COURTING COMPLIANCE: JUDICIAL POLITICS AS A CONSTRAINT ON THE
DOMESTIC ENFORCEMENT OF INTERNATIONAL LAW

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Abstract

This dissertation examines the ability of independent domestic courts to enforce international human rights law. I argue that the long-term ability of a domestic court to enforce international law depends on its institutional sensitivity to international law processes, the diffusion of adjudicatory power within a state, and the degree of flexibility the high court has over institutional rules. Unlike the majority of law and politics theories that treat judicial outputs as binary—with a court either siding with or ruling against the government—my analysis considers the ability of courts to shape their relations with private and public actors through the manipulation of institutional rules governing access, adjudication, and remedies. To support this argument I use both statistical analysis and in-depth case studies in three democratizing states: Colombia, South Africa, and Mexico. In each I examine the ability of newly constituted or newly reformed high courts to enforce international human rights law at the domestic level, and their ability to avoid or enhance their rights enforcement role in contentious cases.

In so doing I paint a much more complex picture than one of courts choosing in individual cases either to protect rights or capitulate to politicians. Rather, I demonstrate that courts are active participants in their institutional development, and that therefore: (1) their willingness to supply rights adjudication is not uniformly reflective of the potential demand for litigation; (2) that courts with flexible institutional environments do not treat procedural rules as fixed but that they morph access, adjudication, and remedies to fit the court’s strategic legitimacy concerns; (3) that this process allows courts to avoid potentially institution-damaging backlash, increasing the likelihood that the court will successfully maintain or expand its enforcement role.
over time; (4) that the ability of a court to engage in this selective rights enforcement behavior is enhanced by a diffuse adjudicatory environment that provides greater opportunities for the high court to balance public concerns against political considerations; and (5) that where there is a strong link between the court’s legitimacy and international law concerns the likelihood of judicial enforcement of international human rights law increases, even absent treaty ratification.
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Chapter 1: International Law in Domestic Courts

Introduction

When do domestic courts increase the likelihood of compliance with international human rights obligations? Nearly three quarters of a century have passed since the inauguration of the post–World War II global human rights era. Legalization of human rights at the international level has never been greater. Judicial power has likewise increased around the globe (Gauri and Brinks 2008; Ginsburg 2003; Hirschl 2007; Shapiro and Stone Sweet 2002; Tate and Vallinder 1997). Even in states following the civil law tradition, the trend toward written constitutions has strengthened the hand of the judiciary vis-à-vis legislatures (Merryman and Pérez-Perdomo 2007). At the same time, increasing numbers of constitutions incorporate international law directly into the legal structure, often granting treaty and even customary law supremacy over local legislation (Ginsburg, Chernykh, and Elkins 2008; Ginsburg 2006). Alongside a steady increase in the number and scope of international human rights protections, independent domestic courts should provide a means of constraining government action that conflicts with treaty obligations (Simmons 2009). Yet this is not reflective of the state of international law globally. For example, in 2005, of 45 democratic states that had ratified both the ICCPR and the CAT treaties and that had the highest judicial independence scores, fully one third received a score of only six or fewer points on the CIRI human rights scale. Nearly ten percent received a score of four or fewer points.
What explains this divergence from expectations, or is it simply unrealistic to expect domestic institutions to buttress international obligations? The ability of international law to drive state compliance is a longstanding area of inquiry for political scientists, with scholarship increasingly recognizing the possibility that domestic institutions play a key role. This dissertation engages this broad debate by attempting to answer what might be considered a relatively straightforward question: When do domestic courts serve as effective enforcement mechanisms of international human rights obligations? The answer, it turns out, is surprisingly elusive. Indeed, the ability to elude is at the heart of my argument: courts are at their most effective when they are adept at selectively evading and engaging the attention of two groups: politicians and the public. In short, courts face a potential trade-off between immediate enforcement and long-term effectiveness. If a domestic court is able to selectively engage human rights issues on an individual basis, it stands the best chance of acting as an ongoing enforcement mechanism over the long term.

Studies of court enforcement of human rights generally assume that courts do one of two things: that they rule in favor of a claimant, or that they rule in favor of the government. This intellectual starting point has focused attention on specific types of questions. How do courts gain the institutional strength to rule against governments, and when do governments comply with adverse rulings? Why do courts cite international or foreign law in their rulings? Do courts rule in accordance with their understanding of the law, in pursuit of their sincere policy preferences, or in strategic consideration of politicians’ likely response? Are civil law or common law courts more likely to rule against the government? In all of these questions, the inquiry begins where court activity is presumed to end: the ruling.
My argument arises from the insight that when deciding cases courts often have a third option: they can change the outcome not through substantive rulings but through the manipulation of institutional rules. Recognizing that courts generate more than a binary output variable expands our understanding of the institutional factors governing their effectiveness. Because courts rely on the slow accumulation of legitimacy through individual decisions over time, a strategic-actor–based theory would not predict that courts are willing to decide all international law obligations based on the substantive merits of the case. Instead, even in judicial systems nominally termed “independent,” domestic courts should be more likely to enforce international legal obligations where government adjustment costs are relatively low or opposition is fractured. Where the government’s policy costs are high and political actors are able to overcome veto points, ruling against the government might invite backlash against the court’s ruling or against the institutional status of the court itself.

Courts face a clear dilemma when they are asked to rule against a unified government. Ruling against the government invites backlash, and in such a situation we might expect the court to capitulate and rule in favor of government actors. Court acquiescence in a substantive ruling, however, may negatively impact the court’s legitimacy as a “rule of law” actor and thereby undermine their claim to act as a countermajoritarian institution in a democratic system.

Courts vary in their ability to overcome this dilemma. Some courts may control procedural mechanisms that allow them to increase public attention on an issue in hopes of avoiding a backlash. Alternatively they may reformulate institutional access rules to remove the court from the dispute altogether, in effect retreating to fight another day. Only when these
options are not available will the court risk an unpopular ruling that invites backlash or risks its legitimacy.

Whether or not they are able and willing to accomplish this depends on institutional factors: the court’s sensitivity to international law, the diffusion of adjudicatory power in the court system, and the degree to which the court itself controls institutional mechanisms governing access, adjudication, and remedies. The theory presented below predicts that courts will be most successful as a human rights enforcement mechanism when they have high scores on each variable. This comes with a tradeoff, however. The ability to avoid certain contentious issue areas allows the court to avoid backlash, but it does so at the expense of the immediate ruling. The result is paradoxical: courts that are successful over the long-term are unlikely to consistently offer a hospitable forum to support human rights across the full panoply of potential issue areas.

My focus is on the subset of states that have enacted court reform or otherwise undergone democratic transitions in the last quarter-century, precisely because it is in these states that courts’ institutional legacy is less entrenched and there is no deep well of legitimacy on which to draw. I also focus on apex courts, since it is these courts whose mandates most frequently call on them to enforce international human rights law. For purposes of this project, I define international legal obligations broadly. In addition to the traditional focus on treaties, I include what is referred to as “soft” international law.¹ I take this to encompass a wide array of

¹ This project draws on the definitions of hard and soft law used by Abbott and Snidal. In particular, the notion of soft law indicates those areas of law that “are weakened along one or more dimensions of obligation, precision, and delegation.” (2000, 422)
international law instruments, from customary international law (often incorporated by reference in domestic law), to aspirational declarations that have been agreed to by individual states, to international organizations’ resolutions purporting to constrain states.

The first part of this chapter situates my theory in two broad areas of the political science literature. I begin by reviewing the extant literature on international relations, international law, and domestic enforcement mechanisms of international obligations. I then draw on the judicial politics literature to elucidate the strategic approach to court activity on which I base my theory. Part two of the chapter lays out a theory of domestic courts as strategic enforcers of international legal obligations, arguing that variation in a court’s international sensitivity, diffusion of adjudicatory power, and control of judicial institutional mechanisms determines outcomes. Third, I present hypotheses growing out of this theory and test them using a macro-quantitative analysis. Finally, I conclude with an introduction of the case studies that constitute the heart of the dissertation. I conclude with an overview of the project’s contributions.

**The Puzzle: International Law, Domestic Courts**

**International Law**

When do domestic courts enforce international human rights law? The treatment of this question in the international relations literature has, in broad strokes, been a function of scholars’ paradigmatic commitments. As a result, it is not surprising that domestic courts have made a relatively late appearance in the discussion. For realists, the ability of international law (and domestic court’s use thereof) to order interstate behavior or constrain sub-state actors is limited
by the strict theoretical dichotomy between the international and domestic spheres. Indeed, the
domestic sphere is scarcely considered, with these theories eschewing attempts to pierce the veil
of the unitary state. Any question of enforcement of international legal obligations prompts a
return to first principles: international law is itself epiphenomenal, with ratification and
compliance both mere surface indicators of power relations between states. At best, international
(not domestic) tribunals may be effective where judges to a case reflect and incorporate states’
interests at the time of the decision. Where there is significant drift between appointed judges
and the states party to disputes, these institutions lose vitality over time as states defect (Posner
and Yoo 2005). Here the question of domestic courts’ role simply does not arise as an
independent compliance mechanism, since the process of compliance is itself illusory. It may
appear that some states comply more than others, but in reality this is the result of the state as a
unit having an underlying interest in compliance. Adding domestic institutions to the mix
increases the complexity of compliance theory but does so without a concomitant increase in a
theory’s predictive capacity (Posner 2005).

The institutionalist paradigm echoes the realist view insofar as both maintain the
theoretical assumption of the unitary state. Institutionalists, however, acknowledge the potential
of international law and courts to alter state interactions as they allow rational, self-interested
states to coordinate their activities (Guzman 2002; Norman and Trachtman 2005). Even though
international tribunals lack direct enforcement power, they may provide information as to which
forms of defection are “acceptable,” thereby allowing states to punish defectors more
selectively (Carrubba 2005). Even “soft” non-treaty international law such as memoranda of
understanding can constrain state behavior where it gives rise to reputational concerns in
situations of repeated play (Guzman and Meyer 2010). Of course, international law does so without resort to sub-national mechanisms, again leaving domestic courts out of the explanation.

Liberal and constructivist scholars, in contrast, adopt a theoretical approach that looks beyond the unitary state and is thus able to incorporate domestic courts. These theories have taken seriously the claim by Slaughter and Alvarez (2000) and reiterated by Slaughter and Burke-White (2006) that the future of international law is domestic. Incorporating domestic courts is consistent with liberalism’s longstanding concern with sub-state actors, domestic social groups, and the institutional frameworks that shape state preferences (Moravcsik 1997). Given this tradition, it is not surprising that liberal scholars have explained international law and the power of international legal institutions with reference to domestic factors. Domestic courts, however, have played a back-seat role in explanations of international law both with regard to the initial joining of international legal regimes and later compliance. A state’s choice to join international regimes and to delegate legal decision-making power to an international tribunal can be explained as a way of locking in the preferences of currently dominant social actors (Moravcsik 2000). These hand-tying efforts can even be memorialized in the state’s foundational legal documents (Ginsburg 2006). Just as sub-state actors determine whether a state joins an international legal regime, so, too, can these sub-state actors become the target of these regimes (Alter 2008). In addition to their role in the ratification of international legal obligations, domestic actors also help determine the level of state compliance. Indeed, the decision to ratify is itself based on the potential effect on transnational actors and domestic institutions (Hathaway 2007). Democratic states with a record of human rights violations may be less likely to ratify
human rights treaties, precisely because of the potential threat of domestic legal enforcement (Hathaway 2005).²

Parallel to liberal theories, norms-based explanations incorporate non-state actors into theories of international law and compliance, with some effort to theorize about the role of domestic courts in this process. Here, authors argue that the nature of compliance with international legal obligations is the result of value shifts, either in terms of beliefs about what is appropriate behavior for states, or in terms of the understandings of what is appropriate for individual domestic actors. These constructivist and sociological accounts have a long pedigree, positing that global norms and shared ideas constitute both the world political system as well as the actors operating within that system (Boli-Bennett and Meyer 1978; Wendt 1992). Many of these more sociological explanations for state behavior rely on the possibility of social interactions to redefine actors’ interests. International organizations may encourage specific behavior among its members through processes such as backpatting or opprobrium (Johnston 2001). These organizations provide reassurance for elites or help socialize them to adopt new behavioral modes (Pevehouse 2002).³ Over time, this socialization process may redefine the interests of states themselves, and the process of a norm cascade helps explain the role of sub-

² Alternatively, active courts may be willing to incorporate international law into their jurisprudence by adopting a monist approach (Waters 2007).

³ Liberals likewise see elite interactions leading to domestic policy change, but such changes are instead explained as a result of the empowerment of new groups of key actors within domestic politics, which in turn leads to policy change (Haas 1989). Pevehouse’s approach suggests a two-fold approach. On the one hand, elites agree to liberalization through a rational process of hand-tying; at the same time, elites’ attitudes toward liberalization shift through socialization (2002, 519).
state actors in both the promulgation and internalization of these normative shifts. Such processes have the ability to change standards of appropriate behavior not only for states, but for their leaders as well (Finnemore and Sikkink 1998; Finne more 1996; Risse, Ropp, and Sikkink 1999; Sikkink 2011). Domestic courts can play a role in this process of norms internalization. According to Koh (1997), states comply with international law when transnational actors provoke an interaction that requires interpretation and eventually promotes internalization of the norm; domestic courts act as one site for this “transnational legal process.” More recent legal scholars have attempted to create a constructivist methodology that would allow for falsifiable hypotheses regarding domestic internalization of global legal norms (Goodman and Jinks 2003, 2004). To date, however, these attempts have not explained when domestic courts are receptive to litigation attempts that draw on international legal rules.

Like constructivists, liberals have theorized that domestic courts are part of a larger, multi-faceted process of legal convergence across the international system. Unlike Koh’s formulation, here judicial activity across national boundaries can be seen as a complex process of judicial network formation and trans-judicial communication. This process allows courts to engage in collegial discourse that results in both legal harmonization and broad doctrinal debates. The historical timing of this discourse may simply be explained by increased globalization and communication among key actors. According to Slaughter (2004), resistance to a single global authority does not obviate the need for collective decision-making; instead, government agencies and decision-makers engage in transnational networks as an alternative form of decentralized global governance. Courts are no different from other government actors in that their sphere of competence inevitably impinges on analogous actors in foreign jurisdictions. Members of the
judiciary engage in transnational communication to manage cases that from a purely practical standpoint raise transnational issues, such as corporate bankruptcy proceedings. This transjudicial dialogue has gone much farther than functional needs would suggest, however, with judges routinely citing one another’s reasoning in cases dealing with human rights violations, privacy rights, and the death penalty (2004, 101).

Beyond any doctrinal influence such dialogues may have on judicial decisions, the very act of engaging in transnational communication may influence judges at a personal and professional level. The mechanism through which this occurs remains in dispute. Common-sense elements of professional education may be key, such as foreign law training or expertise in foreign languages (Law and Chang 2011). This explanation contrasts with Slaughter (2004), who argues for the importance of institutionalized, face-to-face meetings among members of national judiciaries. Elite participation in transnational tribunals may also play an important role in socialization (Borgen 2007). Here, the distinction between rationalist and constructivist explanations begins to break down. Much as Pevehouse argues for both rational and constructivist influences on elite behavior in international organizations, scholars analyzing the role of courts highlight parallel processes of convergence in judicial actors’ understandings of the law as well as in their sense of professional identity. The heightened level of judicial interaction may reinforce the idea among judges that they perform a particular constitutional role with a separate professional identity (Slaughter 2004, 101–02) and that this special role empowers courts vis-à-vis other domestic actors (Benvenisti and Downs 2009). Others have followed a similar sociological tradition to explain that a crucial element of domestic court
behavior is the way judges view their role in the constitutional system (Landau 2005; Scheppele 2002).

These various theories clearly incorporate domestic judiciaries into processes of legal convergence and enforcement, but they often do so without taking into consideration the wider domestic institutional environment. Instead, both liberal and norms-based theories of international law have left domestic courts as relatively undifferentiated black boxes. Domestic courts provide a mechanism of ensuring state compliance with international obligations by offering local litigants a venue in which to challenge state action. As a threshold issue, the international obligation must have been ratified and incorporated into domestic law (Simmons 2009; Slaughter 1995). Once incorporated, courts may provide a venue for enforcement of a state’s legal obligations even in the face of majority opposition (Hathaway 2005). For new democracies in particular courts may provide an appealing buttress against a return to past practices that included human rights abuses. The institution of a constitutional court, for example, may be seen as a hedge against societal backsliding (Ackerman 1997). Indeed, this desire to delegate to courts has its parallel in delegation to international human rights regimes (Moravcsik 2000, 232–33), and may be part of a larger trend among young democracies; constitutional designers in new democracies appear to incorporate international law into their founding documents at a higher rate than do those of non-transitional governments (Ginsburg 2006).4

4 Ginsburg does not explicitly address enforcement mechanisms within the domestic realm, focusing instead on the greater likelihood of new democracies to take the step of referencing
The interplay of courts and human rights is, however, more variegated than simple incorporation followed by judicial enforcement, and recent research has begun to unpack this phenomenon. Domestic compliance with international human rights obligations is not an all-or-nothing proposition; states may simultaneously improve in one area while increasing abuses in an area less prone to scrutiny. Information seems to play an important role, and non-governmental organizations’ advocacy may lead to shifts in patterns of abuse (Hafner-Burton 2008). Similarly, courts’ usefulness in enforcing human rights obligations may be related to the costs of evidentiary production (Lupu 2013). Even where they fail to prevent abuses, however, courts seem to play an important role in changing government behavior. In situations where states derogate from human rights treaty obligations, courts may be unable to prevent derogation but may nonetheless encourage executives to disclose information explaining the derogation (Hafner-Burton, Helfer, and Fariss 2011).

**Domestic Courts**

All of these studies suggest that national court systems treat international law consistently, if not across states, then definitely within states. Whatever the source of cross-national variation, be it engagement in transnational dialogue, governmental ratification of treaties, or the efforts of NGO advocates, little attention is given to the role of judicial actors vis-à-vis other domestic political actors. Interestingly, this runs counter to trends in the judicial international law in the state’s foundational legal document. The role of domestic courts is not clearly delineated.
politics literature, both from the American and Comparative Politics perspectives, which increasingly focuses on the strategic interactions of courts, societal actors, and political institutions. This literature provides a fruitful framework within which to analyze judicial activity, in particular in the area of human rights.

In particular, comparative inquiries rely on a politically grounded understanding of court behavior that takes seriously the political constraints of even the most independent judiciaries. This is a constraint that can inform the international relations and international law literatures, which often instead bracket the question of domestic court behavior. Part of the reason for this disconnect is the perceived functional distinctions between international and domestic courts. Shapiro’s classic formulation of the court describes it as a triad where two actors seek a neutral third to adjudicate their dispute (1986). One of the main arguments against the efficacy of international tribunals is that they can play this adjudicative function, but that they lack direct enforcement power over state actors. While at first blush this seems like a meaningful distinction between international and domestic courts, it ignores the fact that domestic courts themselves lack enforcement power over state institutions. To be sure, domestic courts can order enforcement of rulings in disputes between two private domestic actors. As Staton and Moore rightly point out, however, the lack of a third party to enforce an international court’s decision applies equally to domestic courts when the state itself is a party to the dispute (2011, 560).

Holding neither the legislature’s power of the purse nor the executive’s power to compel, domestic courts have long held the reputation of the least dangerous branch, and rightly so (Bickel 1986; Hamilton 1966). They are similarly situated to international courts, in that enforcement of their rulings is outside their power. Courts gain their institutional power through
the long-term, strategic accumulation of legitimacy, often by ruling against government actors only to the extent that the overall population gains (Carrubba 2009; Ginsburg 2003). If domestic courts are to maintain power, they likewise must act strategically, not squandering legitimacy in quixotic attempts to enforce international ideals that may invite domestic backlash. Incorporating comparative accounts of court activity into explanations of international human rights compliance is therefore not only appropriate, but overdue.

Whereas many of the international relations theories on court-based compliance start their reasoning with the assumption of an independent judiciary, the judicial politics literature questions this assumption and instead focuses on the strategic behavior of courts. Kapiszewski (2011), for example, argues that courts base their decisions on a complex mix of concerns: ideology, institutional considerations, executive and legislative preferences, political/economic consequences, popular opinion, and legal concerns. The balancing of these interests in any one case leads to the court’s “selectively assertive” behavior—they sometimes endorse, sometimes countermand government policy. Variations of the strategic behavior model have also been used to describe behavior throughout Latin America. Helmke (2002) finds that in Argentina despite a lack of strong judicial independence judges were more likely to rule against the government in the latter’s waning days in power. Judges engaged in this “strategic defection,” she argues, precisely because it enhanced their institutional security with an incoming regime. Huneeus (2010) argues that Chile’s supreme court became more active in prosecuting human rights abuses as a means of seeking redemption for the judiciary’s own past failings and its complicity with the Pinochet regime. In her account, increased judicial activity is an...
outgrowth of the institutional need to protect the judiciary’s legacy, and may be limited to a specific, highly contingent area of rights litigation.

The theory presented here is compatible with these accounts and indeed builds on them. Like Kapiszewski, I argue that high courts consider a mix of factors when making decisions and that they act strategically in their decision-making processes. The account here differs, however, in that I argue for a much more dynamic approach on the part of courts. Courts are selective not only in their rulings, but also in their agenda setting. By choosing to hear select cases, to expand access to preferred actors, and to highlight some issue areas at the expense of others, courts limit those situations in which they will have to endorse government policies that are not in line with the court’s other concerns, such as public opinion and institutional strength. Both Helmke and Huneeus’s single-country accounts, meanwhile, can be seen as subspecies of the larger phenomenon explored here. The Argentine case presents a situation where a high court is able to balance increasing public support against a governmental actor. Chile follows a similar logic, wherein the high court perceives a specific subset of international legal obligations to be increasingly supported by the public, and the court therefore chooses to begin leveraging this public concern against government intransigence in furtherance of the court’s own institutional interests. The theory developed here builds on this judicial politics approach to courts as strategic actors rather than treating courts as unconstrained interpreters of legal issues. I develop this theory in the following section with an emphasis on three key variables: international sensitivity, adjudicatory diffusion, and institutional flexibility.
A Theory of Domestic Court Behavior

International Sensitivity

The first variable, international sensitivity, helps to explain court enforcement over time while also demonstrating a shortcoming in current theories of strategic court behavior. Consider the simplified policy space in Figure 1, adapted from Epstein, Knight, and Martin (2001). The horizontal line represents a domestic human rights policy space, with points to the right representing policies that are more restrictive of the right and points to the left representing policies more in line with international human rights commitments.\(^5\) A current domestic policy, representing the executive’s ideal policy point, is represented along the continuum as point E. In a state with an independent judiciary that is tasked with enforcing legal commitments, the court’s policy preference is indicated farther to the left at point C, representing a policy in compliance with international law. The median legislator’s ideal point is represented as point L. A domestic claimant then brings a legal challenge, arguing that international law requires overturning the domestic policy in favor of the international legal commitment (point C). According to a purely legalistic approach to analyzing court decision-making, one would expect the court to rule in favor of the claimant, overturning the domestic policy in favor of one in line with international law commitments.

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\(^5\) One could imagine, for example, points farther to the right representing restrictive policy positions on free speech, and points to the left policies more protective of speech. Alternatively, positions to the right could indicate policies refusing to acknowledge informed consent of indigenous groups to development on their lands, and policies to the left fully incorporating indigenous groups into decision-making practices. Etc., etc.
The outcome changes under the strategic court model. Although a court might prefer to set the domestic policy at its ideal point, it is also aware of institutional constraints. It is also aware that legislative actors have a policy ideal point at point L. As such, the indifference point for the political actors between the current policy and an unacceptably “international” court ruling would be represented by point I. Knowing this, the court is also aware that any ruling to the left of point I would invite backlash, which could take the form of a new law at point L as well the possibility of an undermining of the court’s institutional power. As such, a strategic court should rule at point I, closer to the international ruling and the court’s ideal point but not so far outside the legislative actors’ acceptable policy preferences so as to invite a response.
Most strategic accounts therefore conclude that the court in these situations can be expected to rule in favor of a policy position at point I, since it represents the policy closest to the court’s preferred outcome that is able to avoid legislative backlash. This analysis leaves a crucial factor unconsidered: the court’s legal and institutional legitimacy. To the extent that there is a discrepancy between points I and C, the court does more than abandon its policy preference—it also opens itself up to reputational challenges. Unlike in a purely domestic legal system, international law is cognizant of the legal decisions of international courts and peer courts in foreign domestic systems. As such there are alternative statements of law against which to judge the ruling. Even if courts ignore these international reputational stakes, they are nonetheless subject to having their legitimacy questioned by members of the domestic legal community and the public at large. The greater the distance between I and C, the greater the evident legitimacy cost to the court for capitulating to political actors. The greater the legitimacy cost, the greater
the incentive for the court to find a way either to avoid a broad ruling or to seek allies to bolster its position vis-à-vis a potential backlash.

Courts in democratic systems must base their legitimacy on non-majoritarian foundations. This “countermajoritarian difficulty” is well explored in the literature, and is not the focus of this dissertation. The countermajoritarian difficulty does, however, inform this theory as it highlights the problem courts face if they act either (1) fully in line with strategic motivations and thereby call into question their role as a unique institution or (2) in ways that are legally justified or even mandated but that run counter to aggregate public preferences. A full accounting of domestic court enforcement of international human rights law therefore must consider the degree to which any high court’s legitimacy is sensitive to international factors.

I examine this sensitivity as it operates along two main dimensions: the degree to which the high court is empowered by the legal setting to enforce international law, and the degree to which justices themselves are potentially concerned with international human rights law. Where international human rights are directly referenced in the constitution, or where the highest court is empowered to enforce international human rights law, the court’s legitimacy becomes intricately bound up with its ability and willingness to enforce international human rights law. If, on the other hand, a court is the product of a constitutional reform that is aversive to foreign influence (Scheppele 2003), the likelihood of international law serving as a legitimating basis is unlikely.

In addition to institutional prerogatives, a court’s international sensitivity is reflective of the professional and reputational concerns of justices. Where educational backgrounds have provided grounding in international human rights law, the justice is, ceteris paribus, more likely
to be able to draw on these resources. Where the justice herself considers participation in international forums, overseas teaching, or work in foreign venues to be part of her professional identity, this likewise indicates a heightened personal sensitivity to international considerations. The more justices share this international perspective, the more likely the court is to exhibit a concern for international human rights law in its judicial calculations.

These factors—institutional and professional—comprise the international sensitivity variable. Where neither the constitution calls on the court to enforce international human rights law nor the justices are predisposed to do so due to professional considerations, the court is considered “low” on this variable. Where both factors are positive, the court is labeled “high.” Where only one is present, the court is considered “moderate” in its international sensitivity.

Courts are rightly concerned about their institutional legitimacy, and they face challenges to this legitimacy from political actors as well as the broader public, who are tolerant of non-majoritarian institutions only to the degree that they are not hostile to broadly accepted policy goals. At the same time, the public may at times become a source of support to a court that is not constrained by an institutional structure that focuses review powers solely at the high court level. It is to this adjudicatory diffusion that I now turn.

*Adjudicatory Diffusion*

In addition to international sensitivity, the systemic locus of judicial power helps determine the willingness and capacity of domestic courts to enforce international law. The degree to which judicial review of government actions is dispersed throughout the judicial system is termed here simply “adjudicatory diffusion.” In this project I focus on two interacting
factors: first, whether or not various courts in the judicial system are empowered by the constitution, the law, or history to hear and rule on cases challenging government actions; second, whether as a practical matter the public is able to make use of this lever of power or whether it is instead restricted to a small portion of societal actors.

The first factors is what political scientists are generally referring to when they speak of concentrated versus diffuse systems. In court systems such as those in the United States or Argentina, the power of judicial review exists throughout the court system—all courts of general jurisdiction are empowered to review government actions, providing numerous points of entry to check government behavior. In others, this review power is concentrated along Kelsen’s prescribed lines, centralizing review in a constitutional court (Ginsburg 2003). In some systems, the degree of concentration is greater still, with review of certain governmental actions committed to a specialized chamber within a court.

The level of concentration is particularly important for the theory here, which builds on a strategic court model. In a legalistic model, where domestic enforcement is presumed, state ratification of international law and the presence of a strong domestic court are positive factors for international human rights enforcement; indeed, they are all that matter. Under such a view, a single constitutional court exercising judicial review is theoretically appealing, as it serves as a ready site for legal contestation, one that understands its role as policing the government and ensuring compliance with international law. Scholarly discussion of transjudicial networks, though proceeding from a sociological perspective, support the contention that judges’ may have increased awareness of their role as legal checks on government behavior.
A concentrated system is more problematic for a strategic theory. In concentrated systems the single apex court risks becoming highly politicized due to the nature of its mandate (Epstein, Knight, and Shvetsova 2001; Ginsburg 2003). In addition, because these politicized judicial actors are located in a single institutional site, political actors themselves are more readily able to shape the court’s membership. As Dahl (1957) noted over half a century ago in the United States, a court’s ideal policy point will only deviate from political actors until political actors have had the opportunity to appoint new judges—even in independent court systems. Indeed, this is one reason new democracies adopt constitutional courts; it is a relatively quick, easy way to ensure that relevant judicial decisions are made by individuals whose policy preferences approximate those of politicians (Ginsburg 2003). Diffuse systems of review disrupt this process; they provide less efficient principal-agent monitoring by politicians (Stone Sweet 2000, 134). In addition to making monitoring more difficulty, a diffuse review system also makes post-facto control harder: replacing all judges throughout a court system is simply not as easy as replacing those sitting in a single apex court.

Diffusion offers a second advantage less explored by the political science literature: the judicial system has the potential to become more relevant to diverse members of society. This suggests two systemic attributes of importance to an apex court that seeks to avoid backlash. First, the high court is able to draw on a much broader base of information when selecting and ruling on cases. Where courts throughout a state hear claims against the government, the apex court is better positioned to gauge the relative importance of issues and to determine the degree to which general consensus has or has not emerged. In short, adjudicatory diffusion allows the
judiciary to work as a learning system, and the apex court benefits from this elucidation of societal demand.⁶

Second, the high court may be better positioned to shape its interactions with the general population. Where litigants attempt to bring claims that are politically difficult, a diffuse system may provide the high court the ability to abstain from interceding against the government through procedural tools such as declining to certify an appeal. Alternatively, the ability to receive claims from throughout the system increases the relevance of the court system as a viable alternative to political action. In such a system, the high court may benefit from the increased salience of legal issues. Where society is more aware of legal issues, it also raises the stakes for political actors’ non-compliance with judicial rulings (Vanberg 2005). Indeed, it may also make it possible for the court to act in ways that are less passive than generally acknowledged, for example by actively attempting to publicize important cases (Staton 2006). Adjudicatory diffusion, then, points to a latent resource for the court: it provides for a potential steady flow of legal cases from which the court can choose, and it serves as a source of potential allies in politicized cases. As a result, diffuse systems should over time allow for greater enforcement of human rights claims against the government.

⁶ Judicial hierarchies can function as a learning system in terms of the creation, articulation, and dissemination of legal doctrine (Gewirtzman 2011). Here I suggest that the judicial hierarchy may also serve as a source of information beyond legal doctrine.
Institutional Flexibility

The theory’s third independent variable is the high court’s ability to control institutional rules governing its activities. Most current international relations theories discount the important distinction between substantive and procedural law at the domestic level. International relations and international law scholars have a keen awareness of the important interplay of the substance of domestic and international law, as represented by the large literature on transnational judicial process and dialogue. Few scholars have looked at the flip side of the coin: the procedural rules governing domestic hearings about legal obligations. In general, this task has been left to comparative and Americanist scholars. Tushnet (2009) examines macro-level procedural norms such as judicial review of statutes and horizontal effect7 of constitutional rights. Ginsburg (2003) discusses the effect on constitutional court jurisprudence of restricting court access to political institutions. Staszak’s research on retrenchment highlights the importance of procedural rules in determining the contours of the American judiciary (2010). In the international relations literature, meanwhile, any focus on procedure has been a regional affair. Perhaps the most important examination of procedural rules has focused on the constitutionalization of the European court system, beginning with Eric Stein’s (1981) classic article and continuing through Burley and Mattli’s (1993) reiteration of the importance of Article 177 of the Rome Treaty.8

7 “Horizontal Effect” refers broadly to court enforcement of public law protections to private actors, e.g., application of anti–race-discrimination protections to private business owners.
8 Similarly, Cichowski (2004) explores the use of Article 234 (the current designation of the former Article 177) to expand European governance of women’s rights. Keohane, Moravcsik, and Slaughter (2000) provide the classic account of the importance of access in the context of international and transnational legal disputes.
Alter and Helfer (2009) explore an analogous relationship between domestic court reference mechanisms to the Andean Court. This approach, however, focuses on procedural mechanisms linking domestic court systems, judicial actors, and legal claimants to international institutions. Below, I propose a further inquiry into purely domestic mechanisms that impact the development and enforcement of international laws within domestic courts. ³

By focusing on domestic institutional rules, we gain significant explanatory leverage. First, it allows a discussion of court enforcement to go beyond the well-worn territories of the European Union, where a much stronger history of institutional integration exists among member states and supranational institutions. The sui generis nature of the European system counsels against easy transference of the theories developed there to other regional systems, or to the international system generally, where institutional mechanisms linking local courts to international courts are less well developed or simply non-existent.

Second, and perhaps more importantly, a focus on domestic institutional mechanisms allows an examination of the ways in which courts are able to operate covertly. In particular this elucidates court behavior even where rulings are not taken and the court thereby avoids political backlash or public criticism. Laws prohibiting torture, protecting privacy, granting health care, etc.—these all comprise important legal rules that are likely to be not only substantively rich, but also relatively well known and debated in society. They form the focal points around which activists coalesce and political pressure builds. The law itself consists, however, both of these

³ To my knowledge, Lupu (2013) (referenced above) is the only international relations scholar to have engaged in this type of enquiry. His work emphasizes the important role of evidentiary standards in prosecuting human rights violations.
primary rules that govern society and what Hart (1997) calls secondary rules: the rules that govern primary rules. Rules governing access to courts, the ability to bring claims, the right to challenge a ruling, the determination of precedent—these secondary rules shape the ability to create and enforce primary rules, but because of their technical and at times opaque nature they are much less likely to attract broad-based public attention. The groups among whom these secondary rules do attract attention are invariably lawyers and judges, since it is the latter groups who are trained in the use of these elite tools.

I argue that domestic courts will have the greatest capacity to enforce international legal norms over the long term where the determination of institutional rules is left to the judiciary. Rules governing access vary according to legal family and local custom, and they include the rules governing standing, private prosecutions, joinder and intervention, pleadings, class actions, etc. (Chayes 1976; Cichowski and Stone Sweet 2006; Sikkink 2011). The specific configuration of access rules varies widely across legal systems and within systems across time and issue area. Furthermore, there is no clear logic linking different procedural norms to specific substantive areas of law. (I.e., broad standing is not necessarily a hallmark of environmental regulatory regimes; the restrictiveness of class action certification does not covary with fair wage regulations.) International treaties as well as non-treaty–based legal norms often aim to provide rights to individuals or to impose obligations on the part of states. When these substantive norms

10 In its most basic sense, standing refers to an individual’s ability to claim a justiciable harm. The international relations and comparative literatures have long recognized the importance of standing. See, e.g., Keohane et al (2000) and Epstein, Knight, and Shvetsova (2001). A court’s non-finding of standing is, however, only one of the many rules a court can use to restrict or expand its engagement with substantive issues.
are applied to individual domestic court systems, however, they encounter widely divergent procedural filters. In some states, access mechanisms may align with the actors or interests most likely to make a legal claim; in other states, individuals seeking to enforce the same treaty right may find that they lack appropriate standing in the domestic court system. In both systems, the level of judicial independence, traditionally defined, may be nominally identical. The ability of strategic actors to enter that system, however, will vary.

In a single time period these institutional rules will constitute relatively static frameworks reflecting the history of interplay between the judiciary and the political branches. This will result in differential local articulations of international legal norms. Take, for example, the ability of individuals to maintain a criminal cause of action against elected officials. Norm diffusion accounts of political leaders’ criminal liability argue that conceptions of official accountability may change a victim’s willingness or ability, from a cognitive standpoint, to frame an injury as a human rights violation. This is, however, only the first, tentative step in enforcing a legal right against government persecution (Felstiner, Abel, and Sarat 1980). What form a claim against the government takes depends on the institutional mechanisms available. Where domestic procedures allow only government officials to bring criminal complaints, victims will find themselves foreclosed from pursuing court action independently, and will instead have no choice but to rely on political actors’ willingness to pursue a claim on their behalf. The exact same injury may provoke a different response, however, where individuals are able to take advantage of private prosecution procedures. In such systems, victims will be able to pursue their claim through the courts, notwithstanding political hesitancy. Indeed, in such cases, the victim would be able to proceed unless and until the political branches mobilized to engage the judicial branch
directly through intervention in the individual case or through systemic restriction of judicial access.

These rules like many institutions are less “sticky” across long periods of time. Where these rules have been isolated from the political sphere, either through court reform that explicitly delegates the determination of institutional rules to the judiciary, or as a result of unchallenged historical legacy, courts are better able to exercise discretion and control litigants’ access to the legal system. I term this dimension of variation “institutional flexibility.” It is an amalgam of various factors but together represent a single characteristic: how much control does the court have over its own operations. While in some ways this may be related to the concept of judicial independence, it goes much further. It takes into consideration such aspects as how free the court is to alter its procedures, whether it is able to expand or contract its docket, whether it can determine what types of claims it hears, and how much control it has to bring external actors into the court system to augment its own capacities. In contrast, many measures of judicial independence instead cite more easily quantifiable system-wide measures such as the length of judicial appointment terms and the existence of salary protections (Cameron 2002; Cross 2010; Ríos-Figueroa and Staton 2008).

Institutional flexibility is important in that it indicates the courts’ ability to control its interactions with other political actors as well as other societal actors. With regard to political actors, courts face an important choice when deciding cases against the government: uphold the law as they perceive it, or defer to the policy preferences of the government. Either course of action offers the court risks and rewards, with questions of legitimacy being balanced against the potential for political backlash. At the same time, a court’s ability to control access allows it to
Chapter 1

Domestic Courts

manage this risk through an alternative mechanism: screening cases that provide the potential for conflict with powerful government officials. Where courts exercise control over institutional rules, they should have a greater ability to avoid cases that invite political retribution, maintaining power and building legitimacy over time (Epstein, Knight, and Martin 2001; Epstein, Knight, and Shvetsova 2001). Controlling procedural mechanisms also allows the court to alter the rules in ways that may be legitimacy-enhancing; inviting friends of the court briefs, joining cases, or certifying class actions are all mechanisms by which courts have broadened the field of stake-holders in cases thereby providing further capacity to avoid deferring to the government. This enables the court to engage in an iterative game that expands or contracts litigant access to courts, avoids or engages conflict with political actors, and shapes the degree and form of judicial involvement in international human rights enforcement and policy design.

**Implications**

Figure 3 combines these concepts and builds on the simplified policy space introduced above in Figure 2. This version complicates the initial policy space diagram by including the potential for varying levels of domestic court “self-censoring” through the strategic use of institutional rules. A court’s ability to engage in this dynamic behavior is determined by whether its institutional configuration is flexible or rigid (does it control procedures governing selection of appeals, is it free to alter standing rules, etc.). This ability is further constrained by the court system’s level of adjudicatory diffusion. A higher level of adjudicatory diffusion suggests a wider menu from which the court can choose: there are more potential cases seeking to enforce international legal norms. It also indicates a greater opportunity for the court in question to
balance public opinion against the threat of political backlash, since the court will have more information on the level of salience of any particular issue in society as well as a better understanding of the number of potential court allies. Whether or not the court allows these potential allies access to the court is determined by the court itself in a flexible system; hence, the horizontal lines between societal actors and the domestic court represent procedural screening mechanisms.

Figure 3: Strategic Court Decision-Making with Procedural Controls

Rulings to the left of indifference point “I” again suggest situations where the court’s ideal ruling might invite backlash from political actors. At the same time, international law, unlike domestic law, does not exist exclusively in a singular institutional framework. (Whereas
the United States Supreme Court may be the “final arbiter” of the law, domestic courts are only one of many competing “final arbiters” of international law.) As such, failure to rule consistently with the holdings of other courts (or with hierarchically superior courts in the case of supranational institutions) may invite accusations of court pandering more readily than in the purely domestic law situation. To the extent that the high court has a high degree of international sensitivity, the legitimacy threat is greater. As a result, any ruling to the right of point C in policy space implicate competing considerations for the court: on the one hand, rulings closer to point C are less likely to call into question the court’s “non-political” status; on the other hand, rulings closer to point C are more likely to invite political backlash that undermine the court’s strength. It is in these situations we should expect to see the court attempting to engage institutional mechanisms either to filter out claims or to balance the public against political actors.

Which of these options the court pursues depends on its institutional prerogatives and the distance between C and I. The potential legitimacy gap when ruling for the government as well as the likelihood of political backlash when ruling against the government both increase as the distance between C and I increases. As this distance increases, an institutionally flexible court has the option of engaging the public to the extent that it has indications that the public supports the court’s policy over the government’s. Alternatively, where no such public or civil society support is available, it should seek to filter the case (and similar cases) out of the system by manipulating procedures. This could take several forms: tightening standing requirements, reducing the applicability of a ruling, or even ceding jurisdictional turf to another institution. In short, the court should use institutional mechanisms to reduce the supply of judicial activity in ways that over the long term reduces the harm to the court’s legitimacy in the face of both
domestic and international audiences. Only where the court is both unable to engage in procedural manipulation and lacks public support should it risk a ruling that invites backlash or damages its legitimacy as a rule-of-law actor.

Based on this theory I make the following claims to be tested in this dissertation:

Claim 1: *The supply of rights adjudication is not directly reflective of the potential demand for litigation.* In institutionally inflexible systems, the legislature may change access procedures or court jurisdiction to prevent the court from enforcing international human rights law. In flexible systems the court itself may restrict access when seeking to avoid political backlash. In either case, the occurrence of human rights violations will not translate directly into legal claims, even when statutory or constitutional provisions might otherwise suggest broad access. This is intrinsically related to claim 2.

Claim 2: *Where a court enjoys a flexible institutional environment procedural rules will be epiphenomena of the court’s strategic legitimacy concerns.* Procedures governing access, adjudication, and remedies are often seen by scholars as predictive of the likelihood of rights enforcement. To be sure, this is true in situations where political actors have established these procedures and the procedures are governed by inflexible institutional arrangements. In contrast, courts that enjoy a flexible institutional environment are able to control access, adjudication, and remedies so as to further the court’s own concerns over institutional strength and legitimacy. In such situations, procedures are more appropriately interpreted as intervening variables, subject to manipulation by the court.

Claim 3: *A flexible institutional environment increases the likelihood that the court will successfully maintain or expand its enforcement role over time.* A court that lacks institutional
flexibility will be unable to screen the most contentious cases out of the system or to offer rulings that move in the direction of human rights compliance without being openly antagonistic to political actors. A court that possesses greater institutional flexibility should in contrast be able to use its flexibility to limit rulings while setting favorable precedent or to expand institutional capacity to oversee rights enforcement efforts. Flexibility may also allow courts to limit exposure to backlash in the face of unified political opposition to court interference. This leads to a paradoxical result: A court is more likely to increase compliance with international human rights law over the long term when it is able to do so selectively across issue areas in the short term.

Claim 4: *A diffuse adjudicatory environment will provide greater opportunities for the high court to avoid political backlash by balancing public concerns against political considerations.* Any court acting strategically should attempt to avoid overt political confrontations. If a court serves as the apex institution in an otherwise diffuse system, it gains information from throughout society. It can use this information to determine under what circumstances the court’s ruling will be in line with the public’s preferences. In such situations the court will be empowered to issue rulings against the government with diminished concern for political backlash, since political actors would in that scenario be operating against the public. In concentrated adjudicatory environments this is less likely, since the court lacks information on which legal issues are salient to the broader public.

Claim 5: *A court’s international sensitivity is more predictive of judicial enforcement of international human rights law than state ratification.* This is particularly true of courts that enjoy a flexible institutional environment. Internationally sensitive courts will be likely to
enforce human rights even if the treaties containing these rights have not been ratified or incorporated by the state. Conversely, a court that is not internationally sensitive will eschew international law considerations in favor of domestic contingencies. Of course, at early points of constitutional transformation these two factors might be linked (since ratification of human rights and reform of the court may occur as dual prongs of an attempted rights lock-in). Over the long run, however, an internationally sensitive court should continue to draw on international law—even if it has not been ratified—where opportunities present themselves.

