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Human Rights as International Constitutional Rights

Stephen Gardbaum*

Abstract

The Universal Declaration was, of course, the first of the three global international human rights instruments which have collectively come to be known as the International Bill of Rights. Very often, however, this latter term appears within quotation marks or is prefaced by the qualifying phrase, 'so-called', signalling that there are serious, although mostly unexplored, questions about the validity of the implied comparison with domestic bills of rights. In this article, I treat the anniversary as an occasion to take stock by exploring these questions and making the comparison express. I do so by considering the two parts of the term separately. First, regarding 'bill of rights', what are the similarities and differences between the UDHR, ICCPR, and ICESCR on the one hand and domestic bills of rights on the other? In particular, to what extent or in what sense, if any, has international human rights law become constitutionalized and, thereby, similar and closer to most domestic bills of rights? Secondly, regarding 'international', do the major international human rights instruments simply duplicate domestic bills of rights or provide a generally inferior substitute for them where unavailable – as a certain strand of human rights scepticism suggests? Or do they perform any distinctive functions over and above domestic bills of rights that make a novel and unique contribution to the development of constitutionalism?

1 Introduction

This symposium issue commemorates the 60th anniversary of the Universal Declaration, the first of the three global international human rights instruments which

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have collectively come to be known as the International Bill of Rights. Very often, however, this latter term appears within quotation marks or is prefaced by the qualifying phrase, ‘so-called’, suggesting a certain equivocation about its propriety. Part of this equivocation is, no doubt, purely formal – the International Bill of Rights is not an official term in any international human rights instrument or other source of international law – but part is also substantive. Use of one of these qualifiers signals that there are serious, but mostly unresolved and unexplored, questions about the validity of the implied comparison with domestic bills of rights. In this article, I treat the anniversary as an occasion to take stock by exploring these questions and making the comparison express.

I will do so by considering the two parts of the term separately and in reverse order. First, regarding ‘bill of rights’, apart from the obvious issue of source, what are the similarities and differences between the UDHR, ICCPR, and ICESCR (or international human rights law more generally) on the one hand, and domestic bills of rights on the other, and do they justify an unqualified or literal use of the term in the international context? In particular, to what extent or in what sense, if any, has international human rights law become constitutionalized and, thereby, similar and closer to most domestic bills of rights? Secondly, regarding ‘international’, do the major international human rights instruments simply duplicate the protections typically offered by domestic bills of rights, or provide a generally inferior substitute for them where unavailable in law or in fact – as a certain strand of human rights scepticism suggests? Or do they perform any distinctive functions over and above domestic bills of rights that make a novel and unique contribution to the historical development of constitutionalism?

2 How Different are Domestic Bills of Rights and the International One?

Whatever the general degree of analogy or disanalogy between international and constitutional law,¹ domestic bills of rights and international human rights law perform the same basic function of stating limits on what governments may do to people within their jurisdictions.² There is also a clear similarity between the two in terms of age. Although, to be sure, there were important precursors and subsequent developments in each system, both were essentially created after 1945 as responses to the massive violations of fundamental rights immediately before and during World War II. This filled what were major gaps in the coverage of *both* domestic and international law.

A slightly less obvious but very important similarity between the two is their general content and structure. Taken as a whole, and with the most notable exceptions of certain parts of the ICESCR, the rights contained in the three general international

¹ See, e.g., Helfer, ‘Constitutional Analogies in the International Legal System’, 37 *Loyola L Rev* (2003) 193.

² I do not intend to suggest in either case that this is the only function or, in the case of international human rights law, the only basic function.

human rights instruments are broadly similar in substance to the rights contained in most modern constitutions.³ Both typically include such civil and political rights as the right to the liberty and security of the person; rights against torture, cruel and inhumane punishment, and slavery; the right to vote; rights to freedom of expression and religious practice; and rights to be free from state discrimination on the basis of race, ethnicity, national origin, and gender. Many domestic bills of rights also include some or most of the core social and economic rights contained in the ICESCR, such as the rights to education, healthcare, choice of work, and basic standard of living.

Moreover, both systems generally share a common *structure* of rights. Thus, a few rights in each system are treated as categorical or peremptory norms, permitting no limitations or derogations. Apart from these, the primary conception of rights is as presumptive shields rather than absolute trumps, permitting them in principle to be justifiably limited or overridden where necessary to promote important but conflicting public policy objectives. Such limits tend to be expressed in either or both derogation during national emergency clauses and special or general limitations clauses. Most of the rights in each system apply directly only against governments and not private actors, although in various ways – including where they are understood to impose positive duties on those governments – many of the rights *indirectly* regulate private relations.⁴ Overall, it is these general similarities that explain the common reference to the three instruments as the International Bill of Rights, and make it possible to talk about domestic bills of rights and international human rights law as two systems for protecting the same thing: ‘the fundamental rights of individuals’.⁵

Beyond these important similarities of function, substance, and structure, however, there are at least two actual or potential differences (in addition, that is, to the fact that the UDHR is not as a formal matter legally binding) which may be relevant in moving from explanation to justification, one of which is straightforward and the other more complex. A well-known but very significant institutional difference between the two systems is their respective methods of enforcement. Thus, while the tremendous growth in the number of constitutional and other courts exercising various powers of judicial review and compulsory jurisdiction over their governments has led to the recent coining of such terms as ‘juristocracy’ and ‘juridification’, international human rights courts with similar powers remain the exception rather than the rule, especially at the global level.

³ Certain parts of the ICESCR (and CEDAW) are exceptional because they include more detailed and extensive social and economic rights than are found even in those domestic bills of rights which contain the greatest number of such rights.

⁴ On the difference between direct and indirect effect of constitutional rights on private actors, as well as the variety of types of indirect effect see Gardbaum, ‘The “Horizontal” Effect of Constitutional Rights’, 102 *Michigan L Rev* (2003) 387. In that both the ICCPR and the ICESCR contain an express general duty to enact legislative or other measures necessary to give practical effect to all protected rights, they impose more extensive positive duties than the typical domestic bills of rights.

⁵ Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’, 55 *Stanford L Rev* (2003) 1863, at 1863–1864 (‘[t]wo leading systems exist today for protecting the fundamental rights of individuals: constitutional law and [international] human rights law’).

