

European exceptionalism?

GEORG NOLTE and HELMUT PHILIPP AUST

Humboldt University Berlin, Unter den Linden 9, D-10099 Berlin, Germany

Email: georg.nolte@jura.hu-berlin.de; helmut.aust@jura.hu-berlin.de

Abstract: The paper discusses recent propositions that, after a period of ‘American exceptionalism’, forms of ‘European exceptionalism’ are now emerging. The paper first asks what makes a political entity ‘exceptionalist’. For this purpose inspiration is sought in the defining features of ‘American exceptionalism’. The paper then discusses whether ‘Europe’ displays comparable features in the fields of international legal policy and domestic rights culture. It also asks whether there are other aspects of European governance which could make it plausible to speak of a European exceptionalism. The paper concludes that it is misleading to use the term ‘European exceptionalism’ because the underlying phenomena are not comparable with what is usually understood as ‘American exceptionalism’.

Keywords: constitutional culture; double standards;
European exceptionalism; exemptionism; international law

Introduction

The past decade has seen international lawyers and political scientists discuss ‘American exceptionalism’. This debate was nurtured by widespread concern about perceived hegemonic or unilateral conduct of the ‘last remaining superpower’.¹ At issue was also the specific character of the United States as a political society, as it is expressed in its constitutional system, and the significance of its political identity for the international sphere.² The debate was also spurred by a certain disappointment after the

¹ See, e.g., M Ignatieff, ‘Introduction’ in M Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, Princeton, 2005) 1; HH Koh, ‘On American Exceptionalism’ (2003) 55 *Stanford Law Review* 1479; NT Saito, *Meeting the Enemy: American Exceptionalism and International Law* (New York University Press, New York, 2010) 54–5.

² S Gardbaum, ‘The Myth and Reality of American Constitutional Exceptionalism’ (2008) 107 *Michigan Law Review* 391.

optimism that prevailed after the end of the Cold War. During the 1990s it had appeared as if the way was paved for decisive advances towards a world governed through law and international institutions.³ The shock of the terrorist attacks of 11 September 2001 and the subsequent response of the United States called this optimism in question.

In 2013, it may appear as if debates about ‘American exceptionalism’ have lost some of their pertinence. The change from the Bush administration to the Obama administration has been perceived to entail a ‘reengagement’ of the United States with the international legal order.⁴ Although a closer look at United States international legal practice shows that the last few years have in some important areas entailed more changes in rhetoric than in actual practice, discussions about American exceptionalism no longer seem to be as acute as they were some years ago. While this conclusion may be premature – as the repeated invocations of American exceptionalism in the run-up to the 2012 presidential elections show – the legacy of the past decade seems to have contributed to the emergence of a new debate.

Scholars from different theoretical and ideological backgrounds have asserted the emergence of a ‘European exceptionalism’.⁵ They identify two faces of a possible European exceptionalism: the first face is, according to Magdalena Licková and Sabrina Safrin characterized by the European Union’s (EU) identity as a particular form of organization which projects its identity and its underlying normative understandings onto the global level. This is a form of exceptionalism which would derive its character from the claim to lead by example or to provide the world with a model of governance which is deemed to be superior over other existing forms of political organization. The second face of European exceptionalism has been identified, *inter alia*, by Anu Bradford and Eric Posner as well as by Graíinne de Búrca and would then refer to the cracks in this benign image: is the EU (or Europe in a wider sense) exceptionalist because it does not live up to its own standards? Could it be that it is not practising what it is preaching?

³ G Nolte, ‘Persisting and Developing between Hope and Threat: International Law during the Past Two Decades and Beyond’ in J Crawford and S Nouwen (eds), *Proceedings of the European Society of International Law*, vol 3 (Hart, Oxford, 2011) 75.

⁴ On a possibly emerging ‘Obama Doctrine’ see H Meiertöns, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge University Press, Cambridge, 2010) 224 ff.

⁵ A Bradford and EA Posner, ‘Universal Exceptionalism in International Law’ (2011) 52 *Harvard International Law Journal* 1; G de Búrca, ‘The Road Not Taken: The European Union as a Global Human Rights Actor’ (2011) 105 *American Journal of International Law* 649, 690; M Licková, ‘European Exceptionalism in International Law’ (2008) 19 *European Journal of International Law* 463; S Safrin, ‘The Un-Exceptionalism of U.S. Exceptionalism’ (2008) 41 *Vanderbilt Journal of Transnational Law* 1307.

We want to look more closely at the alleged European exceptionalism. In the following, we will first try to identify what it takes to make a political entity 'exceptionalist'. For this endeavour, we will seek inspiration in the defining features of 'American exceptionalism'. We will then ask whether 'Europe' displays comparable features. We will also discuss whether there are other aspects of European governance which could make it plausible to speak of a European exceptionalism. We will conclude with some observations on what it means to be 'exceptionalist' for states and other political actors and also on the importance of who is advancing these claims. Ultimately we hold that the term 'European exceptionalism' is misleading if it is used with the model of 'American exceptionalism' in mind.

Premises and focus

There is no authoritative definition of 'exceptionalism' as a political or legal concept. Given the characteristic combination of the term 'exceptionalism' with its American embodiment, any 'European exceptionalism' should be developed, in the first place, with the specific traits of the American model in mind. No other political community has been characterized in such a consistent manner as being exceptionalist than the United States. And there appears to be no other state in which leading politicians and thinkers alike have made use of the term as an element of self-definition.

Narrow and wide understandings of exceptionalism

When we try to identify defining features of American exceptionalism, we can see roughly two ways in which the term 'American exceptionalism' is usually understood. The first is narrow and strong. It takes the 'ism'-element of the term seriously. In that sense, American exceptionalism is more than the United States merely being special. Exceptionalism in a strong sense implies an exceptionalist attitude, perhaps even an ideology which attributes a larger meaning or an essential function to the United States in a global context. Such exceptionalism implies 'the view that the values of one particular country should be reflected in the norms of international law'.⁶

Perhaps the most frequently quoted self-description of American exceptionalism in this strong sense is the invocation in 1630 by the Puritan preacher John Winthrop of the biblical phrase of the 'shining city upon the

⁶ Bradford and Posner (n 5) 7; see also J Rubinfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971, 1987.

hill' for the Massachusetts Bay colonists.⁷ This rhetoric has become an important element of public political speech in the United States, having been picked up, for example, by US President Ronald Reagan who made much use of this phrase⁸ as well as by Secretary of State Madeleine Albright who said before the Kosovo intervention: 'But if we have to use force, it is because we are America; we are the indispensable nation. We stand tall and we see further than other countries into the future.'⁹ The debate over American exceptionalism in the primary campaign before the 2012 Presidential elections shows that the idea of American exceptionalism is still very much alive. Mitt Romney pledged that 'America is an exceptional and unique nation ... (W)e have to have an American century, where America leads the free world and the free world leads the entire world.'¹⁰ His adversary Newt Gingrich even penned a book-length pamphlet in which he propagates American exceptionalism.¹¹

The second possible meaning of the term 'American exceptionalism' is broader and weaker. It merely refers to the question whether the United States are special.¹² Asking about exceptionalism in this broad sense does not necessarily exclude ideological elements, but those would then be submerged within a seemingly value-free comparison which seeks to identify characteristics. Under the surface of such inquiries, however, often lurks the question of whether an exceptional-in-the-sense-of-special feature is essential or accidental for a particular entity and whether it is ultimately 'right' in a higher sense or for the purpose of being a global model. One example

⁷ Ignatieff (n 1) 2 with fn 2.

⁸ See his Farewell Address as President of the United States of 11 January 1989, available at <<http://millercenter.org/president/speeches/detail/3418>> accessed 8 January 2013.

⁹ NBC *Today* show, February 19, 1998, available at <http://www.fas.org/news/iraq/1998/02/19/98021907_tpo.html> accessed 8 January 2013.

¹⁰ See Fox News, at <<http://nation.foxnews.com/mitt-romney/2011/11/22/romney-obama-thinks-america-just-another-nation-flag>> accessed 8 January 2013.

¹¹ The book is in large parts an attack on what Gingrich perceives to be President Obama's ignorance towards the importance of American exceptionalism: 'President Obama, for example, simply does not understand this concept. In the past, he was outright contemptuous of American exceptionalism, deriding Americans as "bitter" people who "cling" to guns and religion, pronouncing himself a "citizen of the world"' N Gingrich, *A Nation Like No Other: Why American Exceptionalism Matters* (Regnery, Washington DC, 2010) 9. On Obama's comment on the US 'leading from behind' in the Libya crisis: 'This "definition of leadership" – the closest thing we have to an Obama Doctrine – not only violates American Exceptionalism, it is the precise antithesis of American Exceptionalism. This notion – that America should acknowledge its "decline" and abdicate its global leadership at the behest of those who supposedly "revile" us – is a self-fulfilling prescription for our future as a weaker, less respected, and ultimately less safe country.', *ibid.*, 178.