Assessing Domestic Courts

To test these claims the dissertation proceeds as a nested analysis. A nested analysis allows the leveraging of the “distinct complementarities” and “synergistic qualities” of large-N and small-N analyses (Lieberman 2005, 440). Below I use a large-N analysis to explore the overall relations of the variables of interest and to provide an initial test of the claims listed above. Causal relationships are then explored using qualitative methods in the case study chapters.

Macro-Quantitative Analysis

The macro-quantitative analysis consists of two parts. First, a pooled cross-national analysis compares all states in the international system. Second, I employ a fixed-effects linear regression to explore within-country variation while controlling for country-specific unobservables.
In contrast to many prior explanations of human rights compliance, the theory tested here seeks to disaggregate domestic courts, both in terms of their institutional makeup and their relations to other political and societal actors within the state. The majority of research to date has treated domestic court systems uniformly. Within a single state, the level of judicial independence has been of primary concern. While undoubtedly important, the level of independence can mask variation in courts’ treatment of different issue areas, both in terms of the ability to hear cases and the willingness to offer rulings. Here, I control for judicial independence but focus on institutional configuration.

Specifically, I test here several hypotheses that are derived from the claims in the previous section. It should be noted that as with any quantitative analysis, the hypotheses only roughly approximate the much more nuanced concepts under consideration. Indeed, the theory predicts within-state variation that is not accounted for in state-wide measurements, and as such the macro-quantitative analysis focuses on only one level of analysis. Nevertheless, this provides an important initial overview of the variables of interest.

Hypotheses 1 and 2 focus on procedures and court flexibility in determining those procedures. In some states, access mechanisms may align with the activists or interests most likely to make a legal claim; in other states, individuals seeking to enforce the same treaty right may find that they lack appropriate standing in the domestic court system. Having more forms of standing, broader access mechanisms, etc., suggests at any given point in time activists are more likely to have their case heard. I have claimed, however, that this linkage is epiphenomenal where courts enjoy flexible institutional arrangements. I have further claimed that over the long term a court’s ability to define these procedures means it will be able to preserve its legitimacy.
and institutional strength and hence its ability to increase compliance over time. These two considerations provide the basis for two testable, complementary hypotheses:

*Hypothesis 1:* Court systems that employ a greater diversity of access mechanisms will allow for higher levels of state compliance with international human rights obligations. (It should be noted that a strong statistical association under hypothesis 1 would actually argue against my claim that procedures are epiphenomenal.)

*Hypothesis 2:* State compliance with international human rights law obligations will be higher where courts exercise control over procedural mechanisms.

Next, I have argued above that greater diffusion of adjudicatory power prevents easy political monitoring of the court and allows the court greater information on societal support for court intervention. As such, where concentration of this power is greater monitoring will be more effective, and compliance should be more elusive. This is represented in the following hypothesis:

*Hypothesis 3:* State compliance with international human rights obligations will be inversely proportional to the level of concentration of adjudicatory power.

Lastly, I argue that a court’s international sensitivity is more predictive of enforcement than is ratification. One component of international sensitivity is the degree to which the court is empowered or obliged to follow international law. I test this claim through the following two hypothesis:

*Hypothesis 4:* Compliance with international human rights obligations will be greater following ratification of human rights treaties. (As with hypothesis 1, a strong statistical
association would actually argue against my claim that ratification is itself not the primary factor motivating courts.)

Hypothesis 5: Compliance with international human rights obligations will be greater where the constitution provides that courts are responsible for enforcing international law.

I describe below the data and methodologies employed in testing these hypotheses and present an analysis of the macro-quantitative results. Descriptive statistics are provided in Appendix I for those variables used in the models.

Data and Variables

I construct my primary independent variables of interest from data in the Comparative Constitutions Project ("CCP") (Elkins, Ginsburg, and Melton 2010). A word of caution is required. These variables are admittedly weak proxies for the concepts under consideration. First, the variables rely on textual declarations in constitutions. This gives a rough proxy of initial political proclamations of support for a given principle, but fails to account for later drift in practice. Second, even if it were feasible to account for this shortcoming, the underlying concepts are nevertheless resistant to quantification. Standing, for example, is a highly nuanced concept both in legal theory and in legal practice, varying according to issue area. As such, any single numerical representation is bound to conceal a great deal of within-country variation. Nevertheless, the work here is an attempt to identify broad patterns, or at least to reveal episodes of deviation from theoretical expectations.

The ability of non-governmental actors to access the court system is important for testing the importance of procedural mechanisms. Here, I construct a proxy variable, “Access,” for this
concept using CCP variables indicating who can bring a judicial challenge to legislation. In some states, only members of the government or legislature have standing to challenge legislation. These states are considered the most restrictive in terms of access and given a score of 0. In other states, the level of access varies depending on whether lawyers, private citizens, or the courts themselves may initiate a court’s review of legislation. A state is given a score of 1, 2, or 3 depending on how many of these types of actors may begin the review process. For robustness checks, alternative constructions of this variable allocate points depending on which governmental actors have standing to initiate review, such as individual legislative chambers or members of the cabinet. In addition, I use data indicating whether a constitution provides for the writ of habeas corpus or amparo proceedings as alternative measures of access in robustness checks.

The theory presented also underscores the ability of the court system to control its procedural mechanisms. This in turn helps determine the legal system’s efficacy over the long term. To measure this I use a series of CCP variables that indicate the level of specificity that the constitution provides in terms of court opinions, specifically whether opinions must be written, and whether dissenting and concurring opinions are allowed or prohibited. The variable is an ordinal measure, with a higher score indicating more precision and therefore less court flexibility. The focus here is not on the final form of opinion mandated, but rather whether this decision is left to the courts. In the models below this variable is listed as “Court Procedural Restrictions” to clarify the predicted negative relationship between it and the outcome variable.

I construct the variable “Concentration” using the CCP data as an inverse measure of the level of diffusion of adjudicatory power within a state. Here, I measure concentration in terms of
the constitution’s designation of review to a single court. A national court system is designated as “concentrated” and receives a score of 2 where the constitution assigns power to a constitutional court, a supreme court, a constitutional council, or a specific chamber of a high court. A court system is considered “diffuse” and receives a score of 0 where review is permitted throughout the judicial system by any ordinary court. Lastly, systems where any ordinary court may undertake review but in addition the constitution provides for a high court (however designated), the system is treated as mixed and assigned a score of 1. In an alternative construction of this variable used in robustness checks, an additional point is added where a constitution requires ordinary courts to follow opinions of a single central court.

I use the CCP variable “Judicial Council” as an additional proxy to measure the degree to which the central government controls judicial appointments. This variable provides information on whether the constitution designates a judicial council for the court system. Judicial councils are used in numerous countries as a centralized mechanism to oversee the court system’s administration as well as, in some states, to regulate lawyers and judges.

Information on treaty ratification and constitutional incorporation is also coded to determine whether they offer independent explanatory value for human rights outcomes.\(^\text{11}\) I use the United Nations Treaty Collection data on ratification of the International Covenant on Civil and Political Rights (“ICCPR”) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”). These two treaties are particularly relevant to the question being examined here, as they both include provisions on personal physical integrity

\(^{11}\) In the pooled regression I condition inclusion of an observation on joint ratification of the ICCPR and the CAT. I test separately for the effect of ratification in the fixed-effects models.
and judicially enforceable rights. For each state in the regression analysis (and for each state-year in the fixed effects regression) I code the state as 1 if it has ratified the ICCPR and 1 if it has ratified the CAT. (Each treaty is indicated by a separate dummy variable.)

Finally, the CCP data provides variables that measure whether a state has incorporated treaties into the domestic legal structure via the constitution. Based on this data, I constructed a variable (“Int’l Law Constitutionalized”) that measures the degree to which international law has been formalized as a part of the constitution. Each state is coded along a seven-point scale, with the state receiving one point for each of the following: if the constitution refers to international law generally, treaty law specifically, or customary law specifically; if it incorporates treaty law; if it designates treaty law as superior to normal law; if it incorporates customary law; or if it designates customary law as superior to normal law. The theory claims that national courts are more likely to consider international law as a basis of legitimacy when the constitution requires or encourages compliance. This variable is a proxy for that sensitivity.

I rely on CIRI for my dependent variable, specifically the CIRI composite measure of physical integrity protections. This is an additive index that scores states on a continuum from zero to eight, with two potential points in each of four areas of protection: torture, extrajudicial killing, political imprisonment, and disappearances (Cingranelli and Richards 2010b). I use this measure for two reasons. First, it emphasizes those human rights that are theoretically judicially enforceable, as opposed to socio-economic rights, which have traditionally been considered
“non-justiciable.” Second, the CIRI coders are concerned with government practice as opposed to general conditions in a state. Since the focus here is on the contributions a court system may make to a government’s compliance with human rights norms, CIRI is an appropriate measure (Cingranelli and Richards 2010a, 411–12).

I include two sets of control variables in the models, beginning with variables related to a state’s political form and level of economic development. I use a dataset compiled by the Societal Infrastructures and Development Project (“SID”) (Nardulli, Peyton, and Bajjalieh 2012). The SID Project provides two variables that provide alternative measures of law-based societies. The first variable, “Legal Infrastructure,” measures a state’s capacity to educate lawyers and produce written dialogue on legal issues and generally provide the necessities of a robust legal order. The focus is on de facto measures of capacity that reflect long-term societal trends. The Legal Infrastructure variable provides a composite measure of legal educational access and periodical distributions across time, standardized to account for differences in population and logged to take account of the diminishing returns from ever-greater numbers of periodicals and educational institutions (Nardulli, Peyton, and Bajjalieh 2012, 33–41). I use this composite score as a proxy for the society’s legal capacity. The reasoning is that as the number of schools and periodicals increase the ability of a regime to restrict access to legal knowledge decreases, legal issues become more salient to the public, and the court has more allies on which it can call in contentious cases.

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12 This is, of course, an arguable point, and one that this dissertation examines in subsequent chapters.
The second SID Project variable, Legal Order, measures the legal order within a state. Legal Order is a de jure variable constructed using factor analysis from ten dummy variables. It measures a state’s formal commitment to the rule of law, as indicated by constitutional declarations of rights, judicial independence, and restraints on government action (Nardulli, Peyton, and Bajjalieh 2012, 26–27). I use this as a broad-based control variable for judicial independence.

To control for political regime, I include two measures from the Complete Dataset of Political Regimes, 1800–2007 (Boix, Miller, and Rosato 2013). First, I include the dichotomous Democracy variable, which codes for democracy only where both the executive and legislature were elected and where one party did not dominate the system. Second, I include in some models the Duration variable to control for the regime’s age. In addition I include the Polity III CENT variable, which codes each state along a three-point scale of political centralization as unitary (1), intermediate (2), or federal (3) (Jaggers and Gurr 1996). Since later versions of the Polity dataset failed to update this variable, I reviewed constitutional changes from 1995 to 2005 and updated the scores where appropriate. I also include a logged measure of the per capita gross domestic product from the World Bank for each year. Lastly, I include a state’s combined polity score from the Polity 4 dataset as an alternative measure of democracy in some models as a robustness check (Marshall, Gurr, and Jaggers 2009).

In addition, I include several control variables that address potentially important transnational and international influences. First, I include dummy variables that code for legal family. Here, a “legal family” refers to the broad-stroke designation of a state’s legal system as common law, civil law, Islamic law, customary law, or an admixture of more than one tradition.
Each tradition is included as a dummy variable for each state, and states with mixed systems are coded as “1” for each tradition from which they draw. The JuriGlobe World Legal Systems Research Group at the University of Ottawa is the source of this data. To the extent that a system’s designation captures some procedural aspects, such as the general applicability of rulings or the ability of courts to bind through precedent, a state’s adherence to a specific legal system may signify a greater or lesser likelihood of compliance. At the same time, the level of correlation between legal systems of the same tradition may be overstated. Given the development of distinct domestic legal cultures as well as the possibility of increased international cross-pollination of legal norms (Choudhry 2006), the continuing relevance of this variable is unclear. As a result, I run models both with and without these dummy variables to examine whether a legal family sufficiently captures the effect of the disaggregated measures represented by the independent variables.

In addition, I include dummy variables that indicate colonial past. While colonial past will correlate to a certain degree with legal family, it will also measure distinct influences. For example, Japan uses a civil code based largely on German and French models without ever having been colonized by either of those states. At the same time, the colonial past variable has the potential to capture similarities in imposed domestic institutions that may not be encapsulated in a variable that tracks the legal system only. The source of this data is the CEPII GeoDist dataset. Finally, in some robustness checks I include dummy variables for language. To the extent that courts are engaging in a transnational dialogue, sharing a common language should

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13 Available at: http://www.cepii.fr/anglaisgraph/bdd/distances.htm.
facilitate this process, providing courts with additional normative reinforcement for following international law as well as substantive and procedural tools with which to enforce compliance. Dummy variables are included for any language that serves as an official language in at least five states. The GeoDist dataset likewise serves as the source of this data.

Models

The unit of analysis is the country-year. I observe states over a period of twenty-five years, from 1981 through 2005. I run two sets of models. First, pooled OLS models test the effects of variables across countries. I attempt to control for relevant variation caused by economic and political development as well as colonial, linguistic, and legal heritage. Given the correlations among dummy variables for legal family, colonial history, and language, I run alternative models including each in turn. Of course, the OLS estimate will not be consistent to the extent that unobserved variables correlate with the error term, so I also conduct fixed-effects models to test within-country effects while controlling for unobserved heterogeneity. Unfortunately, panel data does not exist for all variables of interest, so in the fixed-effects model I focus on treaty ratification. The dependent variable in all models is the composite CIRI physical integrity rights index. Control variables for judicial independence, societal legal salience, GDP per capita, democracy, and length of democracy are again included.

Analysis

I report the results of the pooled time-series analysis in Table 1, below. The unit of observation in each model is the state-year, and the dependent variable in all models is the CIRI
measure of government respect for physical integrity. Since it is unlikely that court activity, economic growth, and political indicators would be immediately operative on the outcome of interest independent variables are lagged for two years. (Using different lag periods did not affect the significance or direction of the variables of interest.) Model 1 includes both democratic and non-democratic states in the regression analysis. Models 2, 3, and 4 restrict the analysis to democratic states.\textsuperscript{14} Since in this stage I am interested in testing the effectiveness of court enforcement of pre-existing treaty obligations, all models are conditional on state ratification of the ICCPR and CAT. In all models the Legal Order variable provides the control for judicial independence.

Hypotheses 1, 2, and 3 all deal with institutional variables specific to the domestic court system: hypotheses 1 and 2 with procedures and control over those procedures, and hypothesis 3 with adjudicatory diffusion. According to hypothesis 1 enforcement will be more likely where court systems employ a more diverse set of access mechanisms. Here the results are inconclusive. No statistically significant relationship is discernible when all states are included in the analysis. When the analysis is restricted to democracies, two out of three regressions find a statistically significant relationship in line with the hypothesis that greater access correlates with better outcomes. The finding of a statistically significant relationship would have been proof\emph{ against} my claim that a procedural rules are epiphenomenal in flexible institutional environments. The inconclusive results suggest the\emph{ possible} validity of my claim, and warrant further examination in the case studies.

\textsuperscript{14} The measure of democracy used both here and in the fixed-effects models is the dichotomous indicator from Boix, Miller and Rosato (2013).
Hypothesis 2 posits higher compliance where courts are in control of the procedural mechanisms by which they operate. In the models this relationship would be represented by a negative coefficient on the “Court Procedural Restrictions” variable. This negative relationship is seen in all four models, and the relationship achieves statistical significance in all models. Again this outcome should be interpreted conservatively as the proxy relies on a constitutional designation that covers only a very limited range of court activity.

Hypothesis 3 posits that enforcement of treaty obligations will be inversely proportional to the concentration of adjudicatory power within the state. Here, concentration is proxied by the constitutional assignation of review power to individual courts versus generalized review throughout the legal system. A higher score for “Concentrated Review” would be expected to correlate with a worse outcome in the regression. This result obtains in all models. Where the analysis is limited to democratic states the effect is stronger. While the mechanism cannot be thoroughly explored using this data, the results do suggest a plausible correlation as hypothesized.

Hypothesis 5 suggests that compliance will be greater where the constitution requires or enables the court to draw on international law as a source of law. Under the theory this would increase the court’s sensitivity to international law and thus its likelihood to consider international law in its legitimacy calculations. The results in three of the four models suggest a strong, statistically significant relationship. Although not conclusive, the results provide for the possibility that constitutionalization is an effective means of incentivizing court-based compliance efforts.
Table 1: Pooled Time-Series Models

<table>
<thead>
<tr>
<th></th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Access</strong></td>
<td>.076812 (.0829905)</td>
<td>.2109096 (.0973708)</td>
<td>.2371523 (.09763)</td>
<td>-.0218872 (.0885172)</td>
</tr>
<tr>
<td><strong>Court Procedural Restrictions</strong></td>
<td>-.3204998*** (.0638766)</td>
<td>-.2411431*** (.0679362)</td>
<td>-.1807916 (.0715765)</td>
<td>-.1434194*** (.0631326)</td>
</tr>
<tr>
<td><strong>Concentrated Review</strong></td>
<td>-.279592*** (.074477)</td>
<td>-.5398401*** (.1123028)</td>
<td>-.539733*** (.1115433)</td>
<td>-.5574976*** (.099854)</td>
</tr>
<tr>
<td><strong>Judicial Council</strong></td>
<td>-.0417105 (.1238648)</td>
<td>-.5296119*** (.1617633)</td>
<td>-.4077099*** (.1643203)</td>
<td>-.8736203*** (.1482507)</td>
</tr>
<tr>
<td><strong>Int’l Law Constitutionalized</strong></td>
<td>.1520848*** (.0339483)</td>
<td>.1640441*** (.0418352)</td>
<td>.0966316*** (.0459839)</td>
<td>.0077718 (.0402906)</td>
</tr>
<tr>
<td><strong>Legal Infrastructure</strong></td>
<td>.1316544** (.0548784)</td>
<td>.0873887 (.0608781)</td>
<td>.0578536 (.062119)</td>
<td>.2770656*** (.0565764)</td>
</tr>
<tr>
<td><strong>Legal Order</strong></td>
<td>-.1635477** (.0773184)</td>
<td>-.4647751*** (.1009414)</td>
<td>-.4506292*** (.1008528)</td>
<td>-.1810274* (.0934262)</td>
</tr>
<tr>
<td><strong>Democracy</strong></td>
<td>1.705496*** (.1320607)</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td><strong>Time as Democracy</strong></td>
<td>–</td>
<td>-.0087807*** (.002799)</td>
<td>-.0079242*** (.0031728)</td>
<td>-.017571*** (.0027887)</td>
</tr>
<tr>
<td><strong>Federal System</strong></td>
<td>.0023829 (.006763)</td>
<td>.008552 (.0180601)</td>
<td>.0053413 (.0179864)</td>
<td>.0025282 (.0159964)</td>
</tr>
<tr>
<td><strong>ln(GDP per capita)</strong></td>
<td>.3954079*** (.0464986)</td>
<td>.5290104*** (.0607693)</td>
<td>.5139472*** (.0686444)</td>
<td>.5397382*** (.0713589)</td>
</tr>
<tr>
<td><strong>Common Law</strong></td>
<td>–</td>
<td>–</td>
<td>-.9597289*** (.2789632)</td>
<td>–</td>
</tr>
<tr>
<td><strong>Civil Law</strong></td>
<td>–</td>
<td>–</td>
<td>-.8097778** (.3801555)</td>
<td>–</td>
</tr>
<tr>
<td><strong>UK Colony</strong></td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>-.255192 (.2032352)</td>
</tr>
<tr>
<td><strong>French Colony</strong></td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>1.897332*** (.3100631)</td>
</tr>
<tr>
<td><strong>Spanish Colony</strong></td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>-1.800952*** (.1781625)</td>
</tr>
<tr>
<td><strong>Constant</strong></td>
<td>.9965777*** (.4152828)</td>
<td>3.213022*** (.5572165)</td>
<td>4.379348*** (.6569303)</td>
<td>3.568008*** (.6328145)</td>
</tr>
</tbody>
</table>

*N = 1072
*R² = .42

*p<.10, **p<.05, ***p<.01

The fixed-effects models only test the hypothesis 4 expectation that compliance with international human rights obligations will be greater following ratification of human rights obligations.
treaties. The unit of observation is again the state-year, and the dependent variable in all models is the CIRI measure of government respect for physical integrity. The variables measuring institutional factors (access mechanisms, adjudicatory concentration, procedural autonomy, federalism) and transnational issues (legal family, language, and colonial history) do not vary over time by state and are therefore not included in these models. All models include variables for ICCPR and CAT ratification. Model 5 examines all states for which data is available from 1981–2005. Model 6 examines only those states that are coded as democracies and controls for time as democracy. Model 7 again conditions the analysis on democracy, but examines whether marginal increases in the level of democracy continue to have an effect on compliance even within this subgroup. Results are provided in Table 2, below.

Treaty ratification does not seem to have a consistent effect across models. This should not, of course, be taken as evidence for the claim that ratification is not a primary predictor of court behavior. Rather, the lack of a strong finding suggests the likelihood that more complex intra-case factors are needed to explain the relationship between treaty ratification and compliance. This is by no means a controversial finding, and highlights the ongoing debate in the literature over the independent utility of treaty ratification. It does, however, allow for the possibility that courts are able to draw on international law in ways not consistently constrained by ratification patterns.

The extent of a state’s legal infrastructure is positively and significantly correlated with a higher predicted value on the CIRI physical integrity scale. Although this variable is not linked to any specific hypothesis, the result does indicate the importance of legal salience for compliance. This suggests the importance of examining the link between courts and society in
the case studies. This finding holds among all states as well as within the subset of primary interest, democratic states.

The legal order measure suggests that a formal commitment to judicial independence specifically and the rule of law generally does not imply a greater commitment to compliance with human rights norms; on the contrary, this formal commitment may correspond to a practical inability or unwillingness to comply. The length of democracy is also statistically significant and negative, although the effect seems minor compared to other factors.

Table 2: Fixed-Effects Models

<table>
<thead>
<tr>
<th></th>
<th>Model 5</th>
<th>Model 6</th>
<th>Model 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICCPR Ratification</td>
<td>-.3970242***</td>
<td>-.0004327</td>
<td>-.2045228</td>
</tr>
<tr>
<td></td>
<td>(.0904295)</td>
<td>(.1237831)</td>
<td>(.1254226)</td>
</tr>
<tr>
<td>CAT Ratification</td>
<td>-.145495**</td>
<td>.2254757**</td>
<td>.2543925***</td>
</tr>
<tr>
<td></td>
<td>(.0730093)</td>
<td>(.0950289)</td>
<td>(.0936406)</td>
</tr>
<tr>
<td>Legal Infrastructure</td>
<td>.3521893***</td>
<td>.2882268**</td>
<td>.2997734**</td>
</tr>
<tr>
<td></td>
<td>(.1272209)</td>
<td>(.1290728)</td>
<td>(.1270579)</td>
</tr>
<tr>
<td>Legal Order</td>
<td>-.2286597***</td>
<td>-.343448**</td>
<td>-.4052813**</td>
</tr>
<tr>
<td></td>
<td>(.08888289)</td>
<td>(.1624084)</td>
<td>(.1600812)</td>
</tr>
<tr>
<td>Democracy</td>
<td>.8694126***</td>
<td>-.1422729***</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.0876487)</td>
<td>(.0204865)</td>
<td></td>
</tr>
<tr>
<td>Time as Democracy</td>
<td></td>
<td>-.054101***</td>
<td>-.0586062***</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(.0069034)</td>
<td>(.0068231)</td>
</tr>
<tr>
<td>ln(GDP per capita)</td>
<td>-.0836085</td>
<td>.2081977**</td>
<td>.1856556*</td>
</tr>
<tr>
<td></td>
<td>(.0662832)</td>
<td>(.1045618)</td>
<td>(.1029664)</td>
</tr>
<tr>
<td>Constant</td>
<td>5.142114***</td>
<td>5.816106***</td>
<td>5.257543***</td>
</tr>
<tr>
<td></td>
<td>(.5354177)</td>
<td>(.8363755)</td>
<td>(.8282361)</td>
</tr>
<tr>
<td>N</td>
<td>3540</td>
<td>1682</td>
<td>1681</td>
</tr>
<tr>
<td>$R^2$</td>
<td>.10</td>
<td>.10</td>
<td>.07</td>
</tr>
</tbody>
</table>

*p<.10, **p<.05, ***p<.01

The purpose of the macro-quantitative analysis has been to provide a general overview of the effect of legal institutional variables on compliance with international law. While the quantitative analysis cannot provide definitive support for my claims, it does suggest their plausibility. In addition, a large-N analysis of this sort should be interpreted conservatively for
two reasons. One, the measures used are statewide variables, and as such mask a significant
degree of variation within states. Two, other than the legal infrastructure measure, all measures
are based on constitutional indicators. These textual designations and other numerical indicators
are less likely to reflect institutional changes that arise in processes of intercurrence among
institutions with overlapping and often contested areas of competence. As such, the statistical
analysis should be seen as a macro-level hypothesis-testing mechanism. The correlation of
certain indicators with better human rights outcomes does not prove causality, but instead
suggests the plausibility of a linkage. It is left to the case studies in chapters two through four to
provide a more nuanced picture of causality and of change over time within systems.

Case Studies

Each case study focuses on an individual state and the willingness and ability of the
highest court to engage in enforcement of human rights obligations under international law. The
first case study examines the Colombian Constitutional Court (the “CCC”) during the twenty
years following its creation in 1991. The second study examines the South African Constitutional
Court (the “SACC”) in the twenty years following that court’s establishment during the
transition from Apartheid in 1993. The third and final case study examines the Mexican Supreme
Court of Justice of the Nation (the “SCJN”) for the twenty years following major court-
strengthening reforms in 1994.

These courts were chosen because they exhibit a high degree of variation in their
enforcement of international human rights law over the twenty years of study as well as variation
on the key independent variables. In addition the case studies were selected for their potential to
shed light on this theory’s validity vis-à-vis other political science theories that seek to explain court enforcement patterns. The CCC was chosen as a least-likely case. The CCC and its justices have enjoyed reputations as strong international human rights enforcers, and the Colombian Constitution allows for a high degree of court referencing of international and foreign law. Attitudinal theories that predict courts act in line with sincerely held preferences, as well as theories that predict that sincere legal readings will guide court rulings would thus both predict a court that consistently rules in favor of international human rights law. Strategic behavior of the type predicted by my theory should be extremely unlikely. The South African case meanwhile allows testing of the theory alongside those explanations of court behavior that suggest a court’s ability to rule is conditioned by the occurrence of fractured government or veto points. The SACC’s reputation as a relatively reliable enforcer of international human rights law during a twenty-year period of one-party dominance suggests greater nuance. Lastly, the Mexican SCJN serves as a negative case for the majority of years under consideration. Despite a court reform that greatly strengthened that court’s independence from political actors, the SCJN has until relatively recent failed to emerge as a venue for meaningful international human rights enforcement. It also represents a case with internal variation on the independent variable of international sensitivity, beginning rather low and increasing in later years. The case study attempts to explain how and to what extent the theory can account for the SCJN’s changing role over time.
My theory claims that a domestic court’s docket does not necessarily reflect the underlying societal potential for judicial protection of human rights abuses. For example, if a court successfully restricts access in one area of the law, litigation attempts will be thwarted without the court offering a ruling either for or against the government. As a result, any meaningful inquiry into the domestic court’s institutional output cannot consist merely of a review of decisions. Instead, I proceed so as to test the claim that the court may hear and decide cases in certain issue areas, avoid hearings in other areas, and encourage increased litigation in yet other areas of the law.

Methodology is consistent with this claim that the court’s “supply” of litigation is not necessarily reflective of litigant “demand.” To account for this potential incongruence I begin each case study by determining areas of international human rights law where a state’s compliance is lacking. I review human rights reviews by governmental, non-governmental, and international organizations to determine potential areas of rights litigation. The reviews consisted of United Nations reports, United States Department of States reports, and annual country reports.
by Human Rights Watch and Amnesty International for a two-decade period following court reform in each state. I then chose two of the most regularly referenced areas of rights violation in each state. In each subcase I then explore whether and to what extent the courts become engaged in each area of the law.

This yields a complete set of six country/issue-area subcases for comparison, listed in Table 4. The examination of each state includes one subcase from an area of law that could be considered a first-generation human right and one from an area that is more properly categorized as a second- or third-generation right. This was the result of the methodology described in the preceding paragraph as opposed to an intentional restriction on subcase selection. Nevertheless this results in even greater variation within each state case study and greater ease of cross-country comparison.

Table 4: Subcases

<table>
<thead>
<tr>
<th>Court</th>
<th>First-Generation Right</th>
<th>Second-/Third-Generation Right</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Colombian Constitutional Court</strong></td>
<td>Extrajudicial Killings</td>
<td>Displaced Persons</td>
</tr>
<tr>
<td><strong>South African Constitutional Court</strong></td>
<td>Criminal Proceedings</td>
<td>HIV Treatment</td>
</tr>
<tr>
<td><strong>Mexican Supreme Court of Justice of the Nation</strong></td>
<td>Impunity</td>
<td>Indigenous Peoples</td>
</tr>
</tbody>
</table>

Within each subcase I examine attempts by actors to develop and enforce international legal obligations through the courts. At this stage I review primary and secondary materials including newspaper articles, government reports, court cases, case reporters, government
gazettes, and academic articles. In each subcase I use these materials to test the theory by examining the degree to which international law sensitivity, adjudicatory concentration, and institutional flexibility account for the court’s willingness and ability to serve as an enforcer of international human rights law.\textsuperscript{15}

The Colombian case study highlights the important role adjudicatory diffusion and institutional flexibility can play in enabling a court to selectively enforce human rights even when that court is highly sensitive to international law considerations. The degree of institutional flexibility is moderate, varying across issue areas; it is clear that where this flexibility exists the CCC has been able to use it either to avoid issues or to extend its capacities. The CCC’s effectiveness is greatly enhanced by a diffuse adjudicatory environment that provides constant feedback on the relative importance of issue areas but also empowers the court vis-a-vis political actors by increasing the role of the judiciary in everyday citizens’ political calculus.

The South African Constitutional Court exhibits a distinct pattern of rights enforcement. The lack of adjudicatory diffusion has prevented the SACC from nurturing any broad-based public engagement with the judiciary, depriving the court of the sort of public support structures seen in Colombia and that might otherwise inoculate the court against political attack. Despite the concentration of adjudicatory power in a single, easily monitored apex court, the SACC has nonetheless been able to make use of an extremely flexible institutional environment to reduce the number of confrontations with the overwhelmingly dominant ANC. This has likewise been

\textsuperscript{15} It should be noted that the Colombia case study was also informed by a limited number of interviews with activists and state officials during a period of exploratory field study in Bogotá.
tempered by the Court’s moderate sensitivity to international law, which allows it to overtly weave into its decisions domestic concerns arising out of the country’s difficult history.

The Mexican SCJN has trod the most difficult path. At first glance this court’s limited role in international human rights law enforcement might be seen as a result of its relatively low international sensitivity. A deeper investigation reveals however that even when the SCJN has signaled a willingness to enforce human rights it has struggled to do so. Ultimately the moderate level of adjudicatory diffusion coupled with an extremely rigid institutional environment prevented the high court from escaping political monitoring or effectively engaging the public.

These three courts demonstrate the complex interplay of the variables under consideration in this dissertation. At the same time, the project undoubtedly begs the question of how one defines a successful domestic court. Indeed, it is reasonable to question whether a domestic court that eschews its enforcement role in select areas of international human rights norms is in fact playing a meaningful rights protecting role. It is important to remember, however, that each court operates in a transitional regime, and often under circumstances that would test the institutional capacity of even the oldest, most respected courts. As such, I argue that even though these three courts have been constrained, they have over time increased the likelihood of pro–human rights outcomes.

**Contributions**

It is important to recognize what this study does not attempt. First, I make no claim to a full accounting of the myriad paths through which international law can effect change in a domestic system. The focus here is on domestic courts and their ability to contract, expand, and
morph the implementation of rights under international law. I do not attempt a systematic accounting of civil society groups’ use of those claims to influence public opinion or to shame governments. Nor do I examine local activists’ use of courts to create and mobilize coalitions or alter bureaucratic agendas. While these legal mobilizers undoubtedly play a part in the larger story of rights enforcement, here they are bit players; judges and politicians have the starring roles.

Second, this study also limits itself to claims against governments. In various areas of law, courts may have their greatest impact when litigation targets private actors\textsuperscript{16} through the horizontal enforcement of laws and regulations. Nevertheless, for two reasons I maintain my focus on litigation in which the government is a party. First, the present theory seeks to explain judicial behavior across various issue areas as part of a single theoretical framework. As such it makes sense to rely uniformly on cases in which the government is a party, as this removes from consideration an unnecessary confounding variable and keeps comparative cases as structurally similar as possible. (While certain types of rights cases, e.g., racial discrimination, might involve purely private actors it is difficult to imagine a purely civilian–civilian case involving presidential powers or military abuses.) Second, cases in which both parties are private actors reflect meaningfully distinct power relationships than those involving the government. Where both parties to a suit are private actors the court speaks for the state and can theoretically call on the police and military to enforce its decisions. Where one party is the government, however, the court cannot assume state actors will enforce a ruling. It is not clear that the current theory would

\textsuperscript{16} Gauri and Brinks (2008, 9), for example, find that claims against the government represent a minority of judicial attempts to enforce socioeconomic rights.
apply with equal force in the context of purely private disputes, and so I do not attempt theoretical shoehorning.

It is my hope that this dissertation will contribute to several theoretical and empirical inquiries in international relations and international law. First, it addresses unexplained variation by leveraging comparative case studies more extensively, revealing variation both across and within states. The majority of judicial politics literature refrains from either cross-national or within-country comparison. Kapiszewski and Taylor (2008) find, for example, that more than two thirds of judicial politics literature focusing on Latin America examine only one country. Moreover within these studies, judges and judiciaries are seen as acting consistently across legal issues. As Huneeus notes, “Studies of foreign systems…have tended to emphasize a single, coherent judicial view on law and judging, with judges as passive recipients of that view” (2010, 219). This project addresses the first of these issues by conducting comparative analysis across two regions and three states; it addresses the latter issue through an examination of differing judicial enforcement patterns across issue areas within each of the three states.

Second, I increase our understanding of courts by treating judicial actors as entrepreneurs. Current theories focus on variations in ratification patterns, the nature of specific human rights, or the motivations and strategies of activists. In each account, courts are passive institutions that others use instrumentally. Courts are indeed recipients of litigant claims, but I show that they also transform those claims, both in terms of their treatment of individual cases and their use of those cases to shape legal and policy outcomes over the long term. Judges act in ways that create opportunities for themselves and for human rights enforcement by crafting procedures and forging new autonomies.
Lastly, my theory moves beyond the notion that the law is either purely non-political or simply another field for politics. Courts act strategically, but they also take law seriously. Any court that failed to treat law as a unique field of inquiry would quickly find itself without a claim to legitimacy in a democratic system. This confluence of strategic behavior with legal normativity also means that political considerations ensconced in law at one point in time shape the likelihood that legal tools will be available in a later period. In this way the law is inherently path dependent, focusing on legislative intent, the development of rules, and the importance of precedent. By taking into account the hybrid nature of law and legal action, my theory is better able to address variation in state compliance with human rights obligations by recognizing that courts are both bound by the law but may also be able to manipulate its articulation at key moments.

For scholars and advocates of international human rights law, the assumption is often that better doctrine leads to better outcomes. My research sheds light on when this is true for international law that enters the domestic system, and what institutional factors may improve the likelihood of normatively desirable outcomes. When that occurs varies widely by state and by issue area, as will be seen in the case studies.
Chapter 2: Colombia
Selective Enforcement

Article 22: Peace is a right and a mandatory duty.\textsuperscript{17}

Introduction

In 1990, in the midst of a national state of emergency that saw three presidential candidates assassinated, President César Gaviria called for the creation of a Constituent Assembly. The goal was clear: write a new Constitution that would strengthen state institutions and provide a new framework for citizen-government relations. By 1991 the arduous task was completed, and representatives of the people of Colombia had inaugurated a new political settlement that transformed Colombia from an \textit{Estado de Derecho} (rule of law state) to an \textit{Estado Social de Derecho} (a social rule of law state). This new constitution incorporated a broad panoply of socioeconomic and political rights, bound the state to international human rights and humanitarian law, granted unprecedented citizen access to the court system, and created a new Constitutional Court to enforce these new protections.

On paper.

Two decades later, Colombia is home to the planet’s largest internally displaced population\textsuperscript{18} and plays host to human rights and humanitarian law violations resulting from

\textsuperscript{17} Political Constitution of Colombia (1991). Unless otherwise noted, all translations are the author’s.
decades of civil conflict. Yet Colombia has also made unquestionable progress since the adoption of the 1991 constitution. Some rebel and paramilitary groups have disarmed, the government is engaged in an ongoing peace process, and the country has seen a flourishing of judicial activity aimed at protecting many of the rights promised in the new constitution.

Much of this activity is due to the clear emphasis the new constitution put on judicial review of legislation and executive decrees and compliance with international human rights obligations. At the time of the new constitution’s adoption, Colombia had spent 35 of the previous 42 years in a “state of exception.” These states of exception, in which constitutional protections and international human rights were often suspended, were not subject to judicial oversight in the years leading up to 1991. On the contrary, the pre-1991 Supreme Court considered review of states of exception to be a political matter for Congress and the executive.\(^{19}\) This changed under the new constitution, with the new Constitutional Court exercising mandatory review of legislation and presidential decrees of states of exception. Unlike its predecessor court, the new court has often overruled states of exception as being unwarranted by facts on the ground (Uprimny 2007, 51).

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\(^{18}\) As of 2011 the internally displaced population was estimated at anywhere between 3.9 and 5.3 million, or between 8 and 11% of the Colombian population. Internal Displacement Monitoring Center, *Global Overview 2011: People Internally Displaced by Conflict and Violence*, April, 2012.

\(^{19}\) The Supreme Court preceded the Constitutional Court as the primary judicial body exercising oversight in the domestic political system. The 1991 Constitution allocates judicial powers to a national system composed of the Supreme Court (Articles 234–235), the Council of State (Articles 236–238), the Constitutional Court (Articles 239–245), the Prosecutor General (Articles 249–253), the Superior Judicial Council (Articles 254–257), and various tribunals with special jurisdiction, such as indigenous peoples’ tribunals (Articles 246–248).
Alongside this mandatory review has come a massive increase in citizen use of the court system to protect their rights under the constitution. In terms of citizen access, the new *acción de tutela* is arguably the most important of the new procedures inaugurated in 1991. This protective action allows any citizen to file a petition with any court in the country without need of an attorney when a fundamental constitutional right is threatened or violated. The petitioned judge is legally bound to prioritize the petition, rule on it within ten days, and provide an order of relief where appropriate. The mandate is broad, with no clear restriction on what the judge may order to ensure that a citizen’s enjoyment of the fundamental right is restored (Cepeda-Espinosa 2009). These new powers have resulted in a Constitutional Court that commentators have described as “hyperactive” (Gloppen et al. 2010, 52).

**Case Selection and Methods**

In the pages that follow I explore the theory proposed in Chapter 1 in the context of the Colombian court system, with a focus on the Colombian Constitutional Court. For purposes of my research Colombia serves as a least-likely case (George and Bennett 2005, 121). The CCC and its justices all enjoy reputations as strong international human rights enforcers, and the Colombian Constitution allows for a high degree of court referencing of international or foreign law. The Colombian judiciary moreover has historically enjoyed a reputation as a relatively independent actor compared to other Latin American states (Cifuentes Muñoz 2002). The establishment of the Constitutional Court built on this tradition, with broad incorporation of

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20 Hereinafter referred to simply as the “tutela.”
international human rights into the constitutional framework. Lastly, the Constituent Assembly that drafted and adopted the constitution represented a diverse group of societal stakeholders,\textsuperscript{21} indicating widespread support for this incorporation of human rights protections (Uprimny 2007, 59).

The CCC’s reputation as a strong rule-of-law actor with a history of judicial independence suggests a court that is able to rule without taking into account political considerations or public concerns. The court’s legitimacy is beyond reproach on the domestic scene, and members of the Court should therefore feel institutionally secure. These factors all suggest that the CCC should consistently take an activist stance and rule in favor of international human rights commitments. This prediction is the same under both attitudinal theories that predict courts act in line with sincerely held preferences, as well as under those theories that predict that sincere legal readings will guide court rulings. Strategic behavior of the type predicted by my theory should be extremely unlikely.

I argue below, however, that this is the behavior exhibited by the CCC. The Court’s legitimacy is highly sensitive to international human rights law issues, meaning that the Court is predisposed to rule in line with these legal commitments. At the same time, the high level of adjudicatory diffusion and the moderate degree of institutional flexibility condition the manner in which the Court goes about crafting its decisions. This allows the CCC to take into consideration concerns of political actors and the public and to engage selectively in the enforcement of

\textsuperscript{21} This diversity of interests was, paradoxically, the result of low turnout (roughly one quarter of eligible voters) in elections to the representative assembly that drafted the new constitution. As a result of this low turnout, 40% of the representatives were from outside the traditionally dominant Liberal and Conservative parties (Schor 2009, 185).
international human rights law. As a result Colombia also serves as an appropriate case for testing my theory because of within-case variation on the dependent variable. As will be explored throughout this chapter, different areas of the law in Colombia exhibit varying degrees of court-centered human rights enforcement, both in terms of court willingness to rule as well as the effectiveness of court-directed compliance measures. This explains variation in the disparate patterns of CCC enforcement of the two legal issue areas under consideration, internally displaced persons (“IDPs”) and extrajudicial executions. This within-case variation allows for a richer understanding of the processes at work in determining outcomes. In this analysis I follow what George and Bennett refer to as the “method of structured, focused comparison” (2005, 67). In this method questions reflective of the research objective guide data collection so that the researcher can conduct systematic comparison of disparate cases.

In terms of research strategy, I begin by determining two areas of international human rights law where a history of noncompliance suggests a high probability that victims and activists could engage in litigation. At this stage I review human rights reports by governmental, non-governmental, and inter-governmental organizations. Based on this review I select two issue areas to examine based on their sustained relevance to human rights observers: the conditions faced by IDPs and extrajudicial killings by the Colombian military establishment.

I then proceed to the second stage of data collection, which includes a review of primary and secondary literature on Colombian court rulings and human rights compliance in English and Spanish to determine relevant cases and trends within each subcase. I rely extensively on academic writing as well as governmental and non-governmental reports. I then expand my research to include news articles, government gazettes, and legal documents in order to trace the
development of the human rights situation on the ground, court intervention (or lack thereof) in each issue area, and the government response. Lastly, I supplemented this with approximately twenty semi-structured interviews with actors in the Constitutional Court as well as with academics, bureaucrats, and legal activists. The diversity of sources was intended to capture a broad range of opinions on the activities of the CCC, rather than relying exclusively on the magistrates’ own potentially biased beliefs about the court’s role and operations.

I close this section with a final note on the Colombian case. The depth of international law’s entrenchment in the Colombian legal system presents a special conceptual challenge: the demarcation between international and domestic law is practically nonexistent. This is a double-edged sword for any empirical researcher testing the policy relevance of international legal obligations. On the one hand, it allows certain questions of endogeneity to be taken off the table: While treaty ratification invariably brings into question whether compliance is exogenous to ratification, in the Colombian case the CCC is constitutionally empowered to incorporate international law into its legal interpretations, offering the opportunity for a non-political incorporation of human rights obligations. International court rulings, doctrinal developments at UN bodies, development of customary law, and legal interpretations of peer courts in other states are all directly invokable by the Constitutional Court without intervening political processes. To be sure, treaty law remains a primary source of the legal obligations espoused by the CCC, and a complete list of these major human rights obligations is included in Appendix II.

The deep integration of international law into the domestic system also complicates any attempt to draw clear lines of causality between international law and domestic outcomes. While I find no incontrovertible “smoking gun” linking an international commitment to a domestic
decision, nor do I think such clarity is practically possible or integral to the theory. Courts are quite clever in finding domestic sources of law to justify rulings while neglecting to cite known international precedent. They are equally adept at strategically drawing on foreign and international law to bolster the legitimacy of rulings that are otherwise motivated by domestic contingencies (Roy 2004; Smithey 2001). Here the benefits of a small-N, qualitative investigation become readily apparent. By tracing domestic processes I am able to present evidence to support the notion that international law helps determine the Court’s ideal point but also how outcomes are tempered by domestic political considerations.

