



6-2-2020

International "Constitutions" and Comparative Constitutional Law

Michael Da Silva
McGill University

Follow this and additional works at: <https://scholarship.law.nd.edu/ndjicl>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Michael Da Silva, International "Constitutions" and Comparative Constitutional Law, 10 NOTRE DAME J. INT'L & COMP. LAW 139 (2020).

This Article is brought to you for free and open access by the Notre Dame Journal of International & Comparative Law at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of International & Comparative Law by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

International "Constitutions" and Comparative Constitutional Law

Cover Page Footnote

Canadian Institutes of Health Research Banting Fellow, Institute for Health and Social Policy and Faculty of Law, McGill University. An earlier version of this piece was presented at a meeting of the Younger Comparativists Committee (YCC) of the American Society of Comparative Law. I thank the audience at that meeting and the editors of this journal for helpful feedback that helped me refine the scope of (and hopefully improve) my argument.

INTERNATIONAL “CONSTITUTIONS” AND COMPARATIVE CONSTITUTIONAL LAW

MICHAEL DA SILVA *

INTRODUCTION	140
I. RELEVANT PHENOMENA.....	142
II. SCOPE	145
III. FEATURES OF CONSTITUTIONAL ORDERS.....	149
IV. THE CASE FOR THE CHARTER AS INTERNATIONAL CONSTITUTION.....	151
A. <i>THE FORMAL SUPERIORITY ARGUMENT</i>	151
B. <i>THE SHARED PROJECT ARGUMENT</i>	152
C. <i>THE SIMILARITY ARGUMENT</i>	152
V. THE CASE AGAINST USING THE CHARTER IN DOMESTIC CONSTITUTIONAL COMPARISONS.....	153
A. <i>THE CHARTER LACKS KEY CONSTITUTIONAL FEATURES</i>	154
1. <i>Constituent Authority</i>	154
2. <i>Hierarchy</i>	155
3. <i>Entrenchment</i>	156
4. <i>Enforcement</i>	157
5. <i>Bindingness</i>	158
B. <i>THE LARGER INTERNATIONAL ORDER IS STRUCTURALLY DISSIMILAR FROM CONSTITUTIONAL ORDERS</i>	159
1. <i>Authoritativeness</i>	159
2. <i>A Unity of Laws</i>	160
3. <i>Separation of Powers</i>	162
C. <i>FUTURE INTERNATIONAL CONSTITUTIONAL ORDERS ARE LIKELY TO DIFFER FROM DOMESTIC EQUIVALENTS</i>	163
D. <i>DOMESTIC LEGAL PRACTICE UNDERMINES THE CASE FOR COMPARISON</i>	165
E. <i>COMPARISON IN MONIST STATES MAY JUST BE APPLICATION OF DOMESTIC LAW</i>	166
F. <i>THE CHARTER ALONE DOES NOT SUPPORT OVERLAP ARGUMENTS</i>	166
G. <i>THE SHARED PROJECT ARGUMENT HAS LIMITED APPLICATION</i>	167
VI. OBJECTIONS AND REPLIES	168
CONCLUSION	171

* Canadian Institutes of Health Research Banting Fellow, Institute for Health and Social Policy and Faculty of Law, McGill University. An earlier version of this piece was presented at a meeting of the Younger Comparativists Committee (YCC) of the American Society of Comparative Law. I thank the audience at that meeting and the editors of this journal for helpful feedback that helped me refine the scope of (and hopefully improve) my argument.

INTRODUCTION

Many scholars discuss a “constitutionalization” of international law.¹ Some look for a document or set of documents that can be the “constitution” in this constitutionalizing or constitutionalized system.² Common candidates include the *Charter of the United Nations* (Charter),³ all or parts of the “International Bill of Rights” (the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Cultural, Social, and Economic Rights* (ICESCR)),⁴ and the *Vienna Convention on the Law of Treaties* (VCLT).⁵ Comparisons between international law and domestic constitutional orders help determine whether this process of constitutionalization is taking place or complete.⁶ Some domestic courts use international law to decide cases and understand legal phenomena.⁷ Some conduct constitutional comparisons to decide cases.⁸ These phenomena combine to raise an intriguing question: To what extent can the kinds of comparisons between the international legal order and domestic constitutional legal orders that have provided information about international law and the constitutionalization thereof now shed light on domestic constitutional laws?

This Article provides a response. It proposes caution in conducting such comparisons to address constitutional issues and argues that at least most valid comparisons to fulfill constitutional law purposes likely do not qualify as forms of comparative constitutional law but are instead examples of other kinds of (often clearly useful) analysis. “Constitutional” comparisons to decide constitutional cases in one’s state are legitimate where the foreign legal order is sufficiently similar to one’s domestic constitutional legal order such that we can

¹ See, e.g., RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) [hereinafter RULING THE WORLD]; JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009).

² Blaine Sloan, *The United Nations Charter as a Constitution*, 1 PACE Y.B. INT’L L. 61, 62 (1989); See also, Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. U.N. L. 1, 19 (1997); Bardo Fassbender, *The United Nations Charter as Constitution of The International Community*, 36 COLUM. J. TRANSNAT’L LAW 529, 558, 567, 593, 618 (1998); Stephen Gardbaum, *Human Rights as International Rights*, 19 EUR. J. INT’L LAW 749, 759 (2008).

³ U.N. Charter art. 102. On its candidacy see Sloan, *supra* note 2, at 61; Dupuy, *supra* note 2, at 12; CHRISTIAN TOMUSCHAT, THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE IX (Kluwer Law Int’l 1995) [hereinafter Tomuschat].

⁴ G.A. Res. 217 (III) Universal Declaration of Human Rights, (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. On the status and joint candidacy of this “International Bill of Rights,” see Gardbaum, *supra* note 2, at 750.

⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. On its candidacy (and that of other documents), See KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 23–25.

⁶ RULING THE WORLD, *supra* note 1, at 18. See also, Sloan, *supra* note 2, at 63.

⁷ Baker v. Canada (Minister of Citizenship and Immigration) (1999) 2 S.C.R. 817, 47 (Can.) (see para. 70 for other transnational case law). Some courts are bound to use it. See, e.g., S. AFR. CONST., 1996, § 39(1)(b).

⁸ See, e.g., THE MIGRATION OF CONSTITUTIONAL IDEAS 5–10 (Sujit Choudhry ed., 2006) [hereinafter Choudhry].

plausibly understand the foreign legal order as constitutional and capable of providing insight into the nature of constitutions, constitutionalism, and constitutional phenomena. Yet, there is reason to question whether the international legal order has enough features of domestic constitutional orders to justify this form of judicial comparison between the international legal order and domestic constitutional orders. The ongoing constitutionalization process is unlikely to produce an international legal order with sufficiently similar features to domestic constitutional orders. To make this clear, I address the case of a Charter-based international “constitutional” order. I explore whether the Charter is an international constitution and whether the system that it anchors is a constitutional legal order, providing negative responses to both inquiries. I further detail other reasons to question whether any international legal system is relevantly similar to domestic constitutional systems. While these reasons are, perhaps, inconclusive on whether and the extent to which international law can inform comparative constitutional law as a general matter, they at least suggest that one should take care before comparing the regimes (or their parts) and that such exercises may not qualify as comparative *constitutional* law in any case. Methodologically, these reasons likely also put the onus on those who seek to compare to explain why their proposed comparison is apt. Meeting that onus may also require addressing different considerations than meeting the onus for establishing the aptness of classical comparative constitutional analysis. These findings are individually and jointly important for our understanding of the contours of comparative constitutional law as a discipline and decisions about whether and when to invoke international law when conducting comparative scholarship or deciding legal cases using comparative or foreign materials.

The first three parts of my argument are descriptive. Part I outlines relevant phenomena. Part II limits my focus. Part III identifies recognized necessary features of domestic constitutions and constitutional legal orders. The next three parts are substantive. Part IV outlines the strongest arguments for the Charter as the center of an international constitutional order. Part V demonstrates that the argument in Part IV is not as strong as it appears and provides an original case against comparison (at least as a regular practice). It demonstrates that the Charter lacks core features of domestic constitutions, the Charter-centered legal order lacks features of domestic constitutional legal orders, and future international constitutional orders will likely importantly differ from domestic constitutional orders. It then raises conceptual problems for comparison: the practices of international and domestic law query whether international law is independent of domestic practice in a way that will allow international law to serve as a comparator and many apparent comparative uses of international law are simple domestic legal applications. It then explains how arguments for a Charter-based constitutional system are undermined by the Charter’s lack of common domestic constitutional legal entitlements and by history. These arguments against recognition are only presented in brief due to space constraints and clearly do not suffice to bar comparison between international and domestic orders, but they jointly suggest that comparison between these orders does not qualify as comparative constitutional law and likely suffice to limit the circumstances in which international law can be used to fulfill comparative constitutional law’s purposes. Indeed, the instances in which international law is appropriate for judicial resolution of cases are rarely instances in which it is viewed constitutionally. This (possibly inconclusive)

skepticism about the domains in which international law should be used in constitutional matters at least problematizes claims that comparison is usually apt. I address objections in Part VI.

I. RELEVANT PHENOMENA

Three phenomena are relevant to this discussion: the constitutionalization of international law, interaction between international and domestic laws, and the search for comparative law methodological best practices. To begin, many scholars agree that international law is undergoing a process of constitutionalization, but that process is ongoing and incomplete.⁹ Debate on the nature of this constitutionalization continues. Constitutionalization as a process of securing certain foundational norms distinctive of all legal communities is distinct from constitutionalization as a process of identifying a hierarchical law that binds all communities.¹⁰ Domestic “constitutions” serve the latter role and are partially justified by their ability to secure the former.¹¹ Yet, while some institutions must ensure that constitutional principles are at the top of a normative hierarchy for constitutionalization in any sense to be realized,¹² it is unclear whether the kind of hierarchically superior legal regime or document that courts invoke when doing comparative constitutional law will best ensure that international law is foundationally grounded in and helps further norms distinctive of all legal communities.¹³ These difficulties are partially responsible for a break in the literature on the constitutionalization of international law. Some scholars seek to identify the document or documents that will be hierarchically superior to all other international law and serve the role of constitutions in domestic constitutional orders.¹⁴ Other scholars seek to ensure that certain norms are fulfilled even absent a hierarchical document, documents, or even (constitutional) case law, with some further questioning whether domestic constitutional forms are most likely to ensure that these norms are foundational and furthered in international law.¹⁵

Regardless of whether international law’s “constitutionalization” is ongoing or complete and of the form it is taking or should take, international law plays a role in domestic law and vice versa. Domestic courts appeal to international law to solve cases. Some are legally bound to do so.¹⁶ In “monist” states, international law directly applies as domestic law when a treaty goes into force,¹⁷

⁹ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 4; Fassbender, *supra* note 2, at 532, 576.

¹⁰ Gardbaum, *supra* note 2, at 752–753.

¹¹ *Id.* at 752–753.

¹² Dupuy, *supra* note 2, at 3.

¹³ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 23.

¹⁴ See generally Sloan, *supra* note 2; Dupuy, *supra* note 2; Fassbender, *supra* note 2; Gardbaum, *supra* note 2.