¹² Typical for an analysis in this sense is ME O'Connell, 'American Exceptionalism and the International Law of Self-Defense' (2002) 31 *Denver Journal of International Law and Policy* 43.

is that of the exceptional(ist?) character of the free speech rights of the First Amendment of the US Constitution, or their interpretation.¹³

'Europe'

What is 'Europe' or 'European' in this context? 'Europe' is obviously a different animal from the United States, as it is politically and constitutionally much more amorphous.¹⁴ For present purposes, it does not make much sense to define 'Europe' or 'European' in the abstract. Here we understand 'Europe' in terms of the elements which are relevant when determining what makes 'America' exceptionalist. In this sense 'Europe' or 'Europeanness' is not limited to the instances in which the European Union 'speaks with one voice' on the world stage. It may also consist of the accumulated structures and identity-forming experiences, and perhaps even the style in which 'Europe' acts or 'Europeans' interact with each other and with others. The pooling of large areas of member states' sovereignty in the EU and its specific character as a supranational union of sovereign states invites us to also consider whether particular aspects of the EU and its practice lend support to the view that there exists a 'European exceptionalism'. In any case, it is important to stress that Europe is more than the EU. Especially for the determination of whether there exists a specific European human rights culture, the European Convention on the Human Rights as interpreted by the European Court of Human Rights (ECtHR) for the 47 member states of the Council of Europe will arguably be as important as the handling of fundamental rights by the Court of Justice of the European Union (ECJ).¹⁵

Defining features of exceptionalism in comparative perspective

Exceptionalism in its narrow, strong, and ideological sense is, at its core, a matter of self-understanding. Self-understanding can be identified in more or less measurable ways. Law and legal practice are important

¹³ See Gardbaum (n 2) 401–4; RA Epstein, 'Privacy, Publication and the First Amendment' (2000) 52 *Stanford Law Review* 1003.

¹⁴ See U Everling, 'The European Union as a Federal Association of States and Citizens' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart, Oxford, 2010) 701, 734.

¹⁵ Cf G Nolte, 'European and US Constitutionalism: Comparing Essential Elements' in G Nolte (ed), *European and US Constitutionalism* (Cambridge University Press, Cambridge, 2005) 3, 5.

and comparatively well identifiable forms of self-understanding.¹⁶ Efforts to cope with the topic of American exceptionalism have therefore put a particular emphasis on law and legal practice.

Among the past decade's contributions to the debate on American exceptionalism, those by Michael Ignatieff and Harold Koh have gained particular prominence. They represent a widely received effort to describe the phenomenon of American exceptionalism by breaking it down into different elements. The first way to approach the question of whether there exists a 'European exceptionalism' is therefore to ask whether the categories which they have identified as being the essential elements of the American exceptionalism of the past decade can be meaningfully applied to 'Europe'.

Michael Ignatieff has distinguished between three forms of American exceptionalism: 'exemptionalism', 'double standards', and 'legal isolationism'.¹⁷ Harold Koh has discussed these categories from the perspective of an international lawyer and offered 'four somewhat different faces of American exceptionalism': 'double standards', a 'flying buttress mentality', 'different labels' and a 'distinctive rights culture'.¹⁸ Ignatieff's and Koh's categories do not contradict each other, but rather overlap and are mutually enlightening. They express critiques at two different, though intermingling, levels: international legal policy and domestic constitutional culture.

International legal policy

The first level of what has been described as American exceptionalism refers to the United States' approach towards other members of the international community, in particular its international human rights policy.

Exemptionalism. From the perspective of international law and politics it is Ignatieff's exemptionalism and his and Koh's double standards which have raised most concerns. Exemptionalism would mean that generally the United States would support multilateral agreements and regimes, 'but only if they permit exemptions for American citizens or U.S. practices'.¹⁹

¹⁶ See, for example, U Haltern, 'Europa – Verfassung – Identität' in C Callies (ed), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund* (Mohr Siebeck, Tübingen, 2007) 21, 23–4; on law as an essential of identity see also A von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' (2002) 62 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* 156, 187.

¹⁷ Ignatieff (n 1) 3.

¹⁸ Koh (n 1) 1483.

¹⁹ Ignatieff (n 1) 4.

Examples would include the non-ratification of the Rome Statute creating the International Criminal Court even after successful attempts by the US to have various guarantees built into the regime that US citizens could not face prosecution²⁰ or US absence from the Kyoto Protocol or the Land Mines Treaty.

From a strictly legal point of view, exemptionalism in this sense of seeking built-in exceptions for oneself is a typical feature of international relations.²¹ The European Union has also sometimes pursued this goal, mostly successfully.²² The most obvious examples are perhaps the so-called ‘disconnecting clauses’ by which the European Union receives the agreement of third state parties that a multilateral treaty, in the relations between EU member states *inter se*, remains subordinate to contrary EU legislation.²³ This practice has been compared with the well-known federalism feature of US treaty exemptionalism.²⁴

From a narrow legal perspective the difference between the US exemptionalist practice and the European Union’s ‘disconnecting clause’ practice is a matter of degree. As long as an exemption is agreed to by all sides it is legal and can only be criticized from a moral or a political point of view. Thus, there is more than a kernel of truth in the proposition that the debate about (American) exemptionalism is (or was) ‘an attempt to transform the debate about international morality ... into a debate about formal legal compliance with the law, which can at least in principle be resolved with legal methods’.²⁵

But if exemptionalist tendencies are part of a larger pattern with other forms of unilateral or self-centred conduct, they may well be called exceptionalist in the stronger sense. The political – or moral – question of how to qualify exemptions may well find parts of its answer within the law. It then depends on whether the reasons for seeking an exemption are plausible and considered to be compatible with the general thrust of a

²⁰ For an insider’s account see D Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, Princeton, 2012) 163–226.

²¹ Bradford and Posner (n 5) 44–52.

²² An instance in which the EU did not succeed in accommodating special EU interests was the negotiation of the UNESCO Convention on the Protection of Cultural Diversity; see Licková (n 5) 484.

²³ For a useful overview of this practice see Licková (n 5) 484–9; see also ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, paras 219 and 289–94; as well as CP Economides and AG Kollipoulos, ‘La clause de deconnexion en faveur du droit communautaire: une pratique critiquable’, (2006) 110 *Revue générale de droit international public* 273.

²⁴ Licková (n 5) 487–8.

²⁵ Bradford and Posner (n 5) 52.

given treaty²⁶, and whether the exemption-seeking entity is thereby trying to secure an otherwise illegitimate role for itself. So far, the EU's efforts to have disconnecting clauses included in its treaties have not been perceived as being driven by an effort to have a freer hand for itself or for the pursuit of hegemonic interests.²⁷ On balance, they have rather been accepted as being an effort to reconcile the European acceptance of international standards with the EU's own pursuit of achieving 'stricter' standards among its member states.²⁸ US exemptionalism, on the other hand, has often been seen as being driven by an effort to see others bound by rules and to remain free itself for the purpose of securing a special role in global affairs.

One could also postulate an EU exemptionalism with respect to some recent decisions of the European Court of Justice which seemed to close the EU legal order in part against international legal influences.²⁹ In the MOX Plant case³⁰, for example, the ECJ defended its own competences vis-à-vis dispute settlement mechanisms which originated from other international regimes. There the Court found a violation of the EC treaty by Ireland for going to an Arbitral Tribunal under the provisions of the United Nations Convention on the Law of the Sea (UNCLOS³¹).³² An emerging EU exemptionalism might also be detected in the jurisprudence of the ECJ on the relationship between certain bilateral investment treaties (BITs) between EU member states and non-member states. Since 2009 the

²⁶ ILC Fragmentation Report (n 23) para 293, with a reference to art 41, para 1(b)(ii) of the Vienna Convention on the Law of Treaties of 22 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.

²⁷ See, however, for critical views Economides and Kolliopoulos (n 23) 299–300 as well as the ILC Fragmentation Report (n 23) para 294: 'From the perspective of other treaty parties, the use of disconnection clause (sic) might create double standards, be politically incorrect or just confusing.'

²⁸ Licková (n 5) 489.

²⁹ For a more detailed analysis of recent ECJ case law on the reception and applicability of international law see C Eckes, 'International Law as Law of the European Union: The Role of the European Court of Justice' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden 2012) 353; G de Búrca, 'The ECJ and the International Legal Order: A Re-evaluation' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, Cambridge, 2012) 105; see also Opinion 1/09 – Unified Patent Litigation System, 2011 ECR – not yet reported; on the incompatibility of a proposed international patent court with the EU legal system; on this case see further M Parrish, 'International Courts and the European Legal Order' (2012) 23 *European Journal of International Law* 141.

