").

states against “democratic excess.”⁷⁵ As a result, there is less popular resistance in Europe to delegation of authority to international agencies.

Finally, the EU advocates strong multilateral institutions, in particular security institutions, because of its own limited ability to engage in unilateralism. While the EU member states have pooled their sovereignty on many issues of economic importance, the common foreign and security policy of the EU is limited. Any decision relating to security policy is subject to the requirement of unanimity among the 27 member states. There is also no common European military force that can be dispatched to intervene in international conflicts. Insisting on obtaining UN Security Council authorization for the use of military force thus rarely constrains the EU’s own military ambitions yet gives its important member states, France and the United Kingdom, a right to a veto any attempt by the United States to exercise force unilaterally. Thus, as long as the EU continues to lack a strong, unified European military force, it is likely to prefer constraining other exceptionalist states’ unilateralism through the disproportionate influence it wields in the UN Security Council.

III. CHINESE EXCEPTIONALISM: MINIMALIST DEVELOPMENTALISM

A. Chinese Exceptionalism Defined

1. Strict Sovereignty

China’s vision of international law rests on the principle of sovereignty. Under the Chinese view, sovereign states have an inalienable right to exercise jurisdiction over their territories and their people without interference from other states.⁷⁶ The internal affairs of a state are left for the state’s own people to govern; international affairs are decided by consultation among states acting on the basis of equality and mutual benefit.⁷⁷ While the integrated global economy inevitably compromises states’ economic sovereignty,

⁷⁵ *Id.* at 1986-87, 2006.

⁷⁶ Over the years, China has continued to assert that its sovereignty extends to Taiwan, which it considers to be a province, under its “one China” policy. Chinese government is the sole representative of China. Because of this, China has blocked Taiwan from joining the UN as a member and impeded Taiwan’s ability to enter into relations with other states. Foreign governments’ attempts to engage directly with Taiwan have provoked strong reactions in Beijing: When the United States announced its intention to sell advanced weapons to Taiwan in 2001, China protested by stating that the weapons deal would violate the Sino-US open communiqué and infringe China’s territorial sovereignty. See Björn Ahl, *China*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW § C.3, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1876&recno=24&letter=C.

⁷⁷ Wen Jiabao, Premier of the State Council of the People’s Republic of China, Address at the Rally Commemorating the 50th Anniversary of the Five Principles of Peaceful Coexistence (June 28, 2004), in 3 *Chinese J. Int’l L.* 363, 365–66 (2004), available at <http://www.fmprc.gov.cn/eng/topics/seminaronfiveprinciples/t140777.htm>.

military, political, and cultural sovereignty remain inviolable.⁷⁸ Consequently, China rejects all perceived attempts to undermine its sovereignty, including criticism of its human right policies.⁷⁹

China bases its vision of international law on the “Five Principles of Peaceful Coexistence,” which were first established in an agreement between China and India in 1954. These principles are “mutual respect for the territorial integrity and sovereignty of other states; mutual non-aggression, mutual non-interference in the internal affairs of other states; equality and mutual benefit; and peaceful coexistence.”⁸⁰ Since then, these principles have become a guiding doctrine of international relations for Chinese scholars.⁸¹ Of these principles, the most elemental under the Chinese view is the principle of sovereignty.⁸² In commemorating the 50th anniversary of the Five Principles in 2004, Chinese Premier Wen Jiabao referred to sovereignty as “the birthmark of any independent state, the crystallization of its national interests and the best safeguard of all it holds dear.”⁸³

As a part of its efforts to promote a world order based on the principle of sovereignty, China accords strong authority to the UN Charter and the Security Council.⁸⁴ Qian Qichen, former foreign minister of China, gave special emphasis to the UN’s role in maintaining a pluralist world, describing the UN as the “most universal, representative, and authoritative international organization in the world.”⁸⁵ Moreover, Qian called on states to uphold the UN’s authority and acknowledge the dominant role of the Security Council in conducting international affairs.⁸⁶

China has applied this view of international law to maintain its position that human rights concerns do not trump the principle of sovereignty. China regularly defies the UN’s, foreign countries’, and NGOs’ criticisms of its human rights record.⁸⁷ It resists

⁷⁸ Ahl, *supra* note 76, at § C.3.

⁷⁹ See Rosemary Foot, *Chinese Strategies in a US-Hegemonic Global Order: Accommodating and Hedging*, 82 INT’L AFF. 77, 88 n. 31 (2006).

⁸⁰ Ministry of Foreign Affairs of the People’s Republic of China, The Five Principles, <http://www.fmprc.gov.cn/eng/topics/seminaronfiveprinciples/t140589.htm> (last visited Aug. 7, 2009).

⁸¹ Xue Hanquin, *Chinese Observations on International Law*, 6 CHINESE J. INT’L L. 83, 86 (2007). Xue is the Chinese member of the International Law Commission.

⁸² *Id.*

⁸³ Wen, *supra* note 77, at 365.

⁸⁴ Foot, *supra* note 79, at 91.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See, e.g., Ministry of Foreign Affairs of the People’s Republic of China, Statement By H.E. Ambassador Qiao Zhonghuai, Head of the Chinese Delegation, Before the Vote on the Draft Resolution Entitled "Situation of Human Rights in China" at the 56th Session of the Commission on Human Rights (April 18, 2000), <http://www.fmprc.gov.cn/eng/wjb/zzjg/gjs/gjzzyhy/2594/2596/t15151.htm> (last visited Feb. 1,

the western concept of human rights as incompatible with its non-western and non-democratic society. Under this view, advancement of norms relating to human rights and democratic governance presumes a hierarchy of civilizations, and leads to an imposition of one's culture and values on others.

China has also opposed UN human rights resolutions against individual countries, fearing that such resolutions are primarily tools to exert political pressure on developing countries.⁸⁸ In January 2007, for instance, China used its veto in the UN Security Council to block a resolution denouncing human right violations in Myanmar. In doing so, it argued that the UN Charter grants the Security Council authority to intervene in the internal affairs of a state only if there is a threat to international peace and security. This criterion, according to China, was not met in case of Myanmar.⁸⁹ Similarly, China opposed a proposed Security Council resolution authorizing military intervention in Kosovo in 1998, asserting that the Kosovo matter was an internal affair of the state.⁹⁰

The United States and European Union have challenged China's non-intervention policy and called on China to support responsible humanitarian intervention. Recently, China has—slowly and reluctantly—backed away from its earlier stance that state sovereignty can never be compromised on humanitarian grounds.⁹¹ Concerned over its international reputation, China reversed its position on Myanmar and supported a subsequent UN Security Council statement condemning Myanmar's violent suppression of peaceful demonstrators in the fall of 2007.⁹² China also pressed Sudan to accept the UN and African Union peacekeepers in Darfur.⁹³ Still, it is unlikely that China will depart

2010); U.N. Human Rights Council Fourth Universal Periodic Review, 11th Plenary Meeting Webcast (Feb. 9, 2009), <http://www.un.org/webcast/unhrc/archive.asp?go=090209> (last visited Aug. 7, 2009); Ariana E. Cha, *China Tells U.N. Panel That It Respects Rights*, WASHINGTON POST, Feb. 10, 2009, at A12. Cf. People's Daily Online, Full Text of the Human Rights Record of the US in 2004 (Mar. 3, 2005), http://english.peopledaily.com.cn/200503/03/eng20050303_175406.html (last visited Aug. 7, 2009) (China's response to the United States' periodic report of the human rights record in China).

⁸⁸ Zhu Lijiang, *Chinese Practice in Public International Law: 2007(II)*, 7 CHINESE J. INT'L L. 735, 741 (2008).

⁸⁹ Wang Guangya, Chinese Envoy to the U.N., Remarks Before the U.N. Security Council, 5619th mtg. at 3, U.N. Doc. S/PV.5619 (Jan. 12, 2007).

⁹⁰ Shen Guofang, Chinese Envoy to the U.N., Remarks Before the U.N. Security Council, 3868th mtg. at 11, U.N. Doc. S/PV.3868 (Mar. 31, 1998).

⁹¹ C. FRED BERGSTEN ET AL., CHINA'S RISE: CHALLENGES AND OPPORTUNITIES 227 (2008).

⁹² Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Liu Jianchao's Remarks on the Chairman's Statement of the UN Security Council on the Myanmar Issue, <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t371707.htm> (last visited Aug. 7, 2009); see Sec. Council Agenda, 5757th mtg., U.N. Doc. S/PV.5757 (Oct. 11, 2007); see also Human Rights Council Res. S-5/1, U.N. Doc. A/HRC/S-5/L.1/Rev. 1 (Oct. 2, 2007).