¹⁵ E.g., KLABBERS, PETERS & ULFSTEIN, *supra* note 1.

¹⁶ E.g., S. AFR. CONST., 1996, § 39(1)(b).

¹⁷ E.g., Joseph G.J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT’L L. 66 (1936); NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW

so courts must use international law to resolve some cases. Use of international law in “dualist” states where an international law has not undergone implementation procedures to become part of domestic law is contentious, but dualist state courts too sometimes appeal to international law to understand concepts and otherwise interpret domestic laws.¹⁸ Domestic laws, including comparative analyses, also help establish international law’s content.¹⁹ Absent frequent judicial review by international courts, domestic courts implement and interpret international laws.²⁰ These actions translate international law into domestic proscriptions.²¹ They are also evidence of international law’s content since state practice articulates parts of that content.²²

Finally, comparative constitutional law is now a standard, if controversial, judicial decision-making tool and independent branch of legal academia. Actors in Germany, Canada, and many other liberal democracies commonly cite one another.²³ Courts in Israel, South Africa, and elsewhere hire foreign lawyers as clerks to ensure some broad conformity in a transnational constitutional jurisprudence.²⁴ Comparative law generally and comparative constitutional law particularly now have standalone status within the academy and are studied absent triggering events like the end of the Cold War.²⁵ Second order questions of how to do legal comparison are instead central.²⁶ Whether comparative law requires a single methodology, which methodology that could be, and which methodology qualifies as best practices (and for which ends) are vexing questions.²⁷ Comparativists also debate how to select subjects of comparison.²⁸ Yet, it should be clear that one must compare things with fundamental constitutional features in order to conduct comparisons that will shed light on

3–10 (Janne E. Nijman & André Nollkaemper eds., 2009); *But see* Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT’L L. 514, 516–517, 522–527 (2015).

¹⁸ This is so even where international law is not formally part of the dualist state’s domestic law. *See* Baker v. Canada (Minister of Citizenship and Immigration) (1999) 2 S.C.R. 817, 47 (Can.); *see also* 2 S. AFR. CONST., § 39(1)(b).

¹⁹ Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT’L L. & POL. 501 (2000); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT’L & COMP. L. Q. 57 (2011).

²⁰ *Id.*

²¹ Knop, *supra* note 19.

²² Roberts, *supra* note 19, at 62.

²³ *See, e.g.*, Choudhry, *supra* note 8, at 5–10.

²⁴ *See, e.g.*, YALE LAW SCHOOL CAREER DEVELOPMENT OFFICE, OPPORTUNITIES WITH INTERNATIONAL TRIBUNALS AND FOREIGN COURTS (2016) (listing the jobs). *See also, e.g.*, AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); Lorraine E. Weinrib, *Constitutionalism in the Age of Rights—A Prolegomenon*, 121 S. AFR. L.J. 278, 285 (2004) (each discussing and evaluating the relevant transnational actions).

²⁵ MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 1, 114 (2d ed. 2014).

²⁶ Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 54 (Michel Rosenfeld & András Sajó eds., 2012) (on constitutional law); RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (2014) (also on constitutional law); *THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE* (Maurice Adams & Dirk Heirbaut eds., 2015) (discussing broader comparisons).

²⁷ *See generally* Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985); Mathias M. Siems, *The End of Comparative Law*, 2 J. COMP. L. 133 (2007).

²⁸ *See* HIRSCHL, *supra* note 26, at 244–267 (examining options).

constitutions and constitutional phenomena. Comparing something with such features with something without them will rarely provide insight into either. Where several features are lacking, it is questionable whether there even is a constitution with which one can compare core cases. If there is no constitution or constitutional order, there will be no subject for most different comparative constitutional law analyses. When we say something is the “most different” constitutional order, we still believe it has sufficient features of constitutional orders and thus is part of the same species as other constitutional orders.²⁹

Literatures on these phenomena are often divorced. Intersections usually focus on implications of their overlap for international law. Many scholars use comparative law to analyze international law. Most begin with set features of constitutions and compare them with international law. The comparative constitutional analysis predates the comparison with international law. No statements about the content of domestic constitutional laws are meant to follow. Even discussion of the potential of the Charter’s ability to serve as an international constitution often focuses on the implications of this view for international law only.³⁰ A main argument for the Charter’s constitutional status does not include a single comparative or constitutional law insight in its list of consequences of recognition.³¹ International courts also use comparative law to analyze international law.³² Addressing these questions independently is justifiable: “[c]omparative constitutional law concerns national court decisions on constitutional law, which may overlap, but are not coextensive, with domestic judgments on international norms.”³³ Yet comparative international law, the study of how jurisdictions implement international law,³⁴ demonstrates that one can gain valuable insights into the law by addressing them in tandem. Most extant insight is into the nature of international law, not constitutional law.

This work examines the extent to which addressing these phenomena can help us better understand constitutional law. We can learn about international law by comparing the international and the domestic “constitutional orders.” Can we learn about constitutional law from the same kind of analysis or can we only apply international law in domestic situations? Is such an analysis part of international law, domestic constitutional law, or comparative (constitutional)

²⁹ See KLABBERS, PETERS & ULFSTEIN, *supra* note 1. See also David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545 (1997) (arguing that comparatists should understand how their work contributes to and can help further a global governance project with international governance elements (though Kennedy is largely an exception to the trend here)).

³⁰ Fassbender, *supra* note 2, at 538–551.

³¹ *Id.* See also Sloan, *supra* note 2 (leveraging in-depth comparison to gain insights into international law but making no claims about constitutional law or the use of comparison to gain insights into constitutions or constitutional phenomena).

³² E.g., Neha Jain, *Comparative International Law at the ICTY: The General Principles Experiment*, 109 AM. J. INT’L L. 486, 490 (2015) (suggesting they do so unsystematically).

³³ Roberts, *supra* note 19, at 81.

³⁴ E.g., ANTHEA ROBERTS et al., *COMPARATIVE INTERNATIONAL LAW* (2018) [hereinafter *COMPARATIVE INTERNATIONAL LAW*]; See also Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. INT’L L. 467, 474 (2015) (a special issue on “Exploring Comparative International Law”). Neither treats international law as a subject of comparative constitutional analysis. There is a sense which the current project fits under the “analysis” branch of the most influential definition of comparative international law and can be understood as a normative branch of that largely descriptive field. But this work is not an example of the paradigmatic comparative international law projects that can contribute to international law. *Id.* at 469–471.

law? We know that courts use international law in their decisions. Can they use international law as a source for comparative constitutional analysis that will shed light on constitutions and constitutional phenomena? Work in comparative law methodology suggests that this will only be licit where there is an international constitutional order like a domestic one. But can we view international law as having a constitution or constitutional order like a domestic one? Can we then use its case law as a way of understanding domestic legal issues? Answering all these questions completely likely requires a full-length book, but some initial suggestive considerations, detailed below, at least establish the need to take caution before invoking international law in comparative constitutional exercises. I provide partial answers thereto in the service of two master questions: Does the international legal order share sufficient features of domestic constitutional orders to justify judicial comparison between the international legal order and domestic constitutional orders to resolve cases? If so, when? I argue that international law's constitutionalization is producing something insufficiently like modern domestic constitutions to gain adequate insight into domestic constitutions and constitutional phenomena to warrant comparison in many cases. Deciding domestic constitutional cases based on comparisons with international law is accordingly dubious in most cases given the stakes of legal decisions.³⁵ Judges should accordingly be cautious about using international law for comparative purposes. This does not mean that international law has no role to play in the resolution of legal cases. International law may even have a role to play in understanding some constitutional phenomena. But the concerns I raise about international law's purported constitutionality do suggest that international law's role in comparative constitutional law should be more circumscribed than is often assumed. Many licit uses of international law in deciding cases are actually non-comparative and many comparisons between international and domestic laws are not best described as comparisons between truly constitutional phenomena.

II. SCOPE

The case for international law as a source for comparative constitutional analysis generally is, again and of course, too broad a topic for one work. I thus limit the scope of my analysis. While constitutionalization can take several forms, I focus on constitutionalization as a process of identifying a hierarchical law that binds all communities.³⁶ Above, I contrasted this sense of constitutionalization with a sense of constitutionalization as a process of securing foundational norms distinctive of all legal communities.³⁷ Call these "legal ordering" and "norm-diffusing" senses of constitutionalization. The legal

³⁵ Where we gain insight into some constitutional phenomena from such comparison, there is reason to question whether the comparison is legal, rather than academic or moral, in nature and whether international law has special insight or authority in academic or moral works.

³⁶ Gardbaum, *supra* note 2, at 752–753.

³⁷ *Id.*

ordering sense looks for a common structure between entities. The norm-diffusing sense looks for a stable set of norms across jurisdictions. These senses may not always coexist. My interest here is in the legal ordering sense alone.

This focus may elide important differences between other types of constitutionalization,³⁸ but I address parts of some of those distinctions and others are orthogonal to this particular project. Two representative sets of distinctions make this clear. First, I integrate Pierre-Marie Dupuy's distinction between two kinds of constitutions: on his "*material*" or "*substantial*" view, "a constitution is to be considered as a set of legal principles of paramount importance for every one of the subjects belonging to the social community ruled by it" and the principles are placed above all other components of the legal system in a hierarchy of norms, while on his "*organic*" or "*institutional*" view, a constitution "points to the designation of public organs, the separation of powers and the different institutions which are endowed each with its own competencies."³⁹ My criteria for legal ordering constitutionalization below incorporates parts of both kinds.

Second, distinctions crucial to ongoing debates about the sources of constitutionalization in the norm-diffusing sense—contrasting traditional approaches seeking national sources of existing norms,⁴⁰ pluralistic approaches in which norms are produced by multiple overlapping centers of public authority,⁴¹ and new approaches in which norms are produced by a mix of private and public sources⁴²—are not directly relevant here. The sources, relative value of, and best means of fulfilling norms are good research topics. For instance, constitutional legal orders may protect the wrong norms, including those we would not want a norm-diffusing sense of constitutionalization to emphasize. Yet even determining whether this is generally true requires different work on the nature of legal ordering constitutions first.⁴³ Study of the shared norms of international and domestic constitutional orders is then common. Where harmonization is a core comparative law concern and shared norms aid harmonization, such projects may be *central* to comparative law.⁴⁴ I nonetheless focus elsewhere, partly to avoid overlap with existing research and partly because I am interested in comparison for legal purposes and abstractly comparing norms is not a legal task. One needs to compare similar things to gain insight in comparative analysis. Similarity in law requires that norms exist in similar legal structures. Constitutional documents and orders in domestic

³⁸ My approach responds to related concerns raised by Garrett Wallace Brown. See Garrett Wallace Brown, *The Constitutionalization of What?*, 1 GLOBAL CONSTITUTIONALISM 201 (2012).

³⁹ Dupuy, *supra* note 2, at 3.

⁴⁰ E.g., constitutional contributions to the "legal transplants" literature. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 15 (2d ed. 1993) (on transplants).

⁴¹ E.g., Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 321 (2002); Neil Walker, *Constitutional Pluralism Revisited*, 22 EUR. L. J. 333, 354 (2016).