³⁰ *Commission v Ireland*, Case C-459/03, 2006 ECR I-4636.

³¹ United Nations Convention on the Law of the Sea, 10 December 1982 (entry into force 16 November 1994), 1833 UNTS 3.

³² *Commission v Ireland*, Case C-459/03, 2006 ECR I-4636, paras 121–122.

ECJ has repeatedly held that member states can be required to have certain of their BITs with third states modified on the grounds of a possible conflict with not yet enacted EC secondary legislation³³ because those BITs might stand in the way of effective application of EC measures restricting the free movement of capital.³⁴

Are we faced here with two examples for European exceptionalism in the form of exemptionalism? The jurisprudence in the MOX Plant case does not directly affect non-member states. In a certain sense the EU is undermining the original competence of the institutions charged with dispute settlement under UNCLOS, but the step can also be described as a necessary implication of the relegation of member states by EU integration to an intermediary status. In the cases involving the BITs, the EU is not exempting itself or its members from any agreed commitments. However, the EU has imposed an obligation upon them to withdraw from previous agreements. This is unobjectionable as long as the respective member states do so according to the international rules on the termination of treaties. Of course, politically this means that the EU, under the new competences of the Lisbon treaty, now has a greater bargaining power to negotiate new BITs with the third states in question.³⁵

These developments in the case law of the ECJ do not make the EU 'exemptionalist' in the sense of how Ignatieff and Koh have described the United States. We are only faced with certain consequences of the amorphous state of the EU. Despite various steps of reform, the EU is still in the process of sorting out its internal division of competences and has not, as far as we can see, used this process to pursue other specific goals at the international level.

Double standards. Political criticism of US exemptionalism overlaps with Ignatieff's and Koh's double standards category of US exceptionalism. Double standards is both a political and a legal variant of exemptionalism. In its legal variant, double standards means that a rule, or a system of rules, which are, in principle, applicable to all actors, need not be followed by one particular actor. The form which legal double standards may take are, however, not limited to formally accepted exemptions, but may also

³³ *Commission v Sweden*, Case C-205/06, 2009 ECR I-1335; *Commission v Austria*, Case C-118-07, 2009 ECR I-1301; *Commission v Finland*, Case C-118/07, ECR 2009 I-10889.

³⁴ *Commission v Sweden*, Case C-205/06, 2009 ECR I-1335, para 37.

³⁵ The Commission apparently does not seek a renegotiation of all existing member states' BITs but rather confines this requirement to those agreements which it considers to include provisions incompatible with EU law; see M Cremona, 'Member States Agreements as European Union Law' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden, 2012) 291, 321–2.

include informal practices which result in the discriminatory application of vague legal concepts. The classical instance during the past decade of such a double standards approach is the Bush doctrine of preventive self-defence.³⁶ This doctrine is/was³⁷ couched in general language which permitted to interpret it ambiguously both as a general legal claim and as a special political entitlement of the United States.³⁸ The US has, for example, protested against Russian bombardments in Georgia in 2002 which the Russian Federation justified as acts of self-defence against terrorist organizations³⁹ which has led commentators to conclude that in this case ‘we see the USA claiming rights for itself that it is unwilling to see exercised by others.’⁴⁰ It has also been argued, more generally, that the US decision to attack Iraq in 2003 represented ‘a view that the United States is a privileged nation with more rights than others’.⁴¹

It appears that there is no comparable practice of the European Union, or of European states acting in concert, by which a claim has been formulated that a European entity was free from certain obligations, or occupies a special position with respect to obligations which arose from general international law or from a generally applicable treaty regime.⁴² It might, however, be objected that the jurisprudence of the ECJ in *Kadi* is such a case.⁴³ The difference, however, between the *Kadi* jurisprudence and what has been described as US double standards policy and practice, is that *Kadi* accepts, in principle, that the international rules and decisions are binding and that the limits pronounced with respect to the implementation of certain EU legislation entail no claim to affect the position of other subjects

³⁶ See further Meiertöns (n 4) 179–224.

³⁷ On the continuing relevance of this doctrine see V Pfisterer, ‘Die Nationale Sicherheitsstrategie der Vereinigten Staaten von Mai 2010: Ein Bericht’ (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 735.

³⁸ But see Bradford and Posner (n 5) 39 who argue with respect to pre-emptive self-defence that the ‘Bush Administration and previous administrations never claimed that the United States has the exclusive right to go to war for these purposes.’

³⁹ See UN Doc S/2002/1012.

⁴⁰ C Gray, *International Law and the Use of Force* (3rd edn, OUP, Oxford, 2008) 231; see also L Moir, *Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror* (Hart, Oxford, 2010) 145.

⁴¹ O’Connell (n 12) 43.

⁴² This holds true for contemporary international law. From a historical perspective, it could be argued that for a long time the whole system of public international law was an instrument of power wielded by ‘Europe’ and directed against those states and entities which were not recognized as civilized states. See, e.g., A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge, 2005) 310–2.

⁴³ *Kadi v Council and Commission*, Case C-402/05 P, ECR 2008, I-6531.

of international law.⁴⁴ It is still another question whether *Kadi* is an expression of a new European rights narcissism (see below).

Bradford and Posner identify European double standards in the European support for the International Criminal Court. They argue that European reluctance to send soldiers abroad would mean that Europeans would rarely, if ever, face the risk of prosecution before the ICC.⁴⁵ It is, however, questionable whether the factual premise of their critique is correct. European states are fairly active in terms of participation in UN peacekeeping missions,⁴⁶ and the regular deployment of British and French soldiers abroad should in particular not be underestimated. It is true that European political elites see little reason to be concerned about ICC prosecutions. The French negotiator Marc de Bricambaut is said to have remarked to his US counterpart David Scheffer during the Rome Conference on the Statute of the International Criminal Court: ‘David, I’m going to sign this treaty tomorrow because we know that no French national will ever appear before the International Criminal Court. We will ensure that our courts take the case first ...’⁴⁷ While there may indeed be an expectation that Europeans will never have to stand trial before the ICC it rests on a more self-confident understanding of the principle of complementarity.

It is another question whether European states and/or the EU from time to time violate international law. Commentators which refer to ‘double standards’ followed by European states point to the implication of European states in the fight against terrorism or in the questionable conduct of EU border controls which would result in various violations of human rights and refugee law.⁴⁸ It is, of course, entirely possible that such

⁴⁴ Ibid para 287 on the scope of judicial review enacted by the Court; see also AL Paulus, ‘From Dualism to Pluralism: The Relationship between International Law, European Law and Domestic Law’ in PHF Bekker *et al.* (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP, Cambridge, 2010) 132, 135–6; the *Kadi* judgment is misrepresented by Bradford and Posner (n 5) 16 who hold that ‘the ECJ ruled that the Sanctions Committee’s designation of Kadi did not bind the EU’s member States’ and that, ‘to all appearances, the ECJ’s judgment was accepted by European governments’. To the contrary, the ECJ expressly held that ‘it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.’ (para 286); and that ‘any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.’, at para 288.

⁴⁵ Bradford and Posner (n 5) 52.

⁴⁶ B Fassbender, ‘The Better Peoples of the United Nations? Europe’s Practice and the United Nations’ (2004) 15 *European Journal of International Law* 857, 870.

⁴⁷ Scheffer (n 20) 221.

⁴⁸ See de Búrca (n 5) 690–1.

violations of international law have occurred and keep occurring, maybe even on a regular basis. The relevant question for our analysis, however, is whether these violations also imply ‘double standards’ in the sense that European states and/or the EU would claim special privileges for themselves which they would deny other states. The critical feature of the ‘double standards’ claimed by the United States was that the US sought to establish different standards for themselves and for other states at a normative level. Many states violate international law from time to time. States then try to argue that their conduct was nonetheless in accordance with the law.⁴⁹ This does not imply, however, that these states claim special privileges.

This is also true if we look more closely at the example of the EU border policy where the EU agency ‘FRONTEX’ is trying to secure the EU’s external borders. In the context of ‘FRONTEX’, the EU and its member states are apparently cooperating with neighbouring states in Europe as well as North Africa.⁵⁰ These states take back refugees which have been stopped on their way to the EU at the High Sea. It is fair to assume that human rights violations as well as breaches of refugee law occur in this process.⁵¹ In fact, Italy has recently been found to be responsible for violations of the European Convention on Human Rights for an incident in which it handed over refugees to the Libyan authorities which it previously intercepted on the High Sea.⁵² However, does the EU advance the claim that it and its member states are not bound by the relevant international standards? We have not come across such a claim. Rather, the EU is trying to justify its conduct within the framework of existing law. The Heads of State of the EU member states have affirmed that all FRONTEX operations have to be concluded within the framework of international law.⁵³ The legal mandate for FRONTEX explicitly requires participating member states to respect international law.⁵⁴ The EU has also established a framework for cooperation with UNHCHR to see to it that

⁴⁹ *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, ICJ Rep 1986, 14, para 186.