⁹³ See Ministry of Foreign Affairs of the People's Republic of China, Hu Jintao Meets with Sudanese First Vice President (July 19, 2007), <http://www.fmprc.gov.cn/eng/wjb/zzjg/xybfs/xwlb/t343862.htm> (last visited Feb. 1, 2010); Yang Jiechi Welcomes UN Security Council Resolution to Send Peacekeeping Force

from its non-interference principle except in exceptional circumstances.⁹⁴ China's official position on humanitarian intervention continues to be a minimalist one: intervention is justified only in response to a target state's request to intervene, and only if UN authorization is first secured.⁹⁵

The principle of sovereignty also dominates China's position toward the ICC. The ICC Treaty grants the ICC jurisdiction to try individuals for genocide, war crimes and crimes against humanity, provided that those individuals' own states are unwilling or unable to investigate or prosecute the case. This precondition, called the "complementarity principle," dissuaded China from signing the Treaty in the end, even though it participated in the treaty negotiations. China maintained that "jurisdictional sovereignty of states should be strengthened rather than compromised."⁹⁶ China opposed the complementarity principle on the grounds that the ICC's decision to pronounce a state unable or unwilling to prosecute a case could be politically motivated. In refusing to expose its domestic criminal justice system to a possible review by the ICC,⁹⁷ China confirmed that state sovereignty and the principle of non-interference are the key ordering principles of its vision of international law.

2. Developmentalism

Even with China's emphasis on the principle of sovereign equality, China does not envision that all sovereign states should have equal rights and responsibilities. Instead, the Chinese view maintains that states' international obligations ought to be adjusted to their different stages of development and their unequal capacities to comply with international law. For the Chinese, the right to development is a fundamental principle of international law. Developed countries are in a better position to maintain international order.⁹⁸ Consequently, they must accept more burdensome obligations in providing public goods, including a clean environment or liberal trade order. In contrast, developing countries are entitled to various exceptions that reflect their lesser abilities to assume international obligations. Accordingly, China advances a vision of international law that is grounded on the idea of fairness and redistribution.

This developmental perspective guides China's position on international environmental law. When negotiating states' responsibilities to reduce greenhouse gas

to Darfur (Aug. 1, 2007), <http://www.fmprc.gov.cn/eng/wjw/wjwbz/2467/t347715.htm> (last visited Feb. 1, 2010).

⁹⁴ BERGSTEN ET AL., *supra* note 91, at 228.

⁹⁵ Ahl, *supra* note 78, at 4.

⁹⁶ Xue, *supra* note 81, at 92.

⁹⁷ *Id.* at 91, 93.

⁹⁸ Rosemary Foot, *Chinese Power and the Idea of a Responsible State*, 45 CHINA J. 1, 12 (2001).

emissions under the UN Framework Convention of Climate Change and the Kyoto Protocol, China supported the Convention but resisted the imposition of binding obligations on developing countries. According to China, developed countries should bear the primary responsibility for global environmental protection due to their higher level of industrialization and, consequently, their disproportionate contribution to climate change. Developed countries also have the resources to invest in technologies that enable them to reduce the harm caused on the environment. China's position, which ultimately prevailed, reflects the principle of "common but differentiated responsibilities"—"common," because climate change entails risks that affect all states; "differentiated," to suggest that not all states have to contribute equally in reducing or eliminating those mutual risks. Instead, this view stresses that wealthier states should assume a greater share of the burden of fighting the climate change.⁹⁹ While promulgating its commitment to (non-binding) emission cut targets during the 2009 Copenhagen climate change negotiations, China continued to insist that developed countries must assume the leadership role in fighting climate change.¹⁰⁰

Similarly, in the WTO, China supports the principle of special and differential treatment, which allows for various exceptions and preferences for developing countries. For instance, developing countries benefit from an "enabling clause" that permits derogations to the non-discriminatory treatment in favor of developing countries.¹⁰¹ The enabling clause therefore forms an exception to the principle of reciprocity, which calls for the exchange of balanced concessions among states. In practice, this means that developed countries extend preferential tariff schedules to developing countries without offering the same concessions to their other (developed country) trading partners. Nor do developing countries need to open their domestic markets to the same extent as developed countries.¹⁰² Developing countries are also

⁹⁹ Christopher D. Stone, *Common But Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 276-77, 279 (2004).

¹⁰⁰ National Development and Reform Commission of the People's Republic of China, Implementation of the Bali Roadmap: China's Position on the Copenhagen Climate Change Conference (May 20, 2009), http://en.ndrc.gov.cn/newsrelease/t20090521_280382.htm (last visited Feb. 2, 2010).

¹⁰¹ "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties." Differential and Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, L/4903 at ¶ 1 (1979).

¹⁰² The preferential tariff treatment of developing countries is often administered under domestic Generalized System of Preferences (GSP) programs, which the enabling clause allows individual states to set up. The United States, for instance, provides a duty-free entry for about 4,800 designated products from over 130 beneficiary countries and territories. These do not include China. See Office of the U.S. Trade Representative, Information on Countries Eligible for GSP, [http://www.ustr.gov/sites/default/files/ATT%20\(A\)%20-%20090417%20GSP_BDC.pdf](http://www.ustr.gov/sites/default/files/ATT%20(A)%20-%20090417%20GSP_BDC.pdf) (last visited Aug. 7, 2009).

eligible for transitional periods to allow them to adjust to surges in foreign imports, and to technical assistance to help them implement new WTO commitments.

China's approach to international human rights also follows the logic of developmentalism. According to Chinese policy, the key human right is the right to development, which trumps all other rights in the hierarchy of the human rights discourse.¹⁰³ Civil and political rights have to yield, when necessary, to the larger goal of economic development.¹⁰⁴ The Chinese view on human rights also emphasizes collective rights over individual rights. Human rights are not understood to be inalienable rights that precede the existence of the state. Rather, China emphasizes that human rights derive from the State, which can grant those rights, subject to conditions.¹⁰⁵ Since human rights derive from the State, China argues, nations will vary in their understanding of human rights based on their national traditions and level of economic development. For China, human rights is a concept steeped in cultural and economic relativism; there is no such thing as a universal human right.

China's pursuit of redistribution of power and wealth from North to South is characteristic of the developing countries' decades-strong trend of calling for special treatment and more equitable division of wealth. In the 1970s and 1980s, developing countries advanced proposals for a "New International Economic Order" ("NIEO") through the United Nations. This culminated in the adoption of the Resolution for a Charter of Economic Rights and Duties of States by the UN General Assembly in 1974.¹⁰⁶ The idea behind the NIEO and the Charter of Economic Rights and Duties was to offer an alternative to the western-dominated Bretton Woods institutions and revise the international economic system in favor of developing countries. Arguing that they deserved restitution for the economic and social costs of colonization, developing countries demanded trade concessions and more generous foreign aid than they had received in the past.¹⁰⁷ They also demanded the right to expropriate foreign property without paying full compensation. While China was never able to claim restitution

¹⁰³ ZOU KEYUAN, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW at 244 (citing INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, HUMAN RIGHTS IN CHINA, GOVERNMENT WHITE PAPER I (1991)) ("the right to subsistence is the foremost human right the Chinese people long fight for [sic]").

¹⁰⁴ Foot, *supra* note 79, at 12.

¹⁰⁵ Ahl, *supra* note 78, at 4.

¹⁰⁶ G.A. Res. 3281 (XXIX), 29th Sess., U.N. Doc. A/RES/29/3281 (Dec. 12, 1974); *see also* Charter of Economic Rights and Duties of States, G.A. Res. 40/182, 119th Sess., U.N. Doc. A/RES/40/182 (Dec. 17, 1985).

¹⁰⁷ MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 388-389 (1st ed. 2003).

relating to colonization, it follows the legacy of the NIEO by holding that states should grant special treatment to developing countries in key areas of international law.¹⁰⁸

B. Explaining Chinese Exceptionalism

1. Domestic Policy Preferences: Economic Growth and Reduction of Poverty

China's staggering growth rates have transformed China from a rural undeveloped country to an economic powerhouse.¹⁰⁹ With GDP exceeding \$4 trillion, China has the third largest economy in the world after the United States and Japan.¹¹⁰ China's massive trade surplus has allowed it to accumulate over \$2 trillion in foreign exchange reserves.¹¹¹ Few would question that China has emerged as an economic giant that wields significant power in the global economy.