⁴² Compare GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* (2012), with *NEW CONSTITUTIONALISM AND WORLD ORDER* (Stephen Gill & A. Claire Cutler eds., 2014).

⁴³ See *The Idea of Constitutional Pluralism*, *supra* note 41, at 323. Future legal orders could be tailored to meet different norm-diffusing goals. Calling such systems constitutional in the legal ordering sense today would be premature. While the pluralist model was designed to describe the European Union model of governance, we cannot assume the E.U. is like a domestic constitutional order.

⁴⁴ But see Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699 (1991). See also *infra* the discussion of the "Shared Project Argument."

spheres do not take pluralistic forms or give primary powers to private actors in ways that would allow international legal orders that tried to instantiate some values of the norm-diffusing sense of constitution to be proper comparators for domestic ones.⁴⁵

Whether domestic constitutions *should* be pluralistic is an excellent question, but the second limitation on my current research task provides reason not to address it: I choose to focus primarily on judicial comparison here. Many stakeholders do comparative constitutional law.⁴⁶ But the stakes of comparison are highest in judicial settings. Judges who exercise improper comparisons risk making binding bad law that improperly allocates legal rights and obligations. Proper bases of comparison are thus most necessary in judicial decision-making. The judiciary's role as user of international and comparative law also makes this focus an interesting case study in whether international law as comparative law is licit.⁴⁷ Judges must apply laws and explore legal phenomenon. The general nature of norms is beyond their competence and authority. They instead explore how norms exist in legal structures. They can only look at norms in other structures when the structures are like those in their jurisdictions. They otherwise risk importing norms that would not operate in the same way in their system (and could go against the nature of the system he is supposed to protect). Norm-diffusion is at most a small part of the judicial role and secondary to a commitment to applying one's own law that requires comparison only with legal systems like one's own. My narrower focus lets us identify the value of comparison in its most important genuinely legal form, helping to see if and when comparison with international orders can provide insight into central constitutional issues (or whether it should be peripheral).

One may argue that my so-limited project is too academic to warrant sustained analysis: judicial use of international law as a comparator is uncommon. Yet this project's academic nature puts it on a par with most comparative constitutional law works. Judges rarely use *any* constitutional comparison to decide cases.⁴⁸ Foreign citations are infrequent even in paradigmatic examples of nations that cite foreign law comparison between countries to decide cases is rarer still.⁴⁹ Moreover, there is reason to think that my own academic project is also important for understanding law and legal method. Questions of what it means to have a constitutional structure, when it is legitimate to study the law of another nation to resolve high stakes issues, and

⁴⁵ See *infra* Part V.

⁴⁶ See generally Hirschl, *supra* note 26.

⁴⁷ See COMPARATIVE INTERNATIONAL LAW, *supra* note 34.

⁴⁸ See VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010); See also Tania Groppi & Marie-Claire Ponthoreau, *Conclusion: The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, an Uncertain Future*, in THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 411 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013). Comparison between the domestic and international is more common in international decision-making than in domestic decision-making. This raises the question of whether the converse would be justified.

⁴⁹ Commentary often focuses on the American case. See, e.g., Peter McCormick, *American Citations and the McLachlin Court: An Empirical Study*, 47 OSGOODE HALL L. J. 83 (2009). This is appropriate. Canadian courts cite American courts more than alternatives and the issue is generalized. See, e.g., Gianluca Gentili, *Canada: Protecting Rights in a "Worldwide Rights Culture": An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982-2010)*, in THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 39 (Tania Groppi & Marie-Claire Ponthoreau eds. 2013, 2013).

what similarities and other features are required to conduct comparative analysis are important for many tasks. They may be necessary to answer prior to answering the question of what kind of legal structure best fulfills the norm-diffusing sense of constitutionalization. We need to know what basic constitutional structures are available to spread the norms before we can determine which spreads them best. This analysis can contribute to legal study regardless of how often this kind of comparison currently takes place. Infrequent use of this form of comparison may even make it easier to address questions about the value of forms of comparison without wading into the political debates surrounding other forms of comparison. The analysis can guide future decision-makers faced with situations where strict comparison may be relevant and provide insight into whether and why current forms of comparison are apt.⁵⁰

Finally, while I am interested in whether the international legal order is constitutional in nature, I also study whether a constitutional document, the Charter, has sufficient constitutional features because it is a candidate central constitutional document for the most likely international constitutional order and several scholars argue that it is the international constitution now. Scholars argue that several documents do, can, or should play the role of international constitution. Arguments that each fulfills criteria for constitutional documents are available.⁵¹ Yet, several reasons justify focusing on the Charter. Academically, it is a common candidate in the literature for the world constitution.⁵² Testing the Charter's candidacy thus responds to the literature. Functionally, the United Nations [U.N.] is the best candidate for an international community that could be made into a constitutional order. The Charter is its foundational document and could play a central role in the constitutionalization of the U.N. system. Legally, Article 103 of the Charter prioritizes Charter obligations, apparently providing some hierarchical status.⁵³ There is some indication that the Charter (partly) fulfills some other criteria of constitutions.⁵⁴ Finally, structurally, the Charter shares enough features with other candidate constitutions to be instructive for identifying problems other candidates may face. If the Charter is the best candidate for the constitution of the international legal order and there are reasons to be skeptical about using it as the lynchpin of international law as comparative constitutional law, this provides reason to generally question the use of international law as a comparative constitutional law source. I thus focus on the Charter, but also explore whether it could combine with the International Bill of Rights to fulfill the role of a constitutional document.⁵⁵

⁵⁰ My findings bear on academic use of international law in CCL, but I make no claims about academic comparison beyond implying some limitations thereon.

⁵¹ For a less obvious example, many documents claim authority over specific areas of international law. *See, e.g.*, Constitution of the World Health Organization, July 22, 1946, 14 U.N.T.S. 185; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299. These and similar documents could combine into a multi-part functional international constitution like many multi-part domestic constitutions.

⁵² Sloan, *supra* note 2; Dupuy, *supra* note 2; Fassbender, *supra* note 2; Gardbaum, *supra* note 2.

⁵³ U.N. Charter art. 103.

⁵⁴ *See infra* Part IV (and criticisms in Part V).

⁵⁵ My focus on these documents is also emblematic of another way in which my analysis is limited: I focus primarily on global legal regimes here with the United Nations-based system serving as my

III. FEATURES OF CONSTITUTIONAL ORDERS

Comparative constitutional law projects like this require that comparators share a sufficient number of features to qualify as constitutions and, thus, subjects of comparison. What are the necessary and sufficient features of a constitution capable of serving as the subject of comparison? For fairness's sake, I defer to those who argue that an international constitution or constitutional order is sufficiently similar to domestic ones to warrant comparison in many circumstances. A combination and alteration of Stephen Gardbaum and Bardo Fassbender's accounts of the features of candidate constitutions reveal five features that global constitutions should fulfill if they are going to be like domestic ones and serve as proper bases of comparison: (a) constituent authority, (b) hierarchy, (c) entrenchment, (d) enforcement, and (e) bindingness. While one can question whether any one of these criteria is necessary to have a domestic constitutional order (and my own views on what is necessary differ from these proposals), the criteria in Gardbaum and Fassbender are plausible candidates for at least paradigmatic features of domestic constitutions. Where they are offered as key features of domestic constitutions by those who make the case for international law as a source of comparative constitutional law, accepting them as given for present purposes is fair to the authors who oppose me and the scope of their arguments. Candidate international constitutions should fulfill at least most of the five criteria if they are going to be comparators with domestic constitutions, even by the lights of those who seek to identify international constitutions.⁵⁶

Gardbaum and Fassbender make generally plausible cases for these criteria. Gardbaum states that constitutional documents are generally "made by a special, episodic, and self-consciously constituent power," highest in the hierarchy of laws in an area, and "entrenched against ordinary methods of amendment or repeal which apply to statutes and other forms of law."⁵⁷ He ultimately denies that "special methods of enforcement" are required,⁵⁸ but *some* form of enforcement is generally required and implicit in Gardbaum's account. Judicial review is commonly used to fulfill this requirement in domestic constitutional orders but is not the universal method of doing so. Fassbender then establishes that entrenchment is characteristic of constitutions:⁵⁹ they "almost always present a complex of fundamental norms governing the organization and performance of governmental functions in a given state ... and the relationship between state authorities and citizens."⁶⁰ Constitutions should then be difficult

primary candidate for a constitutional order. There is, of course, a sense in which regional legal systems are more "constitutional" than the more global example on which I choose to focus here. But whether those systems are genuinely "international" is itself a contested issue, so regional systems are not strong foci for the present inquiry. As I further note below, regional systems are not themselves unified into a global collection of laws governed by a common "constitution."

⁵⁶ But see Richard Albert, *The Cult of Constitutionalism*, 39 FLA. ST. U. L. REV. 373 (2012); Gardbaum, *supra* note 2, at 754.

⁵⁷ Gardbaum, *supra* note 2, at 754.

⁵⁸ *Id.*

⁵⁹ Fassbender, *supra* note 2, at 537.

⁶⁰ *Id.* at 536.

to terminate or alter. Constitutions thus tend to bind government institutions and community members alike.⁶¹ Even where community members' actions are not directly subject to constitutional review, their rights against government are established through a constitution. These rights are against both the state's main organ and any organs created under its primary constitutional authority.

These criteria can, of course, be criticized, but they suffice for present purposes. For instance, constitutional documents likely do not reflect the "will of the power" in a way that would reflect a substantive conception of constituent authority.⁶² Where some nations recognize that *jus cogens* norms can supersede domestic constitutions even from the perspective of domestic constitutional law, domestic constitutions likely only need to be very high in a hierarchy, rather than occupying the *highest* position. Gardbaum's criteria are otherwise descriptively and normatively helpful. After all, even imposed constitutions that do not reflect the will of the people, like that of Japan, are the result of a process that aims to create the boundaries of constitutional authority for the people on whom it is imposed. Even persons who impose a constitution through defined procedures may qualify as a constituent power on a less substantive account. The idea that all constitutional documents are made at a set time with a certain special purpose of creating special documents is hardly implausible. Likewise, at least paradigmatic examples of, if not all, domestic constitutions do seem to at least purport to have a high place in the state's hierarchy of laws and to resist change through regular legislative procedures. Where scholars invoke these plausible criteria to make cases for an international constitution, invoking them here is dialectically useful notwithstanding any caveats I would add.

We can then identify features of domestic constitutional *orders* that an international equivalent should possess. A constitutional order has these features regardless of whether they have a specific document with the features in the preceding paragraph. The pro-international constitutionalization scholars Jan Klabbers, Anne Peters, and Geir Ulfstein suggest that a global constitution will have features that are shared by many constitutions, including political accountability and a commitment to the rule of law that itself requires separation of powers, procedural rules, and judicial review.⁶³ These can be understood as features of constitutional orders, rather than constitutional documents. We can specify their requirements as (a2) authoritativeness, (b2) a unity of laws, and (c2) separation of powers. First, constitutional orders are authoritative. The whole order must fulfill the criteria of hierarchy and bindingness even absent a specific constitutional document. Otherwise, there is not a proper subject of the order. Fassbender further specifies that many entities, state and citizen alike, must be bound for a constitutional order to be complete.⁶⁴ Second, constitutional orders unify a body of laws. This follows from what it means to have a constitutionalized legal system in any sense. Laws need to be unified by a set of

⁶¹ *Id.* at 569–670 (Fassbender further states that they seek to be of indefinite length but notes that this is not a necessary feature of constitutions and provides a major counterexample. *Id.* at 578).