⁵⁰ For an overview of the pertinent legal issues surrounding ‘FRONTEX’ see E Papastavridis, ‘Fortress Europe and FRONTEX: Within or Without International Law?’ (2010) 79 *Nordic Journal of International Law* 75. On the general limits to cooperation between states in international law see HP Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, Cambridge, 2011).

⁵¹ See N Markard, ‘Asylrecht. Der Stand der Dinge’ (2012) 65 *Merkur: Deutsche Zeitschrift für Europäisches Denken* 28.

⁵² See European Court of Human Rights, *Hirsi Jamaa and Others v Italy*, App No 27765/09, Judgment of 23 February 2012, available at <<http://www.echr.coe.int>> accessed 13 January 2013.

⁵³ Presidency Conclusions, Brussels Council of the European Union (29–30 October 2009), para 40.

⁵⁴ Regulation (EU) No 1168/2011 (25 October 2011) OJ (L 304) 1.

the requirements of international refugee law are respected during the operations of FRONTEX.⁵⁵ In March 2012, the European Ombudsperson has initiated an investigation into the fundamental rights compliance of FRONTEX.⁵⁶ Is it apologetic to refuse to acknowledge European exceptionalism in this case? We think not. This does not make human rights violations any less serious. But it is another matter whether this element of European practice is testimony to a form of ‘European exceptionalism’. Not every pattern of – even systematic – violations of international law makes for ‘exceptionalism’.

‘*Flying buttress mentality*’. A milder variant of double standards exceptionalism is what Koh has described as ‘flying buttress’ mentality.⁵⁷ This expression was originally coined by Louis Henkin who remarked that ‘the United States has not been a pillar of human rights, only a ‘flying buttress’ – supporting them from the side.’⁵⁸

It is difficult to identify European parallels which could give rise to a flying buttress mentality reproach. European states have generally ratified the relevant universal human rights instruments. They have also established a system of human rights protection⁵⁹ which was conceived as a regional implementation of universal standards.⁶⁰ This system is still today being implemented in conformity with universal standards and is providing itself, vice-versa, influential impulses for the concretization of those standards and for other regional systems of human rights protection.⁶¹

⁵⁵ Frontex Press Release (18 June 2008), available at <<http://www.frontex.europa.eu/news/frontex-unhcr-reinforced-cooperation-a0Yf4h>> accessed 13 January 2013.

⁵⁶ Letter of the European Ombudsperson (6 March 2012), Case: OI/5/2012/BEH-MHZ, available at <<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11316/html.bookmark>> accessed 13 January 2013.

⁵⁷ Koh (n 1) 1484–5.

⁵⁸ L Henkin, ‘Rights: American and Human’ (1979) 79 *Columbia Law Review* 405, 421.

⁵⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (entry into force 3 September 1953), ETS No 5.

⁶⁰ This becomes apparent already from the preamble to the Convention: ‘Considering the Universal Declaration of Human Rights ... ; Considering that this Declaration aims at ensuring the universal and effective recognition and observance of the rights therein declared ... Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration ...’; see also RCA White and C Ovey, *The European Convention on Human Rights* (5th edn, OUP, Oxford 2010) 1–2.

⁶¹ See GL Neuman, ‘Import, Export and Regional Consent in the Inter-American Court of Human Rights’ (2008) 19 *European Journal of International Law* 101; AA Cançado Trindade, ‘The Development of International Human Rights Law by the Operation and the Case-Law of the European and the Inter-American Courts of Human Rights’ (2004) 25 *Human Rights Law Journal* 157; AA Cançado Trindade, ‘Die Entwicklung des inter-amerikanischen Systems zum Schutz der Menschenrechte’; (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 629.

The fact that the European Union itself has so far not ratified any human rights treaties, universal or regional, is not the result of a flying buttress mentality. The most obvious reason for this lack of ratification is rather technical: the limitation of the possibility to ratify such treaties to states.⁶² It is not certain whether this is the only and ultimately the most important reason for the non-submission, so far, of the EU itself to outside human rights supervisory mechanisms.⁶³ However, the general willingness of the member states to submit to such mechanisms, the efforts to enable the Union to accede to the European Convention of Human Rights,⁶⁴ and the jurisprudence of the European Courts (ECJ and ECtHR) to hold the Union and the member states to account (for acts of the Union) according to regional and universal human rights standards,⁶⁵ are all strong indications that 'Europe' plays the role of a pillar in the cathedral of international human rights, and not merely that of a flying buttress.

Insofar as 'Europe' is roughly comparable to the Latin American and African states,⁶⁶ it is certainly not exceptionalist or even exceptional. Perhaps, however, the EU or the member states of the Council of Europe have in their human rights policy towards third states on occasion demanded respect for higher standards than what they were prepared to respect themselves.⁶⁷ Especially when the European Union acts on the international plane, questions arise as to how it can be subjected to meaningful control of its own respect for human rights. A case in point is the presence of the EU mission EULEX in Kosovo after the unilateral declaration of independence in February 2008.⁶⁸ Whereas EULEX has less significant executive powers

⁶² See, for example, art 48, para 1 of the International Covenant on Civil and Political Rights, 16 December 1966 (entry into force 23 March 1976), 999 UNTS 171.

⁶³ On missed opportunities to develop a strong EU/EC mechanism for the protection of human rights see de Búrca (n 5).

⁶⁴ See art 59, para 2 of the European Convention on Human Rights as amended by art 17 of Additional Protocol No 14, May 13 2004 (entry into force 1 June 2010), ETS No 194.

⁶⁵ *Matthews v United Kingdom*, ECHR 1999-I, paras 26 ff; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, ECHR 2005-VI, paras 152–153; *Kadi v Council and Commission*, Case C-402/05 P, ECR 2008, I-6531.

⁶⁶ Notable differences between the regional systems should not be overlooked; however, for an instructive comparison see MD Evans, 'The Future(s) of Regional Courts on Human Rights' in A Casese (ed), *Realizing Utopia: The Future of International Law* (OUP, Oxford, 2012) 261, 273–4.

⁶⁷ It has also been criticized that the EU is not acting very consistently in this regard. See to this effect the study of U Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (CUP, Cambridge, 2008) 219–33 on the changes of EU foreign policy towards Pakistan. Whereas the coup d'état of General Pervez Musharraf in October 1999 led to the suspension of development aid and cooperation, relations were quickly restored after the attacks of 11 September 2001.

⁶⁸ On some general problems attached to EULEX and the international law background see E de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Function of EULEX' (2009) *American Journal of International Law* 83.

than previously the UNMIK mission,⁶⁹ it retains certain operative powers.⁷⁰ These powers are mainly correctional and they concern the investigation and prosecution of serious and sensitive crimes.⁷¹ To review compliance of the exercise of these powers with human rights, the EU has instituted a 'Human Rights Review Panel' (HRRP). The 'accountability concept' of the HRRP is a restricted document which raises questions with respect to transparency and legal certainty.⁷² The HRRP cannot take binding decisions against acts of EULEX, but merely 'submits its findings to the Head of Mission and, where necessary, makes non-binding recommendations for remedial action'. It is also noteworthy that 'recommendations may not result in monetary compensation'.⁷³

Although the executive competences of EULEX are rather limited, the symbolic dimension of the arrangement appears to be that the EU is not prepared to subject itself to the same standards of binding judicial review which it requires, for example, of candidates as a condition for joining the Union.

But what does this mean for our enquiry into a possible European exceptionalism? Again, it seems that we are faced here not so much with a particular European feature but rather with the general reluctance of states and international organizations to subject themselves to strict human rights scrutiny in the context of 'nation-building' or 'post-conflict administration'.⁷⁴ The concern in the case of EULEX in Kosovo is rather that the EU is missing the point at which an (exceptional) post-conflict peacekeeping

⁶⁹ G Nolte, 'Human Rights Protection against International Institutions in Kosovo: The Proposals of the Venice Commission of the Council of Europe and their Implementation' in PM Dupuy *et al.* (eds), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (Engel, Kehl, 2006) 245.

⁷⁰ According to its mandate its aim is to assist and support the Kosovo authorities in matters related to the rule of law through 'monitoring, mentoring and advising, while retaining certain executive responsibilities', EU Council Joint Action 2008/124/CFSP, 4 February 2008, OJ 42/92 (2008).