The more complex issue is that bills of rights typically have constitutional (or quasi-constitutional) status within domestic legal systems. Accordingly, in thinking about the three foundational human rights instruments as an international bill of rights without quotation marks, the question I want to raise and address in the remainder of this section is whether this fact points to a major difference between the two legal systems or whether, to the contrary, the difference between them is further reduced because international human rights law is also, or has become, ‘constitutional’ in some significant sense.

There is undoubtedly something inherently constitutional in the very nature and subject-matter of international human rights law, in that one of its primary functions is to specify limits on what governments can lawfully do to people within their jurisdictions. This is a central constitutional function; indeed, it is arguably the most direct and straightforward constitutional function performed by any type of international law – in that international law does not (EU supranationalism apart) clearly organize and empower any *general* political authority.

But beyond this central function which inheres in the very existence of international human rights law, is there anything constitutional about the international human rights system in some more specific sense? I think there are three more specific claims which either can or have been made, and need to be distinguished in order to assess the existence and extent of any difference between the two systems on this important issue. The first claim is that the international human rights system has become one of constitutional law in its own right, thereby creating twin systems of domestic and international constitutional law protecting fundamental rights. In other words, the legal status of the protected rights has become similar within each system. The second claim is that regardless of the precise legal status of the protected rights *vis-à-vis* other types of international law, the human rights system itself can properly be characterized as a constitutionalized regime of international law in the same way that some other international regimes – most notably the EU – are understood to be. This perhaps parallels the domestic situation in which enactment of a bill of rights may be said to constitutionalize a system of public law. The third claim is that the development of international human rights law is a critical part of the more general case for rejecting the traditional, horizontal paradigm of international law based on the sovereign equality of states, and replacing it with a more vertical, constitutionalist, or ‘public law’ paradigm. This parallels the domestic situation in which a bill of rights constitutionalizes a legal system as a whole.

In further clarifying and evaluating these three claims about what, if anything, is constitutional about human rights law, it may be helpful to refer to two different processes of ‘constitutionalization’ which have, on the whole, been separately discussed by comparative constitutional and international lawyers respectively. The first process concerns the legal status of fundamental rights within a given regime and, in particular, the shift from ordinary to higher law status of rights which has characterized so many domestic systems since 1945. Relatively recent examples of such internal constitutionalization of rights are Canada’s Charter of Fundamental Rights and Freedoms which superseded its statutory Bill of Rights in 1982, and the UK’s Human Rights Act

of 1998 which created a comprehensive bill of rights within the domestic legal system, albeit by 'constitutional statute', for the first time (at least in 300 years).⁶ Accordingly, the first claim – that human rights law is international constitutional law – raises the issue of whether a similar shift has taken place.

The second process of constitutionalization, which has mainly concerned international lawyers, is the transformation of a particular international law regime from a purely treaty-based entity to a 'constitutional' one. Here, the EU presents the paradigmatic case and a good part of the rapidly growing international constitutionalism literature consists of asking whether other international regimes can be said to have followed suit. So the second claim addresses the issue of whether the human rights system has itself become a constitutionalized regime of international law in this sense, and the third whether and how human rights has contributed to the constitutionalization of international law as a whole.

A Is Human Rights Law International Constitutional Law?

Although there is undoubtedly something inherently constitutional about human rights law, in that it functions to specify limits on what governments can do to persons within their jurisdictions, the precise question for consideration here, however, is whether this 'something' currently amounts to giving human rights the specific legal status of constitutional law. Obviously, limits on governments can and do take a variety of legal and non-legal forms; in the purely domestic context, they may be constitutional, statutory, common law, administrative, conventional, or simply political/pragmatic. As constitutional law is law of a particular type, this question has, at least in part, an unavoidably formal content – although, to be sure, this content must be abstracted away from the purely domestic context. Indeed, since the EU is now almost universally acknowledged to have constitutional law (even without a formal constitution), of which its human rights law is part, this type of law is no longer in practice, and so cannot be conceptualized as, limited to the national.

What are the general characteristics of constitutional law, in the sense exemplified by (though of course not limited to) many domestic bills of rights? That is, putting to one side the purely functional sense of constitutional law as any law containing one or more meta-rules for the organization and ordering of political authority, as traditionally employed in the UK.

First, it is law made by a special, episodic, and self-consciously constituent power – however real, nominal, or hard to identify in practice – as compared to the ordinary, continuous lawmaking processes. In some cases, this power is institutionalized in a specially appointed constituent assembly, a special ratification or decision-making process, or simply the same body wearing a different hat, as with the Israeli Knesset; in others, it may be less institutionalized than manifested in the quality and length of

⁶ I analyse these two examples and suggest that they present a new, alternative model of constitutionalism in Gardbaum, 'The New Commonwealth Model of Constitutionalism', 49 *Am J Comp L* (2001) 707.

deliberation.⁷ Secondly, constitutional law is higher law and typically occupies the highest position in the hierarchy of norms comprising all types of positive law, trumping such other law in case of conflict. Thirdly, constitutional law is entrenched against ordinary methods of amendment or repeal which apply to statutes and other forms of law by means of some type of additional procedural or supermajority requirement. As the highest form of law emanating from a special constituent authority, constitutional law can be amended or repealed only by that same lawmaking authority or its equivalent. (Of course, in practice constitutional law can also be changed – if not amended or repealed – by judicial interpretation.)

Although distinctive of domestic constitutional law protection since 1945, special methods of enforcement – particularly through judicial review – are not strictly required. There is a clear and meaningful sense in which the Netherlands protects fundamental rights by constitutional law – and the UK and New Zealand do not – despite the express absence of judicial review in its constitution.⁸ Whether fundamental rights are effectively protected without some form of judicial review is a separate, if practically very important, question, especially in the context of international human rights – where there is a significant difference between regional and global systems in this regard.