⁶² The literature here is voluminous but see Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Authority*, 13 INT'L J. OF CONST. L. 639 (2015) for a representative critical view of constituent authority that views it largely as a legal construct.

⁶³ See Geir Ulfstein, *Institutions and Competences* in KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 55–67 [hereinafter *Institutions*].

⁶⁴ Fassbender, *supra* note 2, at 536.

norms for one sense of constitutionalization to occur. An institution must have authority over a wide set of legal domains for the other to occur. This unity requirement also arguably follows from constitutions' necessary constituent power and hierarchy. Domestic constitutions always seek to create a community under the same law and create some higher law unifying others into a discrete body under one major law to do so. Third, constitutional orders separate governmental powers. Absent some separation of powers, an entity can usurp the constitution as the ultimate authority in a domain. Empirically, moreover, almost all domestic constitutions create distinct roles for different government bodies.⁶⁵ This may not require full checks on the authority of each entity, like those found in liberal-democratic constitutions. But it does require clearly defined roles and some way to ensure those roles are respected in practice. Deferring to pro-constitutionalization scholars on these criteria likewise seems dialectically fair.

IV. THE CASE FOR THE CHARTER AS INTERNATIONAL CONSTITUTION

There are good faith arguments that there can be an international constitutional order and that the Charter (on its own or in conjunction with the International Bill of Rights) is the constitution at its center. I will address three: the Formal Superiority Argument, the Shared Project Argument, and the Similarity Argument. Successful versions of these arguments could produce an order that can be the subject of licit comparison with domestic constitutional regimes in most cases. If the international order were a genuine constitutional order, a default position that it should be the subject of comparative constitutional analysis would be apt. I briefly outline each argument here and return to them with a more critical stance below.

A. THE FORMAL SUPERIORITY ARGUMENT

The clearest legal argument for the Charter as the constitution of the international legal system is that it is formally superior to other international legal documents in public international law. Article 103 states that where “the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁶⁶ The Charter is supreme among “international agreements,” providing it with superiority over other treaties. This may apply to all U.N. law, including United Nations Security Council [UNSC]

⁶⁵ Even if “separation of powers” refers to several kinds of things (*e.g.*, GEOFFREY MARSHALL, *CONSTITUTIONAL THEORY* (Clarendon Law Series 1971)), constitutional orders must include one to qualify as a constitutional order like those in domestic regimes. Champions of the constitutionalization of international law believe this is necessary. My description *infra* of the powers of entities in the international community challenges any plausible separation criterion.

⁶⁶ U.N. Charter art. 103.

decisions.⁶⁷ Such a reading supports the view that the provision is at least chief among many international laws. “International agreement” is not bounded by the qualifier “U.N.” suggesting the Charter could have some formal superiority over non-U.N. agreements from the perspective of international law.⁶⁸ The Charter thus plays a hierarchical role in international law such that international law includes *something* playing a constitutional role. Comparison with the system it instantiates would be licit if the system were also sufficiently similar to domestic constitutional orders. Other questions about the aptness of particular constitutional comparisons would remain, but these questions arise for any comparative constitutional analysis: the Charter-based international legal system’s status as a generally acceptable subject for constitutional comparison would be clear.

B. THE SHARED PROJECT ARGUMENT

Even if the Charter is not formally superior to *all* international laws, its role as a foundational document in a project with international and domestic components could, in turn, still warrant comparison in its domestic parts. The Shared Project Argument suggests that international law and domestic constitutional law are part of the same project, which is itself part of a global constitutional order. This argument, which is most frequently supported in the narrower domain of international human rights law, is grounded in the temporal link between and similar content of modern international law and some modern constitutions. Many modern international law and world constitutions were created in 1945 or later.⁶⁹ Many modern constitutions share similar features with each other and with international human rights law particularly; many such constitutions were explicitly created with reference to one another or international human rights law.⁷⁰ This is sometimes used to explain why particular international legal documents are part of the same project.⁷¹ Comparing parts of the same project is then licit: they are linked in their shared role in a greater scheme and their definitions of terms reinforce each other. If the Shared Project Argument succeeds, then at least international human rights laws are proper bases for comparison with at least constitutional human rights provisions by default—and the same can be said for the wider legal systems meant to protect those rights.

C. THE SIMILARITY ARGUMENT

Content-related aspects of the Shared Project Argument also support a Similarity Argument for comparison. Gardbaum argues that the International Bill of Rights has international constitutional status.⁷² Per Gardbaum,

⁶⁷ See Peter Hilpold, *EU Law and UN Law in Conflict: The Kadi Case*, 13 MAX PLANCK Y.B. OF U.N. L. 141, 161 (2009). See also Fassbender, *supra* note 2 at 577–578, 586.

⁶⁸ U.N. Charter art. 103. Positive law suggests otherwise from regional authorities’ perspective. Hilpold, *supra* note 67, discusses a classic case.

⁶⁹ Gardbaum, *supra* note 2, at 750–751.

⁷⁰ See note 24.

⁷¹ Gardbaum, *supra* note 2, at 750–751.

⁷² *Id.* at 756.

international human rights law shares a similar structure and content with domestic constitutional laws and so the International Bill of Rights that fundamentally grounds it can be the subject of a Shared Project Argument.⁷³ If so, comparison between at least parts of international law and constitutional law may be licit. Even if one contested Gardbaum's empirical bases here, the international rights register clearly partially overlaps with many post-World War II [WWII] constitutional rights registries and limitation clauses are clearly common to both. This suggests that the rights are similar things that can be compared. The International Bill of Rights could then serve as a constitution if it had something to support its hierarchical status. Alternatively, the Charter, while not granting any human rights obligations on its own, could be the constitution that guarantees these rights through its formal superiority and prioritization of human rights norms in its interpretation. Comparison with a system that contains and protects the same kinds of things would be licit by default. International law could, again, play a central role in comparative constitutional law.

V. THE CASE AGAINST USING THE CHARTER IN DOMESTIC CONSTITUTIONAL COMPARISONS

Unfortunately, there are also many reasons not to use international law as a source of comparative constitutional law. Some are familiar concerns with domestic use of international law serving new questions. Others are original. When one applies the criteria for constitutional status to the Charter and the case for an order like domestic constitutional orders to the Charter-based system, one sees that (A) the Charter lacks sufficient features to be analogized to a constitution and (B) the attached international legal order lacks rudimentary features necessary for being a proper subject of comparison with domestic constitutional orders. International documents that could purport to be constitutions, including the Charter, have different statuses and roles in the international legal system and claimed constitutionalization thereof. The constitutionalization of law literature suggests that (C) completion of the constitutionalization process will not remedy (B). There are further conceptual problems with comparing any international legal order to domestic ones: international law (D) could be understood as lacking sufficient independence from domestic law to allow proper comparison and (E) is often just applied in domestic contexts rather than serving as a basis for comparison. Moreover, returning to arguments in the preceding section, (F) the case for the Shared Content Argument is overstated and (G) the history behind the Shared Project Argument limits its application. These arguments at least suggest that the bar for establishing that comparison between international and domestic constitutional legal phenomena is higher than many suppose. They also provide some (clearly inconclusive) reasons to be skeptical about the aptness of many comparisons and, further, suggest that many apt comparisons are not exercises in comparative

⁷³ *Id.*

constitutional law but are instead other kinds of legal analyses and may accordingly operate according to different norms than comparative constitutional law alone.

A. *THE CHARTER LACKS KEY CONSTITUTIONAL FEATURES*

It is not clear that the Charter has the constitutional features proponents of the constitutionalization of international law claim are distinctive of domestic constitutions and plausibly necessary for proper comparison: (a) constituent authority, (b) hierarchy, (c) entrenchment, (d) enforcement, and (e) bindingness. At minimum, the Charter's attendant legal order only fulfills a few of these components—and, even then, often does so to a lesser degree than at least paradigmatic domestic constitutions. Comparing constitutional documents with the Charter is thus non-ideal and it would be surprising if the quasi-constitutional Charter-centered order would be a proper comparator for domestic constitution-centered orders. This alone suggests that one should take caution before comparing the documents or orders at issue. While the case for each feature of a domestic constitution—and, indeed, each feature of a constitutional order in subsection (B)—could also be the topic of its own work, brief suggestive remarks on each provides ample reason to question the case for the Charter's constitutionality and, by extension, the case for regular use of the document in comparative constitutional law.

1. *Constituent Authority*

It is at best controversial to suggest that the Charter has constituent authority for the international legal community. Gardbaum grants that there is “no general conception of a constituent power at the international legal level.”⁷⁴ The Charter arguably was not intended to be a world constitution in 1945.⁷⁵ There is some evidence that some observers viewed the drafting process as a “constitutional moment.”⁷⁶ Fassbender points to the use of the term “Charter” rather than “Covenant” and the use of the opening phrase “We the Peoples of the United Nations,” rather than “The High Contracting Parties,” as further evidence of its intended constitutionality.⁷⁷ Yet, even if the Charter was a “special, episodic, and self-consciously constituent power” in the creation of the U.N., it is unlikely that it was intended to be the constituent authority for the international community at large. Several international legal documents are “Charters” or even “Constitutions” so the naming convention does not make it unique.⁷⁸ Even proponents of the Charter's constitutionality grant that the preambulatory

⁷⁴ *Id.*

⁷⁵ Tomuschat, *supra* note 3, at ix.

⁷⁶ Fassbender, *supra* note 2, at 573.

⁷⁷ *Id.* at 580.

⁷⁸ The fact that it is not the only “Charter” is further evidence of international law's fragmentation into subject matter-based subsystems. See Int'l Law Comm'n Study Group on the Fragmentation of International Law, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Rep. of the Study Group of the Int'l Law Comm'n, Finalized by Martti Koskenniemi, U.N. Doc A./CN.4/L.682 and Add.1 and Corr. 1 (Apr. 13, 2006). Fragmentation will also be problematic below.

language plays no role in the development.⁷⁹ Interpretation of other constitutions and the language Fassbender highlights may intend to identify the Charter's importance rather than its constitutional or hierarchical status. These three brief points are representative of the issues facing a case for constituent authority.⁸⁰ Even if the creation of the Charter—or some other international document—does not qualify as the passage of a special law for a special purpose, whether that purpose was the creation of a constitutional order remains at best debatable. There is at least a difference in degree, if not kind, in the extent to which the international legal system meets this criterion for constitutionality. The degree to which it is fulfilled then likely only pertains to the U.N. system and whether the members of the U.N. constitute the relevant community for comparative purposes is debatable.