⁷¹ See European Commission for Democracy through Law (Venice Commission), *Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and EULEX in Kosovo*, adopted 17–18 December 2010, CDL-AD(2010)051, para 17.

⁷² *Ibid* 13 with fn 17.

⁷³ *Ibid*.

⁷⁴ Cf the heated debate in the aftermath of European Court of Human Rights, *Agim Behrami and Bekir Behrami v France/Ruzhdi Saramati v France, Germany and Norway*, App Nos 71412/01 and 78166/01, Decision of the Grand Chamber of 2 May 2007 on the scope of accountability of UNMIK, available at <<http://www.echr.coe.int>> accessed 13 January 2013. See, for example, H Krieger, 'A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights' (2009) 13 *Journal of International Peacekeeping* 159.

situation has stabilized to such an extent that it becomes imperative to apply peacetime standards. It is this point which the Venice Commission of the Council of Europe has carefully insisted upon in its 2010 Opinion concerning this arrangement:

The HRRP appears to be generally in conformity with the recommendations which the Venice Commission had formulated in 2004 in respect of an advisory mechanism of human rights review for Kosovo. The Venice Commission wishes to stress, however, that those recommendations had been made in a context of a post-conflict emergency situation with only partly operating institutions. A different situation pertains in Kosovo today, and in this respect the Venice Commission is of the opinion that, as long as the acts of EULEX are supportive or corrective within a generally peaceful situation, EULEX should be put under a more stringent review.⁷⁵

Domestic constitutional culture

The second level of what has been described as American exceptionalism refers to the United States' approach to civil rights and other constitutional issues beyond international human rights policy. Of course, exceptionalism in its stronger, ideological sense is harder to identify in a comparative constitutional context, as constitutions serve to establish a distinct identity for a political community which may differ in form and in substance from other constitutions. Therefore, the question tends to become whether a particular constitutional setting is more or less close to a general design. Such an inquiry can be limited to an analytic comparison which determines the degree to which a particular constitutional setting is exceptional in the sense of being special, but it can also go a step further and try to identify whether certain elements of a particular constitutional setting contain a claim which is exceptionalist in the stronger sense of asserting a special position of the so-constituted political community within its international context.

Distinctive labels. It is trivial that different terms do not necessarily denote different substantive concepts. And it is both understandable and legitimate that different constitutions use different terminology to express similar principles or rules. Koh is therefore obviously correct when he remarks that the use of different labels may be 'more of an annoyance than a philosophical attack on the rest of the world'.⁷⁶

⁷⁵ Venice Commission (n 71) para 58.

⁷⁶ Koh (n 1) 1483.

But it is equally trivial that terminology *can* be important and that terminology can denote relevant differences. Without going into detail, the jurisprudence of the European Court of Human Rights has led not only to a *regionalization* of national constitutional rights terminology⁷⁷, but, thanks to the character of the European Convention of Human Rights as the regional implementation mechanism of universal human rights, also to a *universalization* of rights terminology in Europe.⁷⁸ This common universal language of human rights excludes *ab initio* that a European exceptionalism could be grounded on ‘different labels’. It may well be that ‘cruel and unusual punishment’ is basically the same as ‘torture’,⁷⁹ but reservations by the United States according to which torture must be interpreted in the way in which ‘cruel and unusual punishment’ is understood in the United States⁸⁰ do not reinforce such assumptions and smack of exceptionalist claims. As far as we are aware, there are no comparable efforts to secure a specific European understanding of rights at the universal level. At a deeper level, the reason for the different labels used in US constitutional law may be related to the understanding of the ‘human rights revolution’ which took place after the Second World War as the result of the United States ‘bestowing on the world the gift of American law and the American way’. Jed Rubenfeld has argued that ‘Europe might use a different phrase – “human rights” – to describe them, but the fundamental rights guaranteed by international law were nothing other than rights already enshrined in the United States Constitution.’⁸¹ This emphasis of the American origin of international human rights law is another form of underlining the exceptionality of the United States.

What comes closest to this form of identity politics in Europe is probably the importance of the *Déclaration des droits de l’homme et du citoyen* of 1789 which arguably continues to legitimize elements of French foreign policy. There nevertheless appear to be less problems in accommodating

⁷⁷ Cf G Nolte, ‘Das Verfassungsrecht vor den Herausforderungen der Globalisierung’ (2007) 67 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 129, 151–3.

⁷⁸ The Court frequently makes use of the International Covenant on Civil and Political Rights (ICCPR) and its interpretation, see *Al-Adsani v United Kingdom*, ECHR 2001-XI, para 60 (on the prohibition of torture); *A and others v United Kingdom*, 49 *European Human Rights Review* 29, para 178 (on the temporal extension of a state of emergency).

⁷⁹ Koh (n 1) 1484.

⁸⁰ Reservation of the United States to the ICCPR, declared upon ratification on 8 June 1992: ‘That the United States considers itself bound by article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.’

⁸¹ Rubenfeld (n 6) 1988.

French doctrine and terminology of human rights with their international counterparts.

Distinctive and narcissistic rights culture. A more important aspect of American exceptionalism concerns the substance of fundamental rights.⁸² Although most rights which are recognized by the US Constitution, in particular in its several amendments, have been reformulated and reaffirmed by most other constitutions and international human rights treaties, they have nevertheless often been held, on closer inspection, to be distinctive, and to be part of a narcissistic legal culture which gives them, alone and in combination, an exceptionalist character.⁸³ For Koh, distinctiveness refers to specificities of the American rights culture which would follow from its peculiar, political and economic history. Because of history, some rights would have received more attention in the US than in Europe or in Asia, which would hold particularly true for the US First Amendment with its more robust protection of free speech.⁸⁴ In the same vein, Ignatieff adds that US constitutional law provides less protection in some areas than other Western states and international human rights. This would be true, in particular, for socioeconomic and welfare rights.⁸⁵

Put in such terms, the description has become almost a cliché. On closer inspection, however, such distinctiveness of American rights culture tends to dissolve: in most areas the United States does not seem to overstep the margin provided for states by human rights treaties. But what about the European side of the equation?

In particular: social and economic rights. The protection required by the International Covenant on Social, Economic and Cultural Rights is not constitutionally mandated by a good number of European countries either.⁸⁶ Even where social and economic rights are laid down in a given constitution, their effects are often mitigated either by language in the constitutional text itself or by judicial practice.⁸⁷

⁸² See also Gardbaum (n 2) 397; F Schauer, 'The Exceptional First Amendment' in M Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, Princeton, 2005) 29, 56.

⁸³ *Ibid* 29–30.

⁸⁴ Koh (n 1) 1483.

⁸⁵ Ignatieff (n 1) 10.

⁸⁶ Gardbaum (n 2) 449; and the United States is certainly not exceptionalist in this regard if compared with other common law countries, *ibid*, at 448; E Riedel, 'Vorbemerkung vor Titel IV' in J Meyer (ed), *Charta der Grundrechte der Europäischen Union* (3rd edn, Nomos, Baden-Baden, 2011) para 25.

⁸⁷ Gardbaum (n 2) 450.

However, specific cases show that significant differences may arise in the field of judicial review of measures of social welfare. In February 2010, the German Federal Constitutional Court struck down legislation on individual rights to social welfare (the so-called ‘Hartz Legislation’),⁸⁸ mainly on grounds of irrational and intransparent standards for the calculation of the needs of the persons on the receiving end. The Court based its judgment on the fundamental individual right to a minimum of subsistence which it deduced from the provision on human dignity (Article 1, paragraph 1 of the German Basic Law) and the principle of the social state (Article 20, paragraph 1). The Court held that this right was not fully to the disposition of the legislature⁸⁹ and considerably reduced the legislative discretion in this area. The decision intervened in a political question of major importance and has a significant financial impact.

Does this decision testify to a particularly European belief in social and economic rights? In this context, we can note that the struggles in US courts – both federal and state courts – over the constitutional law implications of ‘Obamacare’ have shown that highly sensitive issues of social policy are not immune from judicial scrutiny.⁹⁰ It is, of course, true that these court proceedings have a different momentum: the challenges against federal legislation are not directed at obtaining more support from the public authorities, but rather aim to underscore the limits of government to impose on all citizens and in a binding manner an obligation to contract into a scheme of social security. The court proceedings thus have a different focus as compared to the German ‘Hartz’ example. Nonetheless, they show that it is not ‘exceptional’ for constitutional courts to turn into arenas of negotiation for issues of social policy. At the same time, it is difficult to conceive of a decision by the US Supreme Court which would be as wide-ranging in its financial consequences as the German decision was.⁹¹ But it is equally difficult to conceive of a similar judgment by one of the courts on the European level – if not in form then at least in substance.