Despite its astounding economic growth, China remains a poor country. With the GDP per capita of about \$6,000,¹¹² China ranks 101st in the world. Lifting people out of poverty is of the utmost concern to the vast majority of the Chinese people. Acquiescence in authoritarian rule rests in part on the Chinese government's ability to pursue economic growth, alleviate poverty and spread wealth to an increasing share of its population. China's rapid economic rise has had the downside of increasing economic inequality within China, heightening the risk of political tensions. There is ethnic and religious conflict in the west, and civil unrest throughout the country. The Chinese government has determined that only continued high economic growth can maintain social order and political stability.¹¹³

¹⁰⁸ See Ministry of Foreign Affairs of the People's Republic of China, Speech by H.E. Ambassador Zha Peixin at the Chinese Economic Association Annual Conference (Apr. 14, 2003), <http://www.fmprc.gov.cn/ce/ceuk/eng/dsjh/t27161.htm> (last visited Feb. 1, 2010); Ministry of Foreign Affairs of the People's Republic of China, Statement by Mr. Su Wei of the Chinese Delegation on Agenda Item 154: The Progressive Development of International Legal Principles and Rules for a New International Economic Order (Oct. 16, 2000), <http://www.fmprc.gov.cn/ce/ceun/eng/chinaandun/legalaffairs/sixthcommittee/t28560.htm> (last visited Aug. 16, 2009)

¹⁰⁹ Access to foreign markets has fueled China's economic growth and allowed it to sustain growth rates averaging over 9% each year since its 2001 accession to the WTO.

¹¹⁰ The World Bank, Gross Domestic Product 2008, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (last visited Aug. 14, 2009).[update]

¹¹¹ CENTRAL INTELLIGENCE AGENCY, *Country Comparison: Exports*, in THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2078rank.html> (last visited Aug. 14, 2009).

¹¹² See International Monetary Fund, World Economic Outlook Database, April 2009, <http://www.imf.org/external/pubs/ft/weo/2009/01/weodata/weoselgr.aspx> (GDP per capita based on the current international dollar, purchasing power parity, using 2008 statistics) (last visited Aug. 8, 2009).

¹¹³ See Yang Yao, *The End of the Beijing Consensus*, FOR. AFFAIRS, Feb. 2, 2010, available at <http://www.foreignaffairs.com/articles/65947/the-end-of-the-beijing-consensus> (last visited Feb. 3, 2010)

In its quest for continuing economic growth, China pursues an export-led growth strategy, and manipulates its currency so as to keep the prices of its exports artificially low. To further facilitate its trade, China acceded to the WTO as a developing country, taking advantage of the special and differential treatment available for developing countries.¹¹⁴ Special and differential treatment allows developing countries to benefit from longer time periods for implementing WTO commitments. These provisions also allow developed countries to increase trading opportunities for developing countries without offering comparable opportunities for other WTO member states.

China has also insisted on special and differential treatment in global climate change negotiations. In 2006, China passed the United States as the largest emitter of greenhouse gases in the world, and China's emissions continue to grow at a very high rate.¹¹⁵ China's high rate of emissions is the result of its booming economy and consequent high use of energy in manufacturing. China's comparative advantage in international manufacturing is partly based on low energy costs due to its large coal reserves. Thus, China has weak incentives to switch to alternative fuel sources and sign any international treaty that would force it to do so.

To resist demands for significant cuts in its emissions, China has advocated a developmentalist response to climate change. It has proposed to use countries' historical emissions as a benchmark for assigning emission reduction targets among states. Over the course of the history of industrialization, most emissions originated from developed countries when they were pursuing greater levels of development; akin to what China is currently doing. Alternatively, China has suggested that per capita emissions should form a baseline for contemplated emission reductions. Using per capita emissions as a benchmark for the state's global responsibility would have a very different impact on populous China's responsibilities than any metric focusing on total emissions: China's current per capita emissions are only one-sixth of that of the US.¹¹⁶

China's position on international human rights can also be seen through the lens of developmentalism. Against the western idea that political and civil rights take

("Since the Chinese Communist Party (CCP) lacks legitimacy in the classic democratic sense, it has been forced to seek performance-based legitimacy instead, by continuously improving the living standards of Chinese citizens.").

¹¹⁴ WTO rules do not contain a definition of a "developing country." Instead, states self-designate themselves as developed or developing countries as part of a political calculus. The US and the EU persistently opposed China's attempts to claim a developing country status based on the size of its economy and trade flows.

¹¹⁵ Michael P. Vanderbergh, *Climate Change: The China Problem*, 81 S. Cal. L. Rev. 905, 914 (2007–2008).

¹¹⁶ *Id.* at 917.

precedence, China argues that these rights must be subordinated when they conflict with measures that promote economic growth and maintain political stability that is necessary for growth.

2. Institutional Structure: Authoritarianism

Insisting on respect for the diversity of political, cultural, and social systems,¹¹⁷ China has resisted the ideals of democratic governance that threaten the core values of the one Party-state and the Chinese government's ability to secure domestic political and social stability.¹¹⁸ Thus, Chinese notion of human rights is tilted in favor of economic and social rights at the expense of civil and political rights. As Gerald Chan has observed:

Under China's political structure and culture, human rights are granted by the state and can easily be taken away by the state. If individual human rights run against state interests, the latter will usually prevail.¹¹⁹

International norms that protect political rights pose the greatest threat to the stability of the Chinese government. China may fear that consenting to any such norms would establish a focal point for dissident activity and lead to a more visible demand for political freedoms—a development that would resemble the signing of the Helsinki Accords, a 1975 agreement between the Western countries and the Soviet-bloc countries, which was widely seen to have fueled political dissident activity in the Soviet satellites and ultimately contributed to the collapse of communism.¹²⁰

The United States and other western democracies have long predicted that China's receptiveness to economic globalization and liberal market institutions would spur political change in China. Yet the link between economic liberalization and democratization in China has proved to be elusive. China has enjoyed economic benefits from liberal international institutions while resisting any political liberalization that was

¹¹⁷ See, e.g., Ministry of Foreign Affairs of the People's Republic of China, Joint Statement of the People's Republic of China and the Russian Federation on Major International Issues (May 23, 2008), <http://www.fmprc.gov.cn/eng/zxxx/t465821.htm> (last visited Aug. 7, 2009).

¹¹⁸ Foot, *supra* note 79, at 17.

¹¹⁹ Ivan Rasmussen, *Torture in the United States and China: Comparing American and Chinese Exceptionalism with Respect to the United Nations Convention Against Torture*, 2 ASIAN J. PUB. AFF. 65, 69 (2009) (citing GERALD CHAN, CHINA'S COMPLIANCE IN GLOBAL AFFAIRS: TRADE, ARMS CONTROL, ENVIRONMENTAL PROTECTION, HUMAN RIGHTS 177 (2006)).

¹²⁰ For an argument that the Helsinki Accords helped delegitimize communist states, see DANIEL C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM (2001). In particular, Article 7 of the Helsinki Accords which calls for "respect for human rights and fundamental freedoms" and which thus was argued to guarantee freedoms of thought, speech, conscience, religion and faith of all citizens of the signatory states, including the communist states. See Conference on Security and Co-Operation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292, 1295 (1975), available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

expected to follow from its increasing international engagement. The Chinese government has also nurtured a sentiment among its citizenry that the Western-style democracy would be unsuitable for China's current economic conditions. According to the government, embracing civil and political rights incorporated in international human rights treaties would destabilize Chinese society and endanger its pursuit of economic welfare for the benefit of its citizens. This has resonated with many Chinese, who want to avoid China undergoing the social instability, weak economic growth, and declining national influence that Russia experienced after the Soviet Union collapsed. Chinese citizens' support for the current regime is also fueled by some degree of nationalism and anti-Americanism, making them more receptive to authoritarianism and skeptical of the "imposition" of American-style democracy through international norms.¹²¹ Authoritarianism has also persisted as Western powers have pursued economic engagement with China rather than trying to influence China's human rights policies.

Despite its skepticism of many UN initiatives relating to individual rights, China views the UN as helpful in promoting China's vision of international law. The UN does not pose a threat to China's authoritarian government because of the exceptional status and influence China holds within the organization. As a permanent member of the Security Council, armed with a veto right, China knows that it can single-handedly prevent any UN action that adversely affects China's interests. The UN is not a democratic organ, and that suits China. Rather, the UN is a forum where China enjoys an equal voice with the other great powers. The Security Council seat also provides China's its most effective means to balance and constrain US power.¹²² China is therefore eager to maintain the current structure of the UN system and offers its unwavering support for the authority of the UN Security Council.¹²³

IV. AMERICAN EXCEPTIONALISM REVISITED: PRO-MARKET DEMOCRACY

A. American Exceptionalism Defined

1. Negative Liberties and Markets

The United States has a longstanding commitment to political and civil rights. These commitments are reflected in the United States' attitude toward human rights treaties. The United States has ratified the International Covenant on Civil and Political Rights, the human rights treaty that embodies the standard list of civil and political rights.

¹²¹ Ying Ma, *China's Stubborn Anti-Democracy*, 141 POLICY REV. 3, 11 (Feb./Mar. 2007).

¹²² See *supra* note 79.