2. *Hierarchy*

The hierarchical status of the Charter is then not as straightforward as the Formal Superiority Argument suggests. There is a much stronger argument that this feature is lacking. Article 103 presents some problems on its own. The hierarchical status for “legal obligations” language in the text is narrower than the language in many constitutions that are supposed to form the basis of the Shared Project Argument. Compare article 103 of the Charter with subsection 52(1) of Canada's most recent constitutional document:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.⁸¹

Then compare with section 2 of South Africa's constitution:

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.⁸²

“Any law” is broader than “legal obligations.” “Law or conduct” is broader still. The invalidity language in the domestic constitutional provisions is stronger than the language suggesting that the Charter “shall prevail” in cases of conflict. Any apparent Charter hierarchy thus applies to a narrower set of legal phenomena and has less actual impact than the hierarchy of domestic constitutions. This provides reason to question whether the documents are proper comparators.

Further problems arise when considering the relationship between the Charter and non-treaty international law. Even if we grant that “any other

⁷⁹ Sloan, *supra* note 2, at 80.

⁸⁰ Despite complexities in, e.g., ZORAN OKLOPCIC, *BEYOND THE PEOPLE: SOCIAL IMAGINARY AND CONSTITUENT IMAGINATION* (2018), the problems here exist on most views of the authority's requirements.

⁸¹ Constitution Act 1982, § 52 (UK); Schedule B to the Canada Act, 1982, c.11 (UK).

⁸² S. AFR. CONST., 1996, § 2.

international agreement” includes UNSC decisions,⁸³ the provision is silent on customary international law.⁸⁴ The fraught relationship between Charter norms and *jus cogens* norms and questions about which is superior also raises problems.⁸⁵ The Charter may not include all *jus cogens* norms.⁸⁶ Such norms could be superior despite this lack. A question about whether the Charter is hierarchically superior to *jus cogens* norms thus remains even if we can resolve concerns about its superiority over non-treaty laws like custom. The fact that regional courts that are plausibly international do not apply Charter-based law that conflicts with what they take to be superior, arguably *jus cogens*, human rights norms further suggests that recognition of the Charter as supreme is not as common as one may think.⁸⁷

Questions about the formal superiority of the Charter over other norms are particularly complicated when human rights are involved. The lack of a normative hierarchy in international human rights law is widely noted.⁸⁸ Yet the supremacy of human rights norms is distinctive of the model grounding the Shared Project Argument.⁸⁹ The relative status of Charter, human rights, and *jus cogens* norms in international law is thus famously vexing. The Charter alone cannot protect human rights and article 103 famously does not contain human rights norms.⁹⁰ It is arguably unclear whether the Charter can adequately protect them in tandem with other laws. The ICCPR and ICESCR are quasi-constitutional since interpretative rules suggest we should read other laws in light of them, but they are not formally supreme in conflict cases.⁹¹ Some, but not all, international human rights are *jus cogens* norms. The Charter's superiority over human rights norms, *jus cogens* or otherwise, or *jus cogens* norms generally remains contestable. So too does its constitutionality. The U.N.-based human rights law system likely has sufficient rules and authorities to address some of these concerns, but controversy on what qualifies as hierarchy is understandable. The issue does seem to differ from that of domestic constitutional equivalents.

3. Entrenchment

Entrenchment of the Charter is, in turn, also at best weaker than that of many domestic constitutions. No termination provisions allowing for the end of the U.N. system or of Charter application are included in the Charter.⁹² Yet special amendment procedures are also lacking.⁹³ Practically, the Charter is sufficiently foundational to the U.N. that amendment would likely need to take place alongside amendment of other international legal documents. But this is true of

⁸³ Hilpold, *supra* note 67, at 161.

⁸⁴ Dupuy, *supra* note 2, at 13.

⁸⁵ *Id.* at 6–11.

⁸⁶ *Id.* at 8.

⁸⁷ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 1–3.

⁸⁸ Gardbaum, *supra* note 2, at 754.

⁸⁹ *See* note 24.

⁹⁰ U.N. Charter art. 103.

⁹¹ Gardbaum, *supra* note 2, at 756–757.

⁹² Fassbender, *supra* note 2, at 569–570.

⁹³ U.N. Charter art. 103.

many international legal documents and does not make the Charter specially entrenched. This feature ultimately appears missing for nearly *any* candidate international constitution. Among candidate constitutions, only the ICCPR appears to have special amendment requirements.⁹⁴

4. Enforcement

The lack of enforcement of international laws generally is, of course, famous. No one enforces most international legal judicial decisions.⁹⁵ International courts cannot even make decisions that would “enforce” many international laws through judicial pronouncement. Most notably, the International Court of Justice (ICJ) cannot invalidate laws, in contrast to, e.g., aforementioned German, Canadian, and South African courts.⁹⁶ The ICJ’s limited jurisdiction creates even greater limits on its enforcement capabilities. Blaine Sloan identifies the lack of compulsory jurisdiction for the ICJ and interpretive principles as severe limits on judicial review of the Charter; he then notes that only states can appear before the court.⁹⁷ While not all domestic courts have unlimited jurisdiction,⁹⁸ the ICJ’s jurisdiction is more limited than most domestic apex courts. Other international courts have even more limited jurisdiction, often focusing only on certain subject matters, and only having jurisdiction over parties who explicitly agreed to be bound by their decisions. Any international law “enforcement” authorities have minimal powers.

The concern about a lack enforcement is not reducible to concerns about the lack of judicial review under the Charter, VCLT, and ICCPR alone.⁹⁹ Those concerns does not suffice to differentiate the international legal order and domestic constitutional orders on its own where some domestic constitutional orders do not include judicial review either. Rather, the lack of enforcement jurisdiction in each of these cases highlights a broader issue with the international legal order: *no one* has an uncontroversial enforcement power in the international legal order. Extra-judicial attempts accordingly engender significant controversy. Where, in turn, acts by some international bodies and individual members likely qualify as enforcement measures, the enforcement measures still differ from domestic ones in significant ways. These differences alone also do not suffice to suggest that comparison between orders is inapt. But they do at least serve as potential differences that can and likely do combine with more significant ones to present a case against presuming that comparison between the different sphere is necessarily apt.

⁹⁴ Gardbaum, *supra* note 2, at 758.

⁹⁵ Enforcement powers are missing in the Charter. *See* Charter, *supra* note 3. On enforcement, *see* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

⁹⁶ Fassbender suggests only a small number of domestic constitutions allow judicial review and have authority over all government entities below it; Fassbender, *supra* note 2, at 575. This is not empirically validated. His claim that judicial review is a relatively new phenomenon in domestic courts is undermined by, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803). Moreover, where the Shared Project Argument focuses on modern constitutions that allow judicial review, denying enforcement requires abandoning that Argument.

⁹⁷ Sloan, *supra* note 2, at 72–73.

⁹⁸ Ron Park, *Is the Political Question Doctrine Jurisdictional or Prudential?*, 6 U.C. IRVINE L. REV. 255, 259–263 (2016).

⁹⁹ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 25.

5. *Bindingness*

Finally, the Charter is also less widely binding than domestic constitutions. It only binds states and really only U.N. *member* states. Being bound is voluntary in a way that being bound by domestic constitutions usually is not. Constitutional laws also tend to bind all public entities that are created under their auspices. This is not true of international quasi-constitutions. For an example of a more broadly binding constitution, return to South Africa. Its constitutional Bill of Rights “applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”¹⁰⁰ All state entities are bound. International law, by contrast, generally does not bind many international organizations created under its authority.¹⁰¹ Gardbaum admits that compared with “domestic and supranational [e.g., European Union (E.U.)] constitutional law, this is a significant limitation on constitutional status. It is hard to conceive of [domestic or supranational] bills of rights not binding the political institutions created by a constitution.”¹⁰² This critique applies to the Charter, which only binds member states, not other institutions within it.¹⁰³

The U.N. also may not bind regional state-like entities with large roles in international law,¹⁰⁴ creating further disanalogies between international and domestic “constitutions.” This is especially clear in cases where this is a conflict between (ostensibly international) regional law and paradigmatically international law. The classic European Court of Human Rights judgment in *Kadi*, which held that the E.U. is not bound by international law in cases of conflict between it and E.U. law (at least when E.U. law instantiates human rights or *jus cogens* norms) is arguably an example.¹⁰⁵ Alternatively, if E.U. law is a form of international law, *Kadi* is an example of a case where the Charter law is subservient to other international laws. Klabbbers reads the case as addressing “whether the United Nations (UN) Charter is hierarchically superior to other international institutions, including the EU itself,” with the European Court of Human Rights coming to a negative answer.¹⁰⁶ The Charter-based system remains non-constitutional.

Methods of resolving this issue may not rely on something with structural features resembling those of modern constitutions and so may not produce a proper comparator for many circumstances even in the future.¹⁰⁷ A global federalist constitution is conceptually possible and could be compared easily with local constitutions in federalist states. But the possibility of such an entity may be as remote as that of any world constitutional order.¹⁰⁸ Even then,

¹⁰⁰ S. AFR. CONST., 1996, § 8(1).

¹⁰¹ *Institutions*, *supra* note 63, at 77–78.

¹⁰² Gardbaum, *supra* note 2, at 757.

¹⁰³ International law more broadly does not cover the variety of non-state actors, including non-governmental organizations and individuals, who plausibly should be bound by it. *E.g.*, KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 11–12.

¹⁰⁴ Joined Cases C–402/05 P and C–415/05, P *Kadi* and *Al Barakaat Int’l Found. v. Council and Commission*, 2008 E.C.R. I–6351 [hereinafter *Kadi*]. A discussion thereof is in Hilpold, *supra* note 67, at 159–160.

¹⁰⁵ *Id.*

¹⁰⁶ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 1–3.

¹⁰⁷ *E.g.*, *Institutions*, *supra* note 63, at 80.

¹⁰⁸ Klabbbers, *supra* note 1, at 32.

construction of such a body presages comparison. The output would be something that would be informed by domestic laws, not something that could easily inform how they ought to be interpreted.¹⁰⁹

B. *THE LARGER INTERNATIONAL ORDER IS STRUCTURALLY DISSIMILAR FROM CONSTITUTIONAL ORDERS*

Domestic opposition to the use of international materials in domestic adjudication partially stems from the identification of what could be deemed a constitutional lack in international law. Beyond domestic concerns about a supranational court adjudicating above each nation's highest courts, there is a concern that international law is an incomplete system. *Kadi* is also an example here.¹¹⁰ For critics, this lack offers an example of why international materials should not be examined by domestic courts. This concern can be applied to the international legal system regardless of what we identify as the "constitution" of that system. The international legal order struggles with all three criteria for domestic systems outlined above. When combined with concerns in the preceding subsection, this should at least highlight the need for caution in using international law as a source for comparative constitutional analysis.