⁸⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 9 February 2010 125 *Entscheidungen des Bundesverfassungsgerichts [BVerfGE]* 175 (an English translation of the Judgment is available at <http://www.bverfg.de/entscheidungen/l20100209_1bvl000109en.html> (19 March 2012)).

⁸⁹ Ibid para 133 of the English translation.

⁹⁰ *National Federation of Independent Business v Sebelius*, 132 S.Ct. 2566, decision of 28 June 2012.

⁹¹ Cf Gardbaum (n 2) 408; it must of course be recognized that several state constitutions in the United States provide for social and economic rights, *ibid*, at 446; CR Sunstein, ‘Why Does the American Constitution Lack Social and Economic Guarantees?’ in M Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, Princeton, 2005) 90, 100–1.

But be that as it may, it is difficult to make a case with respect to a distinctive, or even a narcissistic European rights culture. This is not only because the European rights formulations are younger and therefore terminologically more closely tied to the universal standards. So far, the European entities have also made considerable efforts to maintain and cultivate this tie to the universal level. An important recent example derives from the EU Charter of Fundamental Rights and its section on ‘Solidarity’ (Articles 27–38) which includes a number of social rights. The inclusion of social rights in the EU Charter was controversial. During the difficult negotiations the UN Committee on Economic, Social and Cultural Rights addressed the drafters:

The Committee ... would nevertheless like to point out that if economic and social rights were not to be integrated in the draft Charter on an equal footing with civil and political rights, such negative regional signals would be highly detrimental to the full realization of all human rights at both the international and domestic levels, and would have to be regarded as a retrogressive step contravening the existing obligations of member States of the European Union under the International Covenant of Economic, Social and Cultural Rights.⁹²

While there is no conclusive evidence that the eventual incorporation of social rights in the EU Charter of Fundamental Rights can be attributed to this intervention, it is nevertheless noteworthy how the universal body argued and that the drafters of the Charter finally reached an agreement which allowed for a compromise which is in line with the universal standards. While the official explanations to the finally adopted articles contain only sparse references to universal human rights instruments⁹³, it has been noted that the inclusion of social rights in the Charter was a process which mirrored universal experiences.⁹⁴ In this respect, the EU Charter can also be seen as a form of consolidation. The extent to which social rights are recognized in the constitutional law of the EU member states varies greatly. The EU Charter can be seen as an attempt to reconcile these diverging approaches with broader tendencies on the international level.⁹⁵

⁹² Statement of the Committee on Economic, Social and Cultural Rights to the Convention to draft a Charter of Fundamental Rights of the European Union of 27 April 2000, 22nd Session, E/2001/22-EC/C.12/2000/21, annex VIII.

⁹³ See the Explanations Relating to the Charter of Fundamental Rights, OJ 2007/C303/02: art 1 of the Charter (‘human dignity’) found an inspiration in the 1948 Universal Declaration of Human Rights; art 24 in the Conventions on the Rights of the Child.

⁹⁴ C Langenfeld, ‘Soziale Grundrechte’ in D Merten and H-J Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa* vol VI/1 (CF Müller, Heidelberg, 2010) 1117, 1124, para 10.

⁹⁵ Riedel (n 86) para 25; Langenfeld (n 94) para 54.

Thus, while the EU Charter of Fundamental Rights has recognized a few ‘new’ rights, it has also incorporated more rights from the universal level than had been received into the European Convention of Human Rights. These rights bear a close resemblance to the social and economic rights which are recognized in international human rights law, such as in the International Covenant on Social and Economic Rights, and they reflect a convergence between developments on the European and the universal level.

General trends in European rights culture vis-à-vis the universal level. The picture is even clearer in the field of civil and political rights. As far as we can see, the European Court of Human Rights has not interpreted the Convention rights in a way which would set them significantly apart from the universal level, as expressed in particular by the UN Human Rights Committee under the ICCPR.⁹⁶ To the contrary, the European case law seems to be a most important source of inspiration for the interpretation of rights at the universal level by bodies on the universal level. A characteristic example of the level of acceptance which the European rights culture enjoys at the universal level can be observed in the current practice of the UN International Law Commission. Having put the sensitive topic of expulsion of aliens on its agenda, the Commission appointed a distinguished jurist from Cameroon, Maurice Kamto, as its Special Rapporteur. In his reports, the Special Rapporteur has mainly relied on the jurisprudence of the European Court of Human Rights in his quest to identify universal standards.⁹⁷ This approach has been generally accepted by the members of the Commission, mindful that the pertinent European standards have their source in the Universal Declaration of Human Rights and that they have been reaffirmed in the ICCPR and, to a certain extent, by the views of the Human Rights Committee.

It has, however, been argued that there are signs of a developing distinctive and even narcissistic European rights culture turning inward. Gráinne de Búrca has noted that ‘(t)he striking similarity between the reasoning and interpretive approach of the U.S. Supreme Court in *Medellin* and that of the ECJ in *Kadi* regarding the relationship between international law and the “domestic constitutional order” at the very least calls into question the conventional wisdom of the United States and the EU as standing at opposite ends of the spectrum in their embrace of or resistance to international

⁹⁶ See, for example, the case law referred to in (n 78) above.

⁹⁷ See, in particular, M Kamto, ‘Fifth Report on Expulsion of Aliens’ UN Doc A/CN.4/611, paras (among others) 14, 27, 63, 74, 77, 96, 106, 116.

law and institutions.⁹⁸ But a closer look reveals that the ECJ has certainly not interpreted the *substance* of the rights at issue in a distinctive manner, to the contrary. It has ‘only’ refused to recognize the legitimizing effect of the resolutions of the Security Council and the institutional rules of the UN Charter in the internal EU legal order. It tried to answer the question – as yet still unresolved at the universal level – of the limits of the powers of the Security Council, in particular the role of human rights in this context.⁹⁹

The *Kadi* case may well be part of a development by which the jurisprudence of the ECJ has recently become less ‘international law-friendly’ (*völkerrechtsfreundlich*).¹⁰⁰ Besides the *Kadi* case, the already mentioned case law on the availability of UNCLOS dispute settlement procedures for EU member states¹⁰¹ and the requirement to terminate member states’ BITs may be mentioned.¹⁰² One could also point to the *Intertanko* case in which the direct applicability of UNCLOS was denied¹⁰³ – a finding which the ECJ had until then confined to the field of WTO obligations which it consistently held to lack direct effect in the EC/EU legal order.¹⁰⁴ These may be signs that we are in the presence of an ongoing closure of the EU legal order towards the influence of public international law. It is, however, questionable whether this is really the case. The various cases all concern different situations and no overarching judicial policy can be identified

⁹⁸ G de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ (2010) 51 *Harvard International Law Journal* 1, 49. The *Medellin* case (*Medellin v Texas*, 552 U.S. 491 (2008)) concerned the international effects of a judgment by the International Court of Justice on the rights of foreigners to be informed about consular assistance under art 36 of the Vienna Convention on Consular Relations. In the case, the US Supreme Court found ICJ decisions not to be enforceable in the US legal order.

⁹⁹ See G Nolte, ‘The Limits of the Security Council’s Powers and the International Legal System’ in M Byers (ed), *The Role of Law in International Politics* (OUP, Oxford, 2000) 315; Nolte (n 77) 132–9; HP Aust, ‘Between Self-Assertion and Deference: European Courts and their Assessment of UN Security Council Resolutions’ (2008) 8 *Anuario Mexicano de Derecho Internacional* 51.

¹⁰⁰ This has been the subject of a growing discussion, see E Cannizzaro, ‘The Neo-Monism of the European Legal Order’ in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden, 2012) 35, 56–8.

¹⁰¹ See (n 30).

¹⁰² See (n 33).

¹⁰³ *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, Case C-308/06, ECR 2009, I-405.