**Theory Applied to the Colombian Case**

Before proceeding to the subcases I position the Colombian Case in the dissertation’s theory. The theory posits that a court’s enforcement role will depend on the high court’s sensitivity to considerations of international human rights law, the degree of adjudicatory diffusion in the court system, and the level of institutional flexibility. The theory further posits that a high court is most likely to maintain or expand its ability to enforce international human rights law when it scores highly on each of the three variables. The following sections explore each variable as it applies to the CCC. In summary, the CCC is best characterized as highly sensitive to international human rights law considerations, as presiding over a court system with a high degree of adjudicatory diffusion, and as possessing a moderate degree of institutional flexibility. Based on these variables the theory would predict the CCC to be highly cognizant of the legitimacy concerns arising from human rights issues. The high degree of adjudicatory diffusion should likewise provide the Court with information on public concern over human rights.
rights in various issue areas, and the flexible institutional environment should allow the CCC the opportunity to act on this information through a variety of mechanisms. Together these factors should provide the Court with the ability to control the flow of litigation to the high court in such a way as to enforce international human rights in publicly salient issue areas while avoiding litigation in more politically problematic areas of human rights.

**International Sensitivity**

In the case of international human rights law, determining a court’s sensitivity entails both (1) the court’s institutional setting, such as whether its stated function includes enforcing international human rights law and (2) a consideration for individual justices’ concern with upholding a reputation as a court that complies with international human rights law. Not all courts are empowered or expected by their politicians and publics to enforce international law obligations (Sloss 2009). Likewise, some courts are much more eager to consider international law while other courts are more willing to embrace their country’s “exceptionalism” (Bradford and Posner 2011). In both institutional design and the outlook of its justices, the Colombian Constitutional Court can only be considered extremely predisposed toward compliance with international human rights obligations.

From an institutional standpoint, the Constitutional Court is directly empowered in its role as interpreter of the 1991 Constitution to enforce human rights law. This occurs along several legal routes. One, the Constitution specifically guarantees human rights by requiring respect for international humanitarian law and requiring any law regulating “states of exception”
to conform with international treaties. Moreover, the government is required to submit declarations of states of exception to the Constitutional Court for immediate review. Second, the rights protected by the tutela action and reviewed by the Constitutional Court are likewise interpreted in light of international human rights law. Lastly, the Constitutional Court hears constitutional cases and cases relating to international human rights not only because of direct jurisdictional grants in the Constitution but also because the Constitution’s incorporation of international law in effect bootstraps international law into the realm of Colombian Constitutional law.

The justices of the Constitutional Court have even expanded this constitutional and statutory emphasis on international human rights law. The constitution includes a supremacy clause in Article 4 declaring the constitution the ultimate source of law. Interestingly, the Court has clarified the relationship between the constitution and international law such that human rights law can overcome what otherwise appear to be constitutional lacunae. The Court has done this through development of the concept of a constitutionality block ("bloque de constitucionalidad"). This concept incorporates various extra-constitutional sources of human

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24 Decree 2591 (1991), Article 4, “Interpretation of rights under the tutela: Rights protected by the tutela action will be interpreted in conformity with international human rights treaties ratified by Colombia.”
25 “The constitutionality block consists of those rules and principles that, without formally appearing in the text of the Constitution, are used as control parameters of the constitutionality of laws, because they have been normatively integrated into the Constitution, in various ways and by mandate of the Constitution. They are thus true principles and rules of constitutional weight,
rights law into constitutional doctrine, specifically treaty law and decisions made by treaty-based international organizations. As such, even in areas of jurisprudence that do not directly invoke human rights law, the latter binds the former. This can go beyond lacunae to override direct constitutional grants of power to other institutional actors. Attempts to amend the constitution, for example, may be restricted if the Court finds the amendment to conflict with human rights obligations.

In addition to these institutional prerogatives, theories of transnational judicial dialogue (Slaughter 2004) would predict that the justices have personal incentives to follow international law in their rulings. I reviewed justices’ biographies to determine whether individual justices were trained at a foreign institution, worked in a foreign country, or regularly traveled abroad for conferences. The inclusion of this matter in their biographies was considered an indication of the personally subjective importance of this internationalized professional identity. Of thirty regularly appointed justices over the course of the Court’s history, eighteen are categorized as having this heightened awareness to international influences and international reputational considerations. They are marked with an * is Figure 4.
This individual concern for international law can be translated to the institutional level.

Since Colombian Constitutional judges are selected for periods of eight years, commentators
regularly refer to three distinct periods: the first court from 1992 to 2000, the second court from 2000 to 2008, and the third court from 2008 to the present. In each such court, a majority of justices had been trained overseas, worked overseas, or considered their international conference work important enough to include in their professional profiles. Based on these institutional and professional considerations international human rights law can be seen as playing a key part in determining the legitimacy of the Court and the ideal point of the Colombian Constitutional Court itself can be seen as generally predisposed to compliance with international human rights law.

**Adjudicatory Diffusion**

The Colombian Constitutional Court acts as the apex court for a highly diffuse adjudicatory system. The primarily source of this wide diffusion is the tutela writ, and this provides two key advantages to the CCC. First, the tutela ensures that political actors cannot easily monitor human rights claims. Instead, these claims are brought throughout the judiciary, preventing political actors from quashing human rights claims by attacks on a single apex court. Second, the tutela ensures a broad-based public engagement with the judicial system. As a result legal issues are incredibly salient in Colombian society, and attacks on the judiciary involve political risk. The wide base of litigation activity also provides the CCC with ongoing information from all segments of the population, allowing the Court to gauge the relative

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26 Occasional irregularities in this pattern occur due to retirements and temporary replacements. A “court zero” was also temporarily in operation after the Constituent Assembly and until the first selections could be confirmed by the Senate.
importance of human rights issues. This provides the Court with the ability to choose from an extremely wide array of issue areas in which to concentrate its limited institutional resources, and to determine when to engage otherwise politically risky human rights issues.\(^{27}\)

To be sure, numerous opportunities present themselves for political monitoring of the Court. In this sense the high level of adjudicatory diffusion does not prevent the CCC from having a political role in Colombia. Because of the Court’s wide base of public support, however, interactions with political actors have a less detrimental effect than they would in a more concentrated system. Instead interactions with political actors serve as a means of ensuring the Court remains aware of political actors’ ideal points and of preventing potentially dangerous ideological divergence between the CCC and other institutions. First and foremost the 1991 Constitution requires the Court to review legislation and presidential declarations of states of exception to confirm their compliance with constitutional and international human rights law.\(^{28}\) This provides a constant source of information on government policy agendas as the government submits briefs supporting or opposing legislation and decrees. In addition, the Court receives information on governmental support for different policy pronouncements based on the reports of the National Attorney General (el Procurador General de la Nación). Under the 1991

\(^{27}\) This section will focus on the widespread nature of the tutela writ. The next section will explore how the Court’s institutional flexibility enables it to further leverage the tutela’s popularity by allowing the CCC to choose from among a wide array of issue areas.

\(^{28}\) Political Constitution of Colombia (1991), Art. 214(6).
Constitution, the National Attorney General is required to provide an opinion on all such issues of constitutional control,\(^{29}\) providing a further feedback mechanism for the court.

In addition, the Court’s appointment procedures limit the extent of ideological drift over time. A justice’s relatively short term (eight years) lessens the likelihood of substantial policy drift between justices and the politicians who appointed them. The entire Court is, in effect, renewed every eight years. In addition, the appointment procedure itself involves numerous actors across all three branches of government. The Senate is charged with electing justices to the Constitutional Court from lists presented to it by the President, the Supreme Court, and the Council of State.\(^{30}\) (This institutional attribute by design makes the Constitutional Court much more responsive to policy concerns than the other high courts in Colombia, the Supreme Court and the Council of State, both of which select their own replacement lists from Judicial Council nominations.) Lastly, research has found that justices who visited Senators’ offices during the selection process were more likely to be appointed. Interestingly, those who were considered moderate rather than ideologically extreme were more likely to be appointed, as this allowed them to garner more widespread support in the Senate (Montoya García 2011). In short, those justices who demonstrated political awareness—as opposed to any particular political preference—ended up on the Court.

This level of political engagement has not prevented the Court from ruling against government actors. Instead, the high degree of diffusion stemming from the tutela has allowed

\(^{29}\) Political Constitution of Colombia (1991), Art. 278(5).

\(^{30}\) Political Constitution of Colombia (1991), Art. 173 and 239.
the CCC to take into consideration public concerns as well as those of politicians. It is difficult to overemphasize the importance of the tutela as a link between the people and the court system. In terms of process, an individual in Colombia can go to any local judge and request enforcement of a constitutional right. If the individual is not satisfied with the outcome, that person has the right to appeal the ruling. As a result, tutelas reach the Constitutional Court from all areas of the country and from members of all socioeconomic classes. The tutela provides an ongoing indication of which issue areas are important to the population at large.

Within a year of the new constitution’s inauguration, the tutela was being widely discussed in Colombian society. Moreover, this “direct path between the constitution and the citizen,” as one newspaper\(^\text{31}\) put it, was encountering resistance from established institutions like the Supreme Court as the citizens found a new institutional route to enforce rights: “From night to morning, everyone speaks of the tutela. The government defends it, lawyers discuss it, newspapers editorialize over it, citizens timidly begin to exercise it, and the Supreme Court refuses to apply it.”\(^\text{32}\) As time passed entrenched institutions’ resistance and ambiguity over the tutela’s utility both quickly faded.

By the second year the use of the tutela doubled, and within two decades the number of writs filed would grow by almost 4,000 percent. The phenomenal growth of the tutela can be


\[^{32}\text{The Supreme Court’s resistance to the tutela will be discussed in more detail in the section on extrajudicial executions. In summary, the Supreme Court resisted the use of the tutela by citizens to challenge before constitutional law judges what these citizens argued were unconstitutional rulings by the Supreme Court.}\]
seen in Figure 5. By the end of the second year of the Constitution’s being in force, the newspaper *La Semana* would sing the new writ’s praises: “The tutela has the virtue of protecting the people on the street, beggars, the illiterate, doctors, sick, workers, pensioners, prisoners, executives, the unemployed, housewives, children, elderly, students, professors, and dissidents. Everyone.”  

The Court itself aided this expansion in the use of the tutela over time. Although originally the tutela was intended to protect fundamental rights, the Constitutional Court ruled that ancillary rights could also be implicated when the failure to protect those ancillary rights would impinge on an underlying fundamental right.  

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34 See, e.g., ruling T-426/92: “Although the Constitution does not establish a right to subsistence it can be inferred from the rights to life, health, work and care or social security. The person requires a minimum of material elements to survive. The consecration of fundamental rights in the Constitution seeks to guarantee economic and spiritual conditions necessary for the dignity of the human person and the free development of his personality. In interpreting restrictively the scope of the right to subsistence the judge ignored the importance of the tutela application in respect of social security rights and the welfare of the elderly, in the special circumstances of the applicant.” Colombian Constitutional Court, Decision T-426/92 (June 24, 1992).
The success of the tutela has allowed the judiciary to enjoy a rights-affirming role in the public consciousness. This diffuse review of government power has redounded to the CCC’s effectiveness. This effectiveness has been further enhanced by the high court’s moderate degree of institutional flexibility, to which I now turn.

**Institutional Flexibility**

Institutional flexibility has allowed the Court to approach different areas of law in a nuanced fashion. To be sure, certain areas of adjudication exhibit reduced institutional flexibility, and under these circumstances the Court has had more difficulty shielding itself from politically difficult cases. The majority of issue areas, however, have found the CCC able to employ institutional mechanisms either to expand or contract its engagement with litigants, enhancing the Court’s effectiveness over time.

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Institutional flexibility is at its lowest in the Colombian context in the area of constitutional controversies. As noted above, the Constitution requires the Court to review legislation and presidential declarations of states of exception to confirm their compliance with constitutional and international human rights law.\textsuperscript{36} Many of the most controversial cases have involved exactly these types of rulings that the court is required to hear and rule on under the constitution; it simply cannot procedurally avoid these issues. Indeed, under each of the first four post-reform presidents the government responded to CCC rulings by proposing overriding constitutional amendments, two of which passed (Rodríguez-Raga 2011; Uprimny 2007). Even here, however, the Court has found ways to use institutional flexibility to reduce political conflict. For example, the Court may defer a ruling, allowing the contested law to be in effect while the government proposes an alternative formulation (Cepeda-Espinosa 2004).

Other forms of hearings allow the Court to employ the full panoply of procedural mechanisms. In an *actio popularis*, wherein a citizen can challenge the constitutionality of a law under abstract review, the Court can reject the claim on procedural grounds. It is therefore able to avoid or minimize conflict not just in terms of the remedy (such as deferring a ruling for a year) but also through the forms of access and adjudication. The degree to which the CCC maintains control over its docket in this manner is clear from the variability in its acceptance of these claims. For example, in 1992 more than nine out of ten petitions were rejected on procedural grounds; in 1993 just over four in ten were rejected on procedural grounds (Cepeda-Espinosa 2004). This flexibility ensures the Court’s ability to remove cases from the CCC docket without

\textsuperscript{36} Political Constitution of Colombia (1991), Art. 214(6).
addressing the substance of claims and therefore before they become a source of political controversy.

Institutional flexibility is extremely important in adjudicating tutela writs. The volume of writs filed throughout Colombia represent an incredible demand for adjudication, which the CCC can then supply on its own terms. This ensures the Court a wide range of issues from which to select when determining how to focus limited institutional resources. The Court has wide discretion as to which tutela appeals it will review, and panels of justices choose which tutelas to review based on subjective criteria. As seen in the area of IDPs in the next section, the number of tutela revisions received at the Constitutional Court acts as a fire alarm to individuals in the Court that a legal issue is a matter of serious public concern. The level of selectivity is reflected in Figure 6. Although the number of tutela appeals reviewed by the Court increased four-fold in the Court’s first twenty years of operation, the percentage of cases reviewed has never gone above two percent. Indeed, in recent years it has fallen to well below a quarter percent, demonstrating the extreme selectivity the Court employs. This selectivity helps to explain the differing responses to the two human rights issues explored in the subcases.
Predicting Court Behavior

Based on the specific variables in the Colombian case it is possible to predict the Court’s behavior across issue areas. Courts such as the CCC have incentives to comply with international human rights obligations based on institutional obligations as well as the professional incentives of the individuals within the judiciary. Where government policy fails to comport with these international obligations, the Court must weigh the impulse to intervene with its ability to do so effectively without damaging the Court’s long-term institutional prerogatives. The diffusion of adjudicatory power throughout the system also allows the Court a ready supply of issue areas from which to choose, and a steady flow of information on public demand for court intervention across issue areas. The Court’s institutional flexibility allows it to use procedural tools as the

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37 Source: Relatoría de la Corte Constitutional.
“spigot” which increases or decreases the flow of litigation to the Court and thus its exposure to political and public scrutiny.

Of the three courts studied in this dissertation, the Colombian is the best positioned to selectively enforce across issue areas. Its broad adjudicatory base provides it with public information and support not available to the South African Constitutional Court. Its flexible institutional environment enables it to respond to demand in a more nuanced fashion than possible for the Mexican Supreme Court. This enables the CCC to enforce international human rights law while taking into account both the level of organized government opposition to policy change and public support for court intervention. The expected degree of court enforcement in individual issue areas is shown in Figure 7.

Figure 7: Judicial Enforcement by the Colombian Constitutional Court

<table>
<thead>
<tr>
<th>Public Support for Court Intervention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
</tr>
<tr>
<td>Least</td>
</tr>
<tr>
<td>Moderate</td>
</tr>
</tbody>
</table>

Not surprisingly, the likelihood of court intervention is expected to be lowest in issue areas where unified government opposition to a policy change exists and where there is very little public support for court action. While the Court might gain the satisfaction of ruling in line with its policy preferences, it simultaneously risks a government backlash and an undermining of its public support. Of course, this does not mean that no such cases will exist, but rather that the
Court will use procedural rules to avoid these whenever possible. The extrajudicial executions subcase falls into this quadrant.

Where public support for intervention is low and the level of unified government opposition is likewise low, court intervention in the policy area should be moderate. Although the opportunity to intervene exists, no clear benefit accrues to the court for doing so. According to insurance theories of judicial independence, courts have the greatest level of autonomy when political actors do not have clear long-term control over the legislature (Finkel 2005; Ginsburg 2003; Ramseyer 1994). At the same time, courts like any institution have limited resources and so cannot embark on massive policy interventions whenever the opportunity arises. While the lack of unified government opposition provides opportunities for intervention, interviews with Constitutional Court justices and magistrates made clear the Court’s limited resources. The creation of juridical frameworks such as the continuing monitoring chambers (salas de seguimiento\(^{38}\)) invite more litigation while overseeing compliance and thus entail a heavy workload. As such, numerous interviewees indicated that they could only be employed in the most important policy areas, which they defined as those receiving more requests for tutela appeals. These appeals serve as a mechanism through which the Court is able to gauge which policy areas are most important to the public at large.

Court enforcement is also likely to be moderate in policy areas where government opposition to policy change is strong but public opinion supports the Court’s intervention. In

\(^{38}\) In addition to the monitoring chamber to oversee compliance with T-025/04 dealing with IDPs (examined later in this chapter) the Court established a monitoring chamber following its ruling in T-760/08. The latter dealt with the right to health, and like the IDP issue was the subject of an increasingly large number of tutela writs.
these cases the Court faces competing interests from these two key groups. Ensuring legitimacy in the eyes of the public requires a ruling in conflict with the government. In these cases the Court may try to manage its interactions with the two groups by providing rulings that speak to public concerns but do so with limited widespread applicability or impact on government actors. For example, it might support claims in tutela writs, but do so only on an individual basis with no resort to structural oversight. These and other methods allow the Court to support popular rights and continue to engage in policy dialogue with the government while minimizing inter-branch conflict.

The highest levels of judicial activity should manifest in issue areas where government opposition is low and public support for intervention is high. This is in line with arguments that successful court-oriented policy development often happens not where a court is most confrontational with political actors (Tushnet 2007), but where the court engages in a dialogue (Rodríguez-Garavito 2011) that allows for constructive policy evolution (Silverstein 2009) or the effective removal of political or bureaucratic blockages (Whittington 2005). Where the public supports court intervention, however, courts have the added tool of leveraging this support in furtherance of policy change. Epp (1998) argues that courts are more effective where organized groups outside the court provide an ongoing supply of litigation to the courts. While this is true, it is also the case that courts have more of a role in ensuring this flow of litigation than has been acknowledged. The CCC has in certain cases ordered the expansion of public
participation, in effect deputizing outside groups to assist in its oversight and enforcement. The IDPs subcase falls into this category.

In all four quadrants, the background institutional structures remain the same; what varies is the relative strength of public support and political opposition to Court activity. The result is variation in the CCC’s selective leveraging of procedural tools to increase/decrease the flow of litigation and strengthen/weaken the Court’s oversight of its rulings. This in turn leads to divergent levels of Court-led compliance with human rights law across issue areas within an otherwise stable national institutional framework. The subcases explore this in two areas. IDPs represent a scenario where public support for court enforcement of international human rights was high, and where political opposition was weak. As such court enforcement should be at its highest levels. The second subcase, extrajudicial killings, represents a situation where public demand was lacking while unified government opposition to court intervention was strong. Under such conditions we should expect court intervention to be at its lowest levels. It is to these subcases that I now turn.

**Internally Displaced Persons**

 Armed civil conflict has been a fact of life in Colombia for decades, with ongoing violence between government forces, guerilla groups such as the FARC and ELN, and

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39 In 2010, for example, the Court empowered two civil society groups to act as representatives for indigenous peoples and afro-colombians in ongoing hearings relating to T-760/08, the Court’s main right–to–health decision (Colombian Constitutional Court, Order 095/10 (May 21, 1995)). The two groups were the Organización Nacional Indígena de Colombia and the Organización Proceso de Comunidades Negras.
paramilitary groups. One consequence of this ongoing violence has been a humanitarian crisis in the form of more than five million internally displaced persons in the last 25 years, with as many as 300,000 newly displaced annually (Vidal-López 2012, 7). Internal displacement disproportionately affects vulnerable populations. The average age of members of the displaced population is twenty-three years, and half of the population is under the age of fifteen. Members of indigenous and afro-colombian communities represent 37 percent and 13 percent (respectively) of the number of displaced. This compares to their share of the overall Colombian population of just 3.4 and 10.6 percent. Members of the internally displaced population have limited access to housing, employment, and basic services. As many as 98% live below the poverty line, with 79% living in extreme poverty.

*An “Unconstitutional State of Affairs”*

In 2004 the Constitutional Court would finally rule that this situation had reached a “State of Unconstitutional Affairs.” The magnitude of rights violations had grown to such an extent that...

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40 These two rebel groups are known by their Spanish acronyms: The Revolutionary Armed Forced of Colombia (Fuerzas Armadas Revolucionarias de Colombia) and the National Liberation Army (Ejército de Liberación Nacional).


further tutela actions with individualized claims against individual government agencies could not be considered effective. Rather, the violations collectively constituted a structural problem that could only be addressed by the Court through the implementation of a new legal framework.

The ruling came on January 22, 2004, in the Constitutional Court decision known as T-025/04. In the ruling, one of the Constitutional Court’s tutela review chambers44 consolidated 108 separate tutela filings. These various tutela filings represented 1150 displaced families comprised overwhelmingly of women, children, the elderly, and members of the indigenous population—Colombian society’s most marginalized members. The Court noted that many of the individuals who were party to the action had already registered in the state’s Unified Registry for the Displaced Population, or RUPD, but that problems clearly persisted.45

In its decision the Court relied on a combination of international human rights law and domestic constitutional and statutory law. As already noted, the Colombian constitutional system directly incorporates international law, so the international legal framework provides the outer bounds of what is permissible in the domestic context. The primary international law document cited by the Court was the 1998 Guiding Principles on Internal Displacement. This UN-sponsored set of principles is an attempt to restate international human rights law and international humanitarian law as it applies to displaced persons and describes the protections to

44 The tutelas were combined into a single case by the third review chamber, composed of Manuel José Cepeda Espinosa, Jaime Córdoba Triviño, and Rodrigo Escobar Gil.

45 The registry is generally known by its Spanish-language acronym, Registro Único de Población Desplazada. The RUPD came into being following presidential Decree 290 in 1999 establishing the right of displaced persons to be registered with the state. Decree 290 of 1999 (February 17), Diario Oficial No. 43.507, de 22 de febrero de 1999.
be afforded to displaced persons, including freedom from discrimination, the right to assistance, and rights to dignity, life, and security, among other protections.\textsuperscript{46}

Colombian Law 387 of 1997\textsuperscript{47} provided the domestic framework. It represented the first domestic Colombian law to attempt to treat the IDP issue in a systematic manner and offered the government’s first recognition of state responsibility to address the problem. It also provided a definition of IDPs, set up a national registry system to track areas of expulsion and areas of reception of the displaced, and created the National System for Comprehensive Assistance to the Displaced Population (known by its Spanish acronym, SNAIPD\textsuperscript{48}).

The Court used the Guiding Principles to interpret the substantive rights of the population, noting that this was one of the most important sources for determining the extent of rights owed displaced persons.\textsuperscript{49} Of note, the Court indicated that it considered many of these principles to be part of the \textit{bloque de constitucionalidad}, indicating their peremptory status in the domestic legal system. This emphasis on international law is also noteworthy given that Law 387 provided an enumerated list of rights that itself endorsed the right of IDPs to seek and receive international assistance and to enjoy internationally recognized fundamental rights. The Court

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\textsuperscript{47} Law 387 of 1997 (July 18), Diario Oficial No. 43.091, de 24 de julio de 1997.

\textsuperscript{48} El Sistema Nacional de Atención Integral a la Población Desplazada.

\textsuperscript{49} T-025/04, Appendix 3.
\end{flushright}
made clear that international principles provided the substantive content for many of the broad statements of principle found in Law 387.

The ruling contained two distinct types of orders to the government. It ordered responses to the specific, concrete demands of individual tutela petitions in line with previous proceedings. In an important deviation from previous cases in this area, however, the court issued structural orders, requiring systemic changes in service provision to the displaced population as a class.\footnote{Colombian Constitutional Court, Decision T-025/04, §§10–10.2.9 (June 17, 2004).}

This was the first time the Court made pronouncements applying to the class as a whole, rather than individual claims (Garavito and Franco 2010, 84–85).

At this first stage of engagement, however, the Court primarily issued broad rulings that ordered the government to comply with its domestic and international legal requirements but left it up to the responsible bureaucratic agencies to determine budgets, establish appropriate mechanisms, etc. The Court only provided deadlines for the completion of these initial changes. It was only after the repeated failure of government agencies to achieve acceptable outcomes that the Court began more direct oversight of the process, inviting further litigation, hearings, and involvement by civil society actors as a means of pressuring the government.

The overall result has been an ongoing process of Constitutional Court oversight including more than twenty public hearings (Rodríguez-Garavito 2011, 1694) and in excess of three hundred follow-up orders\footnote{Individual orders are available on the Constitutional Court website for the continuing chamber, available at http://www.corteconstitucional.gov.co/T-025-04/.
} as the Court has attempted to refine the initial order in line with evolving facts on the ground. The Court’s orders have been wide-ranging. They have included
orders establishing a schema for measuring governmental compliance levels,\textsuperscript{52} reviewing
government budgets, requiring institutional oversight to reduce waste,\textsuperscript{53} ordering the government
to undertake a national coordination plan to more effectively deliver services,\textsuperscript{54} and ordering the
use of “indicators” to measure the displaced population’s effective enjoyment of rights.\textsuperscript{55} In
addition to these general orders, the Court has issued orders indicating the need to create special
commissions or oversight processes that protect the needs of special groups. These have aimed at
protecting leaders of the displaced populations,\textsuperscript{56} women,\textsuperscript{57} children and adolescents,\textsuperscript{58}
indigenous groups,\textsuperscript{59} afro-colombian communities,\textsuperscript{60} and persons with disabilities.\textsuperscript{61}

The government has responded to many of these demands with new laws and decrees.
Decree 250 of 2005\textsuperscript{62} instituted a new National Plan and renewed requirements for SNAIPD,
including setting appropriate budgets for its various constituent agencies to deal with the

\begin{flushright}
52 Colombian Constitutional Court, Order 185/04 (December 10, 2004).
53 Colombian Constitutional Court, Order 176/05 (August 29, 2005).
54 Colombian Constitutional Court, Order 177/05 (August 29, 2005).
55 Colombian Constitutional Court, Order 116/08 (May 13, 2008).
56 Colombian Constitutional Court, Order 200/07 (August 13, 2007).
57 Colombian Constitutional Court, Order 237/08 (September 19, 2008).
58 Colombian Constitutional Court, Order 251/08 (October 6, 2008).
59 Colombian Constitutional Court, Order 004/09 (January 26, 2009).
60 Colombian Constitutional Court, Order 005/09 (January 26, 2009).
61 Colombian Constitutional Court, Order 006/09 (January 26, 2009).
62 Decree 250 of 2005 (February 7), Diario Oficial No. 45.816, de 8 de febrero de 2005.
\end{flushright}
displaced population and oversee implementation of national policies. In 2008 the government passed Law 1190, which attempted to improve delivery of services by clarifying the obligations of Colombia’s territories toward the displaced population. Despite these governmental efforts, the Court in April of 2009 created a special chamber to continue overseeing implementation of T-025. The chamber has on more than one occasion ruled that the unconstitutional state of affairs continues, thus extending the Court’s oversight in this area.

As it has broadened its oversight, the Court has relied extensively on civil society and non-governmental organizations. This has occurred in several ways, all of which serve to increase the inclusiveness of policy development and oversight procedures. The Court has depended on non-governmental organizations and other civil society actors to provide information on compliance. Indeed, many of these actors joined forces to create a follow-up Commission (the “Comisión de Seguimiento”) to monitor public policy in the area of forced displacement. The Commission has been afforded a semi-official role in the compliance process, being tasked by the Court with providing data and policy feedback. This judicial empowerment of outside actors has not been limited to domestic groups. When determining the adequacy of

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63 Law 1190 of 2008 (April 30), Diario Oficial No. 46.976, de 30 de abril de 2008.

64 The special chamber consisted of Luis Ernesto Vargas Silva (president), Nilson Pinilla Pinilla, and Luis Guillermo Guerrero Pérez.

65 Colombian Constitutional Court, Order 178/05 (August 29, 2005), Appendix, “The Court also considered it necessary to rely on the evaluation of human rights organizations and displaced persons who have participated in the monitoring of judgment T-025 of 2004 on the adequacy of the measures taken by the various agencies responsible for comprehensive care of the displaced population to comply with the ruling in that case to overcome the state of unconstitutionality.”

66 See, e.g., Colombian Constitutional Court, Order 109/07 (April 5, 2007), Par. 9, 15.
governmental budgetary outlays,\textsuperscript{67} for example, the Court relied on data provided by the UN High Commissioner for Refugees. As such, the Court has buttressed its incorporation of international legal principles by using international qualitative and quantitative measures of compliance with those standards.

In addition to this civil society monitoring through the Court, the rulings have promoted a higher level of civil society participation in the policy \textit{formulation} process. In addition to providing data and reports on governmental compliance, these same domestic and international organizations have been tasked with providing feedback on proposed changes to government policy. The Court has gone so far as to require the government to receive and review this feedback as part of the policy-making process. In addition, the presentation of this feedback often occurs in the public forums held by the Court as information-gathering mechanisms. By inviting (and even requiring) the participation of these groups in public hearings, the Court has made the forums serve the additional purpose of educating the public about the issue and shining public attention on the policy debate.

\textit{Outcome}

Can the Court’s efforts to intervene in this policy area be considered successful?

Measuring compliance with human rights obligations presents several difficult questions, but here I consider two. First, it is unclear to what extent human rights decisions should focus on

\textsuperscript{67} See, e.g., Colombian Constitutional Court, Order 176/05 (August 29, 2005), “Orders relating to the budgetary effort required to implement policies dealing with the displaced population, in accordance with judgment T-025 of 2004,” Appendix, paragraphs 15 and 18.8.
rulings favoring individuals, as opposed to those that require structural changes in a state’s mistreatment of a group or in a government’s provision of requisite services. In other words, must effective remedies focus on the individual or group? Second, how do we judge a successful outcome? Is a reduction in violations sufficient, or is complete amelioration of the situation necessary before we can say a court has provided an effective remedy to a human rights violation?

The Constitutional Court answered the first question itself: violations of displaced persons’ rights could not be corrected through a series of remedies targeting particularized claims. Compliance with domestic commitments to international human rights law required a system-wide transformation. This was made clear both by the Court’s characterization of the problem and by the procedures it used to address that problem. By declaring the IDP problem an unconstitutional state of affairs, it sent a strong signal that the issue could not be resolved in piecemeal fashion but would instead require systemic changes. It oversaw these systemic changes (and continues to do so today) through hundreds of individual orders that brought governmental representatives, members of Colombian civil society, and international organizations together to diagnose the problem, reform the system, and provide new means of delivering services. The result of this transformation can be seen in Figure 8. Governmental expenditures were dramatically increased following the ruling in 2004, and continued to increase in later years.
This leaves the second question: Is amelioration enough or must the situation be completely remedied? Here the outcome has been much more ambiguous. Not only has the number of displaced persons failed to decline, it may have in fact increased. The numbers in Figure 6 relate this story. The official records track the number of individuals displaced both in terms of their declaration to the government (dashed line) as well as their reception into the state recovery system (dotted line). The solid line indicates non-governmental estimates. Several observations are possible. First, in early years of the crisis the CODHES numbers are systematically higher than that produced by the government. For example, in the first half of 2011 CODHES estimated there were approximately 89,750 displaced persons in Colombia,

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69 Figure 9 reproduces and reports accounting done by the non-governmental organization CODHES. Consultoría para los Derechos Humanos y el Desplazamiento (CODHES), “De la seguridad a la prosperidad democrática en medio del conflicto,” Codhes Informa: Boletín de la Consultoría para los Derechos Humanos y el Desplazamiento CODHES 78 (19 September 2011).
compared to the official governmental estimate of 44,144. Second, the government figures actually increase after the timing of the ruling, while CODHES’s numbers remain relatively flat though given to yearly variation. This is important, as it indicates that the spike in government numbers does not necessarily indicate a rise in the number of displaced beyond that reported by NGOs, but perhaps merely an improvement in accounting. Indeed, part of the structural remedy ordered by the Court was an improvement in the registration system. (Since registration was required prior to receipt of government benefits, this was a priority area of reform.) In any event, the fact remains that an incredibly large population of displaced persons remains in an extremely precarious human rights situation, one that likely will not be totally eradicated until the government and insurgent groups resolve the larger conflict that has plagued Colombia for half a century.

Figure 9: Number of Internally Displaced Persons

For these reasons the Colombian court’s treatment of the IDP issue must be deemed a qualified success. Despite the sustained difficulties faced by the displaced population, the
structural changes to the registration system and the concomitant increase in public expenditures has benefited numerous groups and individuals. This is not to say that the humanitarian crisis has been averted, rather that the outcome should not be dismissed given that it occurred during a period of extreme civil unrest and military insurgency that persists to this day.

*Linking Theory and Practice*

My theory postulates that in situations where the Court is presented with a legal claim arguing that the current government policy is not in compliance with international human rights obligations, a Court that enjoys a diffuse adjudicatory environment and institutional flexibility will react in accordance with the relative strength of organized government opposition to and public support for policy intervention. Where unified government opposition is low and public support is high, the prediction is that we will witness the highest levels of Court engagement with the issue area, going so far as to enhance public court access mechanisms that extend court oversight of government compliance efforts.

Evidence from both primary and secondary source materials reveal significant congruence between theoretical expectations and the Court’s activity when addressing the IDP issue. Was this an area where the Court had a legitimacy concern? As outlined in chapter 1, the Court has an incentive to rule against government policy where failure to do so threatens the Court’s reputation as a rule-of-law actor. Here this clearly seems to be the case. Not only did the Court indicate the expansive nature of the human rights violation in its rulings, this situation was well documented by both domestic and international human rights organizations in the lead up to
the case. As such, the Court had an incentive to rule against the government and risked paying a legitimacy cost for failure to do so.

Did the relative weight of government opposition to a court intervention outweigh the potential of the Court to leverage the public in support of compliance? Here, too, the facts seem to comport well with theoretical predictions. The government had already indicated a willingness to address the IDP issue with its passage of Law 387 of 1997, which acknowledged state responsibility in this area and set up a national registry system, albeit an ineffectual one. In addition, the Court had ample reason to believe it could leverage public support in this issue to pressure the government to comply. As the Court noted in its ruling, the number of tutela proceedings in this issue area was large enough to raise concerns within the Court. In this sense, the tutela “alarm system” worked quite well. In addition, the numerous organizations that offered reports and friend-of-the-court briefs demonstrated the ready availability of civil society actors to provide resources the Court might not be able to manage on its own, further providing insurance against any potential government noncompliance.70

Lastly, the theory predicts that Court oversight of this type will not be available in all cases due to scarce judicial institutional resources. Did the Court display a concern for these resources? The Court noted early on in the process that the structural failure to provide for the rights of the displaced population had resulted in the overcrowding of the courts and the

70 In retrospect the Court’s calculation may have had an even wider effect than it anticipated. As one court watcher has noted, the ruling “may have contributed to changing public perception of the urgency and gravity of forced displacement in Colombia, or it may have legitimized the claims and reinforced the negotiating power of human rights NGOs and international human rights agencies that had been pressuring the Colombian government to do more for the IDPs.” (Rodríguez-Raga 2011, 1678)
excessive reliance on the tutela (Cepeda-Espinosa 2004, 32–33). Even following the initial ruling the extent of oversight has been taxing on the Court. The monitoring process involved the generation of 1.5 million pages of judicial records, a number cited by the Court itself as one reason the Court proceeded with the establishment of a special enforcement chamber to handle all related matters. 71

Along all axes, the activity of the Court demonstrates congruence with theoretical expectations. The government had previously failed to comply with what was framed as an international human rights obligation, but simultaneously failed to demonstrate a strong unified opposition to compliance. The Court had indications of public concern over the issue in the form of extensive use of the tutela in this issue area. The Court leveraged outside actors in an attempt to increase the likelihood of government compliance with the Court ruling. Lastly, it did this while being cognizant of the institutional cost to the judiciary itself.

**Extrajudicial Executions**

Like claims put forth by displaced indigenous persons, claims against the government and the military for human rights violations exhibit mixed success. What little success has been achieved follows a similar but distinct pattern to that seen in the case of displaced persons: judicial manipulation of procedural rules in the nation’s courts has allowed limited judicial oversight. Unlike in the case of displaced persons, however, here the manipulation of procedural

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rules has had the opposite effect, limiting the Court’s involvement in crafting a successful long-term remedy. Faced with a lack of strong public support in the face of political opposition, the Court has acquiesced and allowed disputes to unfold in other political and judicial venues. This has occurred along two dimensions. First, the combined resistance of the military and its political supporters threatened the institutional prerogatives of the Court; second, the Court reacted by limiting its involvement in this legal issue area. The overall result has been the opposite of that witnessed above in the area of IDPs: a closing off of litigation reaching the CCC and a lack of court-centered enforcement.

In this section I consider the grave human rights violation of extrajudicial execution. In particular, I focus on a problem known in Colombia by the rather anodyne phrase falsos positivos (false positives). This type of extrajudicial killing follows a common pattern and has its roots in government programs. Under various government incentive programs, individuals are offered monetary rewards for assisting in the capture of criminal elements or participants in the armed insurgency that has plagued Colombia for decades. The military participates in these programs, offering incentives for the capture or killing of members of illegal armed groups. Pressure on military units also comes from the desire to increase the reported number of killed insurgents in the ongoing armed conflict. Military commanders have been provided discretionary funds to assist with their operations, and these have been used to provide rewards to informers. It is under these circumstances that the problem arose. Victims are lured with false promises such as the offer of a job. Once the victims are in a remote location, members of the military murder the victim and arrange the scene to make it look as though the victims were members of armed
subversive groups or criminal organizations. These victims are then included in counts of legitimate military targets (Alston 2010).

The problem is widespread but imprecisely documented. Although the earliest allegations trace this phenomenon to the 1980s, the greatest number of falsos positivos are believed to have occurred beginning in 2004. The official figures of the Ministry of Defense as reported to the United Nations Special Rapporteur are shown in Table 5. These numbers, however, reflect only the number of complaints of unlawful killings reported by Colombians to the government. Both Colombian and international NGOs claim a much higher number of killings. The highly respected Colombian Commission of Jurists reports significantly higher numbers over a comparable period; their accounting is also reported in Table 5. The discrepancy is notable, and in fact other government actors report much higher levels of violations. The national Office of the Public Prosecutor has reported it has on its books 1205 active cases, of which 425 are in the stage of preliminary investigation, 641 are active cases, 68 are awaiting judgment, and 71 represent convictions. As late as March of 2013 various NGOs testified before the Inter-American Commission on Human Rights that extrajudicial executions had increased by 64 percent between 2002 and 2008, with one organization estimating the total number of killings.

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72 Presidential figures and CCJ estimates are reported in Alston (2010, 9–11).

73 These figures are reported by the Office of the Public Prosecutor to the Constitutional Court in the tutela review case of T-318 (2011), a tutela filing seeking protection in relation to the extrajudicial killing of the petitioner’s relative.

executions had reached 3347.\textsuperscript{75} Despite the widespread pattern of this grave human rights violation, the Court had only minimal involvement in crafting a solution. Instead, the Court followed a reduced pattern of intervention in this policy area consistent with the theory’s prediction that the Court would limit intervention when faced with government opposition and little counterbalancing public support. The pattern has been the opposite of the Court’s treatment of IDPs: rather than expanding access, inviting litigation, and creating a structural approach to the problem, the Court has limited access, avoided oversight opportunities, and addressed the situation in piecemeal fashion.

Table 5: Reporting of Extrajudicial Killings

<table>
<thead>
<tr>
<th>Presidential Human Rights and International Law Program</th>
<th>Colombian Commission of Jurists</th>
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<tbody>
<tr>
<td></td>
<td>155</td>
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<td>July 1997– June 1998</td>
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<td>2007</td>
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<td><strong>Total</strong></td>
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<td><strong>2276</strong></td>
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Resisting Oversight

Unlike the Court’s intervention in the issue of IDPs, the Court’s involvement in the area of extrajudicial executions does not revolve around a singular case. Instead, the interactions between the Court and the government have appeared only piecemeal in the decades since the inauguration of the 1991 constitution. Although as Table 5 indicates the problem of extrajudicial killings reached unprecedented levels in the mid 2000s, the problem has persisted for two decades. Indeed, the Court’s inability and unwillingness to intercede in the last decade can be seen as having its roots in this earlier period of military violations of international law.

The Court had strong indications that the government would resist oversight in this area. Historically, jurisdiction over military prosecutions had been an area of contestation between the military and civilian courts. This unstable legal framework predates the 1991 political reforms and has extended well into the current constitutional era. As early as 1978 political violence prompted a decree by President Turbay\textsuperscript{76} that ceded jurisdiction over crimes related to political violence to military tribunals. The military courts were also given the authority to determine whether they or civilian courts had jurisdiction over a matter. The Supreme Court finally challenged this situation in 1987 when it ruled that the military courts were unconstitutional, that it had competence to decide jurisdictional disputes between civilian and military courts, and that the civilian courts should have jurisdiction over crimes alleged to have been committed outside the scope of military duties (Nagle 1995, 73).

\textsuperscript{76} National Security Statute, Decree No. 1923 of Sept. 6, 1978 (Martz 1997, 190).
Under the 1991 Constitution the military retained jurisdiction over crimes committed by the military\textsuperscript{77} and soldiers were granted a specific carve-out provision granting them immunity from prosecution for any constitutional rights violations committed under direct orders.\textsuperscript{78} Within the first few years of its operation, however, the Constitutional Court moved to assert its authority over military tribunals. In 1995 it ruled that active members of the military could not serve as judges on military tribunals because of the clear conflict of interest and threat to judicial impartiality.\textsuperscript{79} The political reaction was swift and multifaceted. An exchange of letters between the Minister of Defense and the President of the Court appeared in the media, with each demanding the other respect his institution’s autonomy (Rodríguez-Raga 2011, 108). Political leaders called for the Constitutional Court’s abolition, and a court-packing measure started to make its way through the legislature. Although these initiatives ultimately failed, a different constitutional amendment was passed that same year allowing military tribunals to be composed of retired or sitting military personnel, effectively overruling the Court’s decision. Two years later the Constitutional Court reasserted its control over military tribunals by ruling that grave human rights violations were, by definition, outside the scope of military service and therefore could not be considered by military tribunals (Kyle and Reiter 2013). This trend continued when

\textsuperscript{77} Political Constitution of Columbia (1991), Art. 221.

\textsuperscript{78} Political Constitution of Columbia (1991), Art. 91.

\textsuperscript{79} Colombian Constitutional Court, Decision C-141/95 (March 29, 1995).
the CCC stated that in situations where the applicability of military jurisdiction was not clearly proven, the civilian courts would retain jurisdiction.\textsuperscript{80}

By the turn of the millennium the back-and-forth between the government and the Court had resulted in what could be seen as a truce. Although the Court had reasserted its right to assess jurisdictional issues, political leaders had demonstrated that they would not accept intervention in the nature or functioning of military courts when the latter did have jurisdiction. This came against the backdrop of a series of rulings between the Constitutional Court, the Supreme Court, and the Supreme Judicial Council that suggested further resistance to Constitutional Court oversight in this area. The dispute occurred because citizens attempted to use the tutela as a way of challenging rulings of the Supreme Court and the Supreme Judicial Council, arguing that the latter institutions did not apply constitutional law correctly. This ongoing dispute impacted questions of military jurisdiction when in 1998 the Supreme Judicial Council announced it was not bound by the Constitutional Court’s determination of jurisdiction and remanded a case to the military courts.\textsuperscript{81}

This ongoing dispute between the courts had immediate effects as outlined above in terms of military jurisdiction. More importantly, it had secondary effects due to the Court’s reluctance to assert itself in later questions of criminal law and military liability. According to one court watcher, the dispute between the courts had the effect of “deligitimizing the judicial

\textsuperscript{80} Colombian Constitutional Court, Decision C-358/97 (August 5, 1997).

branch and giving an opportunity to the executive to take sides as it sees fit, despite the executive’s claim that it’s leaving an eventual accord in the hands of the judicial organs.”82 This executive interference was realized in the year 2000, when President Pastrana issued decree 1382,83 which purported to regulate which judges in the country could hear which tutela cases. Indeed, political interest in this jurisdictional issue has extended to the Senate selection process for new Constitutional Court justices. According to one study, a judicial candidate’s position on this issue is more important to senators than the candidate’s ideological views on substantive matters (Montoya Garcia 2011).