¹²³ Ministry of Foreign Affairs of the People's Republic of China, *Towards an Enhanced Role of the UN Security Council in Maintaining Peace and Security* (Nov. 21, 2003), <http://www.fmprc.gov.cn/eng/xwfw/zyjh/t45317.htm> (last visited Aug. 8, 2009).

It has refused to ratify the International Covenant on Economic, Social, and Cultural Rights, the human rights treaty that embodies the standard list of social, economic, and cultural rights. The United States' approach to other human rights treaties fits this pattern. Rights to be free from torture and genocide are derived from civil and political rights that prohibit the government from abusing its citizens; accordingly, the United States has ratified the Torture and Genocide conventions. Other treaties, for example, those promoting the rights of children and disabled persons, concern social rights which the United States defines more narrowly; they have not been ratified.

These commitments are also reflected in American foreign policy.¹²⁴ The U.S. State Department compiles an annual report that criticizes foreign countries for violating human rights. Each country report follows a template that focuses on civil and political rights—including free speech and association, religious freedom, torture, voting—and ignores social and economic rights such as education, health care, and social insurance.¹²⁵ The only exceptions to this pattern are that the reports do have a section on the right to unionize, which falls somewhere between an economic right (to representation in the workplace) and civil right (to associate), and occasionally mention child welfare issues. The reports do not comment on these omissions, which would appear quite substantial to the rest of the world, which has mostly ratified the ICESCR and related treaties. The unstated assumption is that the American conception of human rights is the same as the international human rights which the reports address.

The United States has not consistently put economic and military pressure on countries that violate civil and political rights. Like other countries, it makes exceptions for friends and other important countries that it must do business with. For example, in 1993 President Clinton granted trade concessions to China subject to China improving its human rights protections. A year later, however, President Clinton backed down from linking China's trading status to human rights in order to pursue a "new path" in the US's relations with China.¹²⁶ Delinking human rights from trade was motivated by the US's

¹²⁴ See, e.g., THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 45–46 (2006) ("Abroad, we will work with our allies on three priorities: [1.] Promoting meaningful reform of the U.N., including: Reinvigorating the U.N.'s commitment, reflected in the U.N. Charter, to the promotion of democracy and human rights . . . [2.] Enhancing the role of democracies and democracy promotion throughout international and multilateral institutions, including: [s]trengthening and institutionalizing the Community of Democracies, [f]ostering the creation of regional democracy-based institutions in Asia, the Middle East, Africa, and elsewhere, [and i]mproving the capacity of the U.N. and other multilateral institutions to advance the freedom agenda through tools like the U.N. Democracy Fund . . .").

¹²⁵ See, e.g., Country Reports on Human Rights Practices 2008, <http://www.state.gov/g/drl/rls/hrrpt/2008/index.htm> (last visited Aug. 3, 2009).

¹²⁶ White House Office of Communications, *President in Press Conference on China MFN Status*, 1994 WL 209851 (May 27, 1994).

desire to secure China's cooperation in persuading North Korea not to develop nuclear weapons. The US also wanted to make sure it did not lose large trade deals, including Chinese government's aircraft orders, by insisting on progress on civil and political rights in China.¹²⁷

U.S. international rhetoric relentlessly promotes democracy, and has at least since Woodrow Wilson. In his Fourteen Points speech that justified American entry into World War I, Wilson stressed the right to self-determination, which has since been understood to mean that nations should govern themselves by democratic means.¹²⁸ This right appeared in the Atlantic Charter of 1941, which lay out the United States' (and Britain's) goals in World War II.¹²⁹ Throughout the Cold War, the United States described itself as the leader of the "free world"—that part of the world in which democracy flourished. In a famous article written in 1979, the future Reagan UN ambassador, Jeane Kirkpatrick, justified American support for dictatorships in the Cold War on the ground that merely authoritarian governments (as opposed to communist governments) might eventually democratize.¹³⁰

The collapse of communism and the end of cold war did not change the American stance on democracy. Indeed, the U.S. government over three administrations has made a concerted effort to claim that democracy is a norm of international law. The Clinton administration declared its commitment to promote democracy in Bosnia and Herzegovina, among other places.¹³¹ The Bush administration's "freedom agenda" sought to promote democracy in the Middle East.¹³² This policy supplied one of the rationales for the Iraq War. As a presidential candidate, Barack Obama also declared his support for promotion of democracy abroad, and in the first few months of his administration, officials have expressed this policy on multiple occasions.¹³³

¹²⁷ See JACKSON et al., *International Economic Relations* (5th ed. 2008).

¹²⁸ See Our Documents—Transcript of President Woodrow Wilson's Fourteen Points (1918), <http://www.ourdocuments.gov/doc.php?doc=62&page=transcript> (last visited Feb. 1, 2010).

¹²⁹ Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom ("Atlantic Charter"), U.S.-U.K., Aug. 14, 1941, 55 Stat. 1600, *available at* http://www.nato.int/cps/en/SID-2788FECD-8FACF71E/natolive/official_texts_16912.htm.

¹³⁰ Jeane J. Kirkpatrick, *Dictatorships and Double Standards*, 68(5) COMMENTARY 34, 37 (Nov. 1979).

¹³¹ See Joint Statement Released in Conjunction with the U.S.-EU Summit: Human Rights and Democratization in Bosnia and Herzegovina (Dec. 5, 1997), *available at* http://www.state.gov/www/regions/eur/eu/971205_useu_bosnia_hr.html ("The United States and the European Union have thus decided to coordinate their efforts to enhance their means to work with the parties in a constant dialogue with the aim of promoting democratic normalization and the stabilization of the region.").

¹³² Sarah E. Yerkes & Tamara Cofman Wittes, *What Price Freedom? Assessing the Bush Administration's Freedom Agenda*, http://www.brookings.edu/papers/2006/09/middleeast_wittes.aspx (last visited Feb. 1, 2010).

¹³³ See, e.g., James Steinberg, Deputy Secretary of State, Remarks at the 5th Community of Democracies Ministerial (July 12, 2009), *available at* <http://www.state.gov/s/d/2009/126052.htm> (asserting before the

The United States has also promoted free trade and free markets for more than half a century. The U.S. government initiated the GATT/WTO system in 1948,¹³⁴ and its commitment to maintaining and expanding this system has never wavered. During the cold war, the United States distinguished itself from the Soviet Union in part on the basis of its commitment to markets and the security of property rights. During this period, the United States was also the leading critic of redistributive claims made by developing countries. With the collapse of communism, the “Washington Consensus” emerged, a bundle of policy prescriptions that emphasized macroeconomic stability, fiscal discipline, privatization of government-owned resources, and liberalization of the economy.¹³⁵ The United States, predominantly through the International Monetary Fund and the World Bank, pressured developing countries to adopt these policies, often making loans conditional on significant reform in these directions. American institution-building after the cold war—including the expansion of NATO, the inauguration of the North American Free Trade Agreement and the Asia Pacific Economic Cooperation, the development of the GATT system with the creation of the WTO—were all designed to entrench American political and economic values as global values.¹³⁶

2. Military Force to Maintain Global Order

The United States believes in the use of military force in order to maintain global order and, less explicitly, to advance democracy and human rights. During the cold war, the United States pursued a policy of containment of the Soviet Union—an effort to prevent the Soviet Union from extending its influence into other countries. The policy took two forms: bolstering allies and undermining enemies, often with covert operations, including the rendering of assistance to indigenous insurgencies. During the Cuban missile crisis, the United States explicitly used military force in violation of the UN Charter, when it blockaded Cuba (a traditional act of war); other interventions in Latin American also were unilateral. After the cold war, the United States turned its focus on “rogue states” that engaged in illegal conduct, and used force against, or threatened to use force against, Panama, Iraq, Iran, and North Korea.

In general, the United States has tried to give legal justifications for its use of force. It has frequently cited authority under the UN Charter. The Korean War had

Community of Democracies delegates that “[o]ur common efforts reinforce the universality of the democratic values and serve as a powerful response to those who would argue that democracy belongs only to one region, or history or tradition” and listing the many regional “democratic backtracking” mechanisms in the AU, OAS, EU, OSCE, and ASEAN).

¹³⁴ World Trade Organization, Understanding the WTO—The GATT years: from Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Aug. 3, 2009).

¹³⁵ Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion?*, 44 J. ECON. LIT. 973, 973-74 (2006).

¹³⁶ See G. JOHN IKENBERRY, AFTER VICTORY 215-56 (2001).

Security Council authorization. American participation in the Vietnam War occurred at the invitation of the South Vietnamese government; hence, it was an example of collective self-defense, which is authorized by the UN charter. The Gulf War had Security Council authorization. So did the invasion of Afghanistan in 2001. The Iraq War of 2003 was not explicitly authorized by the Security Council, but the United States went to great lengths to justify the use of force on the basis of Security Council resolutions that suspended hostilities against Iraq at the end of the 1991 war, conditional on Iraqi cooperation in an inspection regime, which did not take place.