1. *Authoritativeness*

An authoritative international legal order is lacking. Even those who recognize the constitutionalization of international law recognize that treaties are not constitutions and most candidates are mere treaties.¹¹¹ They further suggest that candidates like the Charter and the VCLT cannot fulfill that role since they only apply to states and do not even bind all of those.¹¹² No treaty serves the functions of clear hierarchy and wide bindingness distinctive of constitutions. It is formally possible for the order to be authoritative absent a single authoritative document. But the international legal order generally seems to lack the broad hierarchy and bindingness distinctive of domestic constitutional orders. International law is not directly authoritative even within states, its purported subjects. This is especially true in dualist states where the law does not actually bind domestic actors until implemented into domestic law. Yet *Kadi* and *Kadi*-like cases show that regional *and* domestic actors do not always view the international law as authoritative.¹¹³ Moreover, the system generally does not bind all actors that constitutional courts may bind. Recall that South Africa's constitution "binds the legislature, the executive, the judiciary and all organs of state."¹¹⁴ International law does not similarly bind all agents. The features of hierarchy and wide bindingness appear missing in the general system. While international law has rules for what qualifies as being a good actor within the system and these provide normative guidance to the actors within it, those rules

¹⁰⁹ *Infra* Part V(C).

¹¹⁰ See *Kadi*, *supra* note 104.

¹¹¹ Geir Ulfstein, *Empowerment and Constitutional Control*, EJIL: TALK! (July 14, 2010).

¹¹² KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 25.

¹¹³ See also *Kadi*, *supra* note 104.

¹¹⁴ S. AFR. CONST., 1996, § 8(1).

do not operate like their domestic constitutional “equivalents” in practice. This too should provide reason to question the broader system’s “constitutional” status.

2. *A Unity of Laws*

The oft-noted fragmentation of international law makes it structurally dissimilar to constitutional law, undermining the case for comparison by domestic courts. Gardbaum admits that the lack of a single international human rights law system or source of international human rights law complicates his argument that the International Bill of Rights should be the global constitution. Gardbaum’s worry suggests another feature of constitutional orders implicit in the hierarchy conditions for constitutions: a unified system of laws for it to regulate. Fragmentation makes this difficult to identify in the international legal system. On one definition, fragmentation is the phenomenon whereby international law is not a singular entity but several legal entities lacking a clear overarching structure or even a clear conflicts of law solution.¹¹⁵ It is clear that “various aspects of the international legal regime are branching out and gaining some form of quasi-independence.”¹¹⁶ Given the fragmentation of international law and the lack of any legal entity therein to overcome it, international law as a whole lacks a single constitution. This lack is particularly clear from an international organizations perspective. There is a constitution for human rights bodies, a constitution for trade bodies, etc. These constitutions are not clearly linked by some broader constitution. It is unlikely that all are constituent in a way that would let them jointly serve as a global constitution. As noted above, many bodies created by these documents are not bound by candidate constitutions like the Charter. Domestic constitutions, by contrast, generally apply to all areas of law and all public bodies. Likewise, international law is often adjudicated and implemented by diverse treaty bodies.¹¹⁷ International tribunals are not organized in a hierarchical order.¹¹⁸ This is another formal difference. There is usually a clear person with authority for adjudicating constitutional claims in domestic jurisdictions.¹¹⁹ Of course, not all domestic constitutions are included in a singular source—oft-studies constitutions like those in Canada and Israel feature multiple components¹²⁰—but domestic constitutions do at least seek to unify all laws under a singular constitutional order. Thus, Canada and Israel read their respective constitutions holistically and view all of their constitutional documents as applying to and unifying all laws in their states under a common framework.¹²¹ Human rights documents are

¹¹⁵ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 2; Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW*, 109 AM. J. INT’L L. 534, 537–538 (2015).

¹¹⁶ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 11.

¹¹⁷ *Institutions*, *supra* note 63, at 48.

¹¹⁸ Geir Ulfstein, *The International Judiciary*, in KLABBERS, THE CONSTITUTIONALIZATION OF INTERNATIONAL 126 (2009) [hereinafter *The International Judiciary*].

¹¹⁹ Gardbaum, *supra* note 2, at 754–755.

¹²⁰ *Id.*

¹²¹ *Id.*

useful in their domain but do not clearly fulfill the same role in the fragmented international legal arena.

While international bodies have some constitutional elements, this at most suggests that international law ought to have the form of a domestic constitution and does not establish that constitutional law should look like international law.¹²² Arguments that sub-components of international law are themselves becoming “constitutionalized” further challenge the sense in which the international legal system is a constitutional order.¹²³ International law purports to be a full system that unifies all subsystems. If the subsystems are complete constitutional orders—and there is at least an argument that international trade law is on a par with international law in its ability to establish this claim¹²⁴—unity of laws is lacking. Each system may be capable of serving as a closed normative order but comparing “international law” with constitutional orders will be inapt. If the subsystems are only constitutionalizing in the norm-diffusing sense, in turn, one worries that they are creating a larger subsystem linked *only* by the norms. The larger problem is that the constitutionalization—in any form—of what we take to be subsystems of international law seems to highlight the independence of these areas of law. This raises questions about the existence of international law as a unified whole or at least one unified like domestic spheres. It would be odd to compare domestic constitutional law and domestic or foreign intellectual property law to solve a domestic constitutional case. Yet, if international intellectual property law is constitutional in nature too, we would be warranted in comparing our domestic constitutional law with the international intellectual property law system if we were warranted in comparing it with international law simpliciter and both were constitutional in the same way. We would then also be warranted in comparing Charter-based law and World Trade Organization law to decide international constitutional cases. This would take us far from modern legal practice.

Attempts to resolve these fragmentation-based problems are compelling but face limits. Gardbaum suggests that there will be few conflicts in practice and the lack of international courts to resolve them is an easy practical conflict to resolve.¹²⁵ Yet this theoretical issue raises questions about the practical utility of international law as a comparator. Fassbender argues that the Charter should be the primary constitution and other documents, like the International Bill of Rights, should be accorded constitutional status only insofar as they pursue the foundational Charter’s aims.¹²⁶ However, other scholars note that recognition of a world constitution of universal enforcement mechanisms are unlikely to gain political support. Klabbbers, Ulfstein, and Peters suggest that fragmentation may not be *per se* problematic from a constitutional perspective as pluralist constitutionalism in which there are multiple sites of constitutional authority and

¹²² None of this means there must be *one* unifying document. Canada’s Constitution, for example, consists of many documents, and the British constitution is unwritten; PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* (5th ed. 2007). The diffuse nature of the international laws nonetheless remains notable.

¹²³ See DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* (2005) (providing one critical summary of this argument).

¹²⁴ *Id.*

¹²⁵ Gardbaum, *supra* note 2, at 754–755.

¹²⁶ Fassbender, *supra* note 2, at 588.

forms of constitutional entities could exist in the international sphere.¹²⁷ Fassbender sometimes makes similar proscriptions, despite his general view that the Charter could be the constitution for all international law.¹²⁸ Implicit in these claims is a view that domestic constitutions are likewise pluralistic in nature. Yet I am unclear on where such pluralistic constitutions exist. The classic example, the E.U.,¹²⁹ is just as easily described as a site of international law as of domestic constitutional law. While acknowledging those regional entities as international bodies then presents arguable sites of unified laws, even the unified regional legal regimes are not themselves unified into a broader international corpus. Other examples are arguably burgeoning,¹³⁰ but the arguments in this area remain fierce. Aptness still cannot yet be assumed.

3. *Separation of Powers*

Finally, there is a weak sense in which the U.N. fulfills the separation of powers criterion insofar as all U.N. bodies have defined powers, but the roles of U.N. bodies and their attendant powers do not clearly map those found in domestic constitutional orders and actually seem to overlap in ways that make the international and domestic cases disanalogous and raise questions about whether the powers at the U.N. are separated like paradigmatic constitutional powers.

The UNSC is the best candidate for global executive,¹³¹ but it only briefly, if ever, played the role of global executive free from challenge.¹³² Its other functions make it legislative and even quasi-judicial in a manner that undermines any claimed separation of powers.¹³³ The UNSC appears to be the only uncontroversial lawmaker in the U.N. and then only in the domain of laws necessary for “international peace and security.”¹³⁴ If one (plausibly) acknowledges the United Nations General Assembly (UNGA) as a law-making legislature, further problems arise. The UNGA and the UNSC then both hold law-making powers, but only in limited areas, and are frequently free from judicial review. These examples are representative of the general phenomenon whereby “the principle of separation of powers does not apply to the organs of international organizations.”¹³⁵ The lack of judicial checks on the UNSC raises concerns even if we have an executive.¹³⁶ Under the Charter, neither the UNSC nor the ICJ holds any real check on the others’ power.¹³⁷ The separation of powers at the international quasi-constitutional level and within the international organizations that would hold the powers in such an order does not map onto established domestic norms, creating disanalogies. Even Fassbender admits that

¹²⁷ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 11.

¹²⁸ See Fassbender, *supra* note 2, at 532, 555–61.

¹²⁹ See *Constitutional Pluralism Revisited*, *supra* note 41, at 356.

¹³⁰ E.g., Zoran Oklopčic, *Provincialising Constitutional Pluralism*, 5 *TRANSNAT'L LEGAL THEORY* 331, 336 (2014).

¹³¹ Fassbender, *supra* note 2, at 574–575.

¹³² Dupuy, *supra* note 2, at 20–24.

¹³³ Fassbender, *supra* note 2, at 574–576.

¹³⁴ *Id.* at 574 (claiming “growth” of “international peace and security” is controversial).

¹³⁵ *Institutions*, *supra* note 63, at 47.

¹³⁶ Dupuy, *supra* note 2, at 27.

¹³⁷ *Id.* at 28.

the UNSC's multi-faceted and broad role "does not allow us to speak of a true separation of powers in the" U.N.¹³⁸ Treaty bodies and soft law organizations have different forms still.¹³⁹

Unlike in domestic constitutional orders, there also does not appear to be one authoritative interpreter of the Charter: the UNSC, UNGA, and ICJ all play interpretive roles.¹⁴⁰ The ICJ then famously faces many limits on its jurisdiction and its review powers.¹⁴¹ The fact that there are many different fora to make the claims that are available and many existing international tribunals where claims are made are not subject to common constitutional constraints on adjudicators sourced in judicial independence further undermines the extent to which constitutional norms of domestic constitutionalism are realized in international law.¹⁴² Focusing on one interpreter could be helpful for understanding some phenomena, but questions about whether they serve the same role as domestic "equivalents" will remain. The fact that domestic courts look to other domestic courts to understand the content of international law suggests that domestic courts too play an interpretive role.¹⁴³ Thus, this form of interpretation complicates the comparative enterprise regardless of whether it actually provides a good account of "international law" on its own terms.

Fragmentation also disperses powers among many organizations. There is no clear hierarchy and some overlap between them. States show no interest in resisting fragmentation by giving particular organizations supremacy or creating a new system of organizations that integrates existing ones.¹⁴⁴ Proponents of constitutionalism suggest an apex court is unlikely in this sphere; the functional constitutional order they promote instead will again likely lack the structural form of many domestic constitutions since the functionality they discuss is primarily goal-based.¹⁴⁵ There is ultimately "no reason for arguing that the constitutional principles of international organizations should be similar to those known from the domestic context."¹⁴⁶ Again, spheres of international law may have their own hierarchies and rules and may provide insight into various normative phenomena, but they will importantly differ from domestic constitutional orders.