The overt political dispute threatened to involve political actors in the previously CCC-dominated area of procedures. In the years since 2000 the CCC has reduced the likelihood of conflict. To be sure, the Court has reiterated its ability to review other courts’ rulings. It has done so, however, in a way that has significantly restricted court access and limited institutional disputes. Most recently, the Court ruled that the new Criminal Proceedings Law included an unconstitutional restriction on these inter-court tutela actions.84 The court struck that language from the statute, defending its institutional prerogatives. At the same time, it took the opportunity to restrict the applicability of the tutela and tighten the procedural requirements for its use. For


83 Decree 1382 of 2000 (July 12, 2000). Colombia, Diario Oficial No. 44.082, del 14 de julio de 2000.

84 The offending language was found in Article 185 of Law 906 of 2004. Alberto José Prieto Vera, “Régimen de Libertad en el Sistema Acusatorio Colombiano (Ley 906 de 2004),” Defensoría del Pueblo (Imprenta Nacional de Colombia, Bogotá, D.C., diciembre de 2006).
example, it outlined what could be termed a domestic “exhaustion” requirement, meaning that in most circumstances a claimant would have to follow all possible avenues of appeal prior to instituting the tutela procedure.\footnote{Colombian Constitutional Court, Decision C-590/05 (June 8, 2005).}

As a result, issues related to military prosecutions have been relatively removed from the Court’s docket. When the next round of disputes relating to victims’ rights appeared in the mid–2000s, the Court continued this trend of limiting citizen access and thus Court activity. It managed to rule in ways that affirmed victims’ rights under international and constitutional law without challenging government policy or providing systemic relief to claimants. This can be seen clearly in the 2002 constitutional changes that transformed the Colombian criminal justice system from a mixed inquisitorial system to an accusatory system. Whereas under inquisitorial systems victims often have the right to bring a private prosecution, forcing the court or government to pursue a criminal case, under the new accusatory system this special form of standing for the victim was eliminated. Instead, victims under the new criminal procedure code are entitled primarily to financial compensation.\footnote{Law 906 of 2004 (August 31), Diario Oficial No. 45.657, de 31 de agosto de 2004.} For the most part the Court has allowed these limitations to stand. At the same time, the Court’s rulings reiterated the general importance of international law in a theoretical sense. It held that the appeal of a case should not be allowed to limit a victim’s right to justice\footnote{Colombian Constitutional Court, Decision C-591/05 (June 9, 2005), citing international treaties as incorporated through the \textit{bloque de constitucionalidad}.} and that the principle of \textit{res judicata} should not be seen as...
barring a victim’s right to appeal an acquittal. Yet these seemingly technical procedural issues result in substantial transformations in rights enforcement, as they prevent victims from directly participating in enforcement actions. Given the extensive backlog of cases, this inability has left the vast majority of cases unresolved.

**Outcome**

Unlike the situation relating to IDPs, extrajudicial executions have not reflected progress as a result of court intervention. On the contrary, Constitutional Court intervention has been extremely limited. To the extent that improvements in rights enforcement have occurred, they have been attributed to the improvements instituted by the government following press coverage of the Soacha killings. These changes have included disciplining members of the military, increasing monitoring of incentive programs, and enhancing cooperation with international organizations (Alston 2010, 46).

Unfortunately, there is much more that could be done. It is clear that the Constitutional Court has not acted as aggressively as it could, given the example of its intervention and ongoing oversight of reform of the treatment of IDPs. For example, the United Nations special rapporteur has recommended that all cases of extrajudicial execution be held in civilian courts, that more

88 Colombian Constitutional Court, Decision C-047/06 (February 1, 2006).

resources be provided to investigate allegations of extrajudicial executions, and that stated
government policies on human rights and humanitarian law standards be effectively put into
practice (Alston 2010, 28). These are the types of systemic changes that the Court has overseen
in the area of internal displacement, yet the Court has avoided a similar role in the case of
extrajudicial executions.

**Linking Theory and Practice**

My theory postulates that in situations where the Court is presented with a claim that the
current government policy is not in compliance with international human rights obligations, the
CCC will react in accordance with the relative strength of organized government opposition to
and public support for Court enforcement. Where government opposition is high and public
support is low, the prediction is that we will witness the lowest levels of Court engagement with
the issue area, with the CCC going so far as to constrict public access mechanisms so that the
Court is less exposed to legitimacy-threatening legal activity. Evidence from both primary and
secondary source materials reveal significant congruence between theoretical expectations and
the Court’s activity in the area of extrajudicial executions.

Was this an area where the Court had a legitimacy concern? The theory predicts specific
forms of Court behavior in those situations when government policy is in conflict with
international law obligations, as this discrepancy between government policy and international
legal requirements presents a legitimacy challenge to the Court. This situation obtains in the area
of extrajudicial killings. Not only does the killing of civilians clearly contradict well-established
humanitarian law instruments to which Colombia is a party, the situation garnered the attention of numerous NGOs and international organizations including the United Nations.

Did the relative weight of government opposition to a court intervention outweigh the potential of the Court to leverage the public in support of compliance? The empirical record again suggests support for the theory. The history of jurisdictional disputes between the Court and political actors made clear that the government would not hesitate to side with military courts in a dispute, if necessary overturning CCC decisions through constitutional amendment. At the same time the government has enacted criminal and military justice reforms that subsequently transformed the prosecution system into an adversarial system while altering the traditional rights of victims under the Constitution. The Court has offered opinions on these matters and reasserted its ability to weigh the balance of rights under the Constitution, but it has done so while generally permitting the changes made by the government.

The activity of the Court demonstrates congruence with theoretical expectations. The government had previously failed to comply with what was framed as an international human rights obligation, and it simultaneously demonstrated strong unified opposition to compliance. The Court had indications that government response would outweigh the ability to invoke public support to protect the Court from noncompliance. As a result, the Court restricted access and failed to provide oversight when given the opportunity.

**Comparison**

Why was the Court more willing and better able to address the needs of displaced persons than those of military violations of human rights? In both situations, the Court did rule in favor
of claimants and against the government. In the case of displaced persons, however, the Court took on a much more activist role and required greater ongoing changes from the government. Interestingly, the court has been more effective in an area of policy that required structural changes on the part of numerous government agencies, cost the government trillions of pesos, and was in a much less well-defined area of human rights law.

The treatment of IDP claims and extrajudicial executions makes it clear that the CCC was much more willing to engage political actors and the public in the IDP cases. The different outcomes, I argue, result from two factors. One, government opposition in the IDP cases and extrajudicial killings cases were of a different magnitude, with a much greater willingness on the part of government actors to at least attempt to comply with the IDP rulings. Two, as a result of greater governmental reluctance in the extrajudicial killing cases, the CCC would have had to rely on a much stronger public counterbalancing to resist political retaliation. As I describe below, this was unlikely to occur.

**Differing Levels of Political Resistance**

The IDP rulings faced little concerted political opposition. Indeed, politicians conceded the normative importance of this issue by passing Law 387 in 1997. Of course, while Law 387 defined IDPs, it did little to address the costly material needs of this population in an effective manner. To the extent the Court ordered changes, it was able to engage a public concerned about the issue in a way that increased political pressure and required government agencies to comply with the government’s own stated policy goals.
In the military cases, on the contrary, politicians were quick to unite against CCC intervention, resisting or overriding Court decisions. In such a situation, the Court would have had to rely on extremely favorable public opinion in order to effectively pressure the government to comply with any decision against the military. It otherwise would face a choice of two negative outcomes: (1) rule in support of the government and accept accusations of capitulation or (2) rule against the government and face ongoing damage to its own institutional strength. Faced with this situation, the Court limited its exposure by ceding jurisdictional oversight to other institutions and failing to enact a larger juridical framework like the continuing chamber used in the IDP case.

Another factor making Court intervention more palatable to the government in the IDP cases was the characterization of the problem being addressed. In the case of extrajudicial executions the military (and thus the government) was the clear perpetrator. This contrasts with the situation of IDPs, where the problem has been framed as a government failure to deliver services, but as also deriving from the illegal actions of third parties. According to records of the state registration system, IDPs in the year 2010 for example blamed their displacement on the activities of guerrillas (32%), paramilitary groups (15%), other groups (15%), the national army (0.5%), and criminal gangs (0.1%) (Vidal-López 2012). In this framing, the role of the government in creating the situation can be seen as negligible. This framing is also supported by other accounts that suggest the incidence of forced displacement have increased during electoral cycles; the reasoning has been that displacement is related to efforts by irregular armed groups to
maintain control of local offices. As such, the Court’s intervention furthered government interests in consolidating control and providing services in contested regions. The lack of government opposition to the ruling is in this sense consistent with Shapiro’s argument that “a major function of courts in many societies is to assist in holding the countryside” (Shapiro 1986, 23). While the CCC ruled against the government, it did so in a way that furthered broader government interests.

**Differing Levels of Public Concern**

The theory presented here argues for the importance of public opinion precisely because the public in a diffuse adjudicatory system provides the Court with a potential source of political support independent of the government. In contentious cases, the Court is unlikely to risk backlash if it does not have public support that might allow it to employ its array of procedural tools—such as increasing access to new claims or creating public hearings to further educate the public—in such a way as to increase pressure on the government and protect the Court from backlash.

The Court and other actors are well aware of this constraint. As already mentioned, the CCC regularly holds public forums to gather information but also to educate the public. The Court has also resorted to public appeals through news releases in an attempt to shore up its argument against political actors, and it has circumvented traditional news outlets and conducted

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direct outreach to the public through the use of social media. Of course, the Court is not the only institution aware of this public opinion constraint; the military is also well aware of the need for public support, and produces printed and online materials describing its outreach efforts and improvements in relations with the public. Indeed, it has gone so far as to remind the public just how much the public supports the military. In 2009, for example, as part of “National Human Rights Day,” the Ministry of National Defense published a special report on its efforts to support human rights through security in both Spanish and English, noting that the “favorability rating for the Armed Forces and the National Police among Colombians” had reached, according to Gallup, “82% and 70%, respectively.”

While there is no clear poll asking the Colombian populace their views on the issues of IDPs or extrajudicial killings, there are indicators of the likelihood of support for Constitutional Court intervention in these issue areas. Gallup polls can provide a general sense of the relative strength of public support for the Court as well as for the perceived targets of Court intervention in each of the two cases. Figure 10 shows that the Court has consistently hovered around 60% approval, indicating the high regard in which the public holds the institution. Nevertheless, both the army and the national police regularly outperform the Court in public opinion surveys, with the national police consistently receiving scores in the 70% range, and the army receiving public approval levels in the 80% or even 90% range. Compare this with the public approval of the FARC, which seldom exceeds 5% approval ratings. As explored above, armed groups such as

the FARC are much more closely associated with displacement than are the army or national police. This makes the Court’s reliance on public pressure much easier in the IDP case than in the case of extrajudicial executions, since in the latter situation the Court could be seen as attacking a set of extremely popular national institutions. In short, whereas in the IDP cases the Court could balance the public against politicians, in the military cases no such balancing act was feasible.

Figure 10: Public Support for National Institutions

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92 Source: Gallup Colombia, April 2013. The question asked, “Do you have a favorable or unfavorable opinion of [-----]?” For the sake of clarity, Figure 10 reports only the favorability score.
Conclusion

Despite its propitious origins and stated dedication to international law, the Colombian Constitutional Court has only partially lived up to the perhaps unrealistic expectations placed on it from its founding. It has been relatively successful in addressing the crisis of displacement because it could focus its efforts on requiring provision of governmental services that, though expensive, were generally supported by large segments of the population and not systematically opposed by the political establishment. In contrast, the Court’s unwillingness to intercede in a systematic way in the area of extrajudicial killings points to the limits of any court-based strategy to enforce international human rights law. Where government opposition is strong and there is little opportunity to engage the public, even an institutionally well-positioned court such as the CCC has shown it will not risk political backlash. Instead, it has focused its scarce resources on areas of law where it can make a meaningful difference.

Perhaps what is most striking is the area of human rights in which the court has been at least somewhat effective: IDPs. In contradiction of theories that would posit better outcomes based on legalistic rulings or on the importance of treaty ratification, the Court has been more rigorous in supporting human rights law that is less codified. Extrajudicial killings are covered by numerous binding treaties to which Colombia is a party, including the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Geneva Conventions and Additional Protocols, to name but a few. In addition, these obligations are directly imported and theoretically enforceable in the domestic legal system through Article 93 of the Colombian Constitution. The Inter-American Court system has likewise been active in its condemnation of rights violations in this area. All the predictors of an effective judicial role
under traditional legal incorporation theories are present, and yet the Court has failed to act according to expectations in this area.

The reason for this is the selective enforcement pattern of the CCC. The Court receives substantial information through the state’s diffuse adjudicatory system, allowing it to determine which areas of international human rights law are most likely to receive support from the population. Its flexible institutional environment then allows it to shape the flow of litigation on which it must rule. This has allowed it to avoid the heavily legalized area of extrajudicial killings, which threatened to invite a political backlash. An opening for judicial enforcement was much more evident in the much less internationally codified area of internally displaced persons. The primary international law document dealing with this issue is the non-binding Guiding Principles on Internal Displacement. Moreover, the very nature of the problem suggests the difficulty in subjecting this area to international standards: the population of concern is defined as internal to the sovereign state. Yet it is in this area that the Court has made the most forceful push to secure individuals’ and groups’ rights under international legal principles. It has done this not just by reference to the Guiding Principles, but by incorporating international measures of compliance and oversight by international bodies directly into its enforcement process. It was able to do this by changing and sometimes creating out of whole cloth procedures by which litigants, international and non-governmental organizations, and even the public had a much greater role in the court system. It was able to balance outside actors against government reluctance and bureaucratic foot-dragging using tools that the Court was not willing to risk employing in the area of extrajudicial executions. In doing so it strengthened its role in the domestic political system and maintained its institutional legitimacy as a rule-of-law actor.
The future of domestic judicial enforcement of human rights law in Colombia is likely to continue to reflect this pattern of selective enforcement and judicial balancing of political and public interests. Unlike the question of displaced persons, no clear juridical framework has been established to deal with the gravest military violations of human rights. The theory presented here would predict that this situation will only change when there is an indication of greater public support for judicial action, or when political actors fail to represent a source of unified opposition to Constitutional Court intervention. Although it is unclear at the moment, this may yet come to pass as Colombia’s ongoing peace process continues to evolve. This outcome is not ideal for those hoping to see courts act as effective enforcement mechanisms for all areas of international human rights law. It does, however, allow the CCC to continue to act in some policy areas, and it limits the ability of politicians to attack the Court or claim that it is overreaching. Given the still transitional state of democracy and rights enforcement in Colombia, this is perhaps the best possible outcome.
Chapter 3: South Africa

Majoritarian Difficulties

There are circumstances of transition where a certain measure of incongruity and even injustice is inevitable. In the present case, however, the incongruity flows not from the nature of the process itself, as contemplated by the framers, but from the mode of interpretation, as adopted by sections of the judiciary.93

Introduction

From April 26 to 29, 1994, South Africa held its first national elections open to all racial groups. On the first day of elections, a new constitution94 came into force, marking the official transition from the former Apartheid regime and the dissolution of the racially constructed “homeland” system. A newly established Constitutional Court began enforcing the country’s first Bill of Rights. President Nelson Mandela traveled to the United Nations and signed the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, signaling the end of the country’s long isolation from the international community and its former rejection of international human rights legal norms (Thompson 2001).


The adoption of a new constitution created a clear chicken-and-egg problem: how could the Apartheid legislature, illegitimate in the eyes of the vast majority of the population, be entrusted with the drafting and adoption of a legitimate constitution governing an inclusive multiracial state? The answer was to create a two-stage process. Multiparty negotiations would lead to an Interim Constitution that would include a schedule of 34 constitutional principles, covering topics ranging from intra-state fiscal relations to the role of indigenous law. The Apartheid legislature passed this Interim Constitution as Act 200 of 1993. This Interim Constitution provided for the election of a new, bicameral legislature acting as Constitutional Assembly that would in turn draft a final constitution for the new Republic in line with the 34 principles. It was during this radical transformation in institutional structures that the South African Constitutional Court (“SACC”) came into being. Adoption of the final constitution would be contingent upon the SACC’s certification that the new governing document was consistent with the agreed principles.

The new court would have a decisive role in the new regime, as it would be responsible for ensuring compliance with human rights embedded in the constitution and in international human rights law. Among those demanding an independent court was a newly disestablished racial minority eager to protect its rights against a newly empowered majority. Theories of court power would suggest, however, that the extreme electoral dominance of the majority’s preferred party, the African National Congress (the “ANC”), should lead to a compliant court. Yet this has not occurred, at least not in any clear systematic manner. On the contrary the Constitutional

95 Interim Constitution Schedule 4.
Court has gained much of its reputation at home and abroad not just by enforcing international human rights law, but by enforcing rights in the face of government opposition.

My argument here is that the Constitutional Court has been able to walk this tight line between human rights enforcement and backlash from a dominant party by limiting its agenda and shaping the outcome of its rights-affirming cases in ways that leave wide discretion to government actors. The court has affirmed the role of international human rights in the domestic sphere and incorporated human rights principles into the common law. It has also guarded its institutional legitimacy by establishing precedent that affirms its central role in the constitutional structure yet reaffirms the separation of powers and thus avoids antagonizing political actors. Most importantly, it has done this by manipulating access, interpretive standards, and remedies to ensure a constricted docket that asserts international human rights but limits the SACC’s role in determining governmental implementation of its rulings.

Methods

In terms of methods, I began by reviewing reports analyzing the state of human rights compliance in South Africa for the years 1993 through 2012 to set a baseline level of human rights violations and thus potential areas for court intervention during the twenty-year period of study. This can be seen as the potential “demand” for court intervention in specific areas of human rights policy at the domestic court level. The review included a systemic review of a wide variety of sources, including annual State Department human rights reports, reports by United Nations treaty and charter-based bodies, state reports required under the human rights treaty system, and nongovernmental reports by Amnesty International and Human Rights Watch.
Based on this review, I chose two broad areas of litigation to investigate further: first-generation civil and political rights in the criminal justice field and second-generation socioeconomic rights in the area of the right to health. These two areas represented the largest consistent sources of human rights criticism in the various human rights reports. In the second stage I reviewed the primary and secondary literature on South African courts, human rights litigation, and domestic implementation of international law for the same twenty-year period to determine areas of congruence between expected and actual litigation patterns in these two areas of human rights law. During this stage I reviewed court cases, government gazettes, political statements by elected officials and party leaders, and reports by news agencies and non-governmental organizations to determine the factors influencing the SACC’s use of international human rights law and the Court’s institutional output.

**Theory Applied to the South African Case**

Before proceeding to the subcases, I position the South African case study in this project’s overall theory. In chapter one I developed this theory with an emphasis on the three variables that explain a court’s ability to maintain or expand over time its enforcement of international human rights law obligations: a court’s sensitivity to international law, the diffusion of adjudicatory power, and institutional flexibility. The theory posits that a court is more likely to enforce international human rights standards where all three variables score highly. I explore these variables below with regard to the South African Constitutional Court. In summary, the SACC is best categorized as presiding over a system with a moderate degree of sensitivity to international law, a low level of adjudicatory diffusion, and high levels of institutional flexibility.
Based on this, the theory predicts a court that is inclined to enforce international human rights law, but one that is simultaneously very easily monitored by political actors and as a result seeks to limit the judicialization of policy disputes.

**International Sensitivity**

**Status of International Law**

For a court to act as a domestic enforcer of international human rights law, the court must be institutionally and legally empowered to do so. From this perspective, the SACC is moderately well positioned to play an enforcement role, with strong constitutional law enabling the use of international law but sufficient ambiguity to allow the SACC room to interpret, develop, and selectively apply the law.

Much of the language in the Final Constitution\(^96\) reveals an intent to make South African law comport with international standards. International human rights law was the source of much of the rights language found in the Final Constitution’s Chapter 2 (the “Bill of Rights”),\(^97\) and the text specifically incorporated international human rights law as a constraint on government action (or inaction) when applying these protections. All courts are also required to consider international law when interpreting the Bill of Rights,\(^98\) and they are also empowered to consider

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\(^97\) Final Constitution Chapter 2.

\(^98\) Final Constitution §39(1)(b).
foreign law that is not directly binding on South Africa, such as regional court decisions and the jurisprudence of domestic courts.\textsuperscript{99}

Despite this, the language in the Final Constitution includes a lack of clarity as to the directly binding nature of international law. The members of the Interim Constitution Negotiating Council agreed early in the process that international law should play a much stronger role in domestic law as a means of protecting against backsliding. To accomplish this they looked to the recently adopted Constitution of Namibia, which in 1990 incorporated international law directly and accepted all ratified treaties as binding directly under national law (Killander 2010). This language was ultimately loosened, however, to require parliamentary action similar in spirit to the transformation principle that had long governed application of international law domestically. What accounted for this change?

The answer lies with the incoming majority’s concern that minority parties would abuse international law provisions in the new constitutional structure as a way of either maintaining their Apartheid-era privileges or undermining national consensus. In particular, the Afrikaner Volksunie had advocated in favor of incorporating reference to the United Nations declaration on minority rights (Olivier 1993, 7). In the face of these concerns and in a desire to maintain national unity, the direct domestic incorporation of international law was dropped in the text of the Interim Constitution. Instead, the State Law Advisors adopted language requiring both ratification and transformation into local law (Killander 2010). The final text of the Interim Constitution accordingly reads:

\textsuperscript{99} Final Constitution §39(1)(c).
Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.\textsuperscript{100}

The Final Constitution adopts a substantially similar approach, again requiring both parliamentary ratification and legal transformation before international treaty law becomes binding domestically. While theoretically this prevents direct judicial appeals to international treaties absent legislative action, the waters were muddied further when the Constitutional Assembly adopted language allowing for self-executing treaty provisions. The draft including this language was adopted in the final week of negotiations, and as such received little attention (Killander 2010). The Final Constitution’s language reads:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.\textsuperscript{101}

What exactly constitutes a “self-executing” treaty provision has proven as contentious in South African jurisprudence as it has in the United States. To date, the Constitutional Court has not clarified what is required for a provision to be directly applicable by the courts without enabling legislation, and this remains an area open to manipulation by judicial actors. This will be explored further below in the second sub-case study dealing with rights under the criminal law.

\textsuperscript{100} Interim Constitution §231(3).
\textsuperscript{101} Final Constitution §231(4).
As a result of these textual changes, the role of international human rights law in South Africa’s current legal system represents less of a radical shift from prior national practice than originally anticipated. For example, during and prior to the Apartheid era South African legal practice considered international law under most circumstances to be part of domestic law. Customary international law in particular was considered to be an actionable part of municipal law; this was reinforced by the state’s multiple interwoven legal traditions, including roots in both Roman-Dutch law and English common law (John Dugard and Du Plessis 2011, 43–46).

During the Apartheid era domestic applicability of international law was severely restricted. Customary international law was considered subordinate to legislative action, although in such cases an affirmative act of parliament was required to overcome the presumption of domestic applicability. Treaties likewise could be considered part of the domestic legal framework, but only following passage of separate legislation. An outgrowth of this rule was that acts and declarations of treaty-based organizations such as the United Nations Security Council were only accepted as domestically binding following separate legislation. Most importantly, the Apartheid government abstained from all of the major human rights treaties (John Dugard and Du Plessis 2011, 47–48).

The current constitution contains similar textual restrictions, requiring incorporation and allowing for parliamentary override. The more radical change came in the attitude of politicians toward the use of international law as a benchmark for domestic policies. As such, constitutional reform was accompanied by the signing of numerous human rights treaties. Thus, while similar judicial doctrines may govern questions such as incorporation of treaty law, the courts now have a much wider range of options from which to draw. In the years following the 1993 transition

In line with this changed political posture, international human rights law has enjoyed a robust role in the courts. Indeed, the SACC considered international human rights law as a benchmark when certifying the Final Constitution.103 It also made clear in its early jurisprudence that when deciding Bill of Rights cases the courts should interpret rights provisions in line with otherwise non-binding international legal instruments, including decisions of international judicial bodies and reports of specialized agencies.104 Once treaties have been ratified and undergone domestic implementation, courts are enjoined to apply any reasonable interpretation of legislation that is consistent with them.105 Courts are also required to apply customary

102 A complete list of major international human rights instruments to which South Africa is a party appears as Appendix II to the dissertation.
104 S v Makwanyane and Another, 1995 (6) BCLR 665 (CC).
105 Final Constitution §233.
international law absent contrary legislation or constitutional amendment,\textsuperscript{106} and it is up to the courts to decide what customary law is binding on the Republic (Olivier 1993, 11). Where no legislation speaks to an issue, judicial opinions—and thus the common law—must be brought into line with customary international law. As a result, the principle of \textit{stare decisis} can no longer be used by the courts to prevent application of a new, contrary rule under customary international law (John Dugard and Du Plessis 2011, 50). The legal framework for a robust domestic implementation of international human rights law is clearly present.

\textit{The Justices}

This has left the SACC with a high degree of discretion in its application of international law. There are clear indications of the constitution drafters’ intent that human rights law be binding on the courts and government actors. At the same time, while the constitution provides ample support for an expansive use of international human rights law, much ambiguity remains: courts are required to “consider” international law, but not necessarily apply it; what constitutes a self-executing treaty is undefined. As a result, the role of international law in domestic jurisprudence is dependent not just on the constitutional text but more importantly on the degree to which the justices individually and collectively are concerned with enforcing international law.

To determine whether individual justices’ are sensitive to international human rights law, I conducted a review of each justice’s personal biography to determine whether the justice was

\textsuperscript{106} Final Constitution §232.
educated in a foreign institution, worked in a foreign country, or regularly traveled abroad for conferences and presentations. The review relied on information on the Constitutional Court website, namely individual biographies of each justice and transcripts of the justices’ responses during their appointment interviews with the Judicial Service Commission. While not determinative of an individual justice’s attitude toward international law, overseas training and work does indicate exposure to legal traditions beyond the domestic system and a willingness to engage with a legal community conceptualized internationally. The results of this review are included below in Figure 11.
Figure 11: Justices on the South African Constitutional Court
*Names with an * indicate justices with heightened international sensitivity.*

Overall, a majority of justices have experiences that provide them with this heightened sensitivity to international law concerns. Of the twenty-four justices who have served on the
SACC, fully nineteen report education or work experience abroad. This individual exposure translates to the institutional level as well; justices with exposure to international law influences have constituted a majority of the justices at all periods of the SACC’s operation.

It should also be noted that this exposure to international law influences is not restricted to Constitutional Court justices. On the contrary, all new members of the legal community are exposed to international law doctrines through the legal education system; the vast majority of universities require international human rights law as part of their legal training (Heyns and Viljoen 2001, 489). As such, practicing attorneys are increasingly able to avail themselves of international human rights doctrines that may find purchase in the Constitutional Court’s jurisprudence. This also translates into increased awareness by judges in the High Courts and lower courts as increasing numbers of lawyers trained in the post–1994 system enter practice (Heyns and Viljoen 2002, 66). In the viewpoints of judges, then, the SACC can be seen as inclined toward compliance with international human rights law. This general inclination is tempered, however, by the Final Constitution’s ambiguity toward international law’s directly binding nature. As such, the SACC is coded as moderately sensitive to international law considerations.

**Adjudicatory Diffusion**

*A Politically Empowered Court*

Adjudicatory power in South Africa’s judicial system is concentrated in a politically relevant, easily monitored apex court. This concentration of adjudicatory power developed over
the four-year period of the transition to a post-Apartheid regime. The transition to a politically inclusive multiracial society was accompanied by a radical restructuring in the relations among the legislative, executive, and judicial branches. The most striking institutional change was the creation of the new South African Constitutional Court entrusted with powers of judicial review. Although the Interim Constitution originally limited the SACC’s jurisdiction to constitutional issues, later constitutional revisions and SACC legal interpretations resulted in an apex court with powers to review all legislative and executive acts in the country.

Under Apartheid, South Africa followed the tradition of parliamentary supremacy found in many common law states. This situation no longer obtains. Both the 1993 Interim Constitution and the 1996 Final Constitution explicitly provide for constitutional supremacy; legislative and executive acts inconsistent with the constitution are to be considered null and void.107 Under the Final Constitution, this judicial review of governmental activity was expanded to include review of governmental inactivity, where such inactivity could be seen to infringe on a right under the constitution.108 This submission of legislative and executive activity to judicial review was accompanied by a restructuring of the court system, with the new Constitutional Court for the first time exercising exclusive review of constitutional law questions, including legislative certification, constitutional amendments, and compliance with binding international human rights law.

107 Interim Constitution §4; Final Constitution §2.
108 Final Constitution §§2 and 237.
The requirement to submit legislative activity to judicial review began at the earliest moments of the new state’s founding, with the constitution itself subject to certification by the SACC. Adoption of the Final Constitution would be contingent upon the SACC’s certification that the new governing document was consistent with the 34 agreed principles in the Interim Constitution. The SACC, despite being a young institution, did not hesitate to exercise this veto power. In its first major ruling the Court rejected the Final Constitution,\(^{109}\) sending it back to the Constitutional Assembly to address areas not in compliance with the constitutional principles. This was seen as an extraordinary assertion of judicial power for the new institution, not least because eighty-six percent of the delegates to the Constitutional Assembly had voted in favor of the Final Constitution’s adoption (Woolman and Swanepoel 2008). The SACC also took this opportunity to ensure its institutional standing, finding as grounds for non-certification the inclusion of constitutional provisions that allowed for ordinary statutes exempt from judicial review.\(^{110}\)


\(^{109}\) First Certification Case at ¶¶ 482–83.

\(^{110}\) First Certification Case at ¶¶ 86–88.

\(^{111}\) Second Certification Case.
A Focused Point of Review

The reformed judiciary has tended over time to a more concentrated form of review despite manifesting elements of both centralized and decentralized review. Under the Interim Constitution, the newly established Constitutional Court had exclusive power to review laws for constitutionality. It also lacked jurisdiction over non-constitutional issues. Instead these non-constitutional questions could be appealed to the Supreme Court of Appeal (“SCA”) and no further. This had a perverse outcome: any appeal from a High Court decision required bifurcation, with ordinary legal issues proceeding to the SCA and constitutional issues heading to the SACC. Any appellant was thus required to file two separate appeals in a single case.

Several justifications counseled in favor of this initial setup. Perhaps most obviously, the long history of parliamentary superiority led to concerns about courts’ willingness to go beyond a positivist interpretation of legislation; as a result, a new and separate court would address the Kelsenian concern that constitutional law be adjudicated in a forum and in a manner distinct from non-constitutional legal issues.

Beyond this theoretical concern, a separate Constitutional Court allowed drafters to resolve a politically nettlesome issue: how to deal with the judges appointed during the apartheid regime. These judges were politically problematic both because of their tenure during a time of questionable judicial legitimacy and because they represented a holdover from a period of judicial deference (Berat 2005). Creating a new institution filled with politically untainted members embodying a new culture of review seemed a suitable solution.

This division of powers between the SACC and the pre-existing SCA only existed under the Interim Constitution. Under the Final Constitution the SACC enjoyed final—but not
exclusive—constitutional review powers. Instead, all courts at the High Court level or higher received concurrent jurisdiction over constitutional issues. This remedied the difficulties engendered by issue bifurcation between the SACC and the ordinary courts. In addition, allowing wider adjudication of constitutional issues promised a prospective, rather than reactive, approach to the country’s legal culture. Instead of in effect quarantining constitutional issues from review by pre-existing courts, concurrent review offered the possibility of instilling the entire court system with a deeper respect for the constitutional ramifications of non-constitutional legal issues.

The result, ironically, was an even greater concentration of judicial power in the Constitutional Court. Under the Final Constitution, any appeal dealing with constitutional issues can now proceed through the High Courts and to the SCA. Once the latter has pronounced judgment on all legal issues in a case, litigants have the option of appealing constitutional issues to the SACC. The determination of just what constitutes a constitutional issue, however, is determined by the SACC.\footnote{Under the Final Constitution, “The Constitutional Court…makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.” §167(3)(c).} It has essentially ruled that all matters are potentially within its jurisdiction, since the common law must be adjudicated in line with constitutional requirements.\footnote{The Court has stated that “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.” \textit{Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others}, 2000 (3) BCLR 241 (CC), at ¶44.} This has allowed the SACC to act as an apex court for the entire judicial system.
in an expanded realm of constitutional issues. The central role of the SACC was confirmed by parliament in 2001 when it amended the Constitution to recognize the head of the Constitutional Court as “Chief Justice of South Africa,” a title formerly held by the head of the SCA.

The central role of the SACC is also underscored by the court’s exclusive ability to render null and void any act of parliament, the president, or a provincial government. While the High Courts and the SCA enjoy concurrent jurisdiction of constitutional issues, no finding of unconstitutionality takes force unless certified by the SACC. Indeed, court rules require that any other court’s finding of constitutional invalidity be referred immediately to the Constitutional Court. This is an important point of contrast with systems such as that in the United States or Colombia, where the highest court can avoid issues by failing to grant review. In contrast, the SACC is necessarily implicated in constitutional issues as a result of the immediate referral system. The SACC also has exclusive jurisdiction to decide on the constitutionality of amendments to the constitution.

Finally, the politically central role of the SACC can be seen in the Constitution’s treatment of abstract review. The president—and only the president—has the right to refer

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114 For a more in-depth discussion of the SACC’s recognition as an apex court, see Mtshaulana (2001).


117 Final Constitution §167(4)(d).
pending legislation directly to the Constitutional Court for abstract review.\textsuperscript{118} Neither members of the national legislature nor those of the provincial legislatures can avail themselves of this tool. Instead, members of the National Assembly retain the right to challenge legislation after it has passed and been signed by the president but before it has gone into effect.\textsuperscript{119}

The reasons for this distinction between presidential and legislative access to the SACC are informed by the politics of the transition and highlight the important role the Court plays in balancing minority and majority interests. Originally, the Interim Constitution envisioned abstract review challenges by members of the National Assembly. The head of the National Assembly, the Senate, or a provincial legislature could bring a request for prior constitutional certification when requested to do so by the membership of one third of the chamber in question.\textsuperscript{120} It became clear very early on, however, that this could become subject to abuse by minority members of the legislature. Members of the Gauteng provincial legislature\textsuperscript{121} and the Democratic Party, the National Party, and the Inkatha Freedom Party\textsuperscript{122} seized on this procedure as a means of stalling legislative activity in national education policy in the first years of the Interim Constitution. Their claims were ultimately rejected by the SACC, but legal maneuvering

\textsuperscript{118} Final Constitution §79(4).

\textsuperscript{119} Such a request requires the assent of one third of all members of the assembly. Final Constitution §80(2)(a).

\textsuperscript{120} Interim Constitution §§98(2)(d) and 98(9).

\textsuperscript{121} In re: Gauteng School Education Bill of 1995, 1996 (4) BCLR 537 (CC).

\textsuperscript{122} In re: National Education Policy Bill No 83 of 1995, 1996 (4) BCLR 518 (CC).
prompted the negotiating parties to restrict the use of similar tactics in the Final Constitution. Under the Final Constitution legislators can only bring claims after enactment.\textsuperscript{123}

The result of this period of constitutional development and reform is a Constitutional Court at the center of political attention. The SACC has the exclusive ability to render acts null and void. It has also gained the ability to oversee all other courts in the judicial system. Its important political role is also made clear by the debates over legislative and national assembly access to the SACC. This concentration of adjudicatory power also places the SACC in a potentially tenuous position, as political actors can easily monitor the Court’s output. In such an environment, the Court has nevertheless been able to develop a reputation as a legally legitimate actor, rendering decisions against the government in numerous issue areas. Its ability to do this can be attributed to another of its institutional features, flexibility, to be discussed below.

\textit{Institutional Flexibility}

\textit{Procedural and Interpretive Autonomy}

As a result of the constitutional transformation, the SACC enjoys a high degree of procedural and interpretive flexibility when accepting cases and rendering decisions. Under the Final Constitution the Court determines what is considered a constitutional matter, in effect

\footnote{\textsuperscript{123} Even then the Final Constitution requires that the law remain in force unless the Court determines the suit has a reasonable likelihood of succeeding on the merits. In addition, the constitution provides the Constitutional Court with the ability to sanction abusive use of this tool; where the Court determines a suit was without merit, it can order the applicant to pay all costs of the suit. Final Constitution §80(3).}
The Constitution also includes a broad grant of direct litigant access to the SACC, allowing the Court to sit either as a court of first instance or as an appellate court. In either situation, access is granted “when it is in the interests of justice and with leave of the Constitutional Court.” This means that theoretically the SACC could hear cases from litigants across the country without waiting for cases to filter through the appeals process. The requirement that cases come “with leave of the Constitutional Court” also allows the Court to avoid granting access to its docket.

In addition, the SACC has been able to develop its internal court procedures free from political interference. It is these procedures that provide the rules for when and how litigants gain access to the Court. Under a 1997 amendment to the Courts bill the President of the Constitutional Court is empowered to “in consultation with the Chief Justice, by notice in the Gazette make rules relating to the manner in which the Court may be engaged in any matter in respect of which it has jurisdiction[.]” This extremely broad grant of authority goes beyond even that enjoyed by the United States Supreme Court. This flexibility has been key to the SACC’s ability to affirm international human rights while minimizing confrontations with the government.

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124 Final Constitution §167(3)(c).
125 Final Constitution §167(6). Emphasis is mine.
127 In comparison, the U.S. Supreme Court is governed by the Federal Rules of Civil Procedure, which are subject to congressional approval prior to final adoption (Staszak 2010).
Lastly, as described above, the Final Constitution’s provisions on international law provide the SACC with a high degree of interpretive flexibility. This combined with the SACC’s control over constitutional jurisdiction, access, and court procedures provides the Constitutional Court with the ability to control its docket, the manner in which it interprets international law, and the forms of remedies it offers in rulings. This level of flexibility has been key to its institutional strength in the face of the ANC’s ongoing electoral dominance.

**ANC Dominance**

The SACC was clearly established in order to protect rights and act as a check on government action. This is not surprising given the history of the Court’s founding. Not only was a new minority concerned with protecting its rights from a new majority (Hirschl 2007), but the Interim Constitution’s Negotiating Council itself represented a broad array of societal actors and was thus not dominated by any one faction. Because the majority of South Africans were at the time denied suffrage rights the Negotiating Council was not created through direct elections; instead the Council was composed of a broad range of competing stakeholders and political parties. In such a setting the establishment of a constitutional court is consistent with insurance theories of judicial independence. What is surprising is the court’s ongoing activity following the transition when subsequent elections confirmed the ongoing popularity of the ANC. Theories of judicial independence would suggest that the ongoing electoral dominance of the ANC would limit the court’s ability to perform any power-balancing function (Ramseyer 1994; Stephenson

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128 See section *Status of International Law*, above.
2003). Table 6 reports the share of the vote received and seats in the national legislature, as well as the number of provincial legislatures held by the ANC in each of the post-transition elections.\textsuperscript{129} Other major parties are listed for sake of comparison.

\textsuperscript{129} Compiled using electoral data from the Electoral Commission of South Africa.
Table 6: Party Vote Share in National Elections

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<tr>
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</thead>
<tbody>
<tr>
<td><strong>ANC</strong></td>
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</tr>
<tr>
<td>National Vote Share</td>
<td></td>
<td>62.65%</td>
<td>66.35%</td>
<td>69.69%</td>
<td>65.90%</td>
</tr>
<tr>
<td>National Assembly Seats</td>
<td></td>
<td>252</td>
<td>266</td>
<td>279</td>
<td>264</td>
</tr>
<tr>
<td>Share of Seats in Nat’l Assembly</td>
<td></td>
<td>63.00%</td>
<td>66.50%</td>
<td>69.75%</td>
<td>66.00%</td>
</tr>
<tr>
<td>Provincial legislatures controlled</td>
<td></td>
<td>6</td>
<td>7</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td><strong>Democratic Alliance / Democratic Party</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>National Vote Share</td>
<td></td>
<td>1.73%</td>
<td>9.56%</td>
<td>12.37%</td>
<td>16.66%</td>
</tr>
<tr>
<td>National Assembly Seats</td>
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<td>7</td>
<td>38</td>
<td>50</td>
<td>67</td>
</tr>
<tr>
<td>Share of Seats in Nat’l Assembly</td>
<td></td>
<td>1.75%</td>
<td>9.50%</td>
<td>12.50%</td>
<td>16.75%</td>
</tr>
<tr>
<td>Provincial legislatures controlled</td>
<td></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
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<tr>
<td><strong>Inkatha Freedom Party</strong></td>
<td></td>
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<tr>
<td>National Vote Share</td>
<td></td>
<td>10.54%</td>
<td>8.58%</td>
<td>6.97%</td>
<td>4.55%</td>
</tr>
<tr>
<td>National Assembly Seats</td>
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<td>43</td>
<td>34</td>
<td>28</td>
<td>18</td>
</tr>
<tr>
<td>Share of Seats in Nat’l Assembly</td>
<td></td>
<td>10.75%</td>
<td>8.50%</td>
<td>7.00%</td>
<td>4.50%</td>
</tr>
<tr>
<td>Provincial legislatures controlled</td>
<td></td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>(New) National Party</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>National Vote Share</td>
<td></td>
<td>20.39%</td>
<td>6.87%</td>
<td>1.65%</td>
<td>n/a</td>
</tr>
<tr>
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<td>82</td>
<td>28</td>
<td>7</td>
<td>n/a</td>
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<tr>
<td>Share of Seats in Nat’l Assembly</td>
<td></td>
<td>20.50%</td>
<td>7.00%</td>
<td>1.75%</td>
<td>n/a</td>
</tr>
<tr>
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<td>0</td>
<td>n/a</td>
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<tr>
<td><strong>Minor Parties (&lt;10% of vote share each)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>National Vote Share</td>
<td></td>
<td>4.69%</td>
<td>8.64%</td>
<td>9.32%</td>
<td>12.89%</td>
</tr>
<tr>
<td>National Assembly Seats</td>
<td></td>
<td>16</td>
<td>34</td>
<td>36</td>
<td>51</td>
</tr>
<tr>
<td>Share of Seats in Nat’l Assembly</td>
<td></td>
<td>4.00%</td>
<td>8.50%</td>
<td>9.00%</td>
<td>12.75%</td>
</tr>
<tr>
<td>Provincial legislatures controlled</td>
<td></td>
<td>0</td>
<td>0</td>
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</tbody>
</table>

Table includes parties that garnered at least 10% of the national vote share or held at least one provincial legislature in a national voting cycle. Nine provincial legislatures exist; numbers for each election do not sum to nine because several provincial legislatures had no single party in control.

As Table 6 makes clear, the ANC’s dominance has been consistent at the national level throughout the post-Apartheid era, and has increased in the provincial legislatures. As a result
throughout the nineties and noughts the ANC had a majority in the National Assembly that enabled it to pass legislation unilaterally. Indeed, from 2004 to 2009 the ANC maintained the minimum two-thirds majority of all seats in the National Assembly necessary to unilaterally amend most provisions in the Constitution.\(^{130}\) In such an atmosphere of political domination by one party, competing power centers such as the SACC are undoubtedly on questionable institutional footing.

Avoiding Conflict

Yet in the face of this potentially hostile environment the SACC has produced a long list of cases interpreting international law, enhancing its institutional prerogatives, and engaging with a broad range of policy questions. The court’s willingness to rule against government interests seems clear across issue areas, with cases ranging from criminal procedure protections to affirmative action to the right to housing.\(^{131}\) It is at least in part because of this activity that the SACC has garnered such positive reviews by court watchers around the world.

This record masks an underlying truth, however. In terms of access, the Court has limited the number of opportunities for direct conflict with the political branches. This reduction has

\(^{130}\) The exceptions are protections found in the Bill of Rights or a limited number of areas dealing with provincial powers. In these matters at least six of the country’s nine provinces must affirm the amendment. Final Constitution §§74(2) and (3). The Constitution also allows for a two-thirds override vote in the National Assembly for passage of legislation affecting provincial powers without assent by the National Council of Provinces. Final Constitution §§76(1)(e), (i), and (j) §76(5)(b)(ii). Of course, during those years the ANC also controlled 7 of 9 provincial legislatures.

\(^{131}\) A list of what the SACC considers to be its “landmark” cases is available on the Court’s website at http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases.
taken two primary forms. First, it has drastically limited the number of direct access cases it is willing to hear, a limitation that has been the subject of much academic consideration.\footnote{132} One study found that the SACC accepted a mere eight direct access cases in the first four years of its operation (Berat 2005); another found no improvement over time, with the Court accepting a mere nine direct access cases from 1995 through 2005 (Jackie Dugard 2006). Second, the SACC has avoided political conflict by limiting the constitutional right to legal representation. Namely, the Court has failed to adopt any right to representation in civil proceedings (Jackie Dugard 2013).

The result can be seen in Figure 12, which reports the number of cases decided in each year since the Constitutional Court was created in 1993.\footnote{133} The SACC’s extremely flexible institutional environment has had a clear outcome: the docket has remained remarkably small in terms of total output. On average the Court has rendered an opinion in only twenty-seven cases per year since its founding.