However, the United States has not always derived its authority from the UN Charter. As noted above, in 1999 the United States, along with the other NATO countries, launched an air attack on Serbia, which resulted in Serbia withdrawing from its renegade province of Kosovo, which it had been trying to bring under control. Serbia had long been a troublemaker in the Balkan, and had sowed disorder through its aggressive military posture during the collapse of Yugoslavia from 1991 to the Dayton Peace Accord of 1995.¹³⁷ The collapse of stability in the region had immediate harmful impacts on European countries, which had to deal with refugees. In addition, there was a great deal of pressure to stop the atrocities that were taking place on all sides. The 1999 invasion had a number of motives—to support European allies, to prevent Serbians from ethnically cleansing Kosovo of its Albanian stock, and to punish an international troublemaker. The invasion lacked Security Council authorization.¹³⁸

The United States did not always take a consistent line on its legal rationales for the use of military force. But the most common themes were: Security Council authorization; self-defense (including collective self-defense); and protection of democratically elected governments (and sometimes authoritarian governments) from foreign aggression. The Bush administration claimed at various points the right to launch preemptive or preventive wars in self-defense. But the Bush administration and previous American administrations never claimed that the United States has the exclusive right to go to war for these purposes; the arguments were always made in universalistic terms.

¹³⁷ See Warren Zimmermann, *The Last Ambassador: A Memoir of the Collapse of Yugoslavia*, 74(2) FOREIGN AFF., 2, 2, 12-14 (Mar./Apr. 1995) (relating a personal account of the dissolution of Yugoslavia).

¹³⁸ President Clinton contended that Security Council Resolutions 1199 and 1203 implicitly granted authority for military intervention by affirming “that the deterioration of the situation in Kosovo constitutes a threat to the peace and security of the region.” GARY SHARP, SR., *JUS PACIARI: EMERGENT LEGAL PARADIGMS FOR U.N. PEACE OPERATIONS* 313-14 (1999). The United Kingdom, Germany, and Belgium argued that authorization was unnecessary since intervention supported “the values represented in Article 2(4).” James P. Terry, *Rethinking Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism*, 2004(8) ARMY LAWYER 36, 45 (Aug. 2004).

Similarly, the American attitude toward international criminal law has been expressed in universalistic rhetoric. The United States refused to ratify the Rome Statute creating the International Criminal Court and has expressed unhappiness with a range of domestic statutes in foreign countries that permit prosecution of international crimes on the basis of universal jurisdiction. In both cases, the United States feared politically motivated prosecutions of American soldiers and politicians. It does not trust an international body and foreign governments to treat Americans fairly. But the United States never sought an exemption for Americans alone.¹³⁹ Its original conception of the ICC was that its authority would be conditional on Security Council authorization. Once such authorization was secured, the ICC would be able to prosecute anyone in any country.

B. Explaining American Exceptionalism

1. Domestic Policy Preferences: Markets, Liberty, Democracy

The United States is one of the world's oldest continuous democracies and democratic principles are deeply embedded in the political culture. The negative liberties in the Bill of Rights have also been internalized by Americans and American institutions. The United States' commitment to free markets has helped give it the most powerful economy in the world. Although this commitment to the market is often exaggerated—local regulation is as old as the country, and national regulation of the market has made significant inroads on *laissez faire* since the start of the twentieth century—there is no doubt that Americans are more committed to markets than people in the other advanced democracies.¹⁴⁰ The American economy is also among the least regulated.¹⁴¹

Americans are also more optimistic about, and tolerant of, war than people living in other advanced democracies, particularly in Europe. This can in part be attributed to different historical experiences. The United States emerged as a victor of World War I, having suffered battle deaths of 116,516 soldiers.¹⁴² In comparison, France lost

¹³⁹ The United States only began seeking bilateral immunity agreements after other countries ratified the Rome Statute. See Coalition for the International Criminal Court, Status of US Bilateral Immunity Agreements (BIAs), http://www.iccnw.org/documents/CICCFB_BIAstatus_current.pdf (last visited Feb. 2, 2010).

¹⁴⁰ World Values Survey, <http://www.worldvaluessurvey.org/> (follow "Online Data Analysis" hyperlink; then click "Begin Analysis" button; then follow "WVS 2005-2008" hyperlink; then check "Select All"; then click "Confirm Selection"; then click "Private vs. state ownership of business" hyperlink) (last visited Feb. 1, 2010).

¹⁴¹ See, e.g., Simeon Djankov, et al., *The Regulation of Entry*, 67 Q. J. ECON. 1, 22 (2002).

¹⁴² Meredith Reid Sarkees, COW Inter-State War Data, 1816-1997 (v3.0), [http://www.correlatesofwar.org/cow2_data/WarData/InterState/Inter-State War Participants \(V 3-0\).csv](http://www.correlatesofwar.org/cow2_data/WarData/InterState/Inter-State War Participants (V 3-0).csv). See generally Meredith Reid Sarkees & Phil Schafer, *The Correlates of War Data on War: An Update to 1997*, 18 CONFLICT MGMT. & PEACE SCI. 123 (2000).

1,385,000, Germany lost 1,773,700, Britain lost 908,371, and Russia lost 1,700,000.¹⁴³ France, Germany, and Britain had much smaller populations, of course. The United States' triumph in World War II was even more complete. The United States had significant casualties—405,400 missing or killed—but far less than Germany (3.5 million missing or killed), Japan (1.7 million missing or killed), and Russia (7.5 million missing or killed).¹⁴⁴ Cities throughout Europe were destroyed by the fighting; the United States mainland was virtually untouched.¹⁴⁵ Europeans suffered from refugee crises, hunger, and austerity in the aftermath of the war; American civilians enjoyed an economic boom. Since then, the United States has fought a number of “small” wars—many of them frustrating and inconclusive, with one defeat in Vietnam. But in none of these wars did the United States lose more soldiers than France did in the World War I battle of Verdun alone, which resulted in the deaths of 60,000 French soldiers.

Europeans and Americans derived different lessons from these experiences. In Europe one finds a deep strain of pacifism which is almost unknown in the United States. While European governments joined NATO and fought in a few small wars, anti-militarism continues to dominate, particularly on the Continent. Note, however, that anti-militarism has not spread beyond Europe except for Japan. China, Russia, India, Israel, and many other countries have maintained strong armies and fought major wars since World War II—and China and Russia have suffered in twentieth-century wars to a degree comparable to that of European countries.

2. Institutions: Populist Democracy and Powerful Military

From the institutional standpoint, three features about the United States stand out: it is a democracy; it supports a market economy; and it has an enormous military. We have already discussed the first two features: they reflect public opinion rooted in tradition. More than that, they are institutions that are widely regarded as successful. It seems natural for Americans to urge other countries to adopt similar institutions.

¹⁴³ Sarkees, *supra* note 142.

¹⁴⁴ *Id.* Fighting in both the European and Pacific theatres, United States still suffered fewer battle deaths than Britain (418,765 missing or killed). *Id.* France's military only lost 2,500 missing or killed; however, since it was occupied after 1940 subsequent losses were only suffered by the forces in exile at the time of occupation. *Id.*

¹⁴⁵ The United States suffered essentially no civilian deaths; Britain, separated from continental Europe by the English Channel, had 60,600 killed as a result of aerial bombing; Germany and Russia exited the war with 2.35 million and 6.7 million civilians dead, respectively. JOHN ELLIS, *WORLD WAR II: A STATISTICAL SURVEY: THE ESSENTIAL FACTS AND FIGURES FOR ALL THE COMBATANTS* 253-54 (1993).

But institutions matter in other ways. The democratic peace literature suggests that democracies do not go to war with other democracies;¹⁴⁶ they do go to war with non-democracies. If this pattern reflects causal factors, then it is not surprising that democracies would want other countries to be democracies if possible. The absence of war may be just one manifestation of a deeper affinity among democracies, which allows them to cooperate in many ways. Similarly, countries with developed market institutions may prefer to deal with similar countries; trade is no doubt easier when institutions resemble each other and reflect market imperatives. European integration, which began as a customs union but progressed toward unification of economic policy and law, has reflected these pressures. The U.S. government may seek to encourage other countries to adopt American-style institutions because cooperation with such countries becomes easier and more beneficial.