C. FUTURE INTERNATIONAL CONSTITUTIONAL ORDERS ARE LIKELY TO DIFFER FROM DOMESTIC EQUIVALENTS

The forgoing structural issues may explain why scholars view the constitutionalization of international law as incomplete. The incompleteness of the international "constitutional" order provides reason not to compare that order with domestic constitutional ones, particularly in high stakes scenarios of

¹³⁸ Fassbender, *supra* note 2, at 576.

¹³⁹ *Id.* at 48–55.

¹⁴⁰ Sloan, *supra* note 2, at 73–74 (explaining that that similarly diffuse authoritative interpretations appear in the U.S.).

¹⁴¹ *Infra* V(A).

¹⁴² *The International Judiciary*, *supra* note 118, at 144.

¹⁴³ Roberts, *supra* note 19, at 81–82.

¹⁴⁴ *Institutions*, *supra* note 63, at 68.

¹⁴⁵ *The International Judiciary*, *supra* note 118, at 141–142.

¹⁴⁶ *Institutions*, *supra* note 63, at 47.

judicial pronouncements. Incomplete constitutions should likely only be compared with each other. Comparison with an incomplete constitutional order that is not even obviously constitutional should be rare. An incomplete candidate constitution whose status remains controversial is unlikely to tell us much about constitutions generally. This may also explain why a leading proponent of the view that the Charter is a global constitution sometimes makes his claim metaphorical, rather than actual.¹⁴⁷ The metaphor informs international law. Constitutional law is a given. The metaphor only makes sense when contrasted with that given.

Unfortunately for some, there is also reason to suggest that future international constitutional orders will differ from current domestic ones and co-development of the international and domestic that would warrant a norm of comparison is not taking place. Recall the distinction between the legal ordering and norm-diffusing senses of constitutionalization. It should now be clear that the constitutionalization of international law is not constitutionalization in the legal ordering sense. This may be apt if the primary aim of constitutionalization is spreading certain norms. Recall that the legal ordering sense of constitutionalization may not be the best method of realizing the norm-diffusing sense.¹⁴⁸ The defects with the Charter and the order surrounding it outlined above are unlikely to be remedied in circumstances likely to arise soon. Klabbers granted that we likely will not ever have a formal global constitution in 2009.¹⁴⁹ Skepticism about universal binding norms has only grown since. While Fassbender argues that a global constitution is possible, he thinks that the ideal of such a constitution will break from its origins in comparison with domestic constitutions.¹⁵⁰ This could produce something unlike (even future) domestic constitutions and so not a proper source of comparison in many circumstances.

If we get some complete form of international constitutionalization in the future, it may help deal with fragmentation issues.¹⁵¹ But the output likely will not resemble constitutions in the domestic sphere. Klabbers, Peters, and Ulfstein establish that having the same “constitutional features” does not entail having the same constitutional structure. They state that the global constitution that will have these features will not be contained in a single document and will be “pluralist” in nature.¹⁵² Both features make possible global constitutions unlike many domestic constitutions. The pluralist criterion is more worrisome. Domestic constitutions allow for multi-sectoral coverage. Yet, even then, pluralism operates differently in domestic and international cases since international organizations affect member states. To the extent that domestic orders are becoming pluralist, international constitutionalization still differs and is far from being realized. It is still unclear whether an international constitutional legal order exists and it is now unclear whether the form that will

¹⁴⁷ Dupuy, *supra* note 2, at 30.

¹⁴⁸ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 69.

¹⁴⁹ *Id.* at 23.

¹⁵⁰ Fassbender, *supra* note 2, at 572–573.

¹⁵¹ KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 18–19 (also discussing “verticalization” and “privatization”). See also Gunther Teubner, *Fragmented Foundations*, in *THE TWILIGHT OF CONSTITUTIONALISM* 327, 328–29 (Petra Dobner & Martin Loughlin eds., 2010) (explaining how alternative future “fragmented” global orders also differ from domestic ones).

¹⁵² KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 12–13.

exist in the future will be an appropriate comparator in many cases since domestic pluralist constitutions are at best difficult to identify. The judicial comparison at issue is still rarely going to be licit since we will not be comparing things that are even developing similarly. Future licit comparison is also unlikely to be possible in at least high stakes scenarios where we cannot afford inapt comparison and the case for aptness cannot clearly be assumed.

D. DOMESTIC LEGAL PRACTICE UNDERMINES THE CASE FOR COMPARISON

Domestic courts' role in the development of foreign and international law also differs in a way that suggests that the respective legal orders are distinct. A Canadian court can cite German law to examine how Canadian law should develop or as a source of common provenance. But Canadian judges have no special authority in German law and do not directly develop German law. Canadian courts do, however, apply international law. They are understood to have special knowledge of at least aspects of that law in a way that contributes to development of international law through interpretation of its national implications and as evidence of state practice that international courts use to establish parts of the law. Unfortunately, many courts' *comparative* practices are sometimes problematically unsystematic.¹⁵³ There is then good practical reason for judges not to involve international law in comparative judgments where such judgments could impact the development of international law: potential effects of poor comparison are greater where domestic courts impact the development of a third party (here international) legal system.

The role of domestic courts in international law also provides further evidence of the lack of one authority on international law, making it more difficult to point to the body of international law that is the proper comparator. Comparative international law suggests that "international law" may not be one set of legal proscriptions with which one can compare one's own system.¹⁵⁴ This is, of course, a controversial claim—I myself am ambivalent about it—but the possibility that these domains cannot be adequately separated should provide ample reason for comparative caution.

Fragmentation, in other words, may also undermine comparison insofar as the content of international law requires domestic courts to implement it. Domestic courts create international law and translate it into domestic law.¹⁵⁵ This could suggest that there is no standalone body of international law independent of domestic law with which domestic law can be compared. If international law is partly an aspect of domestic law even from the standpoint of international law, the most we can say is comparison of international law and constitutional law is like comparison between domestic tort law and constitutional law. Such a comparison would then be purely domestic and so not comparative law (constitutional or otherwise) in its classic or modern forms.

¹⁵³ E.g., Hirschl, *supra* note 26, at 237; JACKSON, *supra* note 48, at 11–13.

¹⁵⁴ See generally Roberts, *supra* note 19.

¹⁵⁵ *Id.*; The *International Judiciary*, *supra* note 118, at 145–46; Knop, *supra* note 19, at 504.

E. *COMPARISON IN MONIST STATES MAY JUST BE APPLICATION OF
DOMESTIC LAW*

The possibility of widespread apt comparison is further constrained by the reality that international law that has become a binding part of a state's law will need to be applied directly and so cannot properly be part of a comparative analysis. Domestically too, then, there will often be a lack of independent existence of the domestic and international laws that one would like to compare. One can compare how the law operates in the international system with how it operates in the domestic system or one can compare how it operates in one's domestic jurisdiction and another's, but the former is likely illicit where the international law is truly binding since it would admit that one is refusing to apply binding law and the latter is a project in comparative domestic law or comparative international law rather than a comparison between the domestic and international laws. One can compare how the law operated in the international legal system with how it operates in the domestic system, but only the domestic sense is binding. Other reasons to question whether that comparison is going to be enlightening appear above. This may be a weak argument against comparison generally, but it does limit when judges especially can use it (if there is an independent international "constitutional" order with which comparison could be possible).

F. *THE CHARTER ALONE DOES NOT SUPPORT OVERLAP ARGUMENTS*

Independent of the strength of the preceding arguments *against* comparison, there is reason to question some arguments *for* comparison. These potential weaknesses further support caution in the use of international law as a comparator and undermine a default position that comparison is apt, especially in high stakes cases. Where these weaknesses suggest that the international and domestic constitutional projects differ, they also raise questions about the proper standards of comparison between them. The underlying tensions cannot be resolved by simply pointing to the standards of comparative "constitutional" law alone if the international is not truly constitutional.

Consider the "overlap" in the Shared Project and Similarity Arguments. The Charter does not protect much of what we want constitutions to protect and what many constitutions do protect. It contains no explicit human rights obligations.¹⁵⁶ It thus does not grant many of the rights that international law is often used to help explain.¹⁵⁷ The similarity between the content of international human rights law and domestic constitutions that could ground a claim for the International Bill of Rights as a global constitution thus undermines the case for the Charter's centrality. The Charter could combine with other documents to fulfill this role in a manner that may also support the Shared Project Argument above, but other candidate constitutional documents that could combine with it also present problems. For example, recall Gardbaum's claim that the

¹⁵⁶ Gardbaum, *supra* note 2, at 756.

¹⁵⁷ Anne Peters, *Membership in the Global Constitutional Community*, in KLABBERS, PETERS & ULFSTEIN, *supra* note 1, 153 at 167.

International Bill of Rights has international constitutional status.¹⁵⁸ Gardbaum identifies four similarities between international human rights and domestic constitutional rights: both (1) “perform the same basic function of stating limits on what governments may do in their jurisdiction,” (2) are roughly the same age, (3) have roughly the same content (viz., recognize roughly the same roster of rights (with exceptions in the ICESCR)), and (4) contain only a few peremptory norms with most being derogable and subject to limitation.¹⁵⁹ Gardbaum does not provide much empirical support for (1)-(4). There is reason to question each. For instance, the functions of the “constitutions” and nature of the orders in which they operate differ greatly and substantial structural differences make the comparisons even in (perhaps counterfactual) cases where (4) is true less than ideal. Gardbaum himself identifies the non-binding status of the UDHR and the lack of enforcement of many international human rights or even quasi-constitutional status for international bills of rights as clear limitations on recognizing international human rights as global constitutional rights.¹⁶⁰ Given these problems, it is unlikely that the International Bill of Rights or the Charter can ground a Shared Content Argument either individually or combined. Any lingering differences need to be addressed when designing a comparative methodology for any licit comparisons between the spheres one may draw.

G. THE SHARED PROJECT ARGUMENT HAS LIMITED APPLICATION

Finally, the most plausible versions of the Shared Project Argument only grounds a few licit comparisons, undermining any claimed centrality for international law in comparative constitutional law. For instance, some domestic constitutions do contain the mix of peremptory and non-peremptory norms and limitation clauses distinctive of post-WWII international law,¹⁶¹ but this only warrants comparison in nations with those features. Differences between them and the pre-WWII nature of many parts of other constitutions undermine the general case for comparison. For instance, many domestic rights, including controversial ones, predate their international equivalents. Consider the pre-World War II recognition of social rights in many Latin American nations.¹⁶² Widespread domestic recognition of many rights is also not contemporaneous with international recognition. Domestic rates of recognition of many economic, social, and cultural rights did not grow substantially after their international recognition in the 1960s. Recognition is still missing in many nations. The extent to which mutual citation by domestic courts and the use of foreign law clerks is an instantiation of international legal norms is also open to debate. Some shared history between international human rights and many modern domestic constitutions may support the thesis that the respective legal orders are part of a common history. Nonetheless, even this only applies to some countries.

¹⁵⁸ Gardbaum, *supra* note 2, at 752.

¹⁵⁹ *Id.* at 750–51 (merging (3) and (4)).

¹⁶⁰ *Id.* at 751–752, 761.

¹⁶¹ See sources in note 24. See also, e.g., Hirschl, *supra* note 26, at 239. Sujit Choudhry, *After the Rights Revolution: Bills of Rights in the Post-Conflict State*, 6 ANN. REV. OF L. & SOC. SCI. 301 (2010); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. OF COMP. L. 707, 747 (2012).