\footnote{132} I deal with the issue of direct access here, as opposed to in the individual subcases, as the limitation on access applies across substantive legal areas. I deal with questions of adjudication and remedies in the individual subcases, as the SACC’s treatment varies by issue area.

\footnote{133} Information compiled using court data available from the website of the Constitutional Court of South Africa, available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/0/0/x/503/9. Cases are included based on the year of the SACC decision, not the year in which they first appeared on the Court’s docket.
Limitations on direct access and lack of support for civil trials have greatly restricted the number of cases the SACC hears, shutting off the Court’s supply of litigation to a large segment of the population. Importantly for the theory examined here, the restrictions are in large part due to the SACC’s own jurisprudence. After all, the constitution empowers the SACC to act as a court of first instance and to interpret constitutional rights to a fair trial in civil matters. Rather than expanding access, however, the court has limited the number of cases in which it might come into conflict with the political branches.

Of course, its power in this area is not complete. The jurisdictional grant in the Final Constitution ensures that the SACC hears some cases it might prefer to avoid. In particular, any ruling of unconstitutionality by a High Court or the SCA must be affirmed by the SACC before the law is considered invalid.\footnote{Final Constitution §167(5).} In addition, the SACC does not benefit from the use of an
American-style “political question” doctrine that might allow it to openly refuse to hear a case (Roux 2003, 95). As a result, the SACC will undoubtedly hear cases with the potential to invite backlash. Limiting access can only proceed so far—other methods must be found.

Given this constraint, the SACC has managed to limit political confrontation through its procedural rules and adjudicatory standards in those cases that it does hear. Its use of adjudicatory standards has allowed the Court to restrict the applicability of international human rights law while affirming basic rights. In its remedial orders, it has at times ruled that the government was in breach of rights while simultaneously taking into consideration government costs and refusing any ongoing structural oversight role of government policy. In short, the SACC chooses legal outcomes that affirm basic human rights and restate the Court’s own powers but avoid any direct challenge to government prerogatives. Two of these situations are examined below: the rights of individuals with HIV and rights under the criminal law.

**Subcase 1: Socioeconomic Rights: HIV**

My initial review of primary and secondary sources revealed that one of the most consistent sources of criticism of South Africa’s international human rights law implementation was in the area of socioeconomic rights. The particular area of concern was the right to health, with a focus on individuals living with HIV. Of the twenty years of human rights reports reviewed, this issue appeared in eleven years.

The ongoing relevance of socioeconomic rights adjudication in the post–1993 era is perhaps not surprising given the high level of economic inequality arising under the Apartheid regime. Under Apartheid, the commitment to a laissez-faire model of capitalism encouraged the
concentration of wealth (de Wet 1996), and the strict racial formation of the political community helped ensure a lack of ameliorating redistributive policies (Lieberman 2001). As a result, the ability and willingness of the Court to engage in enforcement of second-generation human rights has from the Court’s founding been a source of political controversy.

Concerns over the likelihood of economic redistribution under majority rule led the constitutional drafting committees to exclude many of these rights from the Interim Constitution. Their inclusion in the 1996 Constitution was the result of increased leverage gained by the ANC in the intervening years. As a result, the Final Constitution differed from its predecessor in key ways. First, it included a requirement that citizens’ rights were not only to be a shield against the government, but also that these rights represented government obligations that the state must “promote.”135 Second, the panoply of rights was accordingly expanded to include health care, food, water, and economic security.136

The SACC gave an early boost to socioeconomic claims by rejecting the argument that socioeconomic rights were fundamentally non-justiciable. During the constitutional certification process, several parties had objected137 to the inclusion of socioeconomic rights in the Bill of Rights on the grounds that court intervention in this area would require judicial action on policy

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135 Final Constitution §7(2).

136 Indeed, the Final Constitution made a move beyond second-generation rights to include third-generation group rights in the form of cultural, religious, and linguistic protections. See Final Constitution §§30–31.

137 The objectors were the South African Institute of Race Relations, the Free Market Foundation, and the Gauteng Association of Chambers of Commerce and Industry. First Certification Case, Appendix: Summary of Objections and Submissions, pp. 282–83.
and budgetary matters and thus represent a fundamental breach of the separation of powers principle. The SACC rejected this argument through comparison to judicial enforcement of first-generation rights, stating that “even when a court enforces civil and political rights…the order it makes will often have such implications….In our view it cannot be said that by including socioeconomic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.”

As a result of this very early assertion of justiciability of second-generation rights and the development of a robust socioeconomic rights jurisprudence, the SACC has received laudatory reviews from court watchers both within South Africa and abroad.

Applicable Law

Despite this positive reputation, however, the SACC has had only a marginal impact on the real-world enforcement of socioeconomic rights and HIV treatment in particular. This is despite a wide range of legal sources on which the Court could draw. The most basic source of law for socioeconomic rights claims is the Final Constitution. It reads:

Health care, food, water and social security
27. (1) Everyone has the right to have access to
   a. health care services, including reproductive health care;
   b. sufficient food and water; and
   c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

138 First Certification Case at ¶77.
(3) No one may be refused emergency medical treatment.\textsuperscript{139}

Given the timing of South Africa’s constitutional transformation, this inclusion of health rights in the Constitution is not surprising; constitutionalizing the right to health is heavily influenced by the timing of constitutional change, with later adopted constitutions much more likely to include this right as international norms and treaty instruments have increasingly come to recognize a right to health (Kinney and Clark 2004). This effect was evident in the South Africa case, where NGOs and the ANC relied heavily on the ICESCR and international support for the right to health during the constitutional drafting process (Heyns and Viljoen 2002, 42–43).

The South African commitment to second-generation rights is, however, complicated by the country’s spotty treaty ratification record in this area. Of the treaties comprising the International Bill of Rights, South Africa has signed and ratified the ICCPR, two of its optional protocols, and the Universal Declaration on Human Rights.\textsuperscript{140} South Africa has not ratified the ICESCR, the third major instrument in this group, although it did sign the convention in 1994. In 2012 the government reiterated its intention to ratify the agreement but as yet no action has been

\textsuperscript{139} Final Constitution §27.

\textsuperscript{140} In addition to the Universal Declaration of Human Rights, the ICCPR, and the ICESCR, the International Bill of Human Rights also includes two optional protocols to the ICCPR, one establishing an individual complaint procedure and one aiming to abolish the death penalty. (See http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.) Like the ICCPR, the ICESCR is buttressed by an optional protocol that establishes an individual complaint procedure, but this has not yet received the adequate number of ratifications to enter into force. The ICESCR optional protocol is only open for ratification to states that have ratified the ICESCR; as such, South Africa is not yet eligible. (OPCESCR §17)
As a result, any treaty provisions in the ICESCR are not directly binding. Instead, these otherwise non-binding treaty provisions and any decisions by ICESCR bodies are considered interpretive guides under SACC precedent.\footnote{142}

South Africa did, however, ratify the African Charter on Human and Peoples’ Rights (the Banjur Charter) in July 1996, just prior to the coming into force of the Final Constitution. The Banjur Charter provides that “Every individual shall have the right to enjoy the best attainable state of physical and mental health” and that “States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”\footnote{143} The Banjur Charter, as a duly ratified treaty, acts as a binding constraint for the government under the South African Bill of Rights.

\textbf{The Case}

It was in this relatively hospitable legal environment that the SACC became involved in the HIV treatment issue. The primary case dealing with HIV treatment in South Africa is the landmark \textit{Minister of Health and Others v Treatment Action Campaign and Others (No. 2)}\footnote{144}

\footnote{141} Statement on Cabinet Meeting of 10 October 2012 §2.1.

\footnote{142} See, e.g., \textit{Makwanyane}.

\footnote{143} Banjur Charter §16(1)–(2).

\footnote{144} 2002 (10) BCLR 1033 (CC). \textit{TAC 1} was an accompanying temporary order requiring enforcement of a previous High Court order directing the government to make Nevarapine available where medically indicated at pilot sights already established by the government. \textit{Minister of Health and Others v Treatment Action Campaign and Others (No 1)}, 2002 (10) BCLR 1075 (CC).
(“TAC 2”). Although TAC 2 dealt with a specific scenario—patients’ access to antiretroviral drugs limiting the transmission of HIV from mother to child—the importance of this case in South African politics cannot be overstated. At the time of the TAC decision, approximately 5 million South Africans were infected with HIV, the highest number of infected individuals in any country (Fassin and Schneider 2003). Transmission from mother to child accounted for ten percent of new cases (Makgoba 2000). The SACC itself noted in its opinion that according to government publications, the HIV/AIDS pandemic had cost millions of South Africans their lives, threatened the economy, and produced one of the greatest challenges facing the post-transition democracy.145

The Treatment Action Campaign (“TAC”) originally brought an application against the government in the High Court of Pretoria.146 TAC is an advocacy group focused on expanding access to safe and effective treatment for individuals diagnosed with HIV. The organization brought the case in order to challenge the government’s policy limiting access to Nevirapine, a drug that had been tested as effective at reducing the incidence of mother–child transmission of HIV during birth, and which had been approved for use in South Africa since 1998.147 Under the government’s program, Nevirapine was only made available in public health facilities at two pilot sites (one rural, one urban) in each of the country’s nine provinces (Richardson 2007).

145 TAC 2 at ¶1.

146 TAC 2 at ¶3.

147 TAC 2 at fn. 3.
In December of 2001 the High Court found in favor of the applicants, specifically ruling that the government had acted unreasonably by (1) failing to make Nevirapine available in the public sector when a medical doctor deemed it necessary and (2) failing to set a timeframe for implementation of a national program to prevent mother-child transmission of HIV.\textsuperscript{148} The High Court found that the Constitution and caselaw required the government to move toward progressive realization of the right to health, something that government policy did not achieve. The High Court therefore ordered the government to make Nevirapine available at all public health facilities to women where medically indicated, and to create “an effective national programme to prevent or reduce the mother-to-child transmission of HIV[.]”\textsuperscript{149} Importantly, the High Court maintained jurisdiction over the case, requiring follow-up reports from the government at specified dates.\textsuperscript{150}

The government appealed the case, and the SACC granted expedited review. In a unanimous ruling, the Court agreed with the High Court that the government’s restriction of Nevirapine to eighteen test sites was not in compliance with constitutional mandates. The Court also agreed that the constitution required the development and implementation of a national program providing access to treatment preventing mother-to-child transmission of HIV.\textsuperscript{151}

\textsuperscript{148} TAC 2 at ¶2.

\textsuperscript{149} Treatment Action Campaign and Others v Minister of Health and Others, Case No. 21182/2001 (High Court of South Africa, Transvaal Provincial Division) (“TAC HC”), Order at ¶¶1–2.

\textsuperscript{150} TAC HC Order at ¶¶4–8.

\textsuperscript{151} TAC 2 at ¶135(2).
Despite this, the Court vacated the High Court’s orders requiring development of a program within a specified timeframe and allowing for continued court oversight. In their place, the SACC ordered the government to make Nevirapine access throughout the public health system and to develop a national program, but without any timeline and without maintaining the Court’s jurisdiction.\footnote{152}{TAC 2 at ¶135(3).} Instead, the SACC indicated that it could rely on the good faith of the government to comply with the ruling.\footnote{153}{TAC 2 at ¶129.}

**Court Restrictions**

The SACC’s ruling received a positive reception both in South Africa and abroad. Despite this positive reception, the SACC’s decision in *Treatment Action Campaign* was in many ways self-limiting. The Court built on a jurisprudential foundation that allowed the Court to use procedural and interpretive tools to affirm basic rights without antagonizing reluctant government actors. Specifically, the Court adopted adjudicatory standards that limited the reach of international human rights law and applied remedial orders that avoided any direct oversight role for the Court. In this way, the SACC avoided confrontation with the government, maintained and even strengthened its legal legitimacy, and avoided any threats to its institutional prerogatives.
Adjudication and Standards

Perhaps most importantly, the Court was able to limit the extent to which it would rely on international law standards when interpreting socioeconomic rights. It did this by adopting a less rigorous standard of review for the rights in question. Whereas international law has developed a “minimum core” standard for adjudicating whether or not a right has been fulfilled, the SACC chose instead to rely on a “reasonableness” standard that guaranteed the maximum flexibility for government actors and the Court itself.

This standard was first adopted by the Court in the earlier landmark case of Grootboom,154 which dealt with the right to housing under FC §26. In that case, the appellants had asked the SACC to adopt the minimum core standards used by the United Nations Economic, Social, and Cultural Rights Committee. This would have set “minimum essential levels” of the right that the state would be obligated to provide using “all the resources at its disposal.”155 The SACC noted that some of the language of FC §26 was itself “taken from international law and Article 2.1 of the Covenant in particular”156 and that the Court was obliged to consider international law and interpretations by relevant international tribunals.157 Despite this, the Court in a unanimous decision chose to disregard the Committee’s interpretive guide to

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154 Government of the Republic of South Africa and Others v Grootboom, 2000 (11) BCLR 1169 (CC).
155 Grootboom at ¶¶29–30.
156 Grootboom at ¶45.
157 Grootboom at ¶26, citing Final Constitution §39 and Makwanyane.
the language. In this it deviated from the actions of other South African institutions, most notably the Human Rights Commission,\textsuperscript{158} which employs the ICESCR Committee’s minimum core standards when evaluating government compliance with socioeconomic rights guarantees (Heyns and Viljoen 2002, 52, fn. 126).

The SACC instead adopted a “reasonableness” standard to evaluate the government’s policy. One key problem with this approach is that it fails to provide any content to the rights in question (Bilchitz 2003). Whereas a minimum core approach requires provision of basic essential services, the SACC’s reasonableness standard is entirely context-specific: “The state’s obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person.”\textsuperscript{159} Because it is context-specific, it also limits the Court’s capacity to determine the extent of the right:\textsuperscript{160} “[E]ven if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.”\textsuperscript{161} Instead of seeking more information, the

\begin{footnotesize}
\textsuperscript{158} The Final Constitution mandates that the Human Rights Commission monitor socioeconomic rights in the country (Heyns and Viljoen 2001, 503).

\textsuperscript{159} Grootboom at ¶37.

\textsuperscript{160} This approach differed from the court below, which felt comfortable ordering the government to provide “tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.” Grootboom at ¶4.

\textsuperscript{161} Grootboom at ¶33.
\end{footnotesize}
SACC issued a declaratory order requiring the government to establish a program that would progressively meet the right of access to adequate housing.\textsuperscript{162}

The SACC built on this analysis in \textit{Treatment Action Campaign}. In doing so, it effectively reaffirmed the idea that a “minimum core” was not so much a basic rights guarantee as it was an adjudicatory standard: “It is impossible to give everyone access even to a ‘core’ service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably[.]”\textsuperscript{163} The Court reiterated that FC §27 did not require satisfaction of a particular right’s minimum core: “[T]he socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them.” Rather, the concept of a minimum core would be “possibly relevant” to determining whether the government program was reasonable.\textsuperscript{164}

The SACC used adjudicatory standards to accomplish two goals. First, it reiterated the importance of international law in interpreting the South African Bill of Rights. As such it ensured the ongoing availability of this tool and maintained the legal legitimacy of the court in the eyes of court watchers. Second, the SACC eschewed any direct usage of the minimum core standards found in international law, instead recharacterizing them as interpretive aids—but aids in interpreting standards, not rights. This enabled it to affirm a basic human right while

\textsuperscript{162} \textit{Grootboom} at ¶99.

\textsuperscript{163} \textit{TAC 2} at ¶35.

\textsuperscript{164} \textit{TAC 2} at ¶34.
simultaneously removing itself from direct conflict with the government over determination of that right’s content and implementation.

Remedies

The SACC followed a similar pattern when choosing which remedies to apply in TAC 2. While agreeing with many of the substantive findings of the court below, the SACC replaced the High Court’s structural interdict with a declaratory order. In effect, the SACC simultaneously affirmed appellant’s claim of right and removed the possibility of the type of court oversight that might maintain pressure on the government and ensure fulfillment of that right.

The Final Constitution provides the Court with substantial leeway in its determination and application of appropriate remedies. Specifically, §38 allows the court to provide “appropriate relief,” while §172(1)(b) dealing with the Bill of Rights empowers courts to “make an order that is just and equitable[.]” Theoretically, this provides the SACC with the ability to award money damages, declare laws invalid, provide declaratory relief, or issue structural interdicts granting the Court supervisory powers, to name only a few.

It is likely that a structural interdict was appropriate in this case, given the prevailing legal standards for such orders. A structural interdict would have allowed the Court to maintain jurisdiction, require follow-up reporting by the government, and provide easy access to the Court for the applicants in case of government non-compliance. The SACC instead chose to rely on the government’s good-faith efforts to comply. Under the Court’s own precedent structural interdicts are considered appropriate when a failure to comply—even given good-faith efforts—is likely to have a dramatic negative impact (Roach and Budlender 2005, 333). It seems clear that the facts
in *TAC* 2 met this standard, given estimates that a universal Nevirapine program could prevent as many as 35,000 HIV transmissions annually (J. M. Berger and Kapczynski 2009, 7), and that every day the program implementation was delayed could result in as many as ten additional infections of HIV.\(^{165}\)

Despite this, in *TAC* 2 the SACC overturned the High Court use of a structural interdict to oversee government compliance and instead articulated a more restrictive standard under which oversight would only be appropriate where “necessary.” As one commentator has noted, it is difficult to imagine a case where the SACC would, in advance, know that such oversight was necessary absent clear evidence that a government actor was incompetent or acting in bad faith (Bishop 2008, 9.2(c)(ii)(aa)). Even so, the facts in *TAC* 2 arguably met even this heightened standard. The SACC itself noted that its enquiries to parties throughout the case’s litigation had elicited “contention” instead of “enlightenment”\(^{166}\) and that parties’ interactions entailed “a regrettable degree of animosity and disparagement.”\(^{167}\) The Court deemed the government’s lack of transparency “regrettable.”\(^{168}\) In sum, the Court found that the “unusual degree of political, ideological and emotional contention” surrounding the issue of HIV in South Africa not only “bedevil future relations between government and non-governmental agencies that will perforce

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\(^{166}\) *TAC* 2 at ¶9.

\(^{167}\) *TAC* 2 at ¶20.

\(^{168}\) *TAC* 2 at ¶123.
have to join in combating the common enemy, but it could also have rendered the resolution of this case more difficult.\footnote{TAC 2 at ¶20.} If ever SACC oversight were necessary, this seemed to be the case.

The SACC managed this tactical retreat while maintaining its prerogatives in future cases. The government’s position had been that where a court finds government policy lacking under the Constitution, “the only competent order that a court can make is to issue a declaration of rights to that effect.” In short, the government argued that separation-of-powers concerns should prevent courts from issuing mandatory orders or maintaining a supervisory role over implementation of court orders. The SACC rejected this argument, citing both caselaw and the constitutional imperative that the Court grant “appropriate relief” and “make any order that is just and equitable,”\footnote{TAC 2, citing Final Constitution §§38 and 172(1)(a).} and stating that the Court was empowered to “exercise some form of supervisory jurisdiction to ensure that the order is implemented.”\footnote{TAC 2 at ¶104.} These strong institutional claims were, however, not joined with action. Rather than maintaining jurisdiction, the SACC chose to rely on the government’s good faith, concluding that “The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.”\footnote{TAC 2 at ¶129.} In place of the structural interdict, the SACC provided declaratory relief that found the government policy inconsistent with the Final Constitution and ordered the government to make Nevirapine available at public health facilities other than the testing sites.

\footnote{TAC 2 at ¶20.}

\footnote{TAC 2, citing Final Constitution §§38 and 172(1)(a).}

\footnote{TAC 2 at ¶104.}

\footnote{TAC 2 at ¶129.}
On balance, the SACC retreated from the oversight contemplated by the High Court, avoiding direct confrontation with the government. In doing so it also provided greater flexibility for the government. The High Court’s order had required development of a national program and submission of a progress report to the court within three and a half months; the SACC, in contrast, did not impose any timeline for the development of a national program. The SACC ruling also specifically allowed the government to deviate from the Nevirapine order if other, “equally appropriate,” methods became available.\footnote{\textit{TAC 2} at ¶135.} The Court affirmed human rights and its own powers under the Constitution, all the while crafting a remedy that allowed the government significant room to effectuate its policy free of ongoing Court interference.

\textit{Outcome}

Can SACC intervention in this policy area be considered effective? It seems clear that the failure of the SACC to clearly define the nature of the right and to engage the government through a structural interdict limited the ruling’s effect on non-litigants and the policy area more generally. Table 7 reports the general increase in the use of antiretroviral drugs to prevent mother-to-child transmission before and after the SACC’s ruling (Chigwedere et al. 2008). The progress is less than impressive given the Court’s order to make Nevirapine available in all public health facilities, and given the fact that the government faced little financial cost. (In the summer of 2000 Nevirapine’s manufacturer had offered to supply the drug free of charge for five
years.\textsuperscript{174} By 2005, three years after the ruling, treatment coverage had still not passed the thirty percent mark.

<table>
<thead>
<tr>
<th>Years</th>
<th>Treatment Coverage</th>
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<tbody>
<tr>
<td>2000</td>
<td>&lt;3%</td>
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<tr>
<td>2001</td>
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<tr>
<td>2002</td>
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<tr>
<td>2003</td>
<td>5%</td>
</tr>
<tr>
<td>2004</td>
<td>10%</td>
</tr>
<tr>
<td>2005</td>
<td>&lt;30%</td>
</tr>
</tbody>
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This compares poorly to policy outcomes in Botswana and Namibia, countries of similar economic means\textsuperscript{175} and exposure to the HIV/AIDS epidemic. Botswana had reached 85% coverage by 2005; Namibia had reached 71% coverage in that same year, more than double the proportion achieved by South Africa (Chigwedere et al. 2008). Instead, the anticipated “good faith” efforts by the government were slow in coming. Though the declaratory order in \textit{TAC 2} required immediate development and implementation of a national program, the government did not implement a national treatment plan until 2004. By 2005, as many as half of all pregnant women were not even tested for HIV. It was not until 2007 that the government adopted the more ambitious National Strategic Plan; despite this, fifteen percent of public health facilities

\textsuperscript{174} \textit{TAC H.C.}

\textsuperscript{175} The World Bank currently categorizes Botswana, Namibia, and South Africa as upper middle income countries. Namibia, however, has significantly fewer resources in terms of GDP. For the fifteen-year period 1997–2011, Namibia’s per capita GDP never exceeded 75% of that of South Africa. World DataBank Africa Development Indicators, http://data.worldbank.org/data-catalog/africa-development-indicators.
were still not equipped to initiate antiretroviral treatments as recently as 2012 (Barron et al. 2013).

Use of indicators and data are critical to increasing coverage, but the lack of a structural interdict meant the Court was not involved in this monitoring process. This instead meant that activists and litigants were tasked with ensuring enforcement. Follow-up litigation is a common means of ensuring government compliance (Epp 1998), but this presents particular difficulties in a country such as post-Apartheid South Africa with its lopsided allocation of legal resources. Luckily, in TAC 2 follow-up litigation was possible because of the participation of a large, institutionalized actor. The Treatment Action Campaign filed (or threatened to file) contempt-of-court proceedings to force recalcitrant provinces to comply with the SACC’s order (Heywood and Hassim 2008, 265; Heywood 2003, 314). Even given the participation of this repeat player, however, follow-up litigation was often impeded by the unwillingness of government bureaucrats to act as whistle-blowers (J. Berger 2008, 73). As a result, the Treatment Action Campaign reverted to direct action techniques. These included a march to parliament of 20,000 people in February 2003 and a recurring civil disobedience campaign against the government in 2003 to force compliance with the 2002 ruling (Heywood 2009).

The biggest change may have been in the tone of government rhetoric, but even here the SACC’s ruling was only one of many influences. In April 2002 (just two months prior to the ruling in TAC 2) President Mbeki finally distanced himself from those groups arguing against an HIV/AIDS link; this was followed by a Cabinet statement in October of 2002 supporting wider access to antiretrovirals (Fassin and Schneider 2003). At the same time, it seems clear that pressure was already mounting on the government, both from within and without. At the time of
"TAC 2, a split had already developed among the provinces over how fast to proceed with the Nevirapine program rollout, and consensus had broken down within the ANC. In early 2002 prior to the decision in TAC, for example, ANC Premier Mbahzime Shilowa of the province of Gauteng continued with an expansion of that province’s Nevirapine delivery program in defiance of the ANC’s national Minister of Health (Heywood 2003). As litigation proceeded additional provinces likewise announced their intention to expand their Nevirapine programs (Roux 2013, 295).

Despite a shift from outright government denialism of an HIV/AIDS link, it seems clear that unlike in the provincial governments no radical policy changes were implemented or even advocated for by the national government in the immediate aftermath of TAC 2. On the contrary, a review of Cabinet meeting statements from December 2000 through the end of 2002 reveals that there was little shift in policy emphasis as a result of the Court’s ruling. Both in 2001 and 2002, approximately \( \frac{1}{3} \) of cabinet statements address the HIV/AIDS crisis in some way: 36% in 2001 and 39% in 2002. The percentage actually falls after the ruling, from 50% of the ten statements immediately preceding the ruling to 40% of the ten statements immediately following the ruling.

Indeed, the greatest period of emphasis on HIV policy in general and mother-to-child transmission in particular came during the period following Judge Botha’s issuance of the High Court ruling and the arguments before the Constitutional Court on appeal. During this five-

\[^{176}\text{See, e.g., the Cabinet Meeting Statement of April 17, 2002, wherein the government noted that “In conducting this campaign, government’s starting point is based on the premise that HIV causes AIDS.”}\]
month window, four of seven Cabinet statements dealt with the HIV crisis in South Africa. All of these offer a defense of the government’s existing program rollout or otherwise indicate that the then-current program would continue.

In addition, two statements attempt to reframe the Court battle as one not of policy but of the proper role of the judiciary in the democratic framework. For example the February 21, 2002, Cabinet statement asserts:

Government is appealing against this judgment. This is not because we are against expanding the mother-to-child programme – that process continues. It is because we need to gain clarity on whether the courts or the elected government decides on the detail of providing health services: This is a critical question about the division of powers in our democracy.177

Similarly, the April 30, 2002, Cabinet statement reiterated this framing of the issue, stating that the SACC case “will be treated in its proper context as seeking clarification on the issue of division of powers rather than a debate on access to Nevirapine.”178 It should be noted that all of these statements came during the period of time when the government was under the threat of the High Court’s structural interdict.

Lastly, there is also little evidence of any lasting policy shift among the ANC leadership more generally. A review of the ANC’s important annual policy position statements, the January 8 statements, failed to reveal any major changes in the governing party’s approach to HIV treatment following the SACC ruling. The statements for 2003 and 2006 only mentioned a

178 Cabinet Meeting Statement, April 30, 2002.
general need to increase teaching and awareness;\textsuperscript{179} those for 2004 and 2005 did not contain any reference to AIDS/HIV at all. The first mention of any policy change occurred in 2007, and even then thanked the Ministry of Health for its work and called only for a finalization of the government’s National Strategic Plan.\textsuperscript{180}

Overall, the Court’s decision to adopt a reasonableness standard and to rely on declaratory remedies limited the ruling’s policy impact. This treatment has been consistent across areas of socioeconomic law, including those outside the right to health. The SACC’s rejection of a minimum core standard was first applied to the right to housing in \textit{Grootboom} and later to the right to adequate water.\textsuperscript{181} The SACC’s ruling in \textit{TAC 2} is thus indicative of an ongoing pattern, whereby the Court has been willing to affirm rights while reducing the applicability of international law and deferring to government judgments about what is reasonable given available resources. At the same time, the progressive nature of socioeconomic rights might suggest that they are ideal cases for standing orders. Unfortunately, this has not been the case. Instead, the SACC has preferred declaratory orders that require no follow up, provide no concrete relief to rights advocates—and avoid involving the Court in any ongoing policy dispute with the government.

\textsuperscript{179} The 2003 Statement, for example, cites a need to “continue the awareness campaign with regards to AIDS.”


\textsuperscript{181} Mazibuko and Others v City of Johannesburg and Others 2010 (3) BCLR 239 (CC).
Subcase 2: Criminal Law: Rights and Protections

This pattern of restricting international human rights law’s substantive impact while limiting the effect of rulings appears in the second area of law explored in this study, that of citizens’ rights under the criminal law. These rights represented an additional policy area of international human rights law in which South Africa has received consistent criticism in the post-Apartheid era. Of the twenty years of human rights reports reviewed, this issue appeared in all years. Unlike the health considerations under HIV, however, rights under the criminal law appeared across a wide range of topics, from individual claims of police malfeasance to challenges against the amnesty that arguably formed the basis of the transition from Apartheid. Taken together, these claims reveal a Constitutional Court that has had difficulty matching the strong human rights language of the new constitutional settlement to the facts on the ground.

Applicable Law

Rights in criminal proceedings represent one of the longest standing and thus most heavily legalized areas of international human rights law. They range from those defending the individual against overbearing state power in criminal matters—protections against inhuman or degrading treatment,\(^{182}\) the right to a fair trial,\(^{183}\) prohibitions on arbitrary detention\(^{184}\)—to affirmative rights that impose burdens on the state, such as the right to an effective remedy

\(^{182}\) ICCPR Art. 7.
\(^{183}\) ICCPR Art. 14.
\(^{184}\) ICCPR Art. 9.
against state violations. In sum, they constitute rights to engage the state’s criminal law apparatus in a fair and humane manner. In addition, the vast majority of these protections have analogues in South African constitutional and statutory law (Killander 2010). In particular, the rights were entrenched in the fundamental rights sections of the Interim Constitution and again in the Final Constitution’s Bill of Rights.

Despite this heavy legalization at both the international and domestic level, the SACC adopted a restrained approach to rights enforcement similar to what it followed in the area of socioeconomic rights. First, the SACC interpreted the Constitution in ways that limited the reach of international law’s direct applicability in the domestic court system. Moreover, it adopted remedial approaches that affirmed rights without imposing extensive material costs on the government. At the same time, it has found ways of incorporating even non-ratified treaty law into the domestic system through its role as final interpreter of the Constitution. The result, as in the socioeconomic arena, is a preservation of the SACC’s institutional prerogatives and a general affirmation of basic human rights without undue interference with government policy.

__185__ ICCPR Art. 2(3).

__186__ Interim Constitution, Chapter 3, §§7–35.

Court Restrictions

Adjudication Standards: Limiting the Applicability of International Law

The SACC has avoided conflict with the political branches primarily by narrowing the applicability of international law. In the well-known case *Azapo*, the SACC limited international law’s domestic applicability in order to enable the Truth and Reconciliation Commission to act. Applicants argued that the act creating the Commission contravened both international law and South African constitutional law by granting amnesty to perpetrators of gross human rights violations during the Apartheid era. The applicants argued that the establishment of the Commission violated §22 of the Constitution providing that a court or other forum settle justiciable disputes as well as international law protections under the Geneva Conventions.

The SACC allowed the enabling act to stand by making reference to the Interim Constitution’s rights limitation clause as well as general principles of national unity and

188 Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others, 1996 (8) BCLR 1015 (CC).


190 The act mandated that any offender who had been granted amnesty could not be held liable either criminally or civilly for the acts in question. Nor could the government or any other organization be held vicariously liable for the acts for which amnesty had been granted (Act. 34, §20(7)(a)).

191 *Azapo* at ¶8.

192 *Azapo* at ¶25.
reconciliation found in the epilogue to South Africa’s Interim Constitution. While acknowledging that amnesty breached claimants’ right of access to the courts, the need for national unity rendered this limitation permissible. Perhaps most tellingly, the Court also recognized that without the amnesty provisions the new Constitution would most likely never have come into being.193

The Court also hedged on the question of legality under international law first by finding that international law was not binding in this case, and second by asserting that “there is no single or uniform international practice in relation to amnesty.”194 The SACC found that human rights protections such as the Geneva Conventions could not apply directly, since they had not been transformed by parliamentary act into domestic legislation.195 Moreover the Court skirted the issue of whether these would be violations under customary law (and thus not require transformation) by concluding that the Interim Constitution did not require adoption, but rather mere consideration, of international law when dealing with questions of fundamental rights.196 As a result the SACC took note of international practice and distinguished unrepentant regimes—which the Court reasoned could not legitimately grant themselves impunity—from

193 Azapo at ¶19.
194 Azapo at ¶24.
196 Azapo at ¶27.
transitional regimes such as South Africa which could accept conditional amnesty as part of a constitutional pact entered into by all segments of society.\textsuperscript{197}

This pattern of limiting international law’s reach is reflected in subsequent cases dealing with rights under the criminal law. In \textit{S v Williams}\textsuperscript{198} the SACC was presented with the question of whether South Africa’s subjection of juveniles to corporal punishment could be sanctioned under the Constitution and international law. Six juveniles in five different cases were sentenced with whipping using a light cane under the Criminal Procedure Act.\textsuperscript{199} The Court began by noting that the protections in the constitution against torture and cruel treatment were conformed “to a large extent with most international human rights instruments.”\textsuperscript{200} Despite this, the SACC was clear in treating international law as non-binding. To be clear, this was entirely justifiable given that at the time of the case South Africa had signed but not yet ratified the ICCPR.\textsuperscript{201} Yet the SACC does not make note of this shortcoming, and even goes so far as to note that South African law “conforms to a large extent with most international human rights instruments.”\textsuperscript{202} Instead, it noted that while “valuable insights” might be found in international law and foreign

\textsuperscript{197} Azapo at ¶¶22–24. In this analysis the Court analogized South Africa to states such as Argentina, Chile, and El Salvador, all of which had chosen amnesty as part of the process of democratic consolidation.

\textsuperscript{198} \textit{S v Williams and Others}, 1995 (7) BCLR 861 (CC).

\textsuperscript{199} Criminal Procedure Act, No. 51 of 1977, §294.

\textsuperscript{200} \textit{Williams} at ¶20.

\textsuperscript{201} South Africa signed the ICCPR in October of 1994 but did not ratify it until 1998.

\textsuperscript{202} \textit{Williams} at ¶21.
courts’ judgments, any judgment must comport with “contemporary circumstances” in South Africa.\(^{203}\) (The Court avoided discussion of similarly signed but unratified treaties such as the Convention against Torture\(^{204}\) and the Convention on the Rights of the Child,\(^{205}\) despite a lengthy discussion of torture and child rights by foreign jurisdictions.) Despite this downgrading of international law’s importance, the SACC ultimately found that the use of corporal punishment on children violated constitutional protections and was inconsistent with the purpose of the rights enshrined in the Interim Constitution and which were informed by international standards.\(^{206}\) As such, the offending section of the statute was to be treated as having no force or effect.\(^{207}\) The government subsequently repealed section 294 of the Criminal Procedure Act along with all other laws allowing for corporal punishment.\(^{208}\)

Even where South Africa had already signed and ratified a treaty, however, the SACC has taken a conservative approach to direct domestic applicability of treaty provisions. As noted above,\(^{209}\) the Final Constitution generally requires enabling legislation for ratified treaties except

\(^{203}\) *Williams* at ¶23.

\(^{204}\) South Africa signed the CAT in 1983 but did not ratify it until 1998.

\(^{205}\) South Africa signed the CRC in 1983 and ratified it on June 16, 1993, one week after the judgment in *Williams*.

\(^{206}\) *Williams* at ¶¶50–53.

\(^{207}\) *Williams* at ¶96.


\(^{209}\) The section on the *Status of International Law*, supra, describes the adoption of the “self-executing” language in Final Constitution §231(4).
for self-executing treaty provisions. What constitutes a self-executing treaty provision is up for debate, but an early definition would treat as self-executing any treaty “which of its own force furnishes a rule of municipal law for the guidance of municipal courts in deciding cases involving the rights of individuals.” (Henry 1929, 776)\(^{210}\) Beyond this basic definition little is agreed, most importantly which treaties or provisions qualify. In the cases of *Goodwin* and *Quagliani*,\(^{211}\) both case dealing with an extradition treaty with the United States, the SACC had the opportunity to clarify which treaty provisions were to be treated as self-executing. The cases arose following competing rulings on the issue in the High Courts.\(^{212}\) The SACC chose to sidestep the issue altogether, finding extradition permissible based on prior South African law while avoiding any decision on self-execution.\(^{213}\)

The failure to clarify which treaties are self-executing has led to limited treaty enforcement in later cases, most famously for the appellant in *Claassen v Minister of Justice and Constitutional Development*.\(^{214}\) In that case the appellant was seeking to overturn the dismissal of his claim for damages for unlawful detention. The High Court recognized that South Africa had a

\(^{210}\) Little progress has been made in refining this definition in the following decades. See, e.g., Paust (1988); Sloss (1999). The importation of the doctrine into the South African context has been no less confounding for legal scholars. See Dugard (2011, 56–60).

\(^{211}\) The SACC consolidated the cases in *President of the Republic of South Africa and Others v Quagliani, President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others*, 2009 (4) BCLR 345 (CC).

\(^{212}\) *Goodwin/Quagliani* at ¶¶4–6.

\(^{213}\) *Goodwin/Quagliani* at ¶¶41–46.

\(^{214}\) [2010] 4 All SA 197 (WCC) (8 December 2009).
duty not to unlawfully detain its citizens under §12 of the Bill of Rights; the High Court likewise acknowledged the right to a private law remedy in damages for unlawful detention in Article 9(5) of the ICCPR, which at the time of ruling had been duly ratified by South Africa. The High Court ultimately held, however, that because the ICCPR was not self-executing the relevant article was not binding on the court. This was a critical distinction, since although the language of the Bill of Rights closely tracked the ICCPR, the Bill of Rights failed to include any clear right to compensation for a rights violation (Killander 2010, 387). Hence, the court was not required to provide a private right of action and the appeal was dismissed.

*Development of the Common Law*

The SACC’s reluctance to treat international law as domestically binding has not been consistent. On the contrary, the Court has maintained its flexibility to determine the applicability of international law even where no ratified treaty law is available. The SACC has accomplished this by what it terms “developing the common law.” It is not surprising given South Africa’s constitutional transformation that much of the pre-1993 common law either contains legal lacunae or is in direct opposition to jurisprudential considerations inherent in the new constitutional settlement. As a result, the development of the common law is an active area of jurisprudence for the SACC as it endeavors to bring decades of caselaw into accordance with

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215 The text provides that, “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” ICCPR Art. 9(5).

216 *Claassen* at ¶21.

217 *Claassen* at ¶¶36–39.
new human rights protections. Indeed, this is a constitutional imperative: when applying a provision of the Bill of Rights any court in South Africa “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right[.].” The result has been a legal environment in which the SACC affords itself maximum latitude, at times cabining international treaty or customary law while at other times relying on international law, even non-ratified treaties, to develop the common law.

In *Carmichele v Minister of Safety and Security* the SACC relied both on the Constitution and international human rights law to develop the common law in such a way as to increase the liability of police and prosecutors. In that case the appellant, Carmichele, argued that the police service and public prosecutors had negligently failed to protect her from attack by a known sex offender who had been released from custody pending trial. The Court acknowledged that the legislature had the primary role of reforming the country’s laws. At the same time, the SACC stated that the courts themselves could not eschew their obligations to ensure the common law comported with international standards. It specifically cited statutory guidelines requiring the National Director of Public Prosecutions to encourage prosecutors’ compliance with the principles found in the United Nations Guidelines on the Role of Prosecutors. It noted that

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218 Final Constitution §8(3)(a).
219 2001 (10) BCLR 995 (CC).
220 *Carmichele* at ¶36.
221 *Carmichele* at ¶73 referring to the National Prosecuting Authority Act, No. 32 of 1998, Gazette No. 19021, 3 July 1998.
South Africa had signed and ratified CEDAW, and that CEDAW required the state to take “reasonable and appropriate measures” to protect women’s rights.\(^{222}\)

Importantly, the SACC did not cite any binding law, either domestic statute or international treaty, for the issue at hand: whether police and prosecutors could be subject to liability for a failure to prevent a rights violation. Instead the SACC made reference to UN Committee recommendations that states may be liable for compensating victims.\(^{223}\) The Court found the appellants could be held liable and remanded the case to the High Court for further proceedings and to assess damages.\(^{224}\)

Developing the common law has also allowed the SACC to ignore the constraints it seemed to apply in recognizing non-ratified or non-incorporated treaty law. In *Government of the Republic of Zimbabwe v Fick and Others*\(^{225}\) the SACC instead chose to develop the common law in such a way as to allow domestic South African enforcement of an international tribunal’s costs order. In that case, the Zimbabwean government had argued that the tribunal’s order was not enforceable in South Africa because the latter had ratified but not legally domesticated the treaty establishing the South African Development Community Tribunal. The SACC held, however, that the constitution required the courts to develop the common law in line with international law, and as such ratification rendered the treaty “binding on South Africa, at least on the

\(^{222}\) *Carmichele* at ¶61.

\(^{223}\) *Carmichele* at ¶61, fn. 67.

\(^{224}\) *Carmichele* at ¶84.

\(^{225}\) 2013 (10) BCLR 1103 (CC).
international plane. The Court ignored any number of issues that could been grounds for questioning the binding nature of the SADC Tribunal’s order: no South African enabling legislation directly incorporated the treaty; the order to be enforced was a tribunal’s finding and not part of the original treaty; and the requirements for consideration of international law are less stringent when the SACC is not interpreting the Bill of Rights. It instead used the opportunity to develop a new common law rule treating international tribunals analogously to foreign domestic courts in terms of judgment recognition.

**Damages**

When the SACC has found against the government, it has done so in ways that have limited the material impact of its rulings to the immediate case and prevented more widespread systemic effects. This can be seen in the SACC’s rulings awarding damages. In *Carmichele*, the Court recognized that the state’s negligence allowed the victim to sue for damages. The Court reached a similar outcome in *Zealand v Minister for Justice and Constitutional Development and Another*, a case dealing with a claim of wrongful imprisonment. In *Zealand*, the SACC found that the Constitution’s protection against unlawful detention enabled the applicant to sustain a

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226 *Zimbabwe* at ¶30.
227 *Zimbabwe* at ¶¶51–69.
228 2008 (6) BCLR 601 (CC).
229 *Zealand* at ¶53. The protections are found in Final Constitution §12(1)(a).
claim of damages against the government. The Court, as in *Carmichele*, referred to the ICCPR but instead relied on the Constitution as “sufficient” grounds for its ruling. Together, these cases would seem to bode well for victims of government abuse or neglect.

Unfortunately, the SACC has been unwilling to create a greater incentive structure for government compliance with rights protections. It has done so by limiting damages to those compensatory rights available in delict while avoiding punitive damages. In *Fose v Minister of Safety and Security*, the appellant had claimed a right to damages under the Constitution for police abuse. While the Court agreed that he was entitled to damages for the violation of an entrenched right, it refused to award any punitive constitutional damages as a means of deterring future governmental violations. Doing so, the SACC decided, would place a great demand on public coffers already overburdened by a multiplicity of policy demands; moreover, there would be no guarantee of punitive damages’ effectiveness. (Of course, the demand on public coffers would be the primary reason punitive damages might indeed be effective.) In short, while the appellant was entitled to damages for violation of a constitutional right, real-world considerations counseled against a reward that would significantly impinge on government policy prerogatives. Lack of punitives ultimately meant that there was reduced incentive for government actors to comply with precedent. Indeed, the issue of punitives was not even addressed in subsequent cases such as *Carmichele* or *Zealand*.

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230 *Zealand* at ¶55.

231 *Zealand* at ¶¶ 30 and 52.

232 1997 (7) BCLR 851.

233 *Fose* at ¶¶ 70–72.
Outcome

The SACC in its early years appeared to be focused primarily on its role as an enabler of the post-Apartheid transition, as evidenced by the Court’s willingness to distinguish amnesty in South Africa from crimes covered in international treaties. This early focus on the South African experience carried through later cases, when the SACC continued to limit the applicability of international law in favor of a concern for the special circumstances of South African socio-political considerations. The result was a Court that limited its rulings in ways that prevented any serious conflict with political actors and recognized the broad powers of the government to set policy.

One explanation for the SACC’s behavior is that it became less assertive over time due to its altered political footing as the ANC gained power (Roux 2013, 176–77). According to this argument, the Court in its early years was willing to act as a check on government because the ANC was not yet a dominant actor politically during the immediate post-transition era. As a result, any decisions against the government in early cases served to strengthen the institutional footing of the young Court by asserting its role as a trustworthy guardian against overzealous majoritarianism.\(^{234}\) In contrast, the Court in later cases operated in a more precarious institutional setting, one where the ANC’s dominance and deepening control over state levers of power cast doubt on the SACC’s ability to act in overt opposition to government policy.