The EU shares the United States' commitment to democracy. But this shared commitment masks different political cultures. In European countries, the public tends to defer to self-perpetuating political and bureaucratic elites. Elections are referenda on the performance of the governing party; the political leaders themselves work their way up the party hierarchy. American democracy has a strong populist skepticism of elites. The political class is easily penetrated by unknowns who ride a wave of populist enthusiasm (Jimmy Carter, Barack Obama, Sarah Palin, Ross Perot)—an almost unheard-of phenomenon in Europe, where populists are kept at the fringes. The EU itself is governed by a bureaucratic elite appointed by the political elites of its member states. Efforts to overcome this widely recognized “democratic deficit” by transferring power to the European Parliament have so far been unsuccessful.¹⁴⁷

This divide may explain why European countries support international institutions more readily than the United States does. These institutions, like the EU itself, are staffed by the same kind of elite politician that governs European countries. Europeans, accustomed to deferring to their leaders, also defer to the international institutions those leaders create and staff. Americans, by contrast, distrust their leaders and, fearing a backlash from the voters, American politicians are reluctant to insist that those voters

¹⁴⁶ See BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1994). The U.S. government seems to agree. *see* A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY, *supra* note **Error! Bookmark not defined.**, at 2 (“In designing our strategy, we recognize that the spread of democracy supports American values and enhances both our security and prosperity. Democratic governments are more likely to cooperate with each other against common threats, encourage free trade, and promote sustainable economic development. They are less likely to wage war or abuse the rights of their people. Hence, the trend toward democracy and free markets throughout the world advances American interests. The United States will support this trend by remaining actively engaged in the world.”)

¹⁴⁷ See Rabkin, *supra* note 51, at 274.

submit to another, even more remote layer of bureaucratic governance at the international level.

The third institutional feature—the enormous military—also sets the United States apart from other states. It is an understatement to say that the United States is the dominant military power in the world. In 2005, the United States spent \$503 billion on military expenditures, almost half of the \$1.16 trillion spent worldwide.¹⁴⁸ As Table 1 shows, in absolute terms United States spending dwarfs the amounts spent on the nine next most expensive militaries.¹⁴⁹ This was not always the case. The United States was a military weakling in the nineteenth century up until World War I. But wealthy, populous countries can become military powers and the United States did so during World War II. Since then, its only rival has been the now-defunct Soviet Union.

Table 1: Countries with the Highest Military Expenditures, 2005¹⁵⁰

Country	Military Expenditures (Billions)
United States	\$503.0
China	\$85.3
United Kingdom	\$55.9
France	\$52.9
Japan	\$43.9
Germany	\$38.1
Italy	\$33.5
Russia	\$31.1
Saudi Arabia	\$25.4
India	\$18.8

The United States maintained an enormous military during the cold war because of the Soviet threat. Accordingly, people believed that the collapse of the Soviet Union would deliver a “peace dividend” in the form of smaller budgets. The era of small military budgets was brief, however, as it became clear that the United States could use military force to achieve its foreign policy aims. Indeed, the United States became

¹⁴⁸ World Military Expenditures and Arms Transfers 2005, <http://www.state.gov/t/vci/rls/rpt/wmeat/2005/index.htm> (last visited Aug. 4, 2009).

¹⁴⁹ However, in relative terms the United States spends only 4.06 percent of its GDP on military expenditures ranking it 28th out of the 173 countries ranked by the CIA. CIA - The World Factbook – Country Comparison :: Military expenditures – percent of GDP, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2034rank.html> (last visited Aug. 3, 2009).

¹⁵⁰ World Military Expenditures and Arms Transfers 2005, <http://www.state.gov/t/vci/rls/rpt/wmeat/2005/index.htm> (last visited Aug. 4, 2009).

embroiled in several more wars after the end of the cold war, culminating in the conflict with al Qaeda.

It is hardly surprising, then, that the United States should try to protect its freedom to use military force, just as it is not surprising that the United States should seek to duplicate its democratic and market institutions in foreign countries. It is playing to its institutional strengths. But in taking these positions, the United States uses universalistic rhetoric. It does not claim that the United States alone should be able to use its military: all countries have the same right to resort to military force under defined circumstances. Similarly, democracy and free markets are not just the prerogatives of the United States: all people should have access to democratic and market institutions.

V. ARE EXCEPTIONALIST STATES ALSO EXEMPTIONALIST?

We have argued that the great powers—including the US, the EU and China—advance their exceptionalist views of international law in ways that reflect their distinctive values and serve their particular interests. None of the exceptionalist states, however, calls for a different set of rules that would apply to that state alone. Instead, they call for a universal application of the international rules embedding their respective exceptionalist vision. This is the key distinction between exceptionalism and exemptionalism.

A. Rejecting American, European and Chinese Exemptionalism

In Part I, we disputed the contention that the United States is exemptionalist. As we noted, there are no examples of the United States explicitly arguing that it is exempt from the rules that apply to other countries. Like other great powers, the United States advances a particular vision of international law that reflects its values, serves its interests, and takes advantage of its institutional capacities. But its vision is universal, in the sense that the rules and interpretations it advances are the same for all countries. The US has frequently insisted that its norms and practices should provide the basis for international law. This is different from the US exempting itself from the rules that apply to other states.

It is also wrong to depict the EU as an exemptionalist power. Critics have pointed out that the EU is a champion of multilateral trade liberalization yet the European single market is the most extreme example of trade-diverting regionalism. Similarly, the EU promotes the most-favored nation principle in the WTO yet maintains preferential trading

arrangements with Europe's colonies.¹⁵¹ But the EU is not seeking to carve out an exemption for itself. Instead, the EU takes the stand that regionalism is compatible with multilateralism; that regional trade blocks are building blocks and not stumbling blocks for multilateral trade liberalization. Similarly, preferential trade agreements are consistent with the principle of "special and differential treatment" of developing countries, the EU claims.

It is also wrong to suggest that the EU's voting practices amount to exemptionalism.¹⁵² The EU is not enjoying the privilege of double-voting: depending on whether the issue falls under the Community competence or the national competence, the EU either casts the votes on behalf of the member states or the member states cast their votes individually.¹⁵³ The EU cannot vote independently in addition to the votes cast by member states.¹⁵⁴ The practice of coordinating a negotiation position yet casting individual votes is consistent with the character of the EU: the EU is not a state but a tight economic community and a loose political union among 27 independent nation states. That independent nation states each retain a right to vote is not exemptional.

The best argument for European exemptionalism comes from the global climate change negotiations. The EU insisted it would be treated as a single state when calculating the emissions that the EU members were entitled to under the Kyoto Protocol. In practice this "Kyoto bubble" meant that some EU member states' increases in emission could be offset by emission reductions in others.¹⁵⁵ The EU first opposed a

¹⁵¹ See Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU (May 22, 1997).

¹⁵² See Safrin, *supra* note 14, at 1328 (claiming that the EU seeks different rules for itself because of the "exceptional accommodations" its institutional structures require).

¹⁵³ In the WTO, however, individual member states vote even though the external trade policy falls under the Community's competence. This is partly justified by the expansion of the WTO to new areas, including services and IPR where the EC and the member states share competence and where the EU could not legally exercise the vote of its individual member states. See Opinion 1/94 of the Court of 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property—Article 228(6) of the EC Treaty, 1994 E.C.R. I-5267, at Ruling, ¶¶ 1–3. Consistent with their individual voting rights, all member states pay dues to the WTO based on their total trade, including intra-EU trade. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 58 (2d ed. 2001).

¹⁵⁴ See, e.g., Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1998, 37 I.L.M. 32, art. 22, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>. For a sole example to the contrary, see; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, Nov. 12, 2007, available at http://www.wipo.int/madrid/en/legal_texts/trtdocs_wo016.html.

¹⁵⁵ It is also questionable that the "Kyoto bubble" should be considered exemptionalist per se. When a regional trading block is formed, the WTO allows for an individual country belonging to a regional customs union or a free trade area to increase its duties and other barriers to trade as long as trade barriers on the whole will not be higher than the corresponding duties and trade barriers before the formation of the regional trading block. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55

similar arrangement within other developed countries. This, some would argue, would have amounted to EU exemptionalism.¹⁵⁶ However, other states rejected the EU's proposal for a *sui generis* treatment, and the EU agreed to allow emissions trading between other states as well.¹⁵⁷ Consequently, the possible (failed) exemptionalism in connection with the climate change negotiations aside, the argument for the EU's exemptionalism remains thin.

China has also been accused of exemptionalism. Critics point to China's insistence on differential treatment to account for its developmental needs.¹⁵⁸ However, China does not argue that China alone should benefit from this principle. China argues that, as a general rule, international obligations should be relaxed for developing countries. This universal rule should apply to all, including (but not singling out) China. It is not a coincidence that China is among the many beneficiaries of this universal rule. No state advances international rules that are inconsistent with its national interests. But a state pursuing a universal rule that is consistent with its interests is not the same as the state embracing exemptionalism, even if that universal rule would at times lead to a state being exempted from some international responsibilities.