Determining whether, or to what extent, some or all of international human rights law satisfies these various criteria is complicated by two obvious and well-known factors: (1) as just mentioned, there is no single international human rights system but regional and global ones which overlap and interact in complex ways; and (2) there is no single international legal source of human rights law and many of the sources also overlap. So although the most common method of legalizing human rights has been international treaties, some human rights law – including many rights also incorporated into treaties – has its source in custom and, arguably, also in general principles. Moreover, when the small sub-set of human rights which have achieved *jus cogens* status (and also, if larger, the sub-set imposing *erga omnes* duties) is factored in, certain human rights norms, such as the ban on genocide, may fall into every category.

Indeed, more generally, one might doubt whether the question of the international constitutional status of human rights law has very much traction. As is well-known, there is much disagreement about whether any general hierarchy of norms in international law exists. Even if it does, it is relatively rare in practice for there to be a conflict between a state's human rights obligations and another, subsequent international

⁷ Even if one accepts Jed Rubenfeld's distinction between 'democratic constitutionalism' in the US and 'internationalist constitutionalism' in Europe, between self-government and the protection of one or more universal human rights, such as dignity, as the foundational normative basis of a constitution, this does not mean that European constitutions were not equally the products of a (democratic) constituent power. Thus, the Basic Law of Germany came into effect only upon ratification by two-thirds of the *Länder*, as required by Art. 144(1); not so very different from the US Constitution's requirement in Art. VII of ratification by 'the Conventions of nine [out of 13] States': see Rubenfeld, 'Unilateralism and Constitutionalism', 79 *NYU L Rev* (2004) 1971.

⁸ Art. 120 of the Netherlands constitution states: '[t]he constitutionality of Acts of parliament and treaties shall not be reviewed by the courts'.

law obligation – perhaps the only type of situation where international constitutional status would matter in practice. This contrasts with the much more common situation of a conflict between a state's human rights obligation and either (1) its own purely domestic law or action, or (2) its international conduct which is not undertaken as a matter of international obligation. And even where there is such a conflict, international human rights monitoring or enforcement bodies do not generally have jurisdiction to resolve it as such, but rather only to determine whether the human rights they are empowered to enforce have been violated. This means that faced with such a conflict, an international human rights court, for example, would tend to frame the issue as whether the subsequent international obligation justifies the limitation of the right *as far as the human rights treaty is concerned*. In other words, the court will tend to assume its priority. Arguably, only a more general international court would have the jurisdiction genuinely to resolve the conflict by deciding which international law obligation takes priority.

Nonetheless, I think the question worth pursuing for what it may reveal, positively or negatively, about the human rights system. Admittedly, for the reasons just given, it may frequently be the case that not very much of direct practical significance turns on the answer. But apart from such practical reasons, domestic bills of rights are also typically granted constitutional status – and often placed at the beginning of a constitutional text – for expressive reasons, to reflect a collective commitment to fundamental rights as the most important legal norms within that system. It is a useful exercise to explore whether, or to what extent – rhetoric aside – the international legal system currently expresses a similar commitment. Moreover, if there is international constitutional law at all, then one would expect international human rights law to be part of it.

Let me begin by testing the criteria in a different international context and asking how they apply in the case of EU law, where it is generally understood that both the Treaty of Rome and EU human rights principles operate as constitutional law within the EU legal system. Primarily this is because of their higher law status. Thus, both the Treaty itself and the ECJ's human rights jurisprudence trump all other types of EU law in cases of conflict. Indeed, arguably EU human rights law would trump the Treaty if such a conflict were ever found, although (until such time as the Charter of Fundamental Rights is made binding and incorporated into the Treaty) the ECJ would be likely to rationalize this situation to the effect that, as general principles of law, EU human rights law is authorized by, and so part of, the Treaty itself. Although supremacy is the most important reason for attributing constitutional status, it is not the only relevant criterion – at least as far as the Treaty is concerned. The iterative and highly deliberative process of promoting European integration through law that culminated in the 1957 Treaty is plausibly viewed as amounting to a 'constitutional moment', as too are certain subsequent amendments and additions. Moreover, the cumbersome amendment process of convening an intergovernmental conference and the requirement of unanimous ratification before its proposals take effect entrenches the Treaty of Rome by comparison with many other treaties, including some human rights ones.

How do the three criteria apply to international human rights law? With respect to constituent power, the methods of international lawmaking – treaties aside – are notoriously hard to specify with any precision. Moreover, there is no general conception of a constituent power at the international legal level. Nonetheless, the UN Charter, the Universal Declaration, and the two general global human rights treaties that they authorized and that took 20 years to negotiate have credible claims, like the Treaty of Rome, to be products of constitutional moments – of a constituent authority – in a way that much other international law does not.

Whether there is a hierarchy of norms within international law in general, whether this is a question worthy of further inquiry, and whether human rights law is superior to other types of international law in particular are all matters of significant disagreement and debate.⁹ There is perhaps general agreement that a small, but critical core of the most important human rights law has achieved *jus cogens* and, thus, higher law, status as binding treaty makers and probably also trumping conflicting custom (if such a conflict is a conceptual possibility), although there is less consensus about how – the process by which – norms achieve this status, which may prevent the list from being added to. Some argue that a next tranche of human rights law imposes *erga omnes* duties on states, although neither which these are nor the precise hierarchical implications of this is very clear. Finally, Article 103 of the UN Charter supplies a form of supremacy clause. It provides that '[i]n the event of a conflict between 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'. Yet the Charter itself, of course, includes no specific human rights obligations, and the extent to which Article 103 incorporates subsequent human rights measures mandated or authorized under the Charter's general auspices remains an uncertain question. Within the context of human rights treaties (as distinct from the category of *jus cogens* generally), rights expressly stated to be non-derogable are sometimes claimed to be hierarchically superior to derogable ones, but whether there is a hierarchy among human rights is not directly relevant to whether (all or some) human rights are superior to other types of international law.