¹⁰⁴ See on this question C Tietje, ‘The Status of International Law in the European Legal Order: The Case of International Treaties and Non-Binding International Instruments’ in J Wouters, A Nollkaemper and E de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (TMC Asser Press, The Hague, 2008) 55, 59–64; A Tancredi, ‘On the Absence of Direct Effect of the WTO Dispute Settlement Body’s Decisions in the EU Legal Order’ in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff, Leiden, 2012) 249.

which the ECJ would follow. In effect, it is also possible to identify recent case law of the ECJ which is more open towards international law than before.¹⁰⁵ This holds true, for example, for the *Brita* case in which the Court had to determine the influence of public international law on the EU customs regime with Israel and the Palestinian authority respectively.¹⁰⁶ In this respect, mention can also be made of the recent decision of the ECJ on the EU's emissions trading scheme for airlines. The Court carefully reviewed whether the introduction of this scheme would violate applicable international agreements and customary international law. The Court did not find a contradiction between the EU's scheme and international law and repeatedly affirmed the requirement that all EU conduct remain within the boundaries of international law.¹⁰⁷

Judicial exceptionalism/isolationism. The softest but not least relevant aspect of American exceptionalism has been identified as judicial exceptionalism or isolationism. It would characterize 'the attitude of the U.S. courts toward the rights jurisprudence of other liberal democratic countries'.¹⁰⁸ American judges would be exceptionally resistant to use international and foreign materials.¹⁰⁹ Most prominent is the opposition of Justice Scalia towards the influence of these materials on the interpretation of the US constitution – an endeavour which would result in 'dangerous dicta', spurring the consideration of 'foreign views' which would be irrelevant to the task before the Justices of the Supreme Court.¹¹⁰ Here again, the verdict on this form of American exceptionalism must be nuanced. Justice Scalia's position is by no means generally accepted within the US judiciary, but is under serious and sometimes successful challenge.¹¹¹ But regardless of where exactly the battle lines of the internal US debate are drawn, it is characteristic that, so far, there seems to be no equivalent of this discussion

¹⁰⁵ Eckes (n 29) 367.

¹⁰⁶ *Brita v Hauptzollamt Hamburg*, Case C-386/08, ECR 2010-1289.

¹⁰⁷ *Air Transport Association of America et al. v Secretary of State for Energy and Climate Change et al.*, Case C-366/10, ECR 2011 – not yet reported, paras 50 (on the priority of international agreements over EU secondary legislation), 101 (on customary international law as a limit to EU action) and 123 (on the general obligation of the EU to exercise its competences in light of the international legal requirements).

¹⁰⁸ Ignatieff (n 1) 8.

¹⁰⁹ For an overview of this debate see S Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in S Choudhry (ed), *The Migration of Constitutional Ideas* (CUP, Cambridge, 2006) 1–13.

¹¹⁰ *Lawrence v Texas*, 539 U.S. 558 (2003), diss. op. Justice Scalia.

¹¹¹ See, for example, *Roper v Simmons*, 543 U.S. 551, 575 (2005), Opinion of the Court delivered by Justice Kennedy; *Grutter v Bollinger*, 539 U.S. 306, 345 (2003), Justice O'Connor, concurring.

in Europe. The European Court of Human Rights regularly quotes pertinent jurisprudence from countries which are not members of the Council of Europe¹¹², as well as from international courts¹¹³ and other bodies.¹¹⁴ While the European Court of Justice rarely quotes any source except its own jurisprudence, the Advocates-General do provide it with comparative overviews and references from international courts and courts of foreign countries.¹¹⁵ National courts in Europe quote sources according to their respective national tradition and style and, to our knowledge, there has been no serious debate anywhere in Europe about the legitimacy of taking judicial notice of foreign precedents.¹¹⁶ To the contrary, it seems that the comparative method has become not only an accepted, but also internalized as a *de facto* indispensable method for certain cases.¹¹⁷

¹¹² See, for example, *Jalloh v Germany*, ECHR 2006-IX, paras 49 ff and 105 for a reference to the jurisprudence of the US Supreme Court; *A and others v United Kingdom*, 49 EHRR 29, paras 111 (for a reference to the Supreme Court of Canada) and 112 (US Supreme Court); see further L Wildhaber, 'The Role of Comparative Law in the Case-Law of the European Court of Human Rights' in J Bröhmer (ed), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress* (Heymanns, Cologne, 2005) 1101.

¹¹³ *Cyprus v Turkey*, ECHR 2001-IV, paras 85 ff (for references to the International Court of Justice); *al-Adsani v United Kingdom*, ECHR 2001-XI, para 60 (for a reference to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia); *Mangouras v Spain*, App No 12050/04, Judgment of the Grand Chamber of 28 September 2010, paras 46, 89 (for references to the International Tribunal for the Law of the Sea), available at <<http://www.echr.coe.int>> accessed 13 January 2013.

¹¹⁴ For references to the practice of the UN Human Rights Committee see, for example, *Mammatkulov and Askarov v Turkey*, ECHR 2005-I, paras 114, 124; *Öcalan v Turkey*, App No 46221/99, Judgment of 12 March 2003, para 203 (in this respect upheld by the Grand Chamber in ECHR 2005-IV, para 166).

¹¹⁵ A Nußberger, 'Wer zitiert wen? Zur Funktion von Zitaten bei der Herausbildung gemeineuropäischen Verfassungsrechts' (2006) 61 *JuristenZeitung* 763, 766 with fn 20.

¹¹⁶ C McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499, 507. A rare exception for criticism of the use of foreign and international materials in Germany is C Hillgruber, 'Ohne rechtes Maß? Eine Kritik der Rechtsprechung des Bundesverfassungsgerichts nach 60 Jahren' (2011) 66 *JuristenZeitung* 856, 868 and 871; see also the more nuanced contributions of AB Kaiser, 'Verfassungsvergleichung durch das Bundesverfassungsgericht: Ein Kommentar' (2010) 18 *Journal für Rechtspolitik* 203; H Sauer, 'Verfassungsvergleichung durch das Bundesverfassungsgericht: Zur Bedeutung der Verfassungsvergleichung für die Auslegung des Grundgesetzes' (2010) 18 *Journal für Rechtspolitik* 194.

¹¹⁷ A Weber, *Europäische Verfassungsvergleichung* (CH Beck, Munich, 2010) 7–8, 10–11; see also M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and beyond the State' in JL Dunoff and JP Trachtman (eds), *Ruling the World: Constitutionalism, International Law, and Global Governance* (CUP, Cambridge, 2009) 258, 305–6.

Assuming for a moment, however, that the approach by US Courts would consist of *not* taking note of foreign sources, and that the European approach would be the contrary one, the question could be asked which of the two approaches would be exceptional from a global perspective. Perhaps the European approach could be described in this scenario as being exceptional in quantitative terms (if it is indeed the case that the judiciary in most countries outside of Europe and the United States does not engage in comparative research – which is itself an open question¹¹⁸), but certainly neither exceptional within the group of established constitutional states nor exceptionalist in the sense of seeing this approach as a distinguishing normative factor.

The EU – exceptionalist by definition?

A comparison with the defining features of American exceptionalism leads to the conclusion that Europe does not lay a claim to a form of exceptionalism that would resemble the American original. But could it be that such a comparison overlooks another and more genuine form of European exceptionalism? This form of exceptionalism could relate to the special character of the EU itself – its identity as a supranational union of sovereign states.¹¹⁹ The argument is advanced that no other group of states has pooled sovereignty to the degree that EU member states have done. No other entity would have brought about such a distinct form of supranational governance which also acts alongside its member states on the international level. This would have particular consequences on the international level, for instance when other states have to arrange themselves with particularities of the special status of the EU. The prime example would be the situation in which the EU and its member states are both parties to ‘mixed agreements’.¹²⁰ This would complicate issues such as representation in the organization¹²¹ as well as the question of responsibility for breaches of the respective

¹¹⁸ For example, courts in democracies such as India or South Africa regularly cite decisions of foreign domestic as well as international courts. See with further references E Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ (2008) 102 *American Journal of International Law* 241.

¹¹⁹ This argument is advanced, in particular, by Bradford and Posner (n 5) 16; Safrin (n 5) 1314.

¹²⁰ See in particular JHH Weiler, ‘The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle’ in JHH Weiler (ed), *The Constitution of Europe: “Do the New Clothes Have an Emperor”? And Other Essays on European Integration* (CUP, Cambridge, 1999) 130; see further P Koutrakos, *EU International Relations Law* (Hart, Oxford, 2006) 135–81.

¹²¹ Safrin (n 5) 1328–30.

agreement.¹²² These arguments are certainly worthwhile and it makes no sense to deny the fact that the complex constitutional character of the EU also impacts upon the conduct of its external relations. In this sense, the EU is certainly a ‘special animal’. Other states cannot effectively take comfort in the fact that they are not legally obliged to enter into relations with the EU.¹²³ It is, of course, theoretically possible that a state does not recognize the legal personality of the EU and wishes to keep in contact only with the member states of the EU. Such a posture, however, would ignore the realities of the conduct of international relations where the importance of the EU entails a quasi-automatic recognition of its ability to act internationally on the part of other international actors.

Yet, here again the question is whether this distinctiveness of the EU leads to ‘European exceptionalism’. We are brought back to our initial distinction between exceptionalism in a strong and narrow sense and exceptionalism of a looser character. If one requires of an exceptionalist entity only to be special in some way and thus different from other entities, then it is very well possible to speak of a European exceptionalism. Then, the question must be allowed, however, what is the distinctive analytical value of this category. If one follows this approach, the exceptionality of Europe would be merely contingent upon its governance structure. If exceptionalism is to remain a meaningful theoretical concept in order to understand the specificity of a given political entity, its boundaries must remain better defined and should arguably be kept closer to the American original.