To illustrate the difference between exceptionalism and exemptionalism, consider income tax policy as an example from domestic law. Few would portray progressive income tax policy as a kind of exemptionalism for the poor. Most people believe that different individuals have "common but differentiated responsibilities" to pay taxes. Progressive taxation reflects a public policy based on the idea of fairness and redistribution. It can be contrasted with policies that exempt specified individuals from paying their taxes. China does not seek to create a system that exempts China alone from

U.N.T.S. 194, arts. XXIV:5(a), XXIV:5(b). The idea is the same: offsetting emissions or trade barriers is allowed as long as the EU as a whole ensures that a certain maximum level of tariffs or emissions is not exceeded.

¹⁵⁶ Safrin, *supra* note 14, at 1334-1335.

¹⁵⁷ *See id.* at 1332-33. *Cf.* Convention on Biological Diversity, Open-Ended Ad Hoc Working Group on biosafety, *Individual Government Submissions on the Contents of the Future Protocol*, U.N. Doc. UNEP/CBD/BSWG/Inf.2 (May 6, 1997), available at <http://www.cbd.int/doc/meetings/bs/bswg-02/information/bswg-02-inf-02-en.pdf> (indicating that the EU proposed separate treatment for regional economic integration organizations).

¹⁵⁸ Safrin, *supra* note 14, at 1342-50; C. Fred Bergsten, *A Partnership of Equals: How Washington Should Respond to China's Economic Challenge*, 87(4) FOREIGN AFF. 57 (July/Aug. 2008) (reporting that some have construed China's policy as "the usual free-riding and skirting of responsibility by a powerful newcomer"); *cf.* Stanley J. Michalak, U.N. Conference on Trade and Development, Part 5: The U.S. Must Reassess Its Role, The Heritage Foundation Backgrounder #477, at 7 (1985), available at https://www.policyarchive.org/bitstream/handle/10207/9236/87514_1.pdf?sequence=1 (accusing developing countries, generally, of keeping double standards); John N. Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 167 (1984) (arguing that the international community is more tolerant of violations of law when totalitarian regimes, generally, act purportedly for "revolutionary" or "anti-imperialist" goals).

its rules; it is seeking universal commitment to a “progressive” system of international law with development-adjusted rights and responsibilities.

China is not the sole beneficiary of the developmentalist international order. The World Bank classifies only sixty-six countries as high income countries.¹⁵⁹ The rest are commonly viewed as developing countries. China also acknowledges that some countries are appropriately perceived as “least developed countries” that are entitled to even greater flexibilities than China and other “wealthier developing countries.” Also, assuming that China can maintain its trajectory of economic development, China will one day lose its status as a developing country. Nothing in China’s international law rhetoric suggests that any country, China included, would have an inherent or lasting basis of claiming a right to special and differential treatment.

B. Exemptionalism and Violation of International Law

One might argue that states’ rhetoric is besides the point; what matters is their behavior. The United States is exemptionalist because it violates international law that does not suit its interests. It hardly matters that the United States does not admit that it violates international law, or does not claim a de jure privilege to violate international law that binds others. Behind the rhetoric, the United States engages in de facto exemptionalism.

The problem with this argument is that all states violate international law some of the time. For the United States, the bill of particulars includes the 2003 Iraq war, the 1999 Kosovo War, torture and extraordinary rendition in connection with the war on terror, and a number of trade violations. For the EU, there is a similar list—the 1999 Kosovo War, complicity in extraordinary rendition, trade violations, and—for a substantial group of member states—the 2003 Iraq War. For China, an authoritarian state, one can point to extensive human rights violations, including the suppression of political dissent and religious freedom. Normal states also sometimes violate international law. Human rights violations, including torture, and violations of countries’ WTO obligations are widespread.¹⁶⁰

Our argument is not that the United States violates international law less than other countries do. We do not seek to, or even know how to, count up violations and compare them. Our argument is different. It is that there is nothing distinctive about the

¹⁵⁹ The World Bank, Data and Statistics, <http://go.worldbank.org/D7SN0B8YU0> (last visited Aug. 7, 2009).

¹⁶⁰ See, e.g., Michael J. Gilligan & Nathaniel H. Nesbitt, *Do Norms Reduce Torture?*, 38 J. LEGAL STUD. 445 (2009).

United States, qualitatively speaking. Like the other major powers, and indeed like many normal states, it sometimes violates international law. Either all states are exemptionalist, in which case the term is useless, or none is.

A similar point can be made about behavior that falls short of international law violation but that is in tension with a state's exceptionalist stance on international law. As we noted earlier, many people argue that the United States engages in double standards when it coddles friendly dictators while proclaiming a commitment to human rights. The EU engages in similar behavior, of course. Both the United States and the EU try to maintain friendly relations with China, Russia, and other authoritarian states because of their geopolitical and economic importance. These countries are simply balancing objectives that are not always consistent—prosperity and security, on the one hand, the promotion of human rights, on the other.

China does the same thing, but in the opposite direction. Having proclaimed the inviolability of sovereignty, it has joined some resolutions condemning human rights violations in other states.¹⁶¹ Doing so, China is compromising its stance on international law for reputational reasons—it wants to maintain good relations with the human-rights promoting states. As we noted above, China's position on free trade and the right to development is not always carried through consistently.¹⁶²

In sum, all states have multiple objectives that are in tension with each other. The compromises that results are just normal politics, not special behavior that deserves the label of exemptionalism.

C. Embedded Exemptionalism in International Law

The above discussion has shown that none of the exceptionalist states is explicitly exemptionalist. In forgoing exemptionalism, however, exceptionalist states do not forgo their own interests. Exceptionalist states consistently take advantage of international institutions that are constructed in ways that favor them. They have been central in creating—and remain essential in maintaining— international institutions that embody their influence and preferences. The formation of international institutions has enabled exceptional states to create hierarchies, reinforce privileges, and institutionalize their disproportionate influence over international law.

¹⁶¹ See *supra* note 92 and accompanying text (describing China's decision to join in condemnation against Myanmar).

¹⁶² For a book-length account of China's compliance with international law, see generally Chan, *supra* note 119. Chan says that China's compliance with arms control treaties is "satisfactory," with trade treaties is "good," with human rights treaties is "fair to poor," and with environmental protection treaties is "poor." *Id.* at 205.

The United Nations offers the most compelling example of the presence of exemptionalism or “double standards” in international law. Americans, Europeans and Chinese, (together with Russians) all enjoy a permanent seat and a right to a veto in the UN Security Council. The UN Charter explicitly sets the exceptionalist states apart from all other states and vests them with exclusive rights and responsibilities. This is the most significant departure from the principle of sovereign equality of states. Most commentators concede that the composition of the Security Council fails to correspond to the distribution of power in today’s world.¹⁶³ Some further question the fairness or the legitimacy of the organization as a result.¹⁶⁴ Still, granting the permanent five members of the UN Security Council a privileged position among nations remains widely accepted—if only because of the political infeasibility of any alternative: the current five permanent members are unlikely to agree to empower other states by disempowering themselves.¹⁶⁵

A similar charge of “collective exemptionalism” or “double standards” may be lodged against the Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”). The NPT divides states into nuclear and non-nuclear states and vests the two groups of states with different rights and obligations. Under the Treaty, states that do not possess nuclear weapons renounce any future acquisition of such weapons and undertake to pursue nuclear technology only for civilian purposes. In contrast, states that do possess nuclear weapons (the United States, Russia, China, the United Kingdom, and France—hence the permanent members of the UN Security Council)¹⁶⁶ undertake to pass nuclear technology to non-nuclear weapon states only for peaceful purposes. Thus, like the UN Charter, the NPT openly sets the exceptionalist (nuclear) states apart from normal (non-nuclear) states. However, unlike the UN Charter, the NPT provides for a quid pro quo. The non-nuclear states have no obligation to enter the NPT and are free to develop nuclear weapons technology without violating international law.

¹⁶³ See, e.g., Jacob K. Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 AM. J. INT’L L. 209, 240 (2009) (listing various General Assembly discussions on whether to change the composition of the Security Council and explaining the G-4’s bid for seats in the Security Council).

¹⁶⁴ See, e.g., David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 558–60 (1993) (explaining how perceptions of illegitimacy that arise when the organization fails to live up to its “promise and spirit” may lead to failed negotiations).

¹⁶⁵ Daniel W. Drezner, *The New New World Order*, 86 FOREIGN AFF. 34, 35 (2007) (suggesting the European nations’ unwilling to “reduce their overrepresentation in multilateral institutions”); cf. Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT’L L. 632, 639–44 (2005) (analyzing the potential power struggles that would result if countries tried to add seats to the Security Council).

¹⁶⁶ India, Pakistan, North Korea and Israel, which are either commonly known or widely believed to own nuclear weapons, are not participants to the NPT. (North Korea signed the Treaty, violated it and subsequently withdrew from it.)