\(^{234}\) Hirschl (2007) and Meierhenrich (2008) have made compatible arguments about the enabling role of law and courts in transitional regimes.
The cases reviewed here suggest an alternative phenomenon. Instead of changing its tactics across time, the SACC consistently has sought to assert its institutional prerogatives but has done so in ways that limit the threat to political actors. *Azapo* occurred against the backdrop of negotiations with a not yet vanquished National Party, and the Court recognized this by crafting a legally viable decision that distinguished the South African scenario under international law and allowed the peace process to continue. In *Williams, Carmichele, Zealand,* and *Goodwin/Quagliani*—cases spanning a fourteen-year period—the SACC consistently recognized the role of international law in its criminal law jurisprudence but ultimately limited its direct applicability in favor of domestic considerations. It also limited the costs of those rulings for the government.

By doing so the Court, as predicted by theory, has used its institutional and procedural flexibility to maintain its legal legitimacy without inviting political attack. It has done this not by capitulating on rights, but by crafting decisions that are palatable to government actors. By using international law as an interpretive aid but not as directly binding, the SACC has been able to frame its jurisprudence in ways that legitimate broad human-rights–informed policy goals while referencing the ongoing special circumstances of South Africa. Its rulings have also allowed for a high degree of maneuverability for the SACC in future rulings by hedging on the binding nature of international human rights law. In some rulings the SACC has limited the direct applicability international law that has not been ratified. In separate rulings duly ratified treaties were not applied because the SACC has not determined which treaties are self-executing. In yet other rulings the Court treated non-ratified treaties as key to developing the common law in the new constitutional settlement. The unifying theme in these cases is flexibility—the SACC can
apply international human rights law according to the needs of individuals cases. As a result, the Court’s use of international law to lock-in democratic change has been subtle and marginal.

**Linking Theory to the Subcases**

My theory postulates that courts act according to competing drives as a result of their combined legal and political nature. In order to maintain legal legitimacy, they must whenever possible render legally valid, or at least legally plausible, rulings. To maintain institutional strength they must avoid inviting backlash from the government. These roles are often in tension. How successfully they are able to navigate this course depends on systemic factors, and these in turn help determine the outcome in individual issue-areas.

Where a court is able to engage the public, one option is to balance public opinion against the threat of political backlash. In a system such as South Africa’s, however, such a balancing act is not feasible due to the extreme electoral dominance of the ANC and the large portion of the population that identifies with the party. The constitutional settlement did, however, endow the SACC with high levels of flexibility over its own docket and the terms on which it heard cases. The SACC has used this flexibility to maintain an extremely low number of cases and to avoid diverting public policy questions into the courts.

By limiting access in this way the SACC avoided confrontation with the government, but the cost of this strategy was public opinion. A 1997 survey of public opinion could be summed up as finding that the SACC was itself on probation. All South African ethnic groups registered higher levels of support than opposition for the Court, but all groups also demonstrated an overall willingness to abolish the Court if it regularly ruled against respondents’ preferred policy
outcomes. Overall, 55.4% of the population said that the court could be trusted (Gibson and Caldeira 2003, 9–11). A 2004 follow-up survey found that this number had barely moved, with 57.6% of the population trusting the court. The Court’s overall lack of relevance to the population can be seen in the fact that the same survey found a full 20% of South Africans had not even heard of the Constitutional Court (Gibson 2008, 243). This lack of public confidence or even awareness has led commentators to view the SACC as an “institution of elite politics.”

Given the relative poverty of the South African population, the levels of social need, and the limited resources of the government, the court perhaps wisely chose to avoid becoming the locus of broad policy disputes with the government. It could not limit access in all cases, however, and again the systemic variables explored above explain the SACC’s behavior. The SACC’s failure to engage the public meant that it ceased to participate in a triangular game with the public and political branches; instead it found itself in an institutional environment characterized most readily by the relationship between an apex court and the government. Absent moderating factors this might have created a situation where the SACC would have no choice but to choose between its legal legitimacy and the probability of inviting backlash. Moderating factors did exist, however, in the form of institutional flexibility. This allowed the SACC to limit the direct impact of international law and avoid conflict with the government through relaxed adjudication standards and limited remedies. In line with the SACC’s moderate predisposition toward enforcing international law, the court rendered verdicts that moved the nation’s legal

environment toward greater conformity with international law standards, but subtly and marginally.

This can be seen in both subcases. In the realm of socioeconomic rights, the SACC rendered a verdict that went against the government but did so in a way that did not require immediate implementation. Nor did the ruling directly rely on developing international law standards such as the minimum core, instead focusing on the reasonableness of the government’s approach and allowing political actors to determine the precise course of action. Nevertheless, the ruling did validate an alternative approach than the government had been pursuing and reaffirmed the right to health in the HIV realm, despite its lack of immediate effects on the government.

In the criminal law cases a similar pattern emerged. The SACC avoided the direct applicability of international human rights standards in favor of recognizing South Africa’s special circumstances. Nor did the SACC impose costly remedies, instead requiring protection of rights but avoiding pronouncements on the appropriate allocation of the government fisc. At the same time, international law standards were embedded more deeply into the nation’s legal system through development of the common law and the acknowledgment of generally recognized human rights. In both first-generation and second-generation rights the SACC has acted according to theoretical expectations, crafting legally legitimate rulings that recognize international law but limit the immediate effects to those that are palatable to the government.
Conclusion

The South African Constitutional Court has garnered attention by international law and comparative court watchers because of its many rights-affirming rulings. In a deeply divided state recovering from decades of institutionalized racism, it is easy to understand why so many would be keen to affirm the new court’s role. Interestingly, the SACC’s laudable rulings have often used rights rhetoric and strengthened the SACC’s reputation without providing any meaningful, immediate relief to those claiming the protection of international human rights law. Instead, the court has taken a gradualist approach, affirming international human rights but focusing on domestic sources of law and marginal enforcement.

This discrepancy can be explained by the variables tested in this dissertation. First, like independent courts in other democracies, the SACC can rely on international human rights law rhetoric ensconced in treaties and in the domestic legal structure. South Africa’s transformation from the Apartheid regime was itself at least partially grounded in the interaction between domestic resistance and international rhetoric, an interplay that flowed outward from South African activists seeking to undermine the legitimacy of the Apartheid regime but also flowed back into the domestic system by reliance on this same international human rights rhetoric and developing international law principles. In addition, the beneficiaries of the previous ruling regime themselves had an incentive to rely on and accept incorporation of international human rights law as part of the transition. Whereas the elite in the Apartheid era eschewed any calls for compliance with international human rights law, under the new regime these same laws and rights became a shield against domination by a newly empowered democratic majority. As a result, the role of international human rights law was accepted, institutionalized, and internalized.
by the constitution, the political elite, and the newly appointed justices of the Constitutional Court. This internalization was moderated, however, by the special needs of a South African society in transition.

The outcome also turns on the second variable under consideration: the diffusion of adjudicatory power. The concentration of economic and legal power during the Apartheid era was one argument seized upon by advocates of a new Constitutional Court. The previous judicial system’s complicity—or at the very least acquiescence—with Apartheid-era government abuses meant that many in the ANC and other resistance groups were unwilling to accept a strong, independent judiciary staffed by pre-transition judges. A new Constitutional Court addressed this concern, but it could not overcome the racial imbalance in the overall judiciary or the legal community more generally. As a result, while steady progress has been made toward an increasingly diverse court system nationwide, the SACC has remained the focus of political attention and has even seen its role as apex court strengthened over time. The result has been the lack of a diffuse adjudicatory environment that would allow the SACC to serve as a link between the people and the international human rights ensconced in the Constitution. This has also meant that the SACC is aware of the political importance attached to its rulings, and has further limited its docket and the reach of its rulings in ways that do not invite overt backlash.

Lastly, this desire to incorporate substantive rights buttressed by a new and independent Constitutional Court was accompanied by an institutional environment that granted a high degree of flexibility to the SACC. While the substance of rights was debated during the constitutional drafting process, legal procedures were left to the court—in the name of judicial independence but also as a holdover of the broader common law traditions of the judiciary. As a result, the
SACC has been able to constrict access over time, ensuring that it maintains a relatively elite institution, insulated from the legal demands of a diverse but poor population. Constrained access is matched by minimally restrictive policy outputs that proclaim broad principles but do so without creating follow-up monitoring mechanisms, requiring significant outlays of money, or establishing standards that go beyond reasonable or context-sensitive considerations.

The result has been a Constitutional Court that has affirmed the role of international human rights without taking it upon itself to effectuate those rights directly. The SACC has gained a strong reputation for legal legitimacy by embracing the international human rights articulated in treaties and in the Final Constitution; it has also laid the seeds for an expansion of these rights by declaring that the common law must be developed in line with international law. At the same time, it has guarded its institutional legitimacy by establishing precedent that respects the separation of powers—avoiding rulings that would create an ongoing antagonistic relationship with the government. It has used its control over procedures to ensure a limited level of access to the court alongside marginal demands for governmental implementation of those rulings it does offer.
Chapter 4: Mexico

Rigid Reform

When dealing with amparo suits, actions of unconstitutionality, constitutional controversies and ordinary federal suits, among others, the Supreme Court is an expeditious court for imparting justice, as indicated in the Constitution, but when dealing with the investigatory function envisioned in the second paragraph of Article 97, it is not. It cannot impart justice, even if it wishes.236

Introduction

Constitutional transformation and human rights incorporation were hallmarks of democratic change over the past thirty years, as evidenced by the Colombian and South African experiences. This pattern was replicated throughout much of Latin America: Bolivia (2009), Brazil (1988), Colombia (1991), Costa Rica (1989), Ecuador (1998 and 2008), Paraguay (1992), Peru (1993), and Venezuela (1999) all adopted new constitutions during this period.237

Mexico followed a different path. Rather than adopt a new constitution, Mexican politicians subjected the century-old Carta Magna238 to a series of reforms beginning in 1994.239


237 Mexico and Argentina were the only Latin American countries to undergo significant reform without adopting a new constitution. Both states undertook their reforms in 1994 (Uprimny 2011).

238 The Mexican Constitution of 1918 (the “Constitution”) was adopted at the close of the Mexican Revolution. It is alternatively referred to as the Fundamental Law or the Carta Magna.
The reasons for the 1994 reforms are up for debate. They have been interpreted as a means of cracking down on corruption, representing merely another attempt to strengthen the oversight capacity of a waning authoritarian state (Domingo 2000, 78). Alternatively they may have been motivated by President Zedillo’s desire to recover lost legitimacy on the part of the governing party and the Supreme Court following earlier controversies (Oseguera 2009). The most well received theory, however, is that proposed by Finkel (2003). She argues persuasively that the reforms were a form of political insurance on the part of the then-dominant political party, the Partido Revolucionario Institucional (“PRI”). As the party’s electoral dominance declined in the late eighties and early nineties, the institution of an independent judiciary would assure the PRI ongoing political access in the event the party lost its congressional majority or the presidency (Finkel 2003).

To ensure this access the reforms focused on a purportedly non-political institution: the Supreme Court of Justice of the Nation (the “SCJN” or the “Court”). The reforms strengthened the SCJN across several dimensions. They expanded the Court’s jurisdiction over constitutional issues, allowing minority legislative parties to challenge the constitutionality of laws before they went into effect. The reforms also expanded the stakeholders in the appointment process of SCJN justices, providing for presidential selection of a three-person pool from which the Senate

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239 The Constitution has been amended 216 times, with amendments in 74 of the 97 years since its adoption. Any references to the Constitution will therefore include the year in square brackets where necessary in order to avoid ambiguity (e.g., Const. Art. 94 [1994]). No year is indicated where the constitutional provision was consistent throughout the twenty-year period of this study. A complete list of amendments is available on the website of the Mexican Chamber of Deputies, http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm.

240 See also Finkel (2005) and Ríos-Figeroa (2007).
would choose each new justice. The twenty-five sitting justices of the Court were dismissed and replaced with a total of eleven new justices who were to hold their positions for a single non-renewable term of fifteen years. While this represented a reduction from the previous life appointment of justices, fifteen years was considered long enough for justices to operate without undue presidential influence while at the same time not remaining in office so long as to suffer significant drift from popular sentiment (Domingo 2000, 713).

The PRI dominated the reform process. Zedillo introduced the reforms to Congress within days of taking office, and the changes were passed by both houses of Congress within ten days and by the requisite number of state legislatures within a week. The constitutional amendments became binding law within one month of their introduction (Vargas 1995, 506–07). Throughout this process opposition parties argued that the reform bill should be the subject of a special session of Congress, but the PRI rebuffed such requests. Members of the legal community, academics, and the public likewise had little input in the reform process (Fix-Fierro 2003).

As a result access to the judiciary by political actors remained the hallmark of the reforms. No effort was made at this point to expand standing to non-political actors.

Nevertheless, the newly strengthened judiciary has emerged as politically independent with the

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241 Const. Art. 94 and 96 [1994]. Other judges in the federal judiciary were to be appointed by a new Federal Judicial Council, without the direct involvement of the President or Senate. Const. Art. 97 [1994]. For more on this court reform and earlier twentieth-century court reforms, see Domingo (2000).

ability to exercise constitutional review powers; this has offered the possibility of rights enforcement based on human rights laws and treaties to which Mexico is a party. Indeed, the United Nations in 2013 awarded the SCJN its Human Rights Award for the Court’s “important progress in the promotion of human rights through its implementation and application of the Mexican Constitution and its obligations under International Human Rights.”

This transformation, however, took nearly two decades and further rounds of reforms by political actors. The evolution from a newly strengthened SCJN with a focus on political disputes to a coequal branch able to enforce human rights was slow in coming. It is my argument that institutional constraints on the SCJN limited its ability to enforce human rights in any meaningful way for most of the years of this study. The Court exhibited a modest level of institutional sensitivity to international law, limiting the likelihood that justices would look to treaty law when considering human rights disputes. In addition, the reforms that strengthened the SCJN left the court with a moderately diffuse adjudicatory environment that left the judiciary subject to relatively efficient monitoring by political actors. Lastly, a lack of institutional flexibility rendered the Court unable to avoid politically problematic cases or, alternatively, to balance public opinion and empower rights entrepreneurs against potentially hostile political actors. As a result, the post-reform SCJN failed to provide a hospitable venue for rights enforcement, and the Court’s role would expand primarily at the initiative of political actors outside the judiciary.

Case Selection and Methods

The Mexican case allows a deeper understanding of the impact of independent variables because of the changing role of the SCJN over the past two decades. This institutional evolution has not been accompanied by a larger constitutional revolution of the type seen in Colombia and South Africa, where entirely new institutions assumed the role of constitutional arbiter. Instead, the reform of Mexico’s judicial system occurred within an otherwise static constitutional framework. In addition, the Mexican judiciary has slowly evolved from a negative case, with very little judicial enforcement of rights, to a case where the highest court is beginning to test the waters of rights enforcement. This internal variation allows for a deeper understanding of the country-specific variables that have influenced judicial institutional outputs and societal leveraging of court enforcement mechanisms over time.

The period of study begins with the 1994 reforms and continues through 2013, covering the complete Ninth and early Tenth Epoch of SCJN activity.\footnote{SCJN jurisprudence is divided into Epochs (Épocas). The First through Fourth Épocas are considered “No Aplicable” (non-applicable or non-binding) as they cover the pre-revolution years. Binding jurisprudence begins with the Fifth Época, which coincides with the establishment of the new Constitution in 1918 (Guerrero Lara 1982). The Ninth Época began in 1995 and ended in September 2012. The current (Tenth) Época began in October 2012.} I began with a systematic review of secondary source materials to determine the potential demand for international human rights enforcement litigation. The materials reviewed included State Department reports, United Nations reports, and nongovernmental reports by Amnesty International and Human Rights Watch. Based on this initial review I selected two areas of rights violations that appeared frequently in the reports. The first of these subcases covers impunity for grave human rights
violations in the overlapping areas of extrajudicial killings, torture, and disappearances of civilians. The second subcase examines the rights of indigenous communities.

Having selected subcases, I move to the secondary stage of inquiry. At this stage I reviewed the primary and secondary source materials to determine the extent to which the SCJN acted as an enforcement mechanism for international human rights law and what factors influenced the Court’s institutional output. Source materials included government gazettes, court cases on the SCJN website and in the Semanario, reports by international and nongovernmental organizations, academic articles, and news reports. Using these materials I explain the effects of international law sensitivity, adjudicatory diffusion, and institutional flexibility on the Court’s ability to serve as an enforcer of international human rights law.

Theory Applied to the Mexican Case

To begin I position the Mexico case study in the larger theory outlined in chapter one. The theory emphasizes three variables that explain a court’s ability to maintain or expand over time its enforcement of international human rights law obligations: the court’s sensitivity to international law, the diffusion of adjudicatory power, and the institutional flexibility of the court. I explore these variables below with regard to the SCJN. In the subsequent subcases I examine how these institutional characteristics determine the SCJN’s interactions with the political branches and litigants.

245 The Semanario Judicial de la Federación (Federation Judicial Weekly) serves as the equivalent of an official court reporter.
In summary, the SCJN during the period of study is best categorized as presiding over a system with a sensitivity to international law that slowly shifts from low to moderate, a moderate level of diffusion of adjudicatory power, and low levels of institutional flexibility. As a result the SCJN has played a relatively minor role in the domestic enforcement of international law until relatively recently. The low to moderate degree of international law sensitivity has led the SCJN to deemphasize international human rights in its legal rulings. The Court’s output has been further constrained by the remaining two factors: the moderate concentration of legal power in the SCJN has allowed for relatively easy monitoring of the Court’s behavior over time, and the lack of institutional flexibility has limited the SCJN’s ability to selectively engage in rights enforcement. The result has been a court that has been unable either to avoid contentious rulings or to selectively enforce rights in particular areas of the law. To the extent that the SCJN has expanded its role over time, it has been at the behest of political leaders.

*Sensitivity to International Law*

The status of international law in the Mexican constitutional framework was historically ambiguous, and the courts have played only a tentative role in the domestic enforcement of international law. Only in the past decade has the legislature clarified that international treaty law may have direct effect. For most of modern Mexico’s history, the relationship between domestic and international law was governed by the Constitution’s Article 133 supremacy clause, which provides that both federal laws and duly ratified treaties shall be recognized as the supreme law
of the union. This article also binds the judges of the nation to enforce the federal constitution, laws, and treaties when in conflict with state laws. It is clear from the text of Article 133 of the Constitution and from later interpretations by the SCJN that the article is primarily concerned with federal supremacy over states, not with creating a hierarchy of laws that could place federal statute above or below ratified treaties. The constitution was also completely silent with regard to other forms of international law, such as custom or the pronouncements of international judicial bodies.

As such, the relation between federal statute and international law has been left to judicial interpretation. While the judiciary has addressed the question of whether international law can serve as a source of law to override domestic statutes, it has failed to provide a consistent answer. In several cases the SCJN has found that federal law cannot be constrained by international treaties. In 1981 the Court clarified that Article 133 is primarily concerned with the hierarchy of federal and state laws, not the relationship between laws and treaties: “It is, therefore, a rule of conflict to which Mexican authorities must subject themselves, but at the same time it cannot establish that treaties are of a greater obligation than laws of Congress.” In another ruling that year the SCJN stated that “Article 133 does not establish any preference”

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246 The language of Article 133 has not changed since 1934.

between congressional statutes and duly ratified treaties. The Court reiterated this stance in 1991, finding that an “…international treaty cannot be the criteria by which to determine the constitutionality of a law, nor vice versa.”

Despite this, the SCJN has in more recent jurisprudence suggested an elevating of treaty law’s role in the domestic hierarchy. In a 1998 case dealing with labor rights, the Court concluded that “this Supreme Court of Justice considers that international treaties find themselves on a second plane immediately below the Fundamental Law and above federal and local law.” Indeed, in articulating the ruling the SCJN directly cited its earlier 1991 ruling and stated that it was “appropriate to abandon” the earlier interpretation, and that the Court would view treaties as occupying a higher level in the legal hierarchy “even against federal law.” In such a framework, international treaty law could be used by the courts to strike down federal statutes.

It is difficult to imagine a clearer repudiation of its earlier stance, and yet the Court subsequently hedged. Without declaring yet another interpretation of Article 133, the Court has

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indicated that the elevation of international treaty law above federal statute is not a general rule. In a subsequent speech Justice Sánchez Cordero explained that since the SCJN in its 1998 ruling was addressing an issue of union organization rights, the treaty right paralleled a fundamental right in the Mexican Constitution. As such, the elevation of treaty law in the national hierarchy was primarily an elevation in terms of its interpretive value as a means of supporting the reasoning of the Court in its finding of unconstitutionality. This should not be taken, she stated, as indicating that treaties were situated unequivocally higher than statute.  

Although this interpretation was provided by a single justice, the SCJN subsequently published an edited version of the comments on its website that included this reasoning under the title “The Constitution and International Treaties,” suggesting that the view is at the least not contrary to the understanding of a majority of justices.

The greatest changes in treatment of international law have come not at the hands of the SCJN, but through the political process. In June 2011 President Calderón signed into law a package of constitutional changes that elevated human rights protections to constitutional


These changes were part of a larger set of reforms over the previous three years that included changes to the criminal justice laws, electoral processes, and expansion of protective claims against the government (Colli Ek 2012, 7). The changes to Article 1 of the Constitution were of particular importance, incorporating for the first time the direct protection of human rights. Whereas previous iterations of Article 1 indicated that all Mexicans enjoyed the rights granted by the Constitution, the 2011 reforms expanded those protections to encompass all human rights recognized by the Constitution or international treaties to which Mexico is a party. This not only expanded the range of rights protected to include international treaties, but the reform also made clear that the Constitution was no longer to be considered the source of those rights. Instead, these rights were to be protected in the manner that would provide the broadest possible protection. Accordingly the title of the chapter was changed from “individual rights” to “human rights,” indicating the more expansive nature of the protections (Colli Ek 2012, 9).

This combined textual and rhetorical transformation has enhanced international law’s status throughout the Constitution. Of particular importance are the parallel changes found in the provisions regulating the amparo proceeding. The amparo is a protective suit against the

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254 Diario Oficial, 10 de junio 2011.

255 Chapter 1 of the Constitution includes 29 articles covering human rights and guarantees of those rights. Constitution, Ch. 1.

256 The name of the suit derives from the Spanish word amparar, to protect. The amparo is also the progenitor of the Colombian tutela action explored in Chapter 2. The amparo suit will be examined more closely in the following sections on the Mexican court system’s concentration and flexibility.
government\textsuperscript{257} for the failure to respect or enforce rights, particularly those rights ensconced in the first twenty-nine articles of the Constitution. Prior to the 2011 reforms, any use of this suit was restricted to individuals claiming a “legal interest” in the proceedings. This strict language was expanded in 2011 to allow suit by any individual or group with a “legitimate interest”—a much less textually stringent standard that matches the new rhetoric.\textsuperscript{258} The reforms also increased the powers of the National Human Rights Council. Whereas the Council could previously bring claims in the SCJN for violations of constitutional rights, the revisions allowed the Council to bring claims arising from rights under treaty law.\textsuperscript{259} In practice these combined changes offered the possibility of a greater range of cases reaching the SCJN.

Despite the late constitutionalization of international law, Mexican ratification of treaty law was relatively robust even before the democratic transition and constitutional reforms of the nineties. During the period of inquiry Mexico was a party to the two major human rights instruments, the Covenant on Civil and Political Rights (23 March 1981) and the Covenant on Economic, Social and Cultural Rights (23 March 1981), as well as the numerous issue-specific human-rights treaties governing torture, women’s rights, children’s rights, and the rights of migrant workers. The country was also party to numerous ILO treaties as well as those regional human rights mechanisms comprising the Inter-American system. A complete list of major international human-rights treaty ratifications and accessions is included as Appendix II.

\textsuperscript{257} The amparo is not available when the violation is at the hands of a private party. Const. Art. 107(II).

\textsuperscript{258} Const. Art. 107(I) [2011].

\textsuperscript{259} Const. Art 105(2)(g) [2011].
The high number of human rights treaty ratifications indicates that Mexican courts should have ample legal basis for rulings that safeguard human rights. At the same time, the constitution’s textual ambivalence toward international law’s role provides little guidance as to how, whether, and when courts must apply these protections. The resultant institutional ambiguity suggests that the attitudes of Mexico’s justices have played an outsized role in determining the extent to which international law serves as a source of binding constraint. This has varied greatly over Mexico’s recent history, ranging from an early period of extreme antipathy toward international law to a more recent tentative embrace of human rights norms.

Any discussion of judicial attitudes toward international law must make note of the extreme legal nationalism that historically characterized the Mexican judiciary. In addition to the constitution’s textual downgrading of international treaty law highlighted above, the Mexican legal system until the 1980s was extremely reluctant to enforce legal principles of any non-Mexican provenance, be they public or private principles of law. Scholars have suggested that the origins of this antipathy can be located in the foreign dominance of industry and natural resource exploitation in the years leading up to the Revolution. The resultant social inequities provided populist fervor that shaped the social provisions of the 1917 constitution and the later nationalization of foreign oil investments. This extended to the legal regime, which recognized this nationalism through the adoption of “absolute territorialism”—an aversion to recognizing foreign and international legal principles when deciding disputes. It was not until the late 1980s when economic opening helped break down this resistant to foreign legal influences, resulting in the first attempts to codify conflict-of-laws principles and ratify and incorporate treaties domestically (Vargas 2009, 56–66).
This opening to international and foreign law has only slowly become a regular feature of the Mexican judicial system. Treaty compliance continues to be hindered by lack of knowledge among judges and lawyers. International human rights issues have recently become a standard part of legal curricula, but as of 2002 only fifteen schools required such training as part of the undergraduate law degree (Heyns and Viljoen 2002, 423). A more recent study indicates that human rights law continues to be but a small part of an extremely varied educational system; courses focused on human rights tend to be just one elective course among the forty to seventy courses students complete (Pérez Hurtado 2010, 582–83). Interest in human rights may be growing, but slowly, with only 17.5% of students indicating a concern for social justice of any kind as the reason they pursued a legal education (Pérez-Hurtado 2009, 93–94).

To determine the extent to which the justices of the SCJN are exceptions to this general lack of attention to international law, I examine the educational and professional backgrounds of all justices since the 1994 reforms. To determine whether individual justices’ ideal point is reflective and supportive of international human rights law, I reviewed each justice’s personal biography as included on the judiciary’s website to determine whether the justice was educated in a foreign institution, worked in a foreign country, or regularly traveled abroad for conferences and presentations. While not determinative of an individual justice’s attitude toward international law, overseas training and work does indicate exposure to legal traditions beyond the domestic system and a willingness to engage with foreign or international legal concepts. The

260 The biographies of current justices are available at both the Supreme Court website (www.scjn.gob.mx) and the website of the Federal Judiciary Counsel (www.cjf.gob.mx). The biography of one justice, Juventino Castro y Castro, was not available on these official sites, so reference was made to Camp (2011).
results of this review are included below in Figure 13. An * indicates justices whose experience include this international exposure.

Figure 13: Justices of the Mexican SCJN
*Names with an * indicate justices with heightened international sensitivity*

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Overall, only a minority of justices has experience that provides the justice with any heightened sensitivity to international law concerns. Of the twenty justices who have served on
the Supreme Court since the 1994 reforms, only nine had biographies listing significant educational or work experience abroad. At the institutional level as well these justices rarely represented a majority. Only in the years 2007–2010 and again since 2013 have these more internationally oriented justices constituted a majority of the eleven justices.

In general, both at the institutional level and at the level of individual justices the SCJN has exhibited only a slight orientation toward international law during the period of study, with no clear imperative to either adopt or reject international law. The textual ambiguity of the Constitution has until recently provided little impetus for the Court to consider international treaty law or broader international human rights norms. The legal training and experience of the justices have failed to overcome this institutional shortcoming. The text of the Constitution and a wide range of treaty ratifications suggest the possibility for the Court to enforce international human rights, but the lack of any clear textual imperative is coupled with a high court whose members have limited professional exposure to international law. As a result, the Mexican judiciary is most appropriately classified as having a low international sensitivity, with this sensitivity increasing to moderate over time.

**Adjudicatory Diffusion**

Adjudicatory power in Mexico’s judicial system represents an admixture of diffuse and concentrated constitutional review powers. The degree of diffusion has fluctuated over time as political actors have focused attention on the SCJN and the SCJN has reacted through its rulings. Historically, the system has often adhered more closely to the diffuse model, but periodic political interventions have highlighted the political role of the SCJN. The 1994 reforms
continued this process by increasing the SCJN’s ability to review laws at both the state and federal levels. As a result the Mexican judicial system during the period of study is best categorized as having moderate levels of adjudicatory diffusion, allowing politicians relatively efficient monitoring of the judicial branch.

Historically the Mexican system could be categorized as diffuse in terms of its allocation of adjudicatory power because of the existence of the amparo suit. The amparo is a special judicial suit designed to protect individual rights. It was first established in 1847 and spread outward from Mexico to other parts of Latin America and the Spanish speaking world, extending as far as Spain and the Philippines. It constitutes a multiplicity of actions, from a judicial request to overturn a lower court’s ruling to the equivalent of a habeas corpus writ. The common element is the protection of a private individual’s right under the constitution to be protected from government abuse by any public actor in any branch of government. It is brought in the federal court system\(^ \text{261} \) and serves as the primary judicial means of enforcing human rights in the courts. From the time of the amparo’s initial formulation it has been designed for broad access that would allow individuals to bring a claim in courts throughout Mexico (Brewer-Cárías 2008, 120–29).

This diffuse power was balanced, however, by strict limitations on the applicability of individual court rulings—any ruling in an amparo suit applied solely to the individuals in the

\(^ {261} \text{The federal court system exhibits a familiar hierarchical structure: initial claims are heard in the district courts (los Juzgados de Distrito), appeals are carried to the circuit courts (los Tribunales Colegiados y Unitarios de Circuito), with the final pronouncement of laws in the Supreme Court of Justice of the Nation (la Suprema Corte de Justicia de la Nación). Additional judicial institutions outside the three-tiered hierarchy include the Electoral Tribunal (el Tribunal Electoral) and the Federal Judicial Council (el Consejo de la Judicatura Federal). Const. Art. 94.}\)
case. This inter partes application even extended to challenges against legislative acts, meaning that although a citizen could challenge the constitutionality of legislation, any court ruling in favor of the challenger only applied to the individual; the law itself remained on the books and authorities could continue to apply it against other members of society.\textsuperscript{262}

This is consistent with the Mexican judiciary’s historical basis in civil law principles, wherein the concept of binding precedent has found little purchase. The concept of binding precedent is not, however, completely absent from the Mexican judicial system. Instead, it is calibrated in such a manner as to concentrate important precedential rulings at specific points in the judicial system, allowing for easier monitoring of judicial activity by political actors. In Mexico certain courts are empowered to establish precedent through the articulation of “jurisprudencia”.\textsuperscript{263} This allows these legally designated courts to create binding normative rules through one of two processes.

The first is the process of “repetition,” wherein the court rules on a point of law in the same way five times without contradicting itself. This obviously limits the power of the judicial branch; while even courts in the United States are considered passive because of their inability to seek out cases actively, in Mexico the repetition requirement means a passive judiciary must wait for five separate cases to make their way to the court. It also allows for more active political monitoring in two ways. First, the repetition requirement ensures that no individual court can

\begin{footnote}
\textsuperscript{262} This is referred to as the “Otero formulation” after Mariano Otero, the original promoter of the amparo suit at the national level (Zamora 2004, 25).
\end{footnote}

\begin{footnote}
\textsuperscript{263} “Jurisprudencia” should not be confused with the English word “jurisprudence.” Although the latter refers to legal theory, the Mexican term refers specifically to binding judicial precedent (Vargas 2009).
\end{footnote}
overturn a government policy without the government having ample time to intercede, either by
tweaking the policy or by appointing new judges as terms expire. Second, because the primary
means of enforcement of individual rights is through the amparo, and the amparo is a federal
court hearing, this process of repetition ensures that the SCJN is likely to be the most effective
interpreter of even state laws (Zamora 2004, 85). This allows the federal court system to
operate as a policing mechanism over sub-national government units.

The second means by which a court can create jurisprudencia is through “contradiction.”
Under this method when a high court overrules a lower court’s contrary ruling on a particular
legal point, a new point of law is created and becomes binding on all lower courts. Here the
political concentration of power in specific courts is much more explicit: this method of creating
jurisprudencia is available only to the apex court in each jurisdiction, such as a state high court,
the federal electoral tribunal in electoral matters, and most importantly the SCJN. The SCJN
plenary chamber is also able to create jurisprudencia in this way when it overrules a point of
conflict between its individual chambers. This means that the vast majority of courts, such as the
federal district courts, are simply not empowered to create binding precedent (Zamora 2004, 83–88).

264 Although the 1994 reforms increased SCJN justices’ decisional insulation from political actors, each justice is appointed for a single fifteen-year term. This provides the possibility that during any individual president’s sexenio (single six-year term) he will have the opportunity to replace several justices.

265 The authors also note (at 85, fn. 29) that the SCJN is more likely to influence state law for practical (in addition to legal) reasons: the high court widely disseminates its decisions in both physical and electronic format.
The 1994 reforms built on this history through the adoption of two forms of judicial review: the constitutional controversy and the action of unconstitutionality. This further concentrated adjudicatory power in the SCJN, since it is the only court in the nation empowered to hear these two types of claims. Constitutional controversies comprise those suits that arise between different branches of government or between governmental units at the various levels of the federal hierarchy.\footnote{266 Const. Art. 105(I).} This marks an important departure from the use of the amparo as the only judicial means of ensuring state compliance with federal laws; whereas the amparo depends on citizen suits, the new constitutional controversy can be brought by members of any level of government. This implicates the SCJN directly in political disputes between governmental actors.

Unconstitutionality review represents Mexico’s first venture into abstract constitutional controls. The reforms enable minority party members of the legislative branch to bring claims of unconstitutionality against new legislation before it has gone into effect. This power extends to legislative minorities at the federal and the state level, as well as to the attorney general. Jurisdiction extends to state, federal, and federal district laws, allowing the SCJN to serve as a venue for political disputes throughout the nation.\footnote{267 This type of claim requires 33% either chamber of Congress or the state legislature in question. The claim also had to be brought within thirty days of a new law’s passage. Const. Art. 105(II) [1994].} In both constitutional controversies and...
actions of unconstitutionality the SCJN also received the power for the first time in its history to hand down rulings with general (erga omnes) effect.\footnote{268}

The increased judicial powers were systematically concentrated in the SCJN, continuing a pattern that already existed with regard to amparo suits. An earlier round of reforms in 1988 removed lower court jurisdiction over constitutional issues in amparo proceedings (Zamora 2004, 263). In 1994 lower-level courts received few if any additional powers; to the extent that district courts were empowered to hear cases involving the federal government, those cases were given only inter partes effect. The SCJN also retained the power of “attraction,” which allowed it to immediately assert jurisdiction over any suit of overriding significance.\footnote{269} In addition, the federal government retained the explicit right to appeal amparo cases to the SCJN—a right not extended to other parties.\footnote{270} A further set of reforms in 1996 enabled the Court to hear claims over the constitutionality of electoral laws.\footnote{271}

It should be noted that the enhanced role of the SCJN was focused entirely on political actors. The general populace did not gain any new access mechanisms, nor did they gain either a priori or ex post standing to bring constitutional challenges with erga omnes effects. As a result the SCJN has remained an elite institution in terms of constitutional issues; the amparo action

\footnote{268} Under such circumstances, a supermajority of eight of the eleven justices is required for the ruling to have general effects. In other cases, the ruling is binding only on the parties to the dispute. Const. Art. 105(I).

\footnote{269} Const. Art. 107(IX).

\footnote{270} Const. Art. 105(V) [1994].

\footnote{271} Const. Art. 105(II) [1996].
meanwhile has continued to serve as the sole method by which citizens may challenge government actions even after the judicial reforms of 1994.

Most recently the reforms of 2011 continued this trend, simultaneously enhancing protection of human rights under the constitution and increasing the concentration of adjudicatory power in the SCJN. Any suspension of human rights during states of emergency must now be reviewed by the SCJN, automatically and immediately.\textsuperscript{272} Political monitoring of the judiciary is meanwhile even more seamless: the SCJN is now required to notify the responsible government branch when any federal judicial body finds any legal provision unconstitutional for a second time.\textsuperscript{273} Once a government actor is presented with a finding of unconstitutionality, the responsible authority has ninety days to correct the breach; only if no correction is made can the SCJN rule that the legal norm is no longer applicable and then only with a supermajority of eight out of eleven votes.\textsuperscript{274}

These increased judicial oversight powers would suggest a court well positioned to enforce the numerous treaty law and constitutional provisions that now protect international human rights in Mexico. The increasing concentration of these adjudicatory powers in a single court, however, have highlighted that institution’s political nature and rendered it vulnerable to efficient monitoring by the political powers it might otherwise check. As will be explored below in the subcases, this has resulted in reduced judicial enforcement of human rights, and at times

\textsuperscript{272} Const. Art 29 at ¶5 [2011].

\textsuperscript{273} Const. Art. 107(II) at ¶2 [2011].

\textsuperscript{274} Const. Art. 107(II) at ¶3 [2011].
has even prompted overt attempts by the court to reduce its role in setting policy. The SCJN’s difficult institutional setting has been exacerbated by the rigid institutional structure in which it operates, and to which this analysis now turns.

**Institutional Flexibility**

The existence of the amparo suit might suggest a court well positioned to enforce human rights. Despite this, the strict regulation of the amparo’s use and the extremely rigid nature of the Mexican legal system have acted as an impediment. Historically this lack of flexibility could be attributed to two factors: the extreme dominance of the political system by the PRI and the legal system’s civil law origins. Although both have become less determinative factors over time, the newly independent judiciary has inherited an inflexible institutional environment that continues to be dominated by legislatively determined court rules.

The SCJN’s current lack of institutional flexibility has roots in the president’s post–1917 dominance of the entire political structure. As the head both of the executive branch and the overwhelmingly dominant PRI the president served as the fulcrum of power for Mexico’s political system, an informal method of power consolidation referred to by scholars as *presidencialismo* (Weldon 1997). The president enjoyed ex oficio constitutional power to select members of the judiciary, but under the constitution these selections were subject to Senate approval. This approval however was entirely pro forma. The president’s leadership role in the
PRI provided him with what have been termed “meta-constitutional”\(^{275}\) powers, namely the selection of heads of both chambers of Congress; this guaranteed a seamless judicial appointment process (Ugalde 2001). It also allowed the President to use SCJN appointments as a reward to loyal politicians, resulting in a body of justices who were party loyalists rather than accomplished jurists (Magaloni 2003).

This arrangement had obvious negative effects on the development of an independent judiciary. Although structural safeguards existed in the constitution, the party-based system ensured an alignment of interests and the lack of any effective veto point in the judiciary. Instead the courts followed a policy of deference to political actors. This would be an obvious outcome in any system marked by *presidencialismo*. In the Mexican judiciary this was enhanced by the transformative nature of the 1917 constitution and the revolutionary credo of Mexico’s dominant party. Any judicial attempts to counterbalance political initiatives would be seen as particularly problematic. Instead, members of the judiciary and society at large expected policy would be determined by overtly political—but purportedly representative—bodies such as the Senate (Schor 2009).

Despite this expectation during the period of PRI dominance the courts did act as a check on government power, but instead of checking Congress or the President the federal courts acted as a rein on state and municipal power. Once laws were passed at the federal level the federal courts monitored state and municipal application of those laws through citizen amparo suits. This

\(^{275}\)Ugalde (2001) and other scholars use the term “meta-constitutional” to describe these party-based powers in order to distinguish them from the ex officio powers derived from the constitutional text.
allowed the party to use the courts to police the various branches and levels of government throughout the Mexican federal system. Where a local official failed to apply the law correctly, the application could be challenged in federal court. The federal court system in effect became another governing mechanism for the dominant PRI (Magaloni 2003, 291–94).

The judiciary’s role as enforcer of PRI policy prerogatives had an important secondary effect: the SCJN historically has not been empowered to develop its own procedures. Given the importance of the amparo in the system of vertical checks and balances, the political branches have been attuned to the potential substantive importance of seemingly procedural questions. As a result the legislature has been historically very active in articulating the jurisdiction and procedures governing the federal courts’ use of the amparo. The legislature designed the amparo to be limited in applicability. Litigants can only use the procedure to challenge official acts, and a ruling in an amparo proceeding applies only to that case—no general effects arise from the decision (Brewer-Carías 2008, 82). In short, were an adventurous court to overrule one of the PRI’s preferred policies, it would still only apply to the case at hand.

Lastly, the SCJN’s tight alignment with party mechanisms has limited the court’s efforts at institutional innovation. Unlike in the United States, binding precedent and the ability to override laws are not judicially created legal concepts. On the contrary, the ability of the Mexican courts to serve as a check on the legislature has been a political project self-consciously undertaken by the legislature. It was the federal congress that introduced the idea of binding
precedent with the 1882 Amparo Law; in 1950 the potential for binding through repetition became part of the constitution as Article 107.276

For its part, the SCJN has historically avoided attempts to expand its powers. Partially this was a result of the president’s unilateral control over judicial appointments and the tight alignment of judicial attitudes with party doctrine. Deference was further buttressed by the fact that the judiciary did not represent a long-term career path for the majority of the SCJN’s justices. Although the constitution protected life tenure, presidents throughout the period of PRI dominance appointed on average more than fifty percent of the bench as sitting justices cycled off the Court. As Magaloni (2003, 290) demonstrates, political posts represented the single largest identifiable career path for justices leaving the judiciary during the era of PRI dominance. As such, there was little incentive for justices to concentrate on institutional strengthening of the courts. It was only at the behest of congress that the court’s institutional role grew over time.

This dominant legislative role was likewise supported by the country’s civil law tradition.277 As mentioned above, the amparo suit is a Mexican innovation. As such, its origins cannot be traced to the Spanish legal system or European systems generally (Brewer-Carías 2008, 81). Nevertheless, the implementation of the amparo suit has followed the civil law tradition of reliance on extensively codified legal doctrines to create a fully conceptualized understanding of the law prior to its implementation in the courts. In particular the Mexican legal

277 Ch. 6, The Judicial System, in Zamora et al 2004. For a more historical perspective, see Butte’s (1974) analysis of the evolution of the Mexican courts’ use of precedent and jurisprudencia in the pre-reform era.
system has since its founding relied on numerous regulatory statutes (leyes reglamentarias) that provide the content for constitutional doctrines as well as outlining the procedures through which courts may implement these doctrines. Because codes are intended to be complete and self-explanatory, judicial interpretation (as opposed to application) is considered to be unnecessary (Zamora 2004, 81). As one commentator has put it, the law “was identified with legislation, and the judiciary was its servant.” (Concha Cantú 2006, 364)

The 1994 reforms signaled a conscious attempt to break with this past, but despite institutional strengthening and increased judicial independence, much of the rigid procedural framework has persisted. After President Zedillo and the PRI enacted court reforms in 1994 the party slowly lost its electoral dominance, giving credence to Finkel’s insurance theory. Table 8 provides an overview of political party power in each of the two houses of the Mexican Congress in the post–reform era.\textsuperscript{278} The lack of a dominant party indicates the declining utility of meta-constitutional control structures. Indeed, under 1996 electoral reforms it is now structurally impossible for any party operating alone to amend the Constitution: while constitutional amendments require a two-thirds vote of the legislature, the constitution limits any one party to a maximum three-fifths of the seats.\textsuperscript{279} Zedillo’s successors, Vicente Fox (2000–2006) and Felipe

\textsuperscript{278} This data was compiled using information available on the website of Mexico’s National Electoral Institute, available at www.ine.mx/portal/site/ifev2/Elecciones.

\textsuperscript{279} The Mexican legislature consists of two houses, a lower chamber (the Chamber of Deputies) and an upper chamber (the Senate). The Chamber of Deputies comprises five hundred deputies elected every three years through a combination of single-district first-past-the-post elections (three hundred seats) and proportional representation at the regional level (two hundred seats). The Senate consists of 128 members elected for six-year terms in a mixed system of party ballots at the district level and national proportional representation. This system is the consequence of an ongoing series of reforms over several decades that originally guaranteed one party would
Calderón (2006–2012) of the PAN put forth modest legislative reforms, but during this time no party maintained a majority in either house of congress.

Table 8: Party Power in Congress in Post–Reform Era

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Minor parties are those that garnered less than 10% of the seats in either house of Congress. Elections to the House of Deputies are held every three years; Senate elections are held once every six years. The total number of seats in the House of Deputies is 500; the total in the Senate is 128. Percentages do not sum to 100% due to rounding.