At the regional human rights level, the European Court of Human Rights has consistently engaged in the practice of treating the European Convention (ECHR) as supreme over other international treaty obligations of the member states. This is manifested not only by framing infringements of Convention rights based on subsequent international obligations as questions of justified limitations under the ECHR (the above-mentioned assumption that the ECHR governs), but also by its general statements about the very nature of the ECHR. Thus, the Court has referred to the

⁹ See, e.g., the disagreement on this score between Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden J Int'l L* (2006) 579, and Walter, 'Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law', 44 *German YB Int'l L* (2001) 170. On the value of the enterprise see Weiler and Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?', 8 *EJIL* (1997) 545.

guarantees of the Convention as having a 'peremptory character',¹⁰ and the ECHR as a 'constitutional instrument of European public order'.¹¹ Most directly, it has affirmed that member states 'retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention'.¹²

Another factor surely relevant to its constitutional status is that human rights law is not generally understood to bind international organizations. This is because such organizations are not parties to human rights treaties, are not clearly subjects of international law for *jus cogens* purposes, and/or because non-state actors are square pegs in the hermeneutic circle of customary international law. Again, in comparison with both domestic and supranational constitutional law, this is a significant limitation on constitutional status. It is hard to conceive of bills of rights not binding the political institutions created by a constitution. And would we still talk about the constitutional status of the Treaty of Rome or of EU human rights law if they did not bind the EU institutions?

Finally on supremacy, the 'suprapositive'¹³ or pre-existing and independent normative force of human rights law, most obviously captured (but not exhausted) by that sub-set accorded *jus cogens* status, distinguishes human rights treaties from other treaties.¹⁴ It is also undoubtedly part of what distinguishes human rights law from other international law on the issue of legitimacy. How this substantive factor plays out in terms of supremacy is less clear, but it is, I think, suggestive of a form of hybrid status somewhat akin to that of countries adopting (what I have termed) the 'new commonwealth model of constitutionalism'¹⁵ in the domestic context: a legal status for fundamental rights which largely straddles the normal dichotomy of constitutional versus non-constitutional law. Like certain 'super' or 'constitutional statutes' in domestic contexts, which are granted higher than ordinary statute status by means of an interpretive rule requiring subsequent statutes to be read consistently with them if possible and also an ouster of implied repeal, the ICCPR and ICESCR can be thought of as 'constitutional treaties' in this sense, enshrining a form of quasi-constitutional law at the international level.

We turn to the third characteristic: is international human rights law entrenched? For the small number of core human rights that have achieved the status of *jus cogens*, they are *ipso facto* entrenched against treaty amendment or repeal. On the other hand, to the extent that as a matter of positive law the very category of *jus cogens* derives from an international treaty (Article 53 of the Vienna Convention), this treaty is itself amendable by the ordinary default procedure it stipulates. To the extent that either (a) the category of *jus cogens* or (b) which norms have this status is a matter of custom or general acceptance, these arguably may be modified in the same way in which they were established.

¹⁰ Case 45036/98, *Bosphorus Hava Yollari Turzim ve. Ticaret Anonim Sirketi v. Ireland*, judgment of 30 June 2005, at para. 154.

¹¹ Case 15318/89, *Loizidou v. Turkey* (preliminary objections), at para. 75.

¹² *Bosphorus*, *supra* note 10, at para. 154.

¹³ See Neuman, *supra* note 4, at 1868–1869.

¹⁴ See *ibid.*; see also Koskeniemi, 'The Pull of the Mainstream', 88 *Michigan L Rev* (1990) 1946.

¹⁵ See *supra* note 4.

With respect to other human rights norms contained in the major international treaties, these treaties themselves typically contain a formal amendment process which is somewhat more onerous and specific than the general or default international law of treaty amendments contained in the Vienna Convention, which permits amendment by, and insofar as there is, ‘agreement between the parties’. On multilateral treaties in particular, the Vienna Convention requires only that ‘any proposal ... must be notified to all the contracting States, each one of which shall have the right to take part in: (a) the decision as to the action to be taken in regard to such a proposal; and (b) the negotiation and conclusion of any agreement for the amendment of the treaty’.¹⁶ So, for example, the ICCPR requires (1) the convening of an amendment conference upon at least one-third of states parties favouring one following a proposed amendment, (2) a majority vote at the resulting conference, (3) approval of the proposed amendment by the General Assembly, and (4) ratification by a two-thirds majority of the states parties.¹⁷ In both cases, amendments bind only states which have accepted them, but relative to the default rule, the ICCPR is partially entrenched by the specified procedures. Note, however, that there is no unanimity requirement before amendments enter into force, as in the EU. In other words, states have an ‘immunity’ veto rather than a blocking veto.

On the issue of withdrawal from human rights treaties, the ICCPR in particular has been interpreted as more entrenched than a typical, non-human rights treaty. Under the Vienna Convention, ‘the termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; (b) at any time by consent of all the parties’, or (c) where there is no provision, the intention to permit withdrawal is established or ‘may be implied by the nature of the treaty’.¹⁸ The ICCPR contains no provision on termination or withdrawal, and the Human Rights Committee in General Comment 26 of 1997 declared that there was no such intention so that a state may not withdraw from it. In so doing, the Committee distinguished the permanent protection afforded by the ‘International Bill of Human Rights’ as a whole from the more ‘temporary character’ of many other treaties. By contrast, both the ECHR and the American Convention expressly permit ‘denunciations’ after five years. Trinidad and Tobago exercised its right to denounce the latter in 1998.

B The Human Rights System as a Constitutionalized Regime of International Law

Let’s now turn to the other senses, or ways, in which there may be something constitutional about international human rights law. At the outset, it is important to distinguish between legalization, judicialization, and constitutionalization. Certainly there can be no doubt that the human rights system, like the international trade system, has become increasingly legalized and, to a lesser extent, judicialized. But constitutionalization is not simply the sum of these two processes.

¹⁶ Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 40.

¹⁷ ICCPR, Art. 51.

¹⁸ Vienna Convention, Arts 54, 56.

As discussed above, there are at least two different relevant processes of constitutionalization. The first, discussed in sub-section A, is the process by which fundamental rights achieve the legal status of constitutional law – whether domestically or internationally. Here, the key contrast is between ordinary and higher law. The second, to be discussed in this and the next sub-section, is the process by which a particular international law regime makes a transition from being a horizontal, inter-governmental entity to a more vertical, supranational, or autonomous entity. Here the key contrast is between treaties and constitutions. In this sub-section, I discuss the possible constitutionalization of the human rights system itself and, in the next, the role of the human rights system in the possible constitutionalization of international law as a whole.