Similarly to the UN, the IMF and World Bank were set up after World War II to reflect the distribution of power at that time, disproportionately favoring the US and the European states. Americans and Europeans designed a voting system that allowed them to dominate decision-making: though the United States only constitutes 5% of the population of the IMF member states, it enjoys 17% of the votes—enough to give it a single-handed veto right over all decisions—and Europeans control 40% of the vote, despite only comprising 13% of the IMF member state population. This is particularly striking when contrasted with the 5% voting share that China and India hold collectively. The voting power in the World Bank mirrors that of the IMF. In addition, since the founding of the Bretton Woods institutions in 1944, the Europeans have chosen the head of the former and nominated the head of the latter. This de facto control of both institutions gives the US and the EU special status that allows them to grant loans and debt relief based on geopolitical and ideological considerations.¹⁶⁷

The WTO embodies a less hierarchical decision-making structure: It operates on the principle of consensus and gives all member states an equal vote. In practice, however, states with the largest economies drive the negotiation process. Similarly, the enforcement of the WTO commitments remains largely the privilege of powerful states. Powerful states may violate their trade commitments towards weaker trading partners, knowing that weaker states are unlikely to carry out retaliation against them even if they secure the WTO's authorization to do so.¹⁶⁸ Powerful states are therefore rarely targets of trade sanctions,¹⁶⁹ yet uniquely positioned to employ trade sanctions against their trade partners.¹⁷⁰ Though the WTO rules seem egalitarian on the surface, a closer look at the operation of these rules reveals a familiar hierarchical structure, present in most international institutions.

¹⁶⁷ See International Monetary Fund, *IMF Executive Directors and Voting Power* (July 10, 2009), <http://www.imf.org/external/np/sec/memdir/eds.htm> (last visited Aug. 21, 2009); World Bank, *International Bank for Reconstruction and Development: Subscriptions and Voting Power of Member Countries* (June 30, 2009), <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDCountryVotingTable.pdf> (last visited Aug. 21, 2009); Jeffrey D. Sachs, *How to Run the International Monetary Fund*, 143 FOREIGN POL. 60, 61 (2004) (insinuating that the current IMF managing director owes his job to the collusion of rich countries).

¹⁶⁸ See Steve Charnovitz, *Rethinking WTO Sanctions*, 95 AM. J. INT'L L. 792, 816–17 (2001).

¹⁶⁹ However, the powerful exceptionalist states may still engage in trade disputes among themselves, since the threat of retaliation is credible for those countries.

¹⁷⁰ For example, Ecuador needs access to the US market much more than the United States needs access to the Ecuadorian market. Ecuador would therefore be vulnerable to US sanctions whereas the United States would be only mildly harmed by retaliatory tariffs on the Ecuadorian border. Ecuador is also more likely to be dependent on US imports, and the decision to restrict the entry of US goods on its market is likely to hurt Ecuador much more than the US. Thus, the United States may intentionally violate its commitments towards Ecuador, knowing that Ecuador cannot follow through on its threats.

There is a significant irony here. While the IMF, the World Bank, the WTO, and many other international institutions have been criticized for their bias toward powerful countries, the United Nations has avoided this charge. Yet the United Nations is the only international institution that has the power to issue orders that legally bind all states while giving a privileged group of states the power to ensure that those orders never apply to them. Reform efforts have focused on expanding the group of states with veto power—adding Germany, for example, or Japan, or Brazil, or India—but not in eliminating the basic distinction between great powers with veto rights or other privileges, and ordinary states without them. All states—exceptional as well as ordinary—appear to acquiesce in the basic premise of the Security Council: that significant interventions to keep the peace require the consent of the most powerful states but not the consent of other states.

If this system has exemptionalist overtones, it has nothing to do with exceptionalism. No single exceptional state has authority in the UN system; instead, authority is shared by a group of powerful states, some of them exceptional, some not. The UN system does not reflect any single country's distinctive vision; it reflects an overlapping consensus among the great powers and ordinary countries.¹⁷¹

Now let us consider again the ICC. As we noted above, the EU sought to give the ICC independent authority to initiate prosecutions and trials. The United States sought to make the ICC's authority depend on Security Council authorization, which would have given the United States (and other permanent members) a right of veto, which would have, in effect, immunized their citizens from prosecution. It is widely agreed that the EU position was "universalistic," while the American position was exemptionalist.

If this argument is correct, it reflects a deep irony. The U.S. position was just to add the ICC to the Security Council's long list of existing powers. Thus, the argument boils down to a claim that increasing the power of the Security Council reflects an exemptionalist agenda—even though the Security Council has a high level of international legitimacy.

But there is a more serious problem with the argument. The claim that the United States position is exemptionalist rests on a strong distinction between *de jure* and *de facto*. The United States can argue that its position is (*de jure*) universal because no special exception is made for Americans—Americans would not be granted immunity under the Rome Statute as the United States envisioned it. The skeptics would respond that the United States would be given *de facto* immunity because of its veto in the Security Council. But an exemptionalist charge can also be turned against the Europeans.

¹⁷¹ The same argument applies to the NPT.

The Rome Statute, as ratified, is universalistic in the sense that it applies to all nations. But, de facto, it does not apply to the Europeans because relatively few European soldiers are sent into combat and European law enforcement authorities investigate and prosecute international crimes and thus satisfy the complementarity provision of the Rome Statute. The Rome Statute would create greater risks for the United States than for Europeans because of the more frequent (and aggressive) use of military force by the former. So if the United States' position on the Rome Statute was exemptionalist, so was the European position that was finally adopted—in the sense that both powers were determined to ensure that their own soldiers would never have to stand a trial before the ICC.

Exemptionalism in this sense means a posture of advocating international treaties that place burdens on other states and no burdens, or fewer burdens, on one's own state. There are many ways to do this. One could argue that obligations are contingent on the approval of an institution in which one has a veto right (the United States position). Or one could argue that obligations are such that one's own state already satisfies them and other states do not (the European position). The principle of common but differentiated responsibilities is yet another version of this idea: here, developing states are given more limited obligations than developed states. To condemn exemptionalism in this sense is to condemn all states, because all states enter treaty negotiations with an eye to maximizing their benefits and minimizing their burdens. It is hard to make sense of exemptionalism except in the formal sense of demanding exemptions from general obligations of international law. Otherwise, charges of exemptionalism are just a complaint that a state fails to comply with international morality.

The essence of the debate over exemptionalism should now be clear. It is an attempt to transform the debate about international morality, which is endlessly contested, into a debate about formal legal compliance with the law, which can at least in principle be resolved with legal methods. But the transformation fails. If exemptionalism is understood in a substantive sense—all treaties should be “fair”—it does not differ from international morality. If exemptionalism is understood in a formal sense—all states (or all similarly situated states) should be subject to the same obligations—it does constrain states. But by advocating universal legal obligations that burden other states and do not burden themselves, states can avoid charges of exemptionalism in the formal sense without sacrificing their interests.

CONCLUSION

There has been a long debate about American exceptionalism which, until recently, has focused on American ideology, culture, and institutions. This debate has focused on those aspects of American life that set it apart from the rest of the world;

explanations have been sought in unique features of American history. The debate about the relationship between American exceptionalism and foreign policy is more recent. In this debate, scholars have again identified what seems to be unique about the United States, but here focusing on American foreign policy. They have then tried to explain how these distinctive features of American foreign policy have their source in America's unique history. The foreign policy debate, unlike the original debate, has a strongly negative cast. American exceptionalism in foreign policy means that the United States does not comply with the universal rules of international law—it prefers to maximize its power or pursue idiosyncratic political ends.

Our main argument is that, although there is much to criticize in American foreign policy, exceptionalism is not a useful target of criticism. Indeed, careful examination of the critics' arguments reveals that they are not concerned with American *exceptionalism* or even exceptionalism per se; instead, they disapprove of *American* exceptionalism, wishing that the United States displayed *European* exceptionalism—that is, the approach to international law that European countries have taken. The above discussion has shown that most powerful states are “exceptionalist” in the sense that they seek to embody their values and interests in international law. The criticism of exceptionalism, then, is just a criticism of power, or the use of power to achieve ends of which the critic disapproves.

Stronger complaints about exemptionalism (as opposed to exceptionalism) also turn out to be unpersuasive. All states violate international law some of the time; it makes little sense to call violators exemptionalists. If exemptionalism is understood to be the posture that a state does not have to follow rules that apply to all other states, then no state is exemptionalist; the category is empty. If exemptionalism is understood to be a tendency to support treaties that place greater burdens on other countries and fewer (or no) burdens on one's own countries, then all states are exemptionalist. This is just a normal part of international bargaining.

The United States, the EU, and China have particular visions of international law. Neither of these visions is simply “correct” as a matter of international law: all of the visions shape the content of international law. Scholars can do no better than evaluate these competing visions on the basis of their normative appeal and institutional sustainability, and argue for the vision (or some alternative) that they believe is best.

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