Given this lack of a dominant party in the political branches, theories of divided government would suggest this period would be ideal for the SCJN to assert its institutional role hold a majority of seats. This system was eventually reformed to ensure continued opposition party participation in the electoral system (Molinar Horcasitas and Weldon 2001; Weldon 2001). The electoral requirements are currently outlined in Const. Articles 50–54 & 56, and amendments to the Constitution are controlled by Const. Article 135.
in the political structure.\textsuperscript{280} This has not been the case. The reason can be found in the rigid procedural environment in which the SCJN continued to operate following the 1994 reforms. The declining electoral fortunes of the PRI mask this phenomenon. As in past periods, the focus of procedural innovation in 1994 and subsequently has been the President acting through the legislature, and reforms have been accompanied by the articulation of rigid jurisdictional delineations and procedural mechanisms that provide little leeway for court-generated innovation.

As described in the introduction, the 1994 reforms that strengthened the judiciary were exclusively the work of political actors; members of the court system had little role in designing the reforms.\textsuperscript{281} The 1994 reforms extended access to the SCJN but did so in an extremely focused manner, emphasizing the ability of legislative minorities to bring abstract constitutional review challenges. The reforms also extended the SCJN’s constitutional review powers, but again outlined the types of cases to which these powers would apply, primarily intergovernmental disputes. The reforms also provided specific jurisdictional carve-outs, including electoral cases. In short, the reforms strengthened the institutional bases of judicial independence and ensured that the SCJN was free to decide issues on their merits; but it also did little to enhance the Court’s ability to embark on procedurally innovative methods of engaging litigants.

\textsuperscript{280} Epstein Knight and Martin (2001); Ferejohn (2002); Ríos-Figueroa (2007).

\textsuperscript{281} The members of the judiciary were not involved in the process, perhaps not surprising given that the entire SCJN bench of twenty-five was dismissed and replaced with eleven new justices under new appointment procedures. See Commission on Human Rights Report on Mexico, Independence of the Judiciary, 24 January 2002, E/CN.4/2002/72/Add.1 at ¶13.
The ongoing rigidity of the procedural environment can be seen both at the level of the constitution and in the regulatory laws. The constitution continues to set out an extensive framework for when and how courts can hear amparo suits, comprising over fifty paragraphs and twenty-eight hundred words. The sections lay out in extreme detail the types of cases that litigants may bring; the conditions under which courts may accept cases, render rulings, and allow appeals of decisions; and the extent to which a suit is binding on non-parties to the dispute.\(^{282}\)

The control of procedural instruments extends beyond the constitution, with statutes providing further regulation. The constitution contemplates further statutory regulation for the courts in the timing of declarations of unconstitutionality of general legal provisions;\(^{283}\) the conditions under which a court may suspend an official act pursuant to an amparo hearing;\(^{284}\) and certain venue decisions.\(^{285}\) The Amparo Law\(^{286}\) has long provided detailed regulations for that instrument’s use—details that are so intricate that by 1992 as many as four out of five amparo

\(^{282}\) Art. 107. By way of comparison, the other states examined in this dissertation exhibit much less textual formality. The Colombian tutela system is outlined in the Constitution in just seven paragraphs totaling under two-hundred fifty words (Art. 86 and Art. 241, ¶9, Art. 282, ¶3); South Africa’s constitution is even more reticent when dealing with court procedures and courts’ adjudication of citizens’ claims, containing just two paragraphs totaling approximately seventy-five words (§167(6) and §171). This has allowed these states’ respective constitutional courts much more leeway in determining how and when to engage (or avoid) litigants.

\(^{283}\) Art. 107(II) ¶3 [2011].

\(^{284}\) Art. 107(X) ¶1.

\(^{285}\) Art. 107(XII) ¶2.

\(^{286}\) Ley de amparo, reglamentaria de los artículos 103 y 107 de la Constitución política de los Estados Unidos Mexicanos.
suits were dismissed because of lack of conformity with procedural technicalities (Rubio, Magaloni, and Jaime 2000, 64). The creation of new constitutional controversies in 1994, however, was accompanied by a further expansion of statutory directions to the court. An entirely new Federal Code of Civil Procedure was passed in 1995 to define in extreme detail the contours of this new proceeding. The new code outlined the potential parties to constitutional controversies, who could stand as interested third parties, which officials could represent the President in proceedings, what information filings must contain, deadlines for litigant responses, etc.—very little space was left for SCJN interpretation or any type of Court-led entrepreneurial behavior to control the litigation flow (Vargas 1996).

In addition, the 1994 reforms failed to provide the SCJN with the ability to institute more wide-ranging institutional changes affecting its relations with lower courts. The SCJN has only limited ability to avoid rulings in substantive matters, or to devolve powers to other courts. Although caseload has historically been one of the greatest problems facing the SCJN, the 1994 reforms did not increase its ability to restrict its docket in constitutional issues. This only came about in 1999 following an additional set of reforms that allowed the SCJN to delegate certain cases to the Collegiate Circuit Courts, and only then if the case did not entail important constitutional issues. As a result even after the 1999 reforms the SCJN receives approximately 3000 cases per year. It must hear and decide each case unless the subject matter falls within one of the areas in which delegation is permitted (Zamora 2004, 193). What reforms are made continue to be primarily at the behest of the legislative branch. When in 2000 activists led by former justice Góngora Pimentel presented the federal congress with a package of reforms meant to refine the amparo law, the congress rejected the reforms (Concha Cantú 2006, 382, fn. 19).
The 1994 reforms recognized and reinforced a decade-long trend in declining PRI dominance. The rise of a more competitive party environment suggests the possibility of a more active Court during this period. As will be seen, however, this did not happen. Instead, the SCJN continued to be constrained by a highly articulated constitutional and procedural framework governing the courts. Although the SCJN’s formal institutional independence was greatly strengthened by the reforms, little change occurred in terms of the level of flexibility of procedural rules. This restricted the Court’s ability to become a selective enforcer of international human rights in the post-reform era, meaning that at times it was subject to unwanted and damaging attention. The SCJN’s low to moderate exposure to international law influences, the concentration of power in and concomitant political attention to the Court, and the inflexible institutional environment combined to produce a post-reform judiciary characterized by minimal attempts to enforce human rights and at times the SCJN’s outright rejection of any such role in the constitutional structure. It is to the Court’s role in specific international human rights issue areas that I now turn.

**Subcase 1: Impunity**

In the subcases I test the theory that the three variables limited the ability of the SCJN to act as an effective enforcer of international human rights and to increase its role over time. The selection of subcases was based on the theoretical expectation that the number of court cases is not directly reflective of the societal potential for court-based enforcement efforts. This is particularly important in a case such as Mexico, where political actors have often preconditioned court access on factors (such as electoral insurance for the party itself) that are not directly
related to the demand for human rights enforcement. As such, the review of U.S. State Department, United Nations, and human rights NGO reports was critical in determining the areas of greatest potential demand for litigation. The review of these documents indicated consistent allegations of impunity for violations by state agents for human rights violations in the overlapping areas of extrajudicial killings, torture, and disappearances of civilians. During the twenty-year period of review this appeared in eighteen out of twenty years.

The ongoing relevance of this issue is not unexpected given the decades-long struggle in Mexico between government forces and insurgent movements fueled by the drug trade. Allegations of impunity have much earlier roots, however, beginning in the *guerra sucia* or “Dirty War” of the 1960s and 1970s. During this period government forces engaged in violent repression of political opponents, resulting in 532 disappearances and 2000 victims of torture. It was during this period that the infamous October 1968 Tlatelolco and June 1971 Jueves de Corpus student massacres occurred in Mexico City.

Abuses resumed in the 1990s with the armed uprisings among Mexico’s southern states. In 1994 the Zapatista uprising led to allegations of widespread human rights violations and

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287 Although the Dirty War is generally considered to have occurred during the 1960s and 1970s, additional human rights violations including disappearances continued into the 1980s. See Fiscalía Especial para Movimientos Sociales y Políticos del Pasado, *Informe Histórico a la Sociedad Mexicana: 2006* (Special Prosecutor for Past Social and Political Movements, *Historical Report to Mexican Society: 2006*). (Report on file with author.)


impunity on the part of the military.\textsuperscript{290} In 1995 civilians on their way to a protest were detained outside of the town of Aguas Blancas, Guerrero, and seventeen were killed when police opened fire on the group. Mexico’s National Human Rights Commission (the “CNDH”)\textsuperscript{291} concluded at least one of the individuals was the victim of an extrajudicial killing.\textsuperscript{292} In 1996, military and state police were accused of torture, extrajudicial killings, and disappearances in Guerrero, Oaxaca, Sinaloa, and Chihuahua.\textsuperscript{293} Violence continued in 1997, with forty-five civilians massacred in Acteal, Chiapas. Although the attack was carried out by civilians, it was alleged that they had received their arms from the military.\textsuperscript{294} In Jalisco, the theft of a soldier’s weapon resulted in retaliatory torture and murder of twenty civilians by the military; the soldiers were prosecuted in military tribunals.\textsuperscript{295} That year also saw allegations against the military of extrajudicial killings of eleven people in Guerrero.\textsuperscript{296}

These abuses have been exacerbated by the country’s decades-old fight against illicit drug trafficking to the United States. Beginning in the late 1960s but intensifying during the 1980s, Mexico’s anti-trafficking efforts fight resulted in increased prosecutions in Mexico and

\textsuperscript{290} Human Rights Watch 1995 Report.

\textsuperscript{291} The National Human Rights Commission is known by its Spanish-language acronym, CNDH (Comisión Nacional de los Derechos Humanos).

\textsuperscript{292} Human Rights Watch 1996 Report.

\textsuperscript{293} Human Rights Watch 1998 Report.

\textsuperscript{294} Human Rights Watch 1999 Report.

\textsuperscript{295} Ibid.

\textsuperscript{296} Ibid.
extraditions to the United States. This in turn resulted in increased levels of violence associated with cartel competition within Mexico. By the mid–2000s, extreme levels of violence had led to an increase in the size and funding of the military and state police, and infringement of constitutional rights in those areas where the military operates (Lindau 2011). The pattern of impunity, then, covers three related but distinct periods: the Dirty War (1960s–1970s), the rural uprisings (1990s), and more recent drug-related violence (2000s).

Given the nature of the underlying human rights violations it is not surprising that the problem of impunity is widespread but not well documented. The country’s post–WWII political settlement left Mexico one of the few Latin American states not subject to repeated military interference in politics, but at the expense of a military whose operations were not subject to civilian oversight and transparency (Camp 1992; Concha Cantú 2006). Moreover, Mexico lacks a national or inter-state system to document abuses such as disappearances. Only recently has the federal government created a database of allegations of disappearances; the information, compiled by the Federal Prosecutor’s Office, was very quickly criticized by human rights organizations as being woefully inaccurate or incomplete.297 According to Human Rights Watch, the Military Prosecutor’s Office claims to have opened 3671 investigations into human rights

violations against civilians during the recent drug war; fewer than fifteen of these investigations resulted in conviction.298

In dealing with these issues the SCJN might be expected to draw on any of the numerous treaties to which Mexico is a party and which deal with military-civilian relations, international criminal law, and impunity. At the global level protections are included in the ICCPR. Mexico is also party to numerous regional treaties covering these areas of international law. The legal environment, then, was amenable to enforcement of international human rights. Despite this, the SCJN proved an inhospitable environment for human rights adjudication throughout most of the period of inquiry, adopting enhanced enforcement measures only after political actors again reformed the legal and institutional environment in the late 2000s.

Investigation: Avoid and Retreat

The SCJN’s early efforts to require some level of responsibility on the part of state actors were relatively ineffectual. The concentration of adjudicatory power in the Court made it the focus of human rights enforcement efforts, but the rigid procedural environment rendered the Court unable to effectively expand its powers to match the demands placed upon it. Ultimately this would lead to the Court’s retreat from its minimal enforcement efforts.

The first attempt at exercising some form of oversight came in 1996 and dealt with contemporary events: the previous year’s massacre in Aguas Blancas. Following the massacre

human rights groups as well as the human rights secretary of the main opposition party, the Partido Revolucionario Democratico (“PRD”), petitioned the CNDH to investigate. The CNDH conducted an investigation and determined that grave violations had occurred; it also recommended the appointment of a special prosecutor, restructuring of security forces in the state, and the dismissal or suspension of numerous officials. It was at this point that a human rights NGO petitioned the SCJN to use its investigatory powers in the Aguas Blancas matter.

The special investigatory powers to which the NGO referred were those granted in Article 97 of the Constitution. Under this article, the SCJN was empowered to investigate “an act or acts that constitute a grave violation of individual guarantees” found in the constitution. This historical grant was envisioned as an emergency power to be used in the event of national collapse or a state of affairs resulting in widespread rights violations. The investigatory function had been within the SCJN’s mandate since the initial adoption of the Constitution. Despite this the Court had exercised the power only once in its nearly eight-decade–long history.

Presented with the opportunity to use its power, the SCJN waffled. Now two years into its reform era the Court was severely hampered by two institutional constraints: first, the exercise of the investigatory power was limited by a lack of clarity over who could request an investigation; second, the SCJN would find its powers constrained by a limited jurisdictional grant.


300 Article 97, ¶2 [pre–2011].

301 The only prior use had been an investigation into deaths of forty protestors at the hands of the military in Guanajuato in 1946.
First, unlike the amparo suit, no regulatory law provided a legal framework for the constitutional grant of judicial authority. This proved to be an obstacle for a judiciary still mired in civil law training and accustomed to strict adherence to statutory provisions. The Court at first refused to conduct any investigation, noting that the petitioner did not have proper standing. Moreover, another constitutionally authorized actor (the CNDH) was already investigating the matter. With regard to standing, the constitutional text provided only that the SCJN could initiate an investigation “when it deems it necessary or when requested by the Federal Executive or one of the Houses of Congress of the Union, or a governor of a State[.]” A minority of the Court argued that although the petitioner did not fall within the ambit of Article 97, the SJCN could nonetheless take note of the request and act ex officio based on the language allowing the Court to act “when it deems it necessary.” A majority resisted this approach, instead interpreting this clause as restrictive in nature and allowing only the three government actors named in Article 97 to request an investigation.

This attempt to avoid an investigation ultimately failed when political pressure drove the President to request an investigation. Even without a regulatory framework, the Constitution clearly designated the executive branch as one party that could request that the Court act. By early 1996 President Zedillo was coming under intense political pressure to address the human rights situation in the country. As a result on March 4 his administration filed paperwork with the

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302 Article 97, ¶2 [pre-2011].

303 Expediente “Varios” 451/95.
SCJN requesting that it exercise its investigatory function. In a public session on March 5 the Court’s plenary chamber accepted the petition and voted ten-to-one in favor of exercising its Article 97 powers.

The investigation concluded that there had indeed been “grave violations” of individual rights under the Constitution. The Court went so far as to name specific state officials in the state of Guerrero who were responsible for these violations. It determined that it would send reports to Congress, the President, and the Attorney General so that they could take appropriate actions. Charged with this information, the Attorney General concluded that no federal abuses had occurred, and that the case was therefore properly within the jurisdiction of the Guerrero state authorities (Morineau 1997).

At this point the SCJN’s participation ended. This was the direct result of the second constraint faced by the Court: a lack of jurisdiction. The SCJN had historically interpreted the Constitutional language as granting investigatory powers only, with the Court receiving no jurisdiction over the breaches and no power to proclaim sentences. The purpose of the investigation was to restore the rule of law not by exercising jurisdiction and passing judgments but by acting as an instructive body (Carpizo 2011). The Court could offer findings, but not sentences.

304 Solicitud numero 3/96 relativa a la peticion del presidente de la republica para que se ejerza la facultad prevista en el segundo parrafo del articulo 97 constitucional, 4 May 1996. (Document on file with author.)

305 Reyes Reyes (2009) expounds on the origins of this power, arguing that its creation was inspired by international fact-finding commissions, such as those which investigated the 1898 Maine incident and border disputes between France and Germany. In any event, his analysis accepts that this SCJN power was envisioned as purely fact-finding and non-jurisdictional.
This was clearly problematic in a human rights investigation. The SCJN had already concluded that rights violations had occurred. Without the ability to exercise jurisdiction, however, it could not translate these findings into penal proceedings. Indeed, one Court finding in particular reveals the extent to which the SCJN was hampered by the inflexible procedural environment: With no statutory procedures governing delivery of its final report, the SCJN was not even sure to whom the Court should send its findings. It solved this problem by referencing an adjacent constitutional provision dealing with electoral disputes. That provision ordered the Court to provide a report to “competent organs.”\footnote{Constitution Art. 97, ¶3 [pre–2011].} One of the tesis (rulings of law)\footnote{The SCJN offers “tesis”—rulings on precise points of law—when it decides cases. An isolated tesis must be reiterated in five separate rulings to allow for jurisprudencia through repetition.} adopted by the Court in \textit{Aguas Blancas} thus related exclusively to dissemination of its findings.

The SCJN’s findings did not, however, lead to any convictions, calling into question the efficacy of the Court. This put the SCJN in a precarious position: the Court represented a potential institutional focal point for activists and for public concern over rights abuses, but one unable to address flexibly its findings by crafting politically acceptable rulings. Under these less-than-optimal conditions the SCJN used what little flexibility it did have in an attempt to expand its discretion in future difficult cases and thereby remove itself from the political spotlight.

First, the SCJN promulgated rulings that would allow it to avoid exercising this politically contentious form of investigation. In its vote to investigate \textit{Aguas Blancas} the Court took the opportunity to vote unanimously that exercising this power was discretionary—even

\footnote{Constitution Art. 97, ¶3 [pre–2011].}
when requested by the executive.\textsuperscript{308} This desire to limit the Court’s exposure to criticism and adverse political interactions can be seen in subsequent rulings as well. Having ruled in 1996 that the investigatory function was discretionary, the SCJN in a subsequent ruling found that it was not bound to provide reasons for any refusal to exercise this function.\textsuperscript{309}

Second, the SCJN crafted a blanket rule that would allow it to refrain from exercising any ongoing oversight of rights violations. It did this by distinguishing the constitutional and legal frameworks governing the amparo suit and the investigatory function. The amparo law provided “the procedural instruments by which the Supreme Court and, in general, amparo courts, are legally able to achieve compliance with the terms of amparo sentences.”\textsuperscript{310} As such, any oversight of amparo claims would occur within the amparo framework. The investigatory power would be treated as an entirely distinct function of the court, and any attempt to use it as a means of overseeing and ensuring compliance with amparo sentences would be rejected.

These interpretive stances would allow the SCJN to avoid becoming involved in other situations where it might be forced to recognize widespread rights violations but lack the capacity to act. The inefficacy of the Court in Aguas Blancas would serve as a warning for years

\textsuperscript{308} The Court held: “By unanimous vote of eleven it is resolved that the exercise of the investigatory function conferred on the Supreme Court of Justice of the Nation by paragraph 2 of Article 97 of the Constitution is discretionary.” Solicitud numero 3/96 relativa a la petición del presidente de la republica para que se ejerza la facultad prevista en el segundo párrafo del articulo 97 constitucional, 4 May 1996. (Document on file with author.)

\textsuperscript{309} Tesis 193781, Semanario Judicial de la Federación y su Gaceta, Novena Época, p. 10 (Tesis P. XLVII/99).

\textsuperscript{310} Tesis 199251, Semanario Judicial de la Federación y su Gaceta, Novena Época, p. 655 (Tesis P. XLIV/97).
to come. Those opposed to exercising this power would continue to cite it as a cautionary tale for the next decade.\textsuperscript{311} It would take that long before the Court would accept another petition to exercise this function. In the interim, the Court experienced sustained pressure to exercise the power, receiving petitions at a much higher rate than before the 1994 reforms, as outlined in Figure 14.

Figure 14: Petitions for SCJN to Exercise Investigatory Function

![Figure 14: Petitions for SCJN to Exercise Investigatory Function](image)

The failure to use its power was understandable in the era of PRI dominance, when a judiciary lacking independence might not be expected to exercise institutional prerogatives in opposition to the government. Following the reforms of 1994, however, expectations for the

\textsuperscript{311} In a 2009 case (which the Court ultimately accepted), the minority noted the inefficacy of the \textit{Aguas Blancas} investigation, stating that despite having “confirmed the existence of close range shooting deaths of residents of Guerrero…as of this date [August 6, 2009] we have none of those involved in prison.”
Court were higher, and the judiciary no longer operated in a party environment fully dominated by the PRI. After 1998 the former ruling party no longer had a majority in Congress, and in 2000 it lost the presidency. Given this change the SCJN found itself in a much less restrictive political environment when it was again presented with opportunities to exercise the investigatory function. By the mid-2000s, faced with ongoing calls to use its investigatory powers the SCJN reconsidered its earlier reluctance; it would find its efforts impeded by the same procedural restrictions it had encountered in 1996.

The opportunity arose in a series of cases dealing with human rights, many of which again dealt directly with impunity. The first, in 2006, dealt with the detention of journalist Lydia Cacho. The Court was criticized when it found no rights violations (Colli Ek 2012). In two separate undertakings the SCJN investigated military abuses in 2006 in Atenco (in Mexico State) and Oaxaca. In Atenco the Court found no state liability for the abuses, and NGOs criticized the Court both for dismissing allegations against state officials and for failing to observe international obligations. In Oaxaca, however, the SCJN found the state governor guilty of violations of individual rights. The outcome was the same as Aguas Blancas: the transmission of a report to political leaders with no further judicial involvement.313

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It was a fourth case, unrelated to military impunity, that would sound the death knell for the SCJN’s attempt to expand its role. On June 5, 2009, a fire in a day care center in Hermosillo, Sonora, claimed the lives of nearly fifty children. Within a month the parents petitioned the SCJN to exercise its Article 97 investigatory powers. The Court originally noted that the parents did not have standing, but in an unorthodox exercise in openness the SCJN accepted the case on the motion of the Court’s own justices—in contravention to the procedures it followed in *Aguas Blancas* a decade earlier. The SCJN expressed confidence in “the constitutional role that the Supreme Court has in the new democratic system” and that the power of investigation “allows one to see this Supreme Court as a supreme guarantor clad in the highest constitutional, political, and moral authority.” Despite this lofty language the SCJN found itself bound by the same institutional limitations, namely its lack of jurisdiction. As a result, the Court again suffered a loss of legitimacy. While noting “grave violations,” the SCJN did not hold any individuals responsible for the act, leading NGOs, members of the public, and even one former justice to question the effectiveness of the Court.

The inability of the SCJN to deal effectively with human rights issues ultimately led the members of the Court to support a transfer of its investigatory authority to a distinct institution outside the federal judiciary. The lack of a jurisdictional grant, they argued, was incompatible


with the new role of the SCJN as a constitutional body. The investigation of national tragedies without the ability to address them meaningfully left the SCJN at the center of numerous emotional debates that ultimately served only to damage the Court’s reputation. The members of the Court asked that political reforms either restrict access to the Court, or remove the power entirely (Carpizo 2011). The political branches responded by transferring the investigatory powers to the CNDH.

The SCJN was unable to successfully avoid human rights cases altogether due to its central role in a concentrated adjudicatory structure. At the same time the Court was unable to expand its power because of the extremely rigid, politically determined limits on its procedural environment and jurisdictional grant. As a result the investigatory function ultimately resulted in the Court’s loss of prestige and diminution of its institutional power.

**Convictions: The Marginal Court**

The investigatory function demonstrated the Court’s limited maneuverability in a centralized judicial system. A parallel set of cases indicate the degree to which the Court was able to render meaningful decisions enforcing international human rights, but only to the extent that political actors were willing to pursue these claims. The Court itself was procedurally incapable of providing broad-based rights-affirming outcomes. As a result the 2000s saw the SCJN increasingly willing to engage the issue of military impunity but with limited results.

The Court’s activity was preceded by increased political moves toward compliance with international human rights law standards. In 2001 the CNDH completed its investigation into human rights violations during the Dirty War. Since the CNDH lacked prosecutorial powers, its
president forwarded the report to the executive branch under incoming president Vicente Fox. The new president responded by appointing a special prosecutor, Ignacio Carrillo Prieto, to examine allegations of military involvement in disappearances during Mexico’s Dirty War.\textsuperscript{317}

This domestic attention to past crimes was accompanied by a renewed emphasis on human rights at the international level. In 2002 Mexico ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (the “CNASL”) after a delay of more than thirty years.\textsuperscript{318} In addition, Mexico had previously ratified the CAT and in 2002 filed a declaration for the first time accepting that treaty’s Article 22 individual complaint procedure. This was accompanied by the country’s signature in 2003 and ratification in 2005 of the CAT optional protocol establishing a system of inspections of detention centers. Mexico also ratified the ICCPR’s optional protocol accepting that instrument’s individual complaint procedure.

It was in this increasingly rights-oriented rhetorical environment that the SCJN took its first concrete steps against impunity, and these came at the instigation of government actors outside the judiciary. The SCJN’s first opportunity came in 2003 when the national attorney general attempted to bring charges against past officials for Dirty War–era crimes.\textsuperscript{319} The

\textsuperscript{317} President Fox created the Special Prosecutor’s Office for Social and Political Movements of the Past, known by its Spanish acronym (FEMOSPP) in 2001. FEMOSPP conducted an exhaustive investigation based on government archives and interviews with individuals affected by the events of the Dirty War.

\textsuperscript{318} United Nations, \textit{Treaty Series}, Vol. 754, p. 73. Mexico signed the treaty in 1969 but only ratified the treaty in 2002.

\textsuperscript{319} The attorney general was Rafael Macedo de la Concha. The FEMOSPP was in the office of the Procuraduría Nacional de la República.
attorney general brought the first of these cases in a district court in Nuevo León seeking the prosecution of Luis de la Barreda, ex-head of the Federal Security Directorate; Miguel Nazar Haro, head of the paramilitary force *Brigada Blanca*; and state judicial agent Juventino Ramos Cisneros. All three men were implicated in the 1975 disappearance of human rights activist Jesús Piedra Ibarra. The district court found that the prosecution was barred by the statute of limitations.

At this point the attorney general filed an appeal with the SCJN, and the first chamber agreed to take the case sitting as a criminal appeals body. The SCJN overruled the lower court, finding that the statute of limitations on forced disappearances did not begin to toll when the person went missing, but rather when the person reappeared or was remanded before the proper authorities. The majority opinion ruled that the disappearance constituted a continuing rights violation. This interpretation brought Mexico into compliance with international law standards. It also opened the way for prosecutions at the highest levels of government.

Such a case arrived at the SCJN in 2005. The case arose out of President Echeverría’s alleged ordering of repression of student protests in the Jueves de Cuerpo massacre that likewise occurred during Mexico’s Dirty War. After receiving allegations that government officials had been involved in the repression, FEMOSPP ordered an investigation in 2002 and brought


charges in 2004 in Mexico City district court against former President Echeverría and ten other officials’ actions as genocide. On July 24 of that year the district court determined that the prosecution of the 1971 events was barred by Mexico’s thirty-year statute of limitations. The decision was appealed to the circuit court, but the SCJN interceded and heard the case directly.

On appeal the prosecution argued on various grounds that under international law the statute of limitations could not be applied to a claim of genocide. The SCJN’s first chamber recognized that Mexico was bound by the CNASL, but determined that the bar on statutes of limitation only applied to cases arising after Mexico’s 2002 ratification of the CNASL. (Mexico’s ratification of that treaty included an interpretive declaration indicating that the treaty would not be held to apply to crimes committed prior to the treaty’s entry into force vis-à-vis Mexico.) As a result, the Court had to rely on the Constitution for pre–2002 violations, which did not allow for ex post facto application of laws.

Under this analysis the genocide claim would be barred. The SCJN issued a subsequent ruling dealing with the prosecutor’s additional arguments, however, and this time found in favor of the prosecution. The Court determined that the statute of limitations applied, but that it was tolled while accused individuals held official positions that entitled them to immunity from prosecution. This meant that the statute of limitations for former president Echeverría and his

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323 Although “period of prescription” is more commonly used in civil law jurisdictions such as Mexico and is a more faithful translation of the Spanish-language “prescripción,” I use the term “statute of limitations” here for conformity with other English-language writing on this topic.

324 Solicitud de facultad de atracción 8/2004–PS and expediente relativo al recurso de apelación atraído 1/2004–PS.

interior secretary, Mario Moya Palencia, did not begin to run until they left office in 1976, allowing charges to proceed upon remand to the lower court.\footnote{Suprema Corte de Justicia de la Nación, “Prescripción del delito de genocidio (Halconazo),” \textit{Crónicas: Serie de Crónicas de asuntos relevantes del Pleno y las Salas de la Suprema Corte de Justicia de la Nación}, 2006.}

Although these rulings opened up the possibility of prosecutions at the highest levels of government, the effects were ultimately limited. In the Echeverría case, the SCJN’s reliance on domestic law meant that only two individuals could be charged; the remaining nine implicated in the investigation had left office early enough that the statute of limitations had run. Just as importantly, because the SCJN chose to sit as an appeals tribunal (rather than a court of first instance), prosecutions were held in lower courts. As a result many of the accused ultimately avoided conviction when lower court judges found in favor of defendants.\footnote{De la Barreda died in June 2008, never having been imprisoned. La Jornada, \textit{Murió Luis de la Barreda, ex titular de la disuelta Dirección Federal de Seguridad}, 10 de junio de 2008, available at http://www.jornada.unam.mx/2008/06/10/index.php?section=politica&article=018n1pol. Nazar Haro also avoided serving prison time; he died in February 2012. La Jornada, \textit{Nazar y la Brigada Blanca}, 3 de febrero de 2012, available at http://www.lajornadaguerrero.com.mx/2012/02/03/index.php?section=opinion&article=002a1soc.} So long as the Court was reliant on government officials for determining which cases it heard, its role would be limited.

\textit{Political Reform: Towards an Outward Looking Court}

An opening for the Court to increase its role would have to wait until the introduction of another round of constitutional reforms. The constitutional reforms of 2011 incorporated pro
homine language that increased the SCJN’s interpretive flexibility such that the Court could base rulings on international human rights norms and not just those direct grants of rights found in the constitution. The pattern of strict SCJN adherence to textual requirements finally began to change as the Court received and exercised greater latitude to interpret international law, yet the extent of these changes would again be limited by the restrictive nature of the Court’s procedural environment.

The Court began to test the use of this new power in July 2011. In a landmark decision the SCJN exercised its jurisdiction to determine the judiciary’s obligations vis-à-vis rulings of the Inter-American Court of Human Rights (“IACHR”). The importance of the IACHR as an alternative venue had been growing in the previous decade. After Mexico’s acceptance of the international court’s jurisdiction in December of 1998, the IACHR rendered several opinions against the country dealing with impunity for human rights abuses. These cases are summarized in Table 9.

Table 9: IACHR Opinions Involving Mexico and Impunity

<table>
<thead>
<tr>
<th>Case (Short Title)</th>
<th>Date of Violation</th>
<th>Date of Ruling</th>
<th>Type of Violation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Radilla Pacheco v. Mexico</td>
<td>Aug. 1974</td>
<td>Nov. 2009</td>
<td>Forced disappearance</td>
</tr>
<tr>
<td>Fernández Ortega et al. v. Mexico</td>
<td>Mar. 2002</td>
<td>Aug. 2010</td>
<td>Rape and torture by state agents and military; failure to investigate; improper use of military forum</td>
</tr>
<tr>
<td>Rosendo-Cantú and other v. Mexico</td>
<td>Feb. 2002</td>
<td>Aug. 2010</td>
<td>Rape and torture by state agents and military; failure to investigate; improper use of military forum</td>
</tr>
<tr>
<td>Cabrera García and Montiel-Flores v. Mexico</td>
<td>May 1999</td>
<td>Nov. 2010</td>
<td>Torture, detention by military, lack of adequate investigation into torture; use of military courts in a human rights investigation and trial</td>
</tr>
</tbody>
</table>
In these cases the IACHR ordered Mexico to conduct investigations into the alleged crimes in the ordinary court system. It also ordered Mexico to make legislative and constitutional changes in order to bring the country’s Military Code of Justice into line with international standards, including the American Convention on Human Rights, and to provide an effective means for civilians to contest military jurisdiction as a means of overcoming impunity.\(^\text{328}\) For most of the decade, however, Mexico failed to comply with these rulings. It was not until after the constitutional changes of 2011 that the judiciary became an active participant in enforcing these decisions.

It should be noted that prior to 2011 the SCJN had held that international treaties were subservient to the Constitution, and that their relation to statute was unclear. The 2011 constitutional reforms provided a political and legal opening for the SCJN by elevating the importance of human rights in the constitutional framework.\(^\text{329}\) The SCJN asserted its jurisdiction over these issues in an unprecedented way—by turning directly to the IACHR’s jurisprudence. The Court in effect presented itself with a question: What obligations did the federal judiciary have in ensuring compliance with IACHR rulings? It answered this question in a two-step process.

First, the Court in 2010 charged itself with answering the question of what process should govern IACHR enforcement. The plenary chamber exercised jurisdiction over this question by

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\(^{328}\) Radilla Pacheco at §XII; Fernandez Ortega at ¶308; Rosendo-Cantú at ¶295; Montiel-Flores at ¶274.

\(^{329}\) See section on “Sensitivity to International Law” above.
referring to a paragraph in the organic law that regulates the federal judiciary (the “LOPJF”).³³⁰

This law consists of 251 articles outlining the jurisdiction of the federal courts and the procedures by which they operate. Section 2, Article 10 of the LOPJF describes in detail the jurisdictional grant to the SCJN’s plenary chamber, including amparo suits and constitutional controversies. The section is generally restrictive in nature, specifying which types of cases cannot be delegated to individual chambers and must instead be heard by the full court.

Paragraph XI, however, provided that the plenary chamber could hear “any other matter within the competence of the Supreme Court of Justice which does not correspond to the separate chambers[.]” In short, it does not represent a separate jurisdictional grant, but rather designates the plenary as the appropriate venue for cases over which the SCJN already has jurisdiction but which have not been devolved to an individual chamber.

The SCJN used this paragraph, however, to assert jurisdiction and provide a forum for the Court to expound on the role of the judiciary in enforcing international human rights. The SCJN used as a point of reference the IACHR’s Radilla Pacheco ruling, a case arising from the Dirty War. In a lengthy ruling three justices concluded that there was no appropriate framework in which the SCJN could consider the question, since no formal notification process existed between the IACHR and the domestic judiciary. The majority, however, voted that the Court could proceed “motu proprio” (of its own volition, or sua sponte) to comply with the IACHR ruling—even without coordinating with the other branches of government.³³¹

³³⁰ Ley Orgánica del Poder Judicial de la Federación.

³³¹ Expediente 489/2010, pp. 43–44.
Second, the SCJN followed this 2010 determination with a July 2011 ruling on the handling of the *Radilla Pacheco* case. The Court began by referencing the President’s 1999 decree recognizing the IACHR’s contentious jurisdiction. Based on this recognition, the Court stated, Mexico had an obligation to ensure compliance with the IACHR’s rulings in *Radilla Pacheco*. The SCJN also recognized the conundrum facing the Court: the IACHR ruling required constitutional and legal changes. The SCJN stated that it could not enact those changes, since that would be encroaching on the power of the political branches. At the same time, this did not absolve the judiciary of its obligations. To resolve this contradiction, the Court simply reinterpreted the Military Code such that military jurisdiction could not be extended to any case involving a human rights violation. In the case before the Court, this meant that *Radilla Pacheco* could not be referred to military courts, but also that all future cases apply the new rules. It also ordered all federal courts to notify the SCJN so that the latter could assume jurisdiction of any relevant cases, given the importance and significance of this issue.

The SCJN also used this same case to extend the applicability of international human rights law in future cases as well as to extend the reach of international law throughout the domestic court system. It did this by adopting conventionality control as a feature of diffuse

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333 Expediente 912/2010, ¶¶45 and 55. The SCJN retained the power of “attraction”—meaning it could assert jurisdiction over those cases it considered of importance and significance for the nation.
judicial review. Under this form of judicial review, courts are required to apply human rights laws and norms found in treaties (“conventions”). The IACHR had established diffuse conventionality control as a treaty obligation through a series of cases beginning in 2006. In subsequent cases the IACHR had ordered Mexico to exercise conventionality control: first in a 2009 case arising from forced disappearance and again in a 2010 torture case.

The SCJN’s ruling in this area was particularly sweeping. The Court determined that all judges in the country must apply human rights contained both in the Constitution and in federal judicial precedent. They were also ordered to enforce all human rights contained in treaties to which Mexico was a party. Lastly, they were required to enforce binding rulings of the IACHR. This final element is the most expansive: the SCJN determined that Mexican judges would be

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335 The IACHR adopted this standard for the first time in the case of a failure to prosecute the alleged perpetrators of an extra-judicial execution in Chile. Case of Almonacid-Arellano et al v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 26, 2006, Series C No. 154 at ¶124.


337 Case of Cabrera García and Montiel-Flores v. Mexico, Preliminary Objection, Merits, Reparations, and Legal Costs, Judgment of November 26, 2010, Series C No. 220 at ¶225. For an extensive overview of the development and implications of this doctrine, see the Concurring Opinion of Ad Hoc Judge Eduardo Ferrer Mac-Gregor Poisot Regarding the Judgment of the Inter-American Court of Human Rights in the Case of Cabrera García and Montiel-Flores v. Mexico, November 26, 2010.
bound not just by rulings in cases to which Mexico was a party, but also those IACHR precedents set forth in cases to which Mexico was not a party.\textsuperscript{338}

The SCJN did this by relying extensively on the reforms to the Constitution that had just taken effect. The Court stated that the expanded pro homine principal now included in Article 1 of the Constitution required “all authorities in the country” to safeguard human rights, meaning that the lower courts were empowered to take on an expanded role.\textsuperscript{339} Importantly for the theory examined here, the procedural environment conditioned the manner in which these changes came about. The SCJN noted that its competence in this matter depended on the absence of a legal structure governing compliance with IACHR rulings. In the face of such an absence, the Court was empowered to act.\textsuperscript{340}

It did not go beyond the procedural limits set, however, by the political branches. Instead, it recognized and validated conventionality control only to the extent that it did not overtly counteract the SCJN’s role as the only court politically enabled to annul laws: “While judges may not make a general pronouncement of invalidity or expel from the legal order those norms they consider contrary to human rights contained in the Constitution or treaties…they are obligated to stop applying those inferior norms, giving preference to those contained in the Constitution or applicable treaties.”\textsuperscript{341} The language is striking for a court system with such a

\textsuperscript{338} Expediente 912/2010, ¶ 31. (July 14, 2011.)

\textsuperscript{339} Expediente 912/2010, ¶¶ 26–36.

\textsuperscript{340} Expediente 912/2010, ¶ 10.

\textsuperscript{341} Expediente 912/2010, ¶ 29.
strong civil law history: the offending legal norms are to be considered “inferior” in the analysis. The practical effect, however, is in line with guidelines set by political actors: lower courts must consider international law in their decision-making, but their decisions will still enjoy only inter partes effect, limiting the immediate impact and protecting the central court’s role as the primary political actor in the judicial system.

The ruling was well received by human rights organizations and Court watchers. Little attention was paid, however, to the fact that the SCJN’s inflexible, politically determined institutional environment greatly reduced the ruling’s effect. In particular, the groundbreaking ruling did not create binding precedent, since it did not meet the strictly regulated requirements of jurisprudence through repetition or contradiction (appeal). Since no case was being prosecuted before the courts, the SCJN’s opinion on Radillo Pacheco amounted to instructions to its own chambers and to the lower courts on how to handle future cases should they arise.

Despite not having created binding precedent, these interpretations have begun to permeate the judicial system. On August 12, 2011, a lower court determined that the prosecution of soldiers for the alleged rape of Fernández Ortega and Rosendo-Cantú, the two indigenous women whose cases were heard by the IACHR, could no longer be prosecuted in the military courts as these crimes represented human rights violations against civilians. The SCJN also

began the slow process of creating binding precedent. On August 10 and 21, 2012, the Court handed down two rulings finding Article 57, section 2, of the Military Code unconstitutional and thus requiring transfer of cases from military to civilian jurisdiction.\textsuperscript{343} Still this did not meet the five-repetition requirement for binding precedent, which continued to hamper any court-centered reform strategy.

At the same time, the lack of procedural flexibility prevented further engagement with this issue. Mexican authorities have still not investigated the alleged detention and torture of the two environmentalists, Montiel and Cabrera, whose cases were also heard by the IACHR. Based on this it would appear that the courts are indeed willing to apply conventionality in those cases already at bar, but that they otherwise lack the procedural tools to ensure compliance by otherwise intransigent officials. As a result, any further progress would have to come from the political branches. At the time of writing, the Senate and the Chamber of Deputies had just unanimously approved a reformed Code of Military Justice.\textsuperscript{344} The revised code removed from military jurisdiction any case involving civilians as victims. The extent to which this will result in increased prosecutions remains undetermined.

\textsuperscript{343} Suprema Corte, 38/2012 de agosto, 133/2012 de agosto.

Subcase 2: Indigenous Rights

The review of human rights reports indicated that indigenous rights represented an additional legal area with widespread and ongoing abuses. In part, these abuses were related to the question of impunity. Many of the allegations of torture, disappearances, and extrajudicial killings were made by or on behalf of indigenous individuals and groups. Indigenous communities are concentrated in the southern and central states of Mexico, overlapping with insurgent and drug-related violence and often closely related to these phenomena. The types of abuses noted by the reports, however, extended beyond this class of rights violations, focusing instead on internationally recognized rights such as language and cultural rights, pre-consultation for development projects, and other issues relating to autonomy for indigenous communities.

The ongoing importance of these issues is to be expected given the size of Mexico’s indigenous population. Mexico has one of the largest indigenous population of any country both in terms of raw numbers (10,688,535) and as a percentage (11%) of total national population (Ramirez 2006, 150–51). When cases related to indigenous groups (qua groups)
entered the court system, they historically were under the rubric of other rights, such as land
tenure (Ansolabehere 2010, 99).

This lack of court activity is not due to a lack of justiciable rights or standards at the level
of international human rights law. To be sure, indigenous rights at the international level
represent a relatively recent phenomenon. Decolonization of the Americas primarily entailed a
transfer of authority to creole populations. When 150 years later human rights were recognized
as part of the United Nations system, the drafters of the UN Charter likewise were careful to
define self-determination rights in ways that excluded indigenous peoples’ autonomy claims.
International tribunals followed this practice, excluding these sub-national groups due to their
lack of standing. In short native peoples’ rights were historically considered to be an exclusively
national consideration (Reisman 1995).

International law has nevertheless taken halting steps over the past several decades to
define indigenous rights following sustained efforts of indigenous rights advocacy groups (Brysk
2000). The first codification came in 1957, when the International Labor Organization adopted
the Indigenous and Tribal Populations Convention (No. 107). ILO 107 reflected the assumption
that indigenous groups would eventually be integrated into their states’ dominant sociocultural
groups, and as such the instrument encouraged broad development goals.  

347 I note this only to distinguish cases dealing with an individual indigenous person’s claim,
such as those found in the section above dealing with military impunity. The identification of an
individual as a member of an indigenous group undoubtedly relates to many forms of rights
infringement or even outright persecution, but in this section I deal exclusively with those claims
brought on behalf of indigenous groups as collective entities to which rights appertain.

This integrationist approach was abandoned in the 1980s when the ILO replaced Convention No. 107 with Convention No. 169, focusing on “peoples” rather than “populations” and recognizing indigenous groups as permanent societies (Swepston 1990). This was followed in 2007 when the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”), collecting in one document the many rights provisions of other declarations and treaties and applying them to the context of indigenous peoples.\(^{349}\)

ILO 169 is a legally binding instrument, and Mexico ratified the treaty in 1990.\(^{350}\) The UNDRIP is non-binding but has influenced the interpretation of statutes and rights adjudication in numerous countries and by international organizations (Pulitano 2012). As a result the SCJN today has numerous sources of international human rights law on which to draw in enforcing and interpreting indigenous rights claims.

The first cases dealing with indigenous rights did not reach the SCJN, however, until seven years after the political reforms of 1994. In the intervening years, indigenous rights activists primarily attempted to achieve their goals through non-judicial means. Indigenous rights during this period were seen primarily through the lens of the Zapatista uprising in the state of Chiapas. The government concluded the San Andrés Accords with the Zapatistas in 1996, recognizing the group’s demands for increased local autonomy and democratization. By 2001 those accords had not been implemented, and as a result the Zapatistas organized an historic

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\(^{350}\) Mexico ratified ILO 107 on June 1, 1959. It renounced the convention on September 5, 1990, in conjunction with its ratification of ILO 169 the same day.
march on Mexico City. This direct action effort was followed by President Fox’s 2001 proposal to implement the San Andrés Accords through a package of five constitutional reforms. Congress passed the reform package in 2001, but only after major changes that watered down provisions granting greater autonomy to indigenous communities (Yashar 2005, 25–26, 296).351

It was at this juncture that the SCJN became implicated in the struggle over indigenous rights. The constitutional changes became official with publication in the government gazette in August of 2001, and numerous indigenous communities in concert with local state organs immediately brought constitutional claims challenging the reforms. Although the amendments passed, they were rejected by all of the southern states with sizable indigenous populations; as many as 320 towns and organizations challenged the reforms on the grounds that they did not follow the proper procedures for amending the Mexican constitution. The groups also argued that the reforms did not conform to international standards, including a requirement for prior consultation with indigenous groups (Carbonell 2003). The controversial nature of the reforms along with the longstanding concern over the Zapatista uprising put the SCJN at the center of an intensely political issue.352 The spike in the SCJN’s international law–based constitutional controversy docket resulting from these 2001 filings can be seen in Figure 15.