If the contrast in this second process of constitutionalization is between treaty-based and constitution-based international entities, what is the difference between them? While there is, of course, no watertight division here but rather a spectrum, I think there are two main differences in this context, either of which is sufficient to ground plausible claims of a constitutionalized regime of international law. The first is that, in very general terms, treaty-based regimes operate primarily at the international level, whereas constitution-based regimes penetrate domestic legal systems to some significant degree and thereby structure a relationship between the two levels. This is constitutionalization as federalization, or what might be thought of as the move from dualism to federalism. The second difference is that whereas treaty-based regimes impose legal obligations on states that are both fixed at the outset and consensual, constitutional entities have the capacity to impose obligations on states that are neither. Such new obligations may be imposed by a governance structure with autonomous lawmaking powers acting by some version of majority vote, and may be enforced by an adjudicatory body with compulsory jurisdiction. In this process of constitutionalization, the shift is from consent to compulsion.

The EU is the paradigm of a constitutionalized regime of international law because, uniquely, it has moved far in both directions. Thus, its ‘supranational’ status is a function of (1) the federalization of EU law, (2) a governance structure in which new legal obligations are created by a form of majority decision-making, and (3) are enforced by an international court with compulsory jurisdiction, as well as by domestic courts.

The story of the transformation of the EU from a treaty-based to a supranational entity is now, of course, too familiar to require details.¹⁹ In the constitutionalization as federalization part of the story, the critical role was played by the doctrine of direct effect which, when applicable, means that EU law operates of its own force within the domestic legal system without the need for any national legislative or other measures and regardless of the domestic constitutional status of treaty law. In combination with the traditional doctrine of the supremacy of international law over domestic law, direct effect created a system of hard EU law on which citizens could rely in national courts and against which Member States were powerless to act at the domestic level. Hence, their sovereignty was limited and partially transferred to a vertical, supranational

¹⁹ Almost as familiar is the fact that the seminal work here was done by Joseph Weiler: see, e.g., Weiler, ‘The Transformation of Europe’, 100 *Yale LJ* (1991) 2403.

system of international law. In this transformation, human rights famously played no intrinsic role but rather only an instrumental or pragmatic one as the sugar helping certain Member States' courts to swallow the pill. The result is that with only a few exceptions – the most prominent being that EU human rights law does not generally bind the Member States – the structure of EU law (if not its institutions and processes) is essentially identical to that of federal law within a domestic federal system.

How do regional and global human rights regimes compare? The ECHR has arrived at a roughly similar point of constitutionalization as federalization, albeit via a different route. In addition to its developing *constitutional* supremacy over other sources of international law discussed in the previous section, the ECHR is also quite far along the path of developing *federal* supremacy over the domestic laws of member states. Unlike EU law, in which direct effect is one of its central constitutional principles, the ECHR does not formally require that its provisions themselves be invocable in, and penetrate, the domestic legal system – only that individuals whose rights have been violated 'shall have an effective remedy before a national authority'.²⁰ But there is, as it were, *de facto* rather than *de jure* direct effect, in that at this point all 47 member states have incorporated the ECHR into domestic law in one legal form or another,²¹ and thus permit individuals to invoke its provisions in national court. Moreover, when it is so invoked, several countries require domestic judges to consider or 'take into account' the interpretation of the relevant Convention right given by the ECtHR.²² Similarly, the ECHR has achieved *de facto* supremacy over domestic law in that, whatever the particular internal hierarchy of norms may be *vis-à-vis* the incorporated right, at least where there is a successful recourse to the Strasbourg Court, member states generally abide by that decision as required by Article 46 and, where necessary, amend or repeal their domestic laws and/or policies, including their constitutions. In this only slightly attenuated way in comparison with the that of EU, the ECHR operates within the member states' legal systems as an invocable and supreme law and, accordingly, can be understood as a federalized or constitutionalized regional human right system.

The American Convention on Human Rights also penetrates domestic systems in a broadly similar fashion, at least structurally if not necessarily always in practice. Although, as with the ECHR, (1) there is no principle of direct effect *per se* and (2) states parties are not required to incorporate the treaty itself into domestic law, most have in fact done so, thereby rendering it invocable by individuals in national courts. Some countries, including Argentina and Venezuela, have granted the Convention (as well as other human rights treaties) constitutional rank; others, including Costa Rica and Paraguay, grant it legal status below the constitution but above statutes;

²⁰ ECHR, Art. 13.

²¹ Variations include incorporating the ECHR as having higher status than the constitution (Holland), equal status to the constitution (Austria), below the constitution but above statutes, equal status to statutes (Germany).

²² In the UK, s. 2 of the Human Rights Act requires British judges to 'take into account' ECtHR interpretations; in Germany, a similar duty was imposed on lower courts by the federal constitutional court. See *Görgülü v. Germany*, 2 BVerfGE (2004) 1481.

and yet others give it equal rank with statutes. In addition, unlike the ECHR, Article 2 of the American Convention does mandate some substantive (i.e., non-remedial) domestic legal effects of the treaty by imposing a duty on the states parties 'to adopt ... such legislative or other measures as may be necessary to give effect'²³ to the protected rights. Where this duty is fulfilled, individuals are indirectly invoking the Convention where they rely on the resulting legislation in national courts, in much the same way as with properly transposed Directives in the EU.

Overall, the global human rights system has not yet progressed as far in this process of constitutionalization as federalization. On the one hand, of their own force, several major international human rights treaties, including the ICCPR and CEDAW, contain an equivalent provision to Article 2 of the American Convention mandating domestic legislative and other measures to give effect to the rights. Although again not required, several countries have incorporated global treaties into domestic law either generically (because of a general monist approach) or specifically (incorporating either all ratified human rights treaties or particular ones). On the other hand, the rate of such incorporation is significantly less than with either the ECHR or American Convention, and both reservations and statements of a non-self-executing nature are more frequent at the global level. Finally, it is far more common for domestic judges to consider or rely on regional treaties to which their state is a party than global ones for the purpose of interpreting their own constitutions.