The claims of ‘European exceptionalism’ suffer from a number of other deficits. It is notable, for instance, that the different strands of the argument of ‘European exceptionalism’ contradict themselves. While some authors stress the all-importance of human rights as the specific defining feature of European exceptionalism¹²⁴, others rely on the ‘double standards’ and emerging scepticism towards international law in EU foreign policy.¹²⁵ It can, of course, be argued that it is precisely this paradox which makes Europe exceptionalist. But the defining feature of this exceptionalism would then only be a weak form of ‘double standards’, i.e., one in which

¹²² RA Wessel, ‘The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities’ in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (CUP, Cambridge, 2008) 152; Tietje (n 104) 64–7; F Hoffmeister, ‘Litigating against the European Union and its Member States’ (2010) 21 *European Journal of International Law* 723.

¹²³ On the limited international legal personality of international organizations see K Schmalenbach, ‘International Organizations or Institutions, General Aspects’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, vol V (OUP, Oxford, 2012) 1126, para 23.

¹²⁴ Bradford and Posner (n 5) 14.

¹²⁵ de Búrca (n 5) 690–1.

the mere discrepancy between rhetoric and practice would form the building block of the claim to exceptionality.

In addition, the various assertions of a ‘European exceptionalism’ underestimate the continuing relevance of domestic political culture and identity. Since exceptionalism is not a phenomenon that can only be ascribed to a political entity from the outside but rather needs to convey also a certain articulation of self-understanding, the complexity of contemporary European identity needs to be taken into account. Especially with respect to the conduct of foreign relations, domestic traditions still have a role to play. This became obvious, for example, in the context of the UN Security Council-mandated intervention in Libya in early 2011.¹²⁶ Whereas France and the United Kingdom readily took the lead in the implementation of the Security Council resolution, Germany decided to abstain in the vote for the resolution as well as from participation in its enforcement. Whereas these particular abstentions may have had specific motives, these probably had less to do with a coherent vision of foreign policy than with domestic reasons; German political culture is certainly more reluctant towards the use of force than those of France or the United Kingdom.¹²⁷ The attitude towards the use of force is just one example where attitudes diverge in a field which is important for the shaping of a common European identity. The same is true in the fields of social and economic governance where there is certainly less unity among EU member states than the proponents of European exceptionalism – arguing that the EU ‘has sought to maintain a high level of what it calls “social protection”, sometimes at the expense of its international law obligations’¹²⁸ – would like to acknowledge.

It is, yet again, the complexity of the EU’s structure which makes claims of European exceptionalism difficult to sustain. On a normative level, this complexity is called for by primary EU law. The EU is bound to respect the constitutional identity of its member states, as set forth by Article 4, paragraph 2 of the Treaty on the European Union (TEU).¹²⁹ If exceptionalism

¹²⁶ SC Res 1973, UN Doc S/RES/1973 (17 March 2011).

¹²⁷ On the constitutional requirements for the use of force see G Nolte, ‘Germany: Ensuring Political Legitimacy for the Use of Military Forces by Requiring Constitutional Accountability’ in C Ku and HK Jacobson (eds), *Democratic Accountability and the Use of Force in International Law* (CUP, Cambridge, 2003) 231.

¹²⁸ Bradford and Posner (n 5) 16.

¹²⁹ Consolidated Version of the Treaty on the European Union, art 4, para 2, 9 May 2008, 2008 OJ (C 115) 13; on the implications of this provision see A von Bogdandy and S Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 1147; particularly on ‘constitutional identity’ in a European composite style see I Pernice, ‘Der Schutz nationaler Identität in der Europäischen Union’ (2011) 136 *Archiv des öffentlichen Rechts* 185, 210.

has something to do with the projection of identity onto a global level, the EU will arguably be only capable of projecting a rather complex image. This should not be left out of the picture, especially when one gauges the real-life implications of the rather ambitious value talk in the EU treaties. The preamble to the TEU draws inspiration ‘from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’, and marks the EU’s commitment ‘to implement a common foreign and security policy ... thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world’. This is the language which underpins the EU’s ambition to be a ‘normative power’ which pursues its project of selling the pooling of sovereignty as a model for other states to follow,¹³⁰ as set forth in Article 21, paragraph 1 TEU. However, one should not overestimate the importance of this mandate. Here again we can find a somewhat paradoxical relationship between the diagnosis of a European exceptionalism which portrays the EU as a powerful actor, successfully negotiating privileges for itself and imposing its standards of governance upon others¹³¹ and the general perception that in the field of external relations, European unification is not as advanced as it would be desirable.¹³² Even in areas such as trade policy, where the EU is leveraging a considerable amount of power, it has been held that the EU has not been ‘effective’ in its pursuit of influence since tensions between EU member states would often stand in the way of a successful implementation of a unified set of policy objectives.¹³³ This is not to downplay the relative successes the EU has had as ‘norm generator’ in various fields of social and economic regulation¹³⁴ and even the possibility that the EU may have used its relative superiority in terms of bargaining power when negotiating preferential trade agreements with less powerful actors such as

¹³⁰ See M Cremona, ‘The Union as a Global Actor: Roles, Models and Identity’ (2004) 41 *Common Market Law Review* 553.

¹³¹ Safrin (n 5).

¹³² On the limited impact of the EU as a normative power see, for instance, A Bendiek and H Kramer, ‘The EU as a “Strategic” International Actor: Substantial and Analytical Ambiguities’ (2010) 15 *European Foreign Affairs Review* 453, 467–9; KE Smith, ‘The European Union at the Human Rights Council: Speaking with One Voice But Having Little Influence’ (2010) 17 *Journal of European Public Policy* 224.

¹³³ S Meunier and K Nicolaïdis, ‘The European Union as a Conflicted Trade Power’ (2006) 13 *Journal of European Public Policy* 906, 922.

¹³⁴ B de Witte, ‘International Law as a Tool for the European Union’, (2009) 5 *European Constitutional Law Review* 265, 278–9; the concept of ‘norm generator’ was first used by Cremona (n 130) 557.

the African-Caribbean-Pacific (ACP) countries.¹³⁵ However, seeking to instil one's own regulatory preferences into global law-making processes is not sufficient for recognizing an exceptionalist attribute. In addition, the aspiration of the EU to be a 'normative power' needs to be seen in the context of another fundamental constitutional provision of the TEU: Article 3, paragraph 5 provides that

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

The self-understanding of the EU with respect to its role on the global level is thus certainly characterized by an aspiration to be a role model which others are invited to follow. At the same time, it pays tribute to the normative framework within which it exists, by emphasizing the necessity of 'strict observance' of international law and respect for the principles of the UN Charter.

Conclusion

We have not found a European exceptionalism which comes anywhere close to standard descriptions of the original American exceptionalism – understood in the narrow and strong sense. In our view, 'exceptionalism' is a concept of limited heuristic value today if applied to Europe. It would even be politically misleading to apply it to Europe. The term 'exceptionalism', if it is used in a sense which is too detached from the case for which it is typically used, tends to turn from a critical analytical tool into an apologetic abstraction – all cats are grey at night.

This does not exclude identifying a European exceptionalism in a broader and weaker sense. It is, of course, also possible that developments will take place in the future which would make Europe resemble the original. Should Europe, for example, give up its self-understanding as a faithful and innovative element of a UN-based world order and should it postulate an identity based on features which it considers unique or even superior to other states or entities, it would be on its way to become not only exceptional, but also exceptionalist.

¹³⁵ Meunier and Nicolaïdis (n 133) 913.

The chances of such a scenario happening depend not only on intra-European debates and developments, but probably also very much on the global context. If, for example, a G20 world meant that a pluralism of economic (free market/state managed) and political (democratic/semi-democratic/authoritarian) systems entered into a phase of a certain equilibrium, it could happen that the European model would be globally regarded as an undesirable or unattainable goal, which in turn could prompt 'Europe' to assert an exceptionalism. If, on the other hand, a G20 world meant a more broadly based basically liberal global market economy with elements of stronger supervision by national and international public bodies, then Europe could continue to play the role of a developed but also still developing element of the global fabric. Both scenarios would not only affect the relations of Europe with its global neighbours, but, indirectly and in the long run, very likely also many facets of European constitutionalism and (human) rights interpretation.

In both scenarios, however, Europe would play a soft global role, being either defensive or mildly hegemonic as a role model. It is, on the other hand, unlikely that Europe will be able to, or even be inclined to, play a more active role which would come even close to the 'unilateralist', 'hegemonic' or 'imperial' conduct of 'the last remaining superpower' which triggered the debates about American exceptionalism during the past decade.