351 The reforms were widely condemned by activists as failing to address adequately issues of indigenous autonomy. Press attacks MPs over Indian law, BBC News, 2 May 2001, available at http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1307411.stm.

The SCJN never reached the merits of the claims. Instead, the Court determined this to be a non-justiciable dispute. In an opinion replete with constitutional and legislative history, the SCJN explained that the reforms of 1994 and the designation of the Court as a constitutional tribunal had as its core purpose the protection of the federal system. Under that scheme the constitutional controversy was designed to allow the individual governmental units listed in Article 105 of the constitution (the federal government, the states, municipalities) to challenge encroachments on their respective areas of power within the federal structure and to allow the organs of state to maintain a balance of powers. It was not designed to allow challenges against these individual units when they acted in tandem as a special constitutional reform entity.
The Court was criticized for its failure to reach the merits of the claim. Although the SCJN did not offer a substantive ruling, it did take this opportunity to hand down two tesis developing points of law relating to the constitutional amendment process. It should be noted that the Court designated these two tesis as jurisprudencia, despite the Court’s insistence that the case at hand was not a justiciable constitutional controversy.

In the first of these, the SCJN determined that the procedure for amending and adding to the constitution was itself not subject to constitutional review. The individual state institutions of Congress, the individual states, and the electoral organs operating together constituted a special reform body of the Constitution. Operating in this manner they were more than their individual parts, and as such exercised a sovereign function that could not be subjected to external control.

The SCJN reinforced this conclusion in a second tesis. This time the Court explicitly found that it was not empowered to hear this type of claim. In particular the Court noted that section 105 of the constitution, from which the SCJN derived its jurisdictional grant, provided for only a limited set of constitutional controversies. Constitutional controversies were limited to cases that policed the boundaries of federalism and the division of powers between state organs.

See, e.g., González Galván (2003), González Galván (2009).

Binding jurisprudencia can indeed result from constitutional controversies. The court rules, however, do not provide for how binding jurisprudencia could result from a decision not to rule on a constitutional controversy, nor did the SCJN explore this issue.

A state organ could not use this type of claim to impugn a constitutional reform.\textsuperscript{356} Whereas the reform apparatus was an expression of the people acting as sovereign, the courts and other political units were mere creations of that grander sovereign entity. As such the created unit (the SCJN) could not question the actions of the creator. The practical result was the Court’s removal of itself from the constitutional reform process.\textsuperscript{357}

This marked the high period of court activity on indigenous rights for another decade. The lack of court activity cannot be attributed to a lack of substantive rights in the constitution. On the contrary, despite activists’ claims that the constitutional reforms did not go far enough to implement the San Andrés Accords, the constitutional reforms indicated a meaningful change in the state’s recognition of substantive indigenous rights. The text of the constitution was changed to recognize the “pluricultural” nature of the Mexican state, “originally based in its indigenous populations.”\textsuperscript{358} Beyond this rhetorical change, much of the new constitutional language was inspired by ILO 169 (Carbonell 2003; González Galván 2003). The changes included a definition


\textsuperscript{357} The type of controversy was important because an Article 105 constitutional controversy would have allowed the court to offer a ruling with general binding effect. Carbonell (2002) suggests that an action of unconstitutionality, the other form of action that would allow for general effects, would also be considered inappropriate under the court’s analysis, rendering constitutional amendments a “zone of immunity” for state actors (Carbonell 2002, 148). This conclusion seems reasonable, given the Court’s unwillingness to examine the procedural correctness of legislative acts more generally. (See Ejecutoria CC 82/2001 at p. 31, quoting Jurisprudencia P./J. 129/2001, wherein the Court, sitting in plenary session, found that it was only empowered to determine the constitutionality of the final published law, not the individual steps which led to that law’s publication.) This leaves only the amparo, an action whose inter partes effects are of questionable value as a means of challenging constitutional amendments.

of indigenous groups based on self-identification and a list of the minimal contents to be included in any recognition of autonomy, balancing this with the need for national unity (Giménez 2014). The reform granted substantive rights including control over socioeconomic and political organization, separate legal apparatuses and electoral mechanisms, protection of language and cultural identity, and priority use of land and natural resources. It also marked the first time that collective rights were included in the constitution, and not just the rights of individuals.\footnote{359}{\textit{Const. Art. 2(A)}, 2001.}

The substantive shift was clear. Yet indigenous rights claims did not become a normal part of the SCJN’s docket, and according to one commentator these constitutional changes became yet another reform effort that was completely forgotten.\footnote{360}{Carbonell writes that the reforms of 2001 “parece estar completamente sepultada en el olvido” (2014, 294).} Why did this occur? The reason can be found in the Court’s inability to fashion procedural tools to accompany the new substantive rights. Under the Mexican constitutional system, the creation of necessary procedural instruments resides with political actors. Despite this, no such changes were forthcoming. Collective causes of action to enforce these new collective rights would not arrive for another decade, after Congress implemented another set of constitutional and legal reforms that finally brought procedural tools into line with substantive rights.

The first change was an additional amendment to constitutional Article 17 in 2010 that provided for the possibility of collective causes of action. Like in earlier reforms, however, the constitutional changes were not accompanied by the necessary secondary legislation (Olaiz-
González and Bosco López 2011). Without accompanying legislation, the courts would be unable to adjudicate these rights, since the “current procedural paradigms, in many aspects, will be insufficient and even contrary to the spirit of collective actions and procedures.”\textsuperscript{361} It would take another year and a further round of constitutional amendments and statutory revisions before the courts were truly empowered to act in this field.

Congress finally amended the necessary procedural laws to allow for collective actions in 2011. Collective actions were permitted, however, in only a limited set of subject matter areas: consumer protection, environmental protection, financial services, and antitrust issues.\textsuperscript{362} The focus was clearly on areas relating to commercial transactions and economic development. No mention was made of indigenous groups or other ascriptive minorities.

The use of collective actions for indigenous rights claims did not become a viable alternative until additional constitutional reforms in 2011. These reforms undertook substantial revisions to those articles of the Constitution dealing with human rights and likewise envisioned a reform of the procedures governing amparo suits.\textsuperscript{363} Like all previous constitutional reforms those of 2011 required extensive secondary legislation in order for the reforms’ ends to be fully realized. This was particularly true with regard to the amparo suit, since the extremely rigid

\textsuperscript{361} Dictamen de las Comisiones Unidas de Puntos Constitucionales, de Gobernación y de Estudios Legislativos, respecto a la iniciativa que adiciona el artículo 17 de la Constitución Política de los Estados Unidos Mexicanos, en materia de acciones colectivas, del 3 de diciembre de 2009, p. 9., quoted in Olaiz-González and Bosco López (2011, 175–76).

\textsuperscript{362} Diario Oficial, 30 de agosto de 2011.

\textsuperscript{363} Diario Oficial, 10 de junio de 2011. The changes relating to domestication of international law are examined in the section on International Sensitivity, above. These were part of the same set of constitutional reforms examined in the subcase on impunity.
institutional environment prevented the SCJN from taking the initiative in expanding access to the Court.

One important potential area of change was the creation of collective amparo suits. Prior to the reforms, the Mexican constitution referred to “individuals” as rights holders. The revised constitutional provisions referred to the “person,” opening up the possibility that legal persons and not just natural persons would be able to use the courts to affirm their rights. This in turn suggested the possibility of collective legal persons such as indigenous groups gaining access to the courts. The concept of collective legal persons is one that the courts had failed to develop in the period leading up to the reform (Carbonell 2014, 276). The legislative reforms were themselves slow in coming, however, and highlight the intensely politicized nature of procedural rules in the Mexican legal system. They were completed only after what has been described as a “tortuous” process of repeated exchanges of the legislation between the House and Senate (Carbonell 2014, 270). Congress finally passed procedural reform allowing for collective amparo suits in 2013, nearly two years after the relevant constitutional reform and more than a decade after constitutional reforms first expanded indigenous rights.

The result again underscores the judiciary’s reliance on political branches for meaningful reform to the procedural environment. The 2013 changes were accompanied by a noticeable uptake in the number of court cases and tesis determined by the SCJN. In the entire period 2002 through 2012, the SCJN issued only 26 tesis dealing with indigenous rights, an average of only 2.4 per year. In 2013, the first year of the new legislation, the SCJN issued 13 such tesis—a five-fold increase.
Although the full impact of procedural reform has yet to be realized, members of the judiciary have made clear that they see this as a potential opening for increased indigenous rights litigation. In a presentation on April 15, 2013, SCJN President Juan Silva Meza recognized that the pro homine\textsuperscript{364} principle adopted in the 2011 constitutional reforms would require the SCJN to enforce group rights: “In the case of indigenous peoples [the pro homine principle] has a clear collective dimension.”\textsuperscript{365} Likewise when speaking of the reformed amparo law, Silva Meza said that the “amparo suit also becomes an appropriate instrument for the procedural defense of collective rights recognized by the national and international legal framework relating to indigenous peoples.”\textsuperscript{366}

In coming years the substantive reforms combined with new legislatively created procedural tools offer the possibility of a much more robust SCJN-focused rights enforcement strategy. It seems clear that the Court is willing to use these new tools to protect indigenous rights, but it is also clear that the Court’s protection of these rights follows the lead of the political branches due to the latter’s ability and willingness to control the necessary procedures that govern rights adjudication. While the SCJN is able to protect substantive rights today, its

\textsuperscript{364} The SCJN refers to this alternatively as the “pro persona” principle.

\textsuperscript{365} Dirección General de Comunicación y Vinculación Social de la Suprema Corte de Justicia de la Nación, Protocolo de actuación para quienes imparten justicia en casos que involucren derechos de personas, comunidades y pueblos indígenas, 2014. Video of presentation available at: http://www.sitios.scjn.gob.mx/videoteca/reproduccion/474/Protocolo%20de%20actuación%20para%20quienes%20imparten%20justicia%20en%20casos%20que%20involucren%20derechos%20de%20personas%2C%20comunidades%20y%20pueblos%20indígenas. The remarks come approximately thirty-five minutes into the presentation.

\textsuperscript{366} Ibid.
ability to do so in the future will depend equally on the Court’s ability to overcome its reliance on procedural tools dictated by political branches.

Indigenous claims are international claims in the most basic sense: they call into question the nation-state’s claim to exclusive jurisdiction over its territory and people. Even as the Mexican government has increasingly constitutionalized indigenous rights, however, the ability of indigenous groups to exercise these rights has been limited by the procedural restrictiveness of the Mexican judicial system. As Ansolabehere notes, the Mexican constitutional framework “recognizes group rights outside the judicial sphere, but those rights are not easily exercised as individual rights by members of the ethnic group in question.” (2010, 101) This is an accurate description of indigenous rights adjudication, but access at any one point in time does not fully capture the dynamic between political actors, the Court, and litigants. Rather, the inflexibility of the institutional environment prevents the SCJN itself from adapting to changing societal needs as concepts of substantive right evolve. In other court systems (for example in Colombia), a flexible institutional environment has allowed the high court to fashion procedural tools that allowed for greater court enforcement of indigenous rights. This was not possible in Mexico, where even basic procedural reforms are under the control of the legislator. As demonstrated by the case of indigenous rights in Mexico, even the clearest substantive right cannot be enforced in a high court that lacks the flexibility to match procedural tools to substantive claims.

Linking Theory to the Subcases

A low to moderate exposure to international law influences, a moderate level of adjudicatory diffusion, and an inflexible institutional environment characterize the SCJN. The
theory postulates that such a high court will be amenable to claims based on international human rights law, but that the opportunities to hear these claims will be constrained by political actors’ easy monitoring of the judiciary. As a result the court may serve as a check on the government at the margins of policy, but institutional inflexibility should result in only weak potential for a court-initiated expansion of its role over time. On the one hand, the court will be unable to avoid cases that call into question its legitimacy or threaten its institutional strength; on the other hand institutional inflexibility will prevent it from expanding rights adjudication into areas that would empower actors that could support the court in politically difficult cases. An examination of the SCJN’s activity and institutional outputs indicates general conformity with theoretical expectations.

In the area of impunity the inflexible institutional environment interacted with the concentrated nature of adjudicatory power to limit the SCJN’s role. While during the nineties and early 2000s the Court managed to develop precedents by which it avoided launching investigatory commissions, the Court’s unique role in the political system prevented it from avoiding demands for action. Citizens could not turn to other courts in hopes of receiving structural rulings that might protect their rights; after all, the strict legislative control over amparo proceedings meant those suits would have only inter partes effect. By the mid–2000s the SCJN found itself in the position of receiving submissions and then producing unsatisfactory results. Rather than enhancing the Court’s powers, these incidents resulted in decreased prestige for the SCJN. This became evident when the SCJN lobbied the legislature to reform the process so that the Court would not be responsible for further investigations into such politically salient
issues. Ultimately it led the SCJN to support a reduction in its own institutional strength and the transfer of its investigatory powers from the Court to a separate institution, the CNDH.

The three variables likewise reveal limitations in the SCJN’s ability to hold government actors accountable. In cases brought against Dirty War–era violations, the Court brought Mexico into compliance with international human rights standards governing statutes of limitation, but these rulings in individual cases did not result in broad-based prosecutions. Unlike more flexible courts, the SCJN was unable to establish ongoing commissions that could empower litigants other than government prosecutors.

Similarly, these variables explain the constraints faced by the SCJN in its ruling limiting the use of military tribunals. Although the IACHR ruled against Mexico as early as 2009, the SCJN did not take meaningful action until the government initiated reforms that broadened the scope of international human rights protection in 2011. In this instance the SCJN ruled that the judiciary was responsible for implementing IACHR rulings, and the Court accordingly limited the use of military tribunals. Its ability to do so was only possible given a procedural lacuna—the lack of a legal framework governing the federal judiciary’s interaction with IACHR rulings. The force of the Court’s ruling was limited, however, by pre-existing procedural conditions set out by political branches.

Congruence is also apparent in the area of indigenous rights. Although Mexico undertook reforms to increase internationally recognized indigenous rights in the constitution, the SCJN failed to act as a meaningful enforcer of these rights either at the time of reform or subsequent to their adoption. At the time of reform the Court rejected challenges based on the strict delineation of constitutional controversies in the Mexican judicial system. The constitutional controversy,
originally created by the PRI as a targeted means of ensuring the Court would act as an arbiter of disputes between federal entities, was found by the Court to be of limited use in the claim at hand.

The indigenous rights subcase likewise affirms the theoretical prediction that the Court will have limited opportunities to expand its role over time. In the years following President Fox’s 2001 package of constitutional reforms no great increase was apparent in the Court’s indigenous rights docket. This is despite the reform’s incorporation of a broad array of indigenous peoples’ rights. Instead, any increase in indigenous rights litigation did not come until after the political branches undertook further reforms in 2011 and 2013, finally matching procedural forms to substantive rights. The SCJN itself was not a major player in this transformation, as the Court was constrained by a procedural environment historically dominated by the political branches.

In both subcases the institutional constraints faced by the SCJN greatly limited the Court’s immediate effectiveness and the growth of its institutional strength over time. The SCJN was able to rule in favor of international human rights in individual cases, such as those dealing with Dirty War rights violations, but the effects have been limited. Nor has the Court been effective in expanding its role over time. Only when political actors reformed the constitution or expanded the panoply of procedural tools did rights litigation increase. The Court itself was generally incapable of initiating these processes, as predicted by the theory.
Conclusion

The Mexican case demonstrates that a court’s likelihood of serving as an enforcement mechanism for international law depends on more than judicial independence. Although the 1994 reforms to the SCJN increased that court’s independence and its role as constitutional arbiter, this did not lead to any profound change in its treatment of international law. Although the Court took tentative steps in this direction, its role was limited by the factors considered here.

Like independent courts in the other cases examined in this dissertation, the SCJN has the ability to rely on international human rights law in its decisions. It has been less likely to do so, however, given its low to moderate sensitivity to international law concerns. The constitution throughout the period of study suggested the possibility of treaties serving as a source of binding law, but did not require the Court to do so. Nor did the majority of justices themselves have high exposure to international influences. Overall, this low to moderate sensitivity did not predispose the Court to being a leader in human rights enforcement nor did it provide an overtly hostile venue for rights enforcement efforts. Instead, the Court was unlikely to venture beyond the confines of the domestic constitution except in those instances where international obligations clearly required more, as in the area of impunity.

International sensitivity alone does not account for the Court’s output. Rather, it helps explain the Court’s decision-making in those situations where opportunities for rights enforcement were available. The availability of those opportunities is explained by the two remaining variables: a moderate level of adjudicatory diffusion and the SCJN’s lack of institutional flexibility. The moderate concentration of adjudicatory power in the SCJN rendered it the subject of ongoing monitoring by political actors. The 1994 reforms themselves were a
targeted project meant to secure the PRI’s ongoing access to the political process. Later reforms in 1996 (granting the Court jurisdiction over electoral laws) and in 2001 (expanding indigenous rights) were likewise politically targeted efforts. Over time this has resulted in increased visibility for the Court and expectations that it act more forcefully in the policy arena.

The reforms have done little however to transform the extremely rigid institutional environment in which the SCJN operates. As a result, the heightened focus on the Court has not resulted in enhanced rights enforcement over time. Instead, it has resulted in the Court conducting human rights investigations, ruling on prosecutions, and considering indigenous rights claims in an environment where substantive rights outrun procedural mechanisms.

Interestingly, the historical unwillingness to investigate rights violations has been attributed to procedural vagueness. According to one commentator, the Court has had to overcome “one of the greatest historical limits to its labor, the lack of regulation.” (Suárez Ávila 2012, 247) On the contrary, the evidence presented there suggests that the few times the SCJN was able to act effectively was when it managed to overcome its extremely dense, rigid procedural environment, finding procedural lacunae and transforming these into rights-affirming opportunities.

These opportunities, however, have been limited. The SCJN did not begin to assert its role as an international human rights enforcer until after political actors undertook additional reforms in 2011 and 2013, more deeply incorporating international law and expanding the procedural mechanisms available to enforce them. These reforms both elevated the importance of international human rights in the Mexican constitutional framework and increased the likelihood that the amparo suit would be an effective means of protecting individual and collective human rights. The innovation of these procedural tools, however, was again a
legislative project. This calls into question the ability of the SCJN to continue to serve as a rights lock-in mechanism were the political winds to shift yet again. So long as political actors tightly regulate the procedural environment, it will be they rather than the Court that is able to control the flow of litigation. Only if the newly empowered SCJN uses the current period of widened access to increase the number of stakeholders in the judicial process will the Mexican high court solidify its role as a long-term enforcer of international human rights law.
Chapter 5: Conclusion

When do domestic courts enforce international human rights law? This question has been of ongoing concern to both international relations researchers and scholars of comparative politics. In this dissertation I have drawn on both literatures to develop a new theory of domestic court behavior. The theory treats courts as strategic actors, but strategic actors who take seriously questions of legal legitimacy.

In doing so I find that courts are active participants in their institutional development, and that therefore: (1) Their willingness to supply rights adjudication is not uniformly reflective of the potential demand for litigation. (2) That courts that enjoy a flexible institutional environment do not treat procedural rules as fixed; instead court access, adjudication, and remedies morph to fit the court’s strategic legitimacy concerns. (3) This allows courts to avoid potentially institution-damaging backlash, increasing the likelihood that the court will successfully maintain or expand its enforcement role over time. (4) The ability of a court to engage in this selective rights enforcement behavior is enhanced by a diffuse adjudicatory environment that provides greater opportunities for the high court to balance public concerns against political considerations. (5) These processes also depend on whether there is a link between the court’s legitimacy and international law concerns; where there is a strong link the likelihood of judicial enforcement of international human rights law increases, even absent treaty ratification.

Taken together these five claims involve the domestic high court’s sensitivity to international law considerations, diffusion of adjudicatory power throughout the court system,
and the level of institutional flexibility enjoyed by the court. These variables have structured my analysis of each court’s role in enforcing international human rights law. Although I analyze them in turn, the three variables obviously interact: a court that is sensitive to international considerations may be unable to adequately incorporate the substance of those laws due to a lack of institutional flexibility; the degree of adjudicatory diffusion may constrain an otherwise institutionally flexible court’s ability to alter the locus of review. Taken together these variables inform a rich theoretical framework within which to predict and explain outcomes across the three cases and six subcases examined in this dissertation.

**International Sensitivity**

Courts that are sensitive to international law due to their institutional standing and professional considerations are the most likely to enforce international human rights obligations. This rather uncontroversial statement leads to a more provocative finding in this dissertation: the linkage between international sensitivity and rights enforcement occurs even absent treaty ratification. While the ratification of individual treaties is not dispositive of individual enforcement efforts, however, constitutionalization of those same rights does improve the likelihood of a court ruling against the government. Indeed, where a court finds a commitment to international human rights law in the constitution, the court is likely to consider protection of international human rights law to be intricately bound up with the court’s own role in the political system. In such situations the court may find ways to incorporate international human rights law to which the state has not yet committed itself. Where constitutionalization is paired
with a commitment to international law, moreover, the likelihood of the court ruling against the government is further enhanced.

While scholars have called attention to courts’ potential to serve as enforcement mechanisms for human rights commitments in democracies, the case studies indicate the contingent nature of any such outcome. Courts may indeed serve as venues for rights articulation and contestation over policy agendas. Yet courts only assume this role in limited circumstances that have little to do with the binding nature of the treaty itself. Where a state is bound by treaty law to comply, courts often have the ability to restrict their docket in ways that maintain the court’s own legal legitimacy while avoiding political backlash. This was seen in the Colombian Constitutional Court’s handling of the falsos positivos cases. Alternatively, as seen in the South African case a high court may make selective use of legal fictions such as the distinction between self-executing and non–self-executing treaties to give differential domestic effect to treaties that are, from an international law standpoint, similarly binding on the state.

Likewise, even where treaty ratification is followed by legislative incorporation this does not always serve as an effective means of binding future governments. Where international law is incorporated directly by legislation, courts have been willing to permit subsequent governmental changes to that legislation. In doing so they give effect to the traditional principle that though international law may bind a state internationally, a state may derogate domestically without judicial recourse. In short, domestic courts often treat international law as a juridical Schroedinger’s cat: international law simultaneously applies and does not apply. This can be seen clearly in the Mexican case, where the SCJN regularly interpreted treaties as a source of domestic law but as a source without the necessary status to override federal statutes.
Treaty ratification is therefore seldom a *sufficient* condition for domestic court enforcement—but neither is it a *necessary* condition. As shown by the behavior of high courts in all three states, when a court is considering a generally recognized human right it often resorts to international legal standards that would not be considered binding on the state under international law principles of treaty ratification or accession. The Colombian Constitutional Court is exceedingly receptive to international law principles, incorporating United Nations declarations and guiding principles into its jurisprudence. The South African Constitutional Court has done so to a lesser extent, at times citing treaties such as the ICESCR in its interpretations despite South Africa not having completed ratification. Only the Mexican court, with its historically low levels of international sensitivity, has been relatively immune to this process.

In contrast to treaty ratification, constitutionalization increases the ability of a domestic court to resist legislative or executive backsliding on human rights. Where an international law principle has been incorporated into the constitution (even without direct ratification of the treaty from which that principle derives), courts tend to take this as a serious commitment to the domestic political community. As a result, any policy deviation may be seen not just as reneging on an international commitment but also on the domestic political settlement. For a court such as the South African Constitutional Court, the Constitution serves as an important indicator of what is acceptable and demanded of domestic institutions in the reform era. To the Mexican SCJN, the changes of 2011 confirm society’s desire to move beyond the previous era of ambivalence (or even hostility) toward foreign legal influences. The SCJN’s implementation of the pro homine principle occurred not because of new treaty ratifications or domestic incorporation, but because
the high court began to see these rights as constitutive of a broader rights-affirming normative environment that the court was charged with protecting.

Constitutionalization matters for rhetorical purposes as well. When rights advocates seek to use courts to challenge government action, exclusive reliance on international law can be problematic. When the Treatment Action Campaign demanded compliance with human rights law and broader access to antiretroviral drugs, for example, government officials including the president were quick to claim that the group was supported by foreigners opposed to ANC rule. The Court ultimately rejected this framing, in part because the Treatment Action Campaign was able to make reference to the Final Constitution’s inclusion of health rights. Indeed, the appeal to nationalism was undermined by the ANC’s own role in expanding the range of international human rights principles entrenched in the Final Constitution (Heywood 2005).

This leads to a final point: while constitutional protections can bind in ways treaty law alone cannot, constitutional protections are at their strongest when buttressed by international law. Except for those institutions situated in the rapidly diminishing number of states where parliamentary supremacy is still recognized, courts look first to the constitution when judging the

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368 A Cabinet statement in March of 2002, for example, revealed the extent to which the government viewed the debate as one of South African exceptionalism by emphasizing “…the renewed campaign particularly in some international media around this issue, directed against government in general and the President in particular.” Cabinet Meeting Statement, March 6, 2002.
validity of new legislation or executive action. The old adage—quoted often by South African judges in reference to the Apartheid era—that they merely “apply the law as it is,” is simply no longer tenable as a rule-of-law precept. The constitution, understood as a Kelsenian compact above laws, binds meaningfully in a way that international law alone seldom does. Where a Court interprets a constitution to embody elements of international human rights, however, the constitution no longer stands alone as a backstop against legislative and executive action. Instead, courts in states with constitutions heavily imbued by international human rights law increasingly treat international law itself as part of the constitutional matrix.

This is the case even where the government has the electoral wherewithal to overcome procedural obstacles to constitutional change. In such situations, courts increasingly treat international law as a further measure against which to judge proposed constitutional amendments. This is most readily apparent in the Colombian case, where the desire to imbue all aspects of governmental activity with international human rights considerations is part of the state’s transformation from an estado de derecho to an estado de derecho social. The bloque de constitucionalidad may even require constitutional amendments to conform to international law obligations.

To be sure, ratification matters. Contrary to many scholarly accounts, however, it matters not because it serves as an independent legal source that individual litigants can use to counter majoritarian desires. Rather, treaty ratification operates as an indicator of the societal bargain the high court must enforce to ensure its ongoing legitimacy in the domestic political arena. Overall the case studies support the claim that a court’s international sensitivity is more predictive of judicial enforcement of international human rights law than is state ratification.
Adjudicatory Diffusion

Adjudicatory diffusion measures the systemic locus of court power. It takes into consideration both the degree to which various courts throughout the judicial system are empowered to review government action (or inaction), and whether as a practical matter this power is available to the broad public or confined to a small number of elite actors. The importance of diffuse adjudicatory power and accessibility to that power is well-documented both in the international and domestic court literatures, and the findings here build on and extend these analyses. The importance of diffusion is reflected in the varied degree of societal-court engagement seen across the states in this study.

The diffuse adjudicatory environment in Colombia has allowed individuals relatively quick and inexpensive adjudication of their rights without stringent procedural burdens. As a result, citizens from all socioeconomic groups and all regions of the state have been able to challenge government policies, and courts throughout the state have been able to rule on government action or inaction. As a result, the CCC is not the only court politicians must monitor, and litigants enjoy multiple points of entry to the court system.

The CCC benefits further by being able to take the most contentious issues off of its agenda while focusing resources on cases with broad public relevance. Once the CCC accepted oversight of the IDP issue it employed a broad range of remedial procedures to effectuate its ruling, engaging various sectors of society and benefiting from the increased rights consciousness of Colombian society. The CCC is able to leverage public concern to offer meaningful rights-protecting rulings in cases that might otherwise invite political backlash.
The importance of adjudicatory diffusion is highlighted by its absence in South Africa. While both the CCC and the SACC enjoy a high degree of latitude over their access procedures, only the CCC has been able to both open and close its doors to the public; the SACC has been constrained to use its prerogatives to reduce the high court’s exposure. The Colombian high court was well-attuned to public concerns and therefore able to craft its agenda in a way that answered broad-based demand for rights enforcement. In contrast, the vast majority of South Africans lack the necessary resources to wage sustained litigation through multiple layers of appeals. As a result a more insulated court meant that docket control was less precise as a filtering mechanism. In such a constrained setting, the SACC has embarked on a prudent course: it has limited the number of cases it hears across all issue areas, minimizing the likelihood of conflict.

This also helps explain the two courts’ differing approaches to remedies. The Colombian high court has enjoyed a ready supply of litigants in a rights-imbued culture, providing the CCC with a broad base of support. As a result it could expand its efforts to include monitoring and follow-up. The SACC, meanwhile, stands in elite disconnect from the larger population. Instead the population identifies with the dominant political party, and the legal system does not play an important role in the lives of everyday South Africans. In such an environment the SACC has

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369 South Africans in this respect have been subject to the same economic and structural limitations in rights enforcement that have been documented in previous studies of cause lawyering. Galanter (1974) provides an early foray into the importance of structural constraints. Epp (1998) provides a more recent comparative account of the structural foundations of legal mobilization.
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avoided follow-up litigation and structural rulings, instead building legitimacy through rights-affirming decisions that entail little subsequent monitoring by the court.

Compare this with the situation of Mexico’s SCJN. A cursory appraisal would suggest a court similarly situated to the CCC. The broad availability of the amparo suit should provide the SCJN with a steady supply of information on the demand for human rights enforcement throughout the country, similar to that seen in the Colombian cases. On closer inspection, however, this similarity gives way to an important distinction: Mexican litigants’ opportunities to use the amparo have been curtailed by an inflexible institutional structure primarily determined not by the high court but by political actors. As a result the ability of citizens to bring claims challenging the general applicability of laws for non-compliance with human rights obligations has been severely restricted. Similar restrictions have limited group standing to bring claims. Taken together, this moderately diffuse adjudicatory environment has left the SCJN with little ability to cultivate direct linkages to a broader human rights-seeking public. Meanwhile successive court reforms have heightened the political nature of the high court, preventing it from successfully avoiding legitimacy-damaging cases and (until recently) investigatory commissions. As a result the SCJN has enjoyed few opportunities to balance public concerns against the potential of political backlash, placing the high court in a precarious position: Its central role in the court system increases societal expectations, but without the resources to follow through on these demands.

This analysis provides support for two claims. First, the differing outcomes across cases support the claim that a diffuse adjudicatory environment will provide greater opportunities for the high court to avoid political backlash by balancing public concerns against political
considerations. Colombia was able to draw on the diffuse adjudicatory environment to selectively engage issues and draw more litigants into the courtroom to support court-based enforcement. The lack of such diffusion prevented the South African court from drawing on the public in a similar manner. The Mexican SCJN enjoyed only moderate adjudicatory diffusion, meaning that it too was unable to create ongoing linkages to the public that would enable it to balance against political considerations.

The case studies also strongly support the claim that the supply of rights adjudication is not directly reflective of the potential demand for litigation. The Colombian Constitutional Court selectively restricted the supply of adjudication, while the SACC constrained the supply even more dramatically. The Mexican SCJN likewise did not offer consistent judicial recourse across issue areas where a demand for court enforcement was evident. These outcomes are explained more fully by incorporating the final variable in the theory: institutional flexibility.

**Institutional Flexibility**

The case studies provide ample support for the claim that where a court enjoys a flexible institutional environment, procedural rules will be epiphenomena of the court’s strategic legitimacy concerns. This can be most clearly seen in the Colombian case. The CCC faced the possibility of strong political backlash in the extrajudicial execution cases, and as a result it constricted court access in a way not seen in the IDP issue area. Rather than accepting appeals in line with the high court’s role as rights protector, it allowed these cases to be removed from its docket by limiting the number of tutela appeals and affirming changes in victims’ rights to court access. Alternatively, where the CCC engaged an issue it greatly expanded access to the court. It
required follow-up reports under continuing orders, and where it lacked expertise it deputized NGOs to collect information and act as government watchdogs. This innovation even extended to meta-procedures such as those governing ratification and incorporation of international human rights law. The CCC was quite willing to embark on novel interpretations that gave binding weight to anything from regional court rulings to United Nations declarations. The CCC’s sensitivity to international human rights law generally overcame the textual lack of specificity on individual rights, so the high court used its flexibility to find novel ways of drawing on international legal principles.

In South Africa the SACC likewise used its institutional flexibility to further its legitimacy concerns. While the Final Constitution offered a broad grant of direct litigant access to the high court, the SACC severely restricted this access in order to avoid taking an oversight role in otherwise contentious cases. It also used this flexibility to craft limited remedies that reinforced the court’s legitimacy as an enforcer of international human rights law without unnecessarily antagonizing government actors. At the same time, it engaged in a more limited form of the meta-procedural manipulation seen in the Colombian case. The SACC was willing to embark on considerations of international treaty law, such as the ICESCR, that had not been incorporated into domestic law at the time of decisions. When broad interpretations of treaty law would have been detrimental to the court’s institutional concerns, however, it flexibly interpreted concepts such as “self-executing” in ways that avoided political confrontations.

Both of these courts likewise demonstrate the ways in which institutional flexibility interacts with the other variables considered in this dissertation. The diffuse adjudicatory environment in Colombia provided that court with a selection of issues from which to draw and a
wide range of potential follow-up actors. This allowed the CCC to draw on a flexible institutional environment to engage those resources. The lack of a diffuse environment in South Africa meant that the SACC’s flexibility was predetermined to operate in one direction only: further constriction of adjudicatory supply. Both situations lend further support to the claim that the supply of rights adjudication is not directly reflective of the potential demand for litigation, but instead is reflective of court institutional concerns. Indeed, the Colombian case suggests the possibility that the willingness of the high court to supply adjudication has the potential to stimulate further demand in an iterative process.

The most constrained court in terms of flexibility was Mexico’s SCJN. The importance of institutional flexibility is perhaps best revealed by comparing the outcome there with the outcome in Colombia. Both states are participants in the Inter-American system of rights protection, and they share similar treaty obligations and regional institutional frameworks. Citizens of both states also have had recourse to seemingly analogous court access provisions in the form of the Mexican amparo suit and Colombia’s tutela. (The tutela is itself a derivative of the amparo.) Strikingly, both the Colombian and Mexican judiciaries underwent reform at a period of democratic transition marked by insurgency and political violence. What differed, however, was the form that constitutional and judicial rehabilitation would take. In Colombia, the establishment of a new Constitutional Court resulted in a new judicial actor not bound by

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370 In Colombia, this took the form of the FARC and the assassination of presidential candidates Bernardo Jaramillo and Carlos Pizarro. In Mexico, similar unrest was found in the Zapatista uprising in the state of Chiapas, and reform was likewise punctuated by the assassination of PRI presidential candidate Luis Donaldo Colossio and the majority leader of Congress, Jose Francisco Ruiz Massieu. Both states had also spent numerous years under executive-ordered states of emergency.
decades of extreme procedural rigidity common to civil law systems. The tutela was itself a new procedural tool, and the CCC’s procedures were left to the court to develop in its caselaw. In contrast the Mexican SCJN was not a new court and thus inherited an institutional environment characterized by extreme rigidity in the form of a politically determined amparo law and procedural restrictions embedded in the constitution.

As a result, the SCJN found itself without adequate tools in which to alter procedures in line with the high court’s legitimacy concerns. This is seen perhaps most clearly in the SCJN’s inability to overcome restrictions in its use of the investigatory function. In that subcase the rigid institutional environment meant the high court was unable to further a rights agenda and even struggled to determine how to report its findings. To be sure, even in the Mexican case the high court was able to take advantage of a few instances of flexibility to enhance its legitimacy. In its consideration of the Inter-American Court rulings, for example, the lack of any clear institutional structure linking the domestic judiciary to the regional system provided the opportunity for the SCJN to create new procedures.

The Mexican case also provides support for the claim that a flexible institutional environment increases the likelihood that the court will successfully maintain or expand its enforcement role over time. When the SCJN was presented with an opening, it was able to seize that opportunity in a way that potentially expanded its enforcement role over time. The Mexican high court also demonstrates the converse, however: lack of flexibility inhibits this process. The SCJN was unwilling to engage international legal principles unless and until human rights norms were fully and clearly articulated in the domestic sphere.
This contrasts with the much more successful expansion of the high courts’ role in both Colombia and South Africa. In Colombia this took the form of creating new institutional and procedural tools through which to engage litigants, NGOs, and international organizations. The CCC also systematically expanded the degree to which it could call on international law principles to legitimate its power. In doing so, it cultivated an internationally informed, legalized rights culture that provides the potential for the CCC to address increasingly contentious issues over time.

Although less dramatic in its approach, the South African Constitutional Court has also used its flexible institutional environment to lay the groundwork for increased rights adjudication. It has used remedies that limited the immediate impact on the government, but it has ruled in ways that embed international human rights in the domestic legal system. It has also reiterated that the common law—an area of law completely within the court’s cognizance—must be developed in line with international human rights law principles. The SACC has undoubtedly taken a gradualist approach, but it is an approach that gradually moves South Africa in the direction of compliance with human rights obligations.

The cases here demonstrate the importance of a flexible institution environment. When a court enjoys a flexible environment, it is able to deal with difficult issues in nuanced fashion. This will undoubtedly lead at times to less-than-satisfying outcomes for human rights activists or victims of abuses. The longer term trend, however, should be positive as the high court is able to pick and choose its battles. These courts may even become conduits for implementation of human rights principles that political actors have been unable or unwilling to enact, as seen in the Colombian case and to a lesser extent South Africa.
In contrast, institutional rigidity results in a court bound to follow the law as the executive and legislature define it. Such a court lacks the ability to follow developing trends in international jurisprudence on its own initiative. Instead, it must await political actors’ decision to implement these reforms domestically. More importantly, this rigidity indicates the court will be unlikely to continue to act as a rights enforcement venue once political winds change. Institutionally inflexible courts may at first appear to act as lock-in mechanisms, but they do so only in lock-step with political leaders, and without the ability to promote or preserve international human rights when those political leaders are not already leaning toward compliance.

Implications

Contributions to the Discipline

This dissertation expands our understanding of domestic courts’ role as enforcers of international human rights law in several ways. First, I leverage case studies to better explain variation in human rights enforcement. I look at two distinct legal issues in each of three states, revealing variation both across and within states. Previous international law and international relations scholarship has focused on issues of compliance across multiple states, but has done so in specific issue areas and often without considering the motivations of domestic court actors. The comparative judicial politics literature in contrast has dealt extensively with domestic court systems, but often at the expense of comparing across legal systems. This study examines variation across states while simultaneously considering variation that occurs within individual
court systems. In doing so it develops a richer theoretical framework that better explains judicial enforcement patterns both across states and within states across issue areas.

Second, I increase our understanding of international human rights enforcement by treating judicial actors as entrepreneurs. Extant theories have focused on variations in ratification patterns, the strategies of domestic or international activists, or the form, content, and articulation of individual human rights norms. In these theories courts sometimes play key roles as enforcement sites, but they are generally passive institutions that receive and adjudicate others’ claims. The courts themselves are instrumental. While politicians, activists, and citizens undoubtedly do attempt to use courts instrumentally, courts themselves are more than passive recipients of litigant claims. Instead, I show that courts are active participants in the process of rights enforcement. Their treatment of individual cases transforms legal and policy outcomes both in individual cases and over the long term. Judges act in ways that create opportunities for themselves and for human rights enforcement by crafting procedures and forging new autonomies.

Lastly, my theory moves beyond the debate over whether law is either purely non-political or simply another field for politics. To be sure, courts act strategically, but they also take into consideration the legitimacy costs of overtly politicized legal interpretations. A court’s failure to treat the law as a unique deliberative field would undermine the court’s own claim to legitimacy in the democratic system. As a result a court’s strategic behavior is informed by legal normativity, and political considerations from one point in time create path dependencies that shape the role of courts as venues of rights enforcement in later periods. My theory takes into account this hybrid nature of the law. In doing so it is better able to address variation in state
compliance with human rights obligations by examining how courts are both bound by the law but also able to shape it strategically at key moments of doctrinal development.

**Normative Considerations**

This dissertation also speaks to normative questions about the role of courts in democratic societies. High courts are often seen as countermajoritarian institutions. International law has likewise been criticized as intrinsically anti-democratic. And yet throughout the late twentieth century, the rapid expansion of international law coincided with an ongoing spread of court power. If critics are correct then these two trends, taken together, represent a profound undermining of democratic principles.

This dissertation argues for the opposite conclusion. As others have demonstrated, purportedly antidemocratic international institutions can actually enhance domestic processes of democratic deliberation (Keohane, Macedo, and Moravcsik 2009). Likewise, domestic courts may be necessary counterweights to majoritarian excesses. As such, liberal theories increasingly see domestic courts as enforcers of international human rights in the face of domestic political backsliding.

In short, the rise of independent domestic judiciaries and an ever-expanding web of international human rights obligations do not together signal the death of domestic democratic autonomy. At the same time, courts do not offer a straight path to democratic consolidation in newly democratic states. On the contrary, domestic courts offer a venue for enforcement of international human rights obligations, but only where they are able to engage these issues in ways that take into consideration political realities and conform the demands of international law.
to domestic contingencies. The rights-protective role of courts in the domestic policy sphere is potentially robust, but it is unlikely to endure where court rulings deviate greatly from the demands of political actors or the broad public.

How effective courts are in threading this needle depends on several variables. Does their legitimacy rely to some extent on a faithful reading of international human rights law? Does the level of adjudicatory diffusion in the court system provide opportunities to learn about and engage the public’s demand for rights enforcement? And, most importantly, does the court enjoy a level of institutional flexibility that allows it to selectively engage politically difficult questions of law and policy?

Courts with favorable institutional settings can serve as domestic compliance mechanisms for international human rights obligations. In doing so the most successful courts will balance public concerns, political considerations, and the institutional needs of the court itself, leading to improved human rights outcomes. Where courts fail to balance these considerations, however, they risk their institutional independence, their legitimacy, and ultimately their policy relevance.
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S v Makwanyane and Another, 1995 (6) BCLR 665 (CC).

S v Williams and Others, 1995 (7) BCLR 861 (CC).

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Political Constitution of the United Mexican States (with years where relevant), Articles 2 [2001], 2(A) [2001], 14, 29 ¶5 [2011], 50–54, 56, 94 [1994], 96 [1994], 97 ¶2 [pre–2011], 97 ¶3 [pre–2011], 105(2)(g) [2011], 105(I), 105(II) [1994], 105(II) [1996], 105(V)
Cases


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Solicitud numero 3/96 relativa a la petición del presidente de la republica para que se ejerza la facultad prevista en el segundo párrafo del artículo 97 constitucional, 4 de mayo de 1996.


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Ley de amparo, reglamentaria de los artículos 103 y 107 de la Constitución política de los Estados Unidos Mexicanos.

Ley Orgánica del Poder Judicial de la Federación
Appendix I: Descriptive Statistics

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Appendix II: Major Human Rights Treaty Ratifications

Colombia

Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: signed April 10, 1985; ratified December 8, 1987; accepted inquiry procedure.

International Covenant on Civil and Political Rights: signed December 21, 1966; ratified October 29, 1969; accepted individual complaint procedure.


Convention for the Protection of All Persons from Enforced Disappearance: signed September 27, 2007; ratified July 11, 2012; accepted inquiry procedure.


Mexico

Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: signed March 18, 1985; ratified January 23, 1986; accepted individual complaint procedure March 15, 2002; accepted inquiry procedure.


Convention for the Protection of All Persons from Enforced Disappearance: signed February 6, 2007; ratified March 18, 2008; accepted inquiry procedure.


International Convention on the Elimination of All Forms of Racial Discrimination: signed November 1, 1966; ratified February 20, 1975; accepted individual complaint procedure March 15, 2002.


International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: signed May 22, 1991; ratified March 8, 1999; accepted individual complaint procedure.


Convention on the Rights of Persons with Disabilities: signed March 30, 2007; ratified December 17, 2007; accepted individual complaint procedure; accepted inquiry procedure.
South Africa

Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: signed January 29, 1993; ratified December 10, 1998; accepted individual complaint procedure; accepted inquiry procedure.


Convention on the Elimination of All Forms of Discrimination against Women: signed January 29, 1993; ratified December 15, 1995; accepted individual complaint procedure October 18, 2005; accepted inquiry procedure October 18, 2005.


Convention on the Rights of Persons with Disabilities: signed March 30, 2007; ratified November 30, 2007; accepted individual complaint procedure; accepted inquiry procedure.