As discussed, the second type of treaty to constitution shift, from consent to compulsion, is also typified by the EU. Thus, there is the compulsory element of qualified majority voting in its general governance structure, and the ECJ has compulsory jurisdiction over all Member States as a condition of membership. Elsewhere within international law generally, a compulsory governance structure is far more partially embodied in the UN, given the limited subject-matter jurisdiction of the Security Council, and compulsory adjudication in the WTO's Appellate Body and the ECtHR. Apart from the EU, the model of constitutionalization via compulsory governance structure seems most relevant to functionally self-contained international regimes, such as the WTO, rather than to the human rights system, which necessarily applies to and cuts across all governmental functions. Moreover, bills of rights, of course, do not purport to constitute any governance structure but rather to limit those brought into, or already in, existence. Compulsory jurisdiction of human rights courts, in the strong sense as a condition of membership, remains limited to the ECtHR. With respect to its contentious case load, the Inter-American Court of Human Rights has compulsory jurisdiction only over those states parties which have chosen to accept it; currently 21 out of 24 countries.

C Human Rights and the Constitutionalization of International Law

A third and final claim that there is something constitutional about human rights focuses less on the human rights system in isolation – as a particular regime of international law – than its wider role in the constitutionalization of international law as

²³ American Convention on Human Rights, Art. 2.

a whole. Again, this would parallel the effect of a bill of rights in the constitutionalization of a domestic legal system as a whole as, for example, in Canada. The growth of the human rights system is a critical part of the case for those who argue that such fundamental changes have taken place in international law as to justify or require a shift in overall paradigm from a horizontal conception of sovereign equality to a more vertical, ‘constitutionalist’ conception.

Perhaps the most general of these fundamental changes is that individuals have become subjects of contemporary international law in addition to states. That is, individuals, and no longer just states, have rights and duties under international law. Just as in 1963, the ECJ cited this precise characteristic of EU law as the basis of its famous statement in *Van Gend en Loos* that EU law forms ‘a new legal order of international law’,²⁴ so too since 1963 can it be said that this characterization now applies to international law as a whole. Human rights law, which was essentially re-launched just a few years later with the opening of the two international covenants for signature, is of course the major source and manifestation of the rights side of the transformation, while the rapid development of individual liability under international criminal law in the last decade is arguably the major source and manifestation of the duties side. This transformation in the basic subjects of international law can be thought of as constitutional in nature because it represents a shift from the ‘private law’ model of international law as exclusively regulating horizontal relations among sovereign equals to the ‘public law’ model of also regulating vertical relations between states and individuals. In other words, a shift from contractual to constitutional functions.

Among other developments in international law which have been adduced in support of this claim of *implicit* constitutionalization are the growth of non-consensual state obligations (such as forms of binding majority decision-making and compulsory adjudication of international courts), the general objective of securing the common interests of humanity rather than simply the individual or aggregate interests of states, and the establishment of the UN, EU, and perhaps also the WTO as systems of international governance. This descriptive claim also has a normative variant, as expressed by German Constitutional Court Judge Brun-Otto Bryde, ‘a constitutionalist concept of international law tries to bind these actors [states and international organizations] ... to substantive constitutional principles, especially the rule of law and human rights’.²⁵ By contrast, the role of human rights is far less central in the claim of *explicit* constitutionalization of international law, which views the UN Charter as the constitution of the international community.²⁶ This is, of course, due to the low profile of human rights in that document.

Because it performs both the general public law function of regulating relations between the state and individuals and the particular constitutional function of limiting governmental power, the contemporary human rights system is undoubtedly one

²⁴ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, at para. 12.

²⁵ Bryde, ‘International Democratic Constitutionalism’, in R. St J. MacDonald and D.M. Johnston (eds), *Towards World Constitutionalism* (2005), at 106.

²⁶ See Fassbender, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia J Transnat’l L* (1998) 529.

of the strongest parts of this general constitutionalist claim. Indeed, it is *the* strongest part of the claim to the extent that the UN is not seen as successfully fulfilling the other primary constitutional function of creating an autonomous governance structure.

Nonetheless, there are also certain weaknesses in this claim about the role of human rights in constitutionalizing international law. First, as Joseph Weiler has noted, the human rights system tends to make individuals *objects*, or recipients, of rights – like endangered species or the environment – rather than truly subjects of them in the strong, authorial sense.²⁷ This, of course, lessens the claim of a fundamental change in international legal subjecthood – as it does not apply to states – and also stands in contrast to most modern constitutions, which typically claim their legitimacy from being the active, engaged handiwork of ‘we the people’.

Secondly, the human rights system does not generally bind governments against their will, and so, in this regard, exists in some tension with the other factors driving the non-consensual, constitutionalist paradigm. With the exception of human rights norms that have customary international law or general principle status, the treaty basis of much modern human rights law requires state consent, as of course the US failure to ratify several illustrates. Moreover, under a purely positivist reading of *jus cogens* as deriving exclusively from the Vienna Convention, such norms primarily function to restrict a state’s treaty-making power but do not directly impose the substantive duty on an unwilling state.

Thirdly and finally, because of this still dominant consensual model of state subjects of international law in this area, international human rights do not generally bind international organizations or the constituted structures of international governance. Such organizations and structures are not parties to, but rather often creations of, human rights treaties. This is surely a significant limitation on the constitutionalist model, distinguishing the global human rights system not only from domestic bills of rights, the primary function of which is to bind the constituted political authority, but also from the human rights system of the EU. It is the equivalent of a bill of rights in a federal system binding only state governments, and not federal or EU human rights law binding only the member states and not the EU institutions – the reverse of the actual situation.

From the perspective of the constitutionalist paradigm of international law, there is thus a disjunction between the substance of the human rights system and its scope. Within the confines of a human rights regime itself, which does not purport to have an autonomous governance structure in the first place, this disjunction does not arise. But once human rights law is conceptualized as part of a broader system of international governance, this limitation in the scope of coverage becomes a highly visible lacuna. This is particularly so when the creation and expansion of international organizations is heralded as part of the evidence that international law is developing goals beyond those of merely serving state interests. Accordingly, calls among international constitutionalists for human rights to bind international organizations are

²⁷ Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’, 64 *ZaöRV* (2004) 547, at 558.

highly appropriate, but this must be the full panoply of human rights and not simply a selection – whether just economic rights or any other.²⁸

3 Are There Any Distinctive Functions of an ‘International’ Bill of Rights?

With respect to international law itself, the development of the human rights system closed a huge gap in coverage in that previously, due to the doctrine of non-intervention in internal affairs, it concerned itself almost exclusively with a state’s external conduct – conduct outside its territory and/or regarding foreign nationals. But since 1945, this same internal space, previously largely unregulated by *either* constitutional or international law, has also and increasingly been regulated by domestic bills of rights. Accordingly, if domestic bills of rights and the international one perform the same primary function of protecting fundamental rights and placing limits on how governments may treat their own populations, why is there a need for both? From the perspective of constitutional subsidiarity, are there any fundamental rights-protecting functions that either cannot be, or typically are not, adequately performed at the national, or perhaps regional, level? Does an ‘international’ bill of rights add anything essential or distinctive to domestic ones?