¹⁶² JOHN TOBIN, THE RIGHT TO HEALTH IN INTERNATIONAL LAW 22 (2012).

Structural differences will again make this appeal problematic, and nations that explicitly link the projects by making international law part of their domestic laws then face the problem in (E).

VI. OBJECTIONS AND REPLIES

The above should contribute to the understanding of the relationship between international law and comparative constitutional law and (at least) its implications for judicial practice. Objections linger. I will address three objections briefly before concluding with necessarily tentative remarks. First, one may object that the Charter is not the best candidate for the international constitution. A powerful line of argument states that the constitution of international human rights law is sufficiently similar to domestic constitutions to warrant comparison.¹⁶³ Yet the forgoing demonstrated that the larger international order lacks constitutional features regardless of what document would serve as its constitution. Fragmentation and enforcement issues are particularly widespread. I also discussed limitations with using the International Bill of Rights as a constitution.¹⁶⁴ Indeed, I actually think that it serves as the basis for a sub-system in which international human rights law operates as a closed normative order that can provide insight into important normative phenomena, but that sub-system still differs from domestic constitutional orders and its insights may not be directly importable to domestic legal decisions for several reasons outlined above. While I did not discuss the VCLT in detail, it is a treaty and thus likely lacks requisite constituent authority despite its formal status as the document that otherwise establishes the hierarchical ordering of constitutional law. I grant that *jus cogens* or erga omnes norms fulfill several criteria above, including hierarchy and bindingness. While I find them intuitively problematic as constitutions, whether they can be the basis of a global constitutional order would admittedly require more work elsewhere.¹⁶⁵

Second, one may argue that my criteria above are too demanding. Fassbender, for one, claims that the hierarchy of norms is a new feature of constitutions that began in the eighteenth century.¹⁶⁶ However, I identified these criteria by consulting sources that claim that international law has something like a domestic constitution. This is dialectically fair. I think some combination of the criteria is plausible. The Charter and the system connected to it fails to

¹⁶³ Gardbaum, *supra* note 2, at 751.

¹⁶⁴ The ICCPR also has too many reservations to qualify as global constitution; KLABBERS, PETERS & ULFSTEIN, *supra* note 1, at 23–25.

¹⁶⁵ Moreover, I suggested some reasons to question their ability to serve as the basis of a global constitutional order above. Similar problems with the Charter-based system likely apply to them. Truly *jus cogens* norms should already operate in domestic constitutions. Thus, the application of *jus cogens* in domestic law and their comparison to how they operate in the international legal system may not be apt where the system in which they operate differs from— and yet may not have independent existence from—domestic constitutional orders. *Jus cogens* norms may have some special moral status. Whether this warrants their use as the basis for a global constitutional order justifying widespread comparison between domestic and international phenomena is unclear.

¹⁶⁶ Fassbender, *supra* note 2, at 537.

fulfill the demands of any plausible combination. The hierarchy criterion is nonetheless important enough to require a response here. If hierarchy is not required, one may question whether a unity of laws is required. The case against comparison from fragmentation would then falter. Yet if even most modern constitutions have this feature and international law's candidate constitution and the international legal order does not, this provides reason not to compare modern constitutions or constitutional orders and the international would-be equivalents. Some claims that domestic constitutions are becoming pluralistic notwithstanding,¹⁶⁷ modern domestic constitutions that we see in most constitutional comparisons are hierarchical and unify laws. A demandingness objection sourced in practical considerations also misses the mark. There is admittedly a strong case to be made that appealing to international legal orders can produce good outcomes that will protect foundational constitutional norms.¹⁶⁸ If successful, it provides practical reason to cite international law and may provide reason to do so comparatively. From this perspective, my limit may seem overdemanding: it makes it more difficult to protect important things. While I grant this, my primary interest is knowledge production and reasoned judgments. Suggested practical reasons for comparison will usually be defeated by the normative reasons above, especially given bad law's practical disutility.

Relatedly, third, and finally, one may argue that this makes judges unable to fulfill many of their important comparative tasks. An idealized picture of the field identifies (at least) nine goals of comparative constitutional analysis, including (a) curiosity, (b) legal tool identification and understanding, (c) understanding legal tool selection, (d) mapping the history of ideas, (e) theory building, (f) norm identification, (g) taxonomy, (h) harmonization, and (i) determining cases.¹⁶⁹ Perhaps our comparison fulfills *these* aims? I take this objection most seriously. I must ultimately grant that international law has a role to play in comparative constitutional law. But the preceding does suggest that the nature of this role cannot be easily adduced, and that the role may be less central than many would expect. Where the international legal system appears inadequately constitutional, one should exercise caution when invoking international law for comparative constitutional law purposes. The preceding could admittedly be clearer on the specifics of what this requires. But a few implications do immediately present themselves. While I must be suggestive here due to space constraints, these implications are worth exploring further in other (methodological) works.

One implication of the forgoing is that not all comparisons between international and domestic constitutional orders are likely to fulfill comparative constitutional law purposes and that even some licit comparisons between the orders that could fulfill those purposes may not actually be best understood as comparative constitutional law properly-so-called. The preceding does not entail

¹⁶⁷ See *infra* Part V(C).

¹⁶⁸ Gardbaum, *supra* note 2, at 766.

¹⁶⁹ This amalgam of categories in methodological works above is defended in Michael Da Silva, *Methodological Pluralism and the Methods of Comparative Constitutional Law*, 2 INT'L COMP., POL'Y & ETHICS L. REV. 631 (2019). I also discuss how to combine methods and purposes in that work. The preceding offers some considerations on why international law may not be a good source to input into any method. This does not mean that it cannot fulfill the purposes, but the method of doing so may not be a comparative constitutional one.

that all comparisons between international law and constitutional law are inappropriate. Comparison may be necessary to determine whether international law has constitutional features. Even the question that animates this work requires some comparison. It is, moreover, worth exploring whether any mainstream existing comparative constitutional law projects can still use international law as a source of analysis. Indeed, I suspect that there are many ways in which comparison could be useful. The international and domestic constitutional systems do face common problems and contain some similar, if not identical, concepts.¹⁷⁰ Some constitutional phenomena are meant to directly incorporate or mirror international legal phenomena.¹⁷¹ International law is accordingly clearly relevant for understanding what legal tools are available to address different issues and for understanding the history of some legal ideas, if not an underlying theory of what the concepts are supposed to mean. Where there is direct borrowing of international legal concepts in the domestic sphere, international law is plausibly *necessary* for understanding the relevant constitutional norm.

One should accordingly not take the preceding words of caution as suggesting more than they do: I propose that the presumption that comparison is apt is undermotivated and that not all forms of comparison qualify as comparative constitutional analysis. That suggestion is far from assuming that comparison between the spheres is always illicit or even that international legal phenomena are irrelevant to some of the traditional tasks of comparative constitutional legal analysis. But assumptions to the contrary now appear equally problematic. If the international system is not constitutional, then its ability to shed light on constitutional concerns can no longer be taken for granted. The onus should instead be on those who seek to explain why non-constitutional phenomena are relevant comparators apt to provide insight into constitutional phenomena and fulfill relevant purposes. This alone is a methodologically important finding. Yet the forgoing concerns about the constitutionality of international law and international law's implications in the domestic constitutional realities of many states further suggest that assumptions that any such comparisons are best understood as exercises in comparative constitutional law are also questionable and require reconsideration. This has implications not only for our understanding of the constitutionality of the international legal order but for our understanding of the contours of comparative constitutional law. Comparative constitutional law is now severable from international law. Its textbooks should accordingly focus primarily on domestic constitutions—or perhaps regional ones—and should admit the international legal order only as a peripheral case. This skepticism further provides reason to question whether the norms of comparative constitutional law apply to comparisons between the international and domestic constitutional spheres or if some other set of norms

¹⁷⁰ For a particularly strong analysis of this point, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009). Goldsmith and Levinson suggest that these commonalities make international law more like constitutional law than ordinary domestic law. Even if this is so, however, its being a better comparator than another does not make it a generally apt one.

¹⁷¹ Consider, e.g., the influence of international human rights law on many domestic constitutions motivating the Shared Project Argument. Several sources above, including those in notes 24 and 161, are relevant here.

are necessary. Giving up on many assumptions tied to the constitutionality of the international legal order opens many new and important research paths at the same time that they foreclose easy access to simple comparisons.

Finally, returning to my central case, the preceding offers some evidence that *judicial* use of such comparison should still be limited at best. The stakes of judicial determinations are too high to determine constitutional cases based on comparison between the international and domestic. Few other purposes are within the domain of the judiciary. Many within their domain are not in it in a way that allows comparison. Judges particularly should not be seeking comparison for the sake of curiosity and taxonomy. Identifying patterns of use of legal tools is irrelevant to domestic decision-making of most forms and judges should not compare to identify legal tools, since the only legal tools they have are the rules of reasoning and remedial rules in their domain. Appealing to international law will be apt for understanding international legal tools and understanding the history of ideas, but this will rarely be helpful for deciding cases on domestic legal phenomena absent the historical and functional links required to get to such a high stakes scenario. Even when judges look to other jurisdictions to establish that foreign phenomena could work in a jurisdiction to, for instance, help establish whether a limitation on a derogable right is justified, they must appeal to jurisdictions that are similar enough to allow us to say they could work here.¹⁷² The international order is too different from domestic ones to allow this. Judges can harmonize constitutional and international laws only when they have the authority to do so. Use of this authority will often lead to *application* of international law. A lack of authority may bar comparison. Comparison may be helpful for theory-building, but legal theories that can resolve cases may not give international law special support absent clear links between the international and domestic spheres that either make the analysis purely domestic or establish that we are in a case where the Shared Project Argument applies and international law does not apply domestically. It should be clear, for instance, that international human rights law particularly reflects the considered (if politicized) judgments of intelligent people on what certain concepts should include. This does not provide it with special moral authority over other regimes that ought to be recognized as a matter of law. Using international human rights law as a legal source, especially as a source for comparative law, is different. Given the preceding, we may question whether we should use it for legal purposes. At minimum, a sense of caution is clearly needed. While one may question whether so much ink needed to be spilled to get to this point, a simple reminder of this fact has clear value.

CONCLUSION

The best candidate for an international constitution lacks core constitutional features and the larger international legal order lacks core features of domestic constitutional orders. These structural differences mean that there is no

¹⁷² See generally Hirschl, *supra* note 26 (discussing case selection).

international constitutional law that is sufficiently similar to domestic constitutional laws to warrant comparison that reliably provides new information about constitutional phenomena. International law may lack independent existence from domestic law that would allow it to serve as a basis of true comparison and many licit forms of would-be comparison are ultimately just applications of domestic law. One should accordingly take care when conducting comparisons between the international and domestic constitutional spheres and should recognize that licit comparison is not best described as comparative constitutional law but another interpretive exercise subject to its own norms of conduct. Viewing comparisons between international and domestic constitutional law as a form of comparative constitutional law misunderstands the relevant legal spheres and relationship(s) between them.