Most straightforwardly, the international human rights system performs the instrumental function of filling a number of important gaps in domestic bills of rights. These perhaps mostly fall into the category of rights-protecting functions that are contingently, rather than necessarily, unperformed at the national level. But, in addition, the human rights system performs at least two additional and unique functions, even in ‘liberal states that actively enforce constitutional norms’.²⁹ These are that it marks a new, external stage in the historical development of constitutionalism and it also enshrines and clarifies a distinct normative basis for fundamental rights.

In terms of gap-filling, most obviously there is no duplication of function with respect to those domestic systems lacking either *de jure* or *de facto* constitutional protection of fundamental rights. That is, either where there is no constitutional bill of rights – as, for example, in the UK and (Kelsenian) Austria prior to its constitutional incorporation of the ECHR – or for the many more countries in which there is no effective protection of the constitutional rights formally granted. Here, the international system may be said to substitute for, rather than duplicate, the domestic. The challenging issue, of course, is what non-duplicative functions human rights play in countries outside this category; for some human rights sceptics, the answer is essentially none.

But there are other significant gaps which human rights help to fill. First, even where domestic bills of rights exist and are generally enforced, they often do not bind, or fully bind, governments acting outside their territories. By contrast, international human rights law in principle should, and in practice does, have significant degrees of

²⁸ By the ‘full panoply of human rights’, I mean that no type or category of human right should be excluded. Clearly, given the variety and range of human rights, certain particular ones are not plausibly applicable or transferable to international organizations.

²⁹ See Neuman, *supra* note 10, at 1863.

extraterritorial application. Although (a) this is not an issue that has been fully resolved by international courts, monitoring bodies, or commentators, and (b) the extent of a state's extraterritorial human rights obligations may vary depending on such factors as relevant treaty language³⁰ and degree of control, human rights obligations have been interpreted to include substantial extraterritorial application.³¹ So, for example, the US Constitution has generally been interpreted by the Supreme Court as protecting US citizens but not others outside the territorial limits of the country. Hence, the presumed rationale for the Bush Administration's deployment of offshore detention centres, such as Guantánamo Bay in Cuba.³² By contrast, given the degree of control exercised by the US government over Guantánamo, there is little doubt that its international human rights obligations, including those under the ICCPR and the Torture Convention, apply there (and perhaps also to centres in Iraq and Afghanistan).

Secondly, international human rights undoubtedly apply to a government's treatment of non-citizens inside its territory where a bill of rights may not, or may not fully or equally, apply. So, for example, constitutional anti-discrimination norms often do not prevent governments from treating resident non-citizens in ways that would be prohibited in the case of citizens.³³ Thirdly, human rights law may bind governments in situations where they jointly create an international organization and claim immunity for it under domestic constitutional law. Finally, in addition, of course, to the fact that particular bills of rights and human rights instruments may specify somewhat different fundamental rights for protection, human rights treaties tend to use the protective method of imposing positive duties on governments more generally or frequently than is true of domestic constitutions. Thus, several human rights treaties contain a blanket obligation on states not only to 'respect' the included rights but also to 'ensure' them by adopting legislative and other measures necessary to give the rights practical effect.³⁴ Such measures may in turn impose duties on private actors.

³⁰ Thus, Art. 2 of the ICCPR states that '[e]ach State Party ... undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant ...' (emphasis added). By contrast, most other human rights treaties omit the reference to 'territory' and bind states to respect and secure rights to everyone 'within their jurisdiction', giving them a potentially broader territorial scope.

³¹ See generally Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-international Armed Conflict in an Extraterritorial Context', 40 *Israel L Rev* (2007) 72.

³² The recent US Sup. Ct. decision in *Boumediene v. Bush*, judgment of 12 June 2008, not yet reported holding by 5 votes to 4 that, as an exception to the general principle, the Constitution protects aliens held at Guantánamo because of the US's *de facto* sovereignty over the base of course undermined the Administration's rationale – and also reduced the contrast between the US bill of rights and international human rights on this particular issue.

³³ A striking example of this difference is that, applying the international human rights provisions of the ECHR as incorporated under the Human Rights Act, the UK's House of Lords declared the indefinite detention provisions of the Anti-Terrorism, Crime and Security Act of 2001 (which applied only to foreigners) to be unlawful discrimination against aliens living in the UK. By contrast, the US Supreme Court stated in 2003 that on the issue of preventive detention, the Constitution permits treatment of aliens living in the US that would not be permissible in the case of citizens: see *A and others v. Secretary of State for Home Department* [2004] UKHL 56; *Denmore v. Hyung Joon Kim*, 538 US 510, at 522 (2003).

³⁴ See, e.g., the ICCPR and American Convention.

Even where positive duties exist in domestic systems, they tend to be specific to particular individual rights and not of this blanket nature.

But apart from filling these largely contingent gaps, international human rights law also performs three functions that cannot be performed by domestic bills of rights. The first and most concrete is that, in addition to imposing legal limits on how a state may treat its own population (a function it shares with bills of rights), international human rights law gives states a cognizable legal interest in how *other* populations are treated by their governments. That is, one should not forget that, although human rights law has helped to make individuals subjects of international law, it also renders states the objects of legitimate scrutiny and action by other states as well as by international and non-governmental organizations.

Related to this point but generalizing from it, a second unique function is that international human rights law creates a new, external stage in the institutional development of constitutionalism. Even where there is in practice a complete overlap between the two systems, human rights create a second set of legal limits which, unlike the first, is not exclusively specified or enforced by the state itself. Under domestic bills of rights, limits on government are self-generated and self-imposed and, whatever the internal degree of separation of powers or procedural/institutional mechanism for enforcing them, a state is still ultimately and inevitably the judge in its own case. Where bills of rights are judicially enforced, judges may be independent of the other branches of government but are still themselves government officials, and so in a broader picture part of the accused state³⁵ – as typically acknowledged in both domestic constitutional and international law.

By contrast, the human rights system adds a layer of greater independence. Limits on the state are no longer exclusively created or enforced internally but also externally. This division of authority over fundamental rights between internal and external systems, between constitutional law and human rights law, adds an important international dimension to separation of powers/checks and balances, and creates the possibility of a more genuinely impartial or independent adjudication that does not violate the principle of *nemo iudex in causa sua*. Here, it is helpful (though not precisely analogous) to think of the difference between a claim under the ECHR being brought against a member state before a national court of that state with the final word in the case, and the existing system with its possibility of appeal to the ECtHR. By adding the final layer of greater independence and impartiality, the ECHR system enhances constitutionalism – and the international human rights system globalizes this phenomenon.

In this way, the human rights system can be thought of as a further stage in the historical development of the idea of constitutionalism. In the pre-constitutionalist order, sovereignty was conceptualized as absolute and indivisible, and located in the person of the monarch (*l'état, c'est moi*). In the first stage of constitutionalist

³⁵ The one exception to this would be where a domestic constitutional court had foreign members, as in Bosnia and Herzegovina. Under its constitution, 3 of the 9 members of the constitutional court are nominated by the President of the ECHR and cannot be citizens of the country.

thought, sovereignty is still conceptualized as absolute and indivisible, but is now located in the people and delegated to their representatives (popular sovereignty). This in turn implies certain moral and/or political limits on the exercise of power, most famously enforced through Locke's right of rebellion. In the second stage of constitutionalism, limits on the exercise of power are legalized and also often both judicialized and constitutionalized, but all such limits and enforcement mechanisms are internally generated (domestic constitutionalism). In the new, third stage, legal limits are now imposed by international law and may also be interpreted and applied by – or in the shadow of – international rather than domestic state actors (global constitutionalism).

Of course, some individual countries may have skipped the second stage (and possibly also the first), so that human rights supplies the only layer of legal limits. But either way it represents a growth in constitutionalism. Moreover, this growth in global constitutionalism occurs whether or not the human rights system is properly understood as a form of international constitutional law. This is because, as is well known, constitutional law and constitutions are neither necessary nor sufficient for constitutionalism. Accordingly, global constitutionalism does not require global constitutional law.

A third unique function of the international human rights legal system is that it enshrines – and clarifies – the distinct normative basis for the protection of fundamental rights as rights of human beings rather than as rights of citizens. Thus, the ECHR, for example, is properly thought of as specifying the rights of humans as recognized, legalized, and applied in Europe, and not simply the rights of Europeans. In specifying this function as 'unique', however, it is important to specify the precise difference between bills of rights and international human rights law in this regard, and not to overstate it. Undoubtedly the fundamental rights protected by constitutional law in some countries are conceived of as human rights. Here one might think, for example, of the Declaration of the Rights of Man which has been incorporated by the *Conseil constitutionnel* into the Constitution of the Fifth French Republic. But in other countries bills of rights are conceptualized as protecting the more particularized rights of citizenship in that country. Perhaps instructive in this regard is the contrast between the American Declaration of Independence, which speaks in the voice of the rights of man, and the US Constitution, which seems to take a narrower, rights of citizenship, perspective. The point is that, uniquely, international human rights law can *only* be conceptualized as protecting human rights and, in so doing, it clarifies the normative basis of these rights as rights all humans have simply in virtue of being human.

More concretely, even countries with a self-understanding of constitutional rights as human rights may find themselves struggling with the issue of whether to extend such rights to (legal and illegal) immigrants, a distinction that is normatively irrelevant under a human rights analysis. The fact that the protection of a particular international human rights law may attach to the rights of citizenship in Country A and not Country B, because A has ratified a human rights treaty and B has not, does not detract from this point. Citizenship in Country A is not the normative, but simply the legal, basis for the rights in question.

The distinct normative basis of human rights, as enshrined in international human rights law, has several implications. First, whatever the general legitimacy problem that international law faces due to its changing nature as a structure of governance does not attach to the human rights system. International human rights law may have an enforcement problem, and perhaps an identification/specification problem, but not a general legitimacy problem. Secondly, the fundamental rights of US or Brazilian citizens are historically context-specific so that it makes perfect sense to think of their content changing over time in a way that is not so obviously true of human rights given their different normative basis. Finally, unlike bills of rights, the inherently universalistic basis of human rights, as rights all humans have simply in virtue of being human, necessarily casts a shadow over the resolution of such issues as extra-territorial application, even if the specific form and content of their legalization place certain limits on their scope.

4 Conclusion

In terms of function, age, substance, and structure, we have seen that there are substantial similarities between domestic bills of rights and the international one. The most obvious differences seem to be in legal status and methods of enforcement, but probing the former leads us to ask: what, if anything, is constitutional about the major international human rights instruments? They undoubtedly perform the basic constitutional function of specifying limits on how governments treat people within their jurisdictions. At a more specific level, there are plausible arguments that they satisfy at least some of the conditions for being considered international constitutional (or quasi-constitutional) law, particularly those of constituent power and entrenchment. Moreover, there is an ongoing process of implicit constitutionalization in both the human rights system itself and international law as a whole, although both continue to be constrained by the still important role of state consent and the failure of human rights generally to bind international organizations. These developments in the human rights system have combined to further and promote global constitutionalism.

This last point suggests one reason why the international human rights system does not simply replicate domestic bills of rights – or substitute for them where lacking – in that, by externalizing the limits in significant ways, it takes constitutionalism to a new stage in its historical development. I have argued that international human rights law also functions to enshrine and clarify the distinct normative basis for the protection of fundamental rights as rights of human beings rather than as rights of citizens. Whether or not the International Bill of Rights evolves into a more unqualifiedly constitutional charter, this then is what is irreducibly ‘international’ about it.