Chapter 7: International Constitutional Courts

Abstract: Many people question whether the metaphor of a constitutional court is appropriately transferred to international courts. This debate misses, however, that some ICs have explicitly been given constitutional review authority, meaning the authority to invalidate statutes and executive acts that conflict with higher order legal principles. This chapter considers the politics that ensues when ICs are authorized to conduct constitutional review. Constitutional review politics depend on the ability of ICs to foster a culture of constitutional obedience, wherein violations of the constitution are seen as illegitimate and thus politically unsustainable. Developing a culture of constitutional obedience is easier with respect to the review of acts of international institutions, since international institutions have a fragile legitimacy. Developing a culture of constitutional obedience is harder vis-à-vis domestic actors, where IC’s constitutional authority must compete with the authority of domestic actors and institutions. European ICs, however, have developed a culture of constitutional obedience so that at this point one can say they have developed a morphed constitutional review role vis-à-vis domestic acts. I show, however, that it is the reaction of domestic judges and domestic actors that in the end determines whether or not ICs gain morphed constitutional review roles vis-à-vis domestic acts.

International enforcement courts can find states in noncompliance with international law, and sometimes authorize remedies to compensate victims of noncompliance. A finding of state noncompliance does not, however, invalidate conflicting domestic laws. Constitutional review does invalidate illegal acts, and therefore it raises the political stakes of noncompliance. Alec Stone Sweet defines constitutional review authority as the judicial authority to invalidate laws and government acts on the basis of a conflict with higher order legal obligations. \(^1\) Where there is a culture of constitutional obedience, domestic actors will see unconstitutional behaviour as ipso facto illegitimate. Because the legal problem is a higher order law, the only way to resurrect unconstitutional laws is to change the law in question or to change the constitution.

Giving judges constitutional review power is controversial. A finding of constitutional invalidity becomes a legal trump card that constitutional judges and constitutional law lawyers are uniquely able to play. By specifying what it would take for a policy to be constitutional, judges become de facto policy makers and veto players. This policy-making role of constitutional judges raises dilemmas for democracy. The harder it is to change a constitution, the more difficult it is to reverse a constitutional veto. For these reasons, wherever constitutional review authority exists one hears concerns about a “government of judges,” meaning a political system in which unelected judges replace accountable politicians in making law.

\(^1\) Stone Sweet, 2000: 21.
The notion of international constitutional review raises the same sorts of concerns about the possible deleterious effects of judicial review on democracy.² Changing national statutes or the national constitution will not suffice where national rules conflict with higher order international legal obligations. States cannot change international rules on their own, and legal principles that fall under the category of jus cogens cannot be changed at all. The contentious notion that ICs could be seen as constitutional bodies has generated active debate. Critics of the constitutional analogy question whether treaties can or should create higher order legal obligations in the domestic sphere, whether one can have a constitution without a demos that supports it, and whether international legal orders contain the types of foundational grundnorms one associates with legitimate constitutional orders. Meanwhile, even the most revered domestic constitutional orders exhibit at least some of the problems and limitations critics point to when they criticize international constitutional orders.³

Most domestic lawyers focus only on how international law impacts the domestic constitutional order. The polemical idea that international constitutional review can affect the domestic constitutional order has served as a distraction, obscuring the reality that states have asked ICs to play a constitutional role in the international legal order and that the idea that ICs should have this role is for the most part fairly uncontroversial. This book adopts a positivist approach.⁴ For me, the real issue is when and where do ICs become constitutional review bodies? What politics follow from international courts exercising constitutional review authority?

Section I identifies which ICs have been explicitly delegated a constitutional review role, providing a history of the decision to create international constitutional courts. The discussion shows that states have delegated to certain ICs the authority to serve as constitutional arbiters of an international agreement, and in some cases ICs have also been asked to be constitutional arbiters of domestic law. Section II focuses on IC review of international legislative acts.

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² Some examples about these concerns include: Barfield, 2001, Bork, 2003.
⁴ I return to normative constitutional questions in Chapter 8. This chapter focuses primarily on what Keith Whittington calls conceptual constitutionalism (the functions of constitutional review and how constitutional reviews works). I leave aside empirical questions about the overall effect of international constitutions. Whittington, 2008.
Delegating ICs the authority to review IO acts can be seen as a grant of ‘other binding’ authority, since states themselves do not fall under this type of IC review. But such delegation is also self-binding to the extent that IO acts embody decisions of state actors. I review two cases where ICs invalidated international legislation that had the support of states. In both cases, the ICs played their explicitly delegated constitutional role, invalidating the IO acts on the basis of conflicts with higher order legal obligations.

Section III considers IC constitutional review of state acts. International constitutional review of state acts represents a self-binding, sovereignty compromising exercise of IC authority. I argue that with respect to the review of state acts, IC gain a constitutional review role—morphed or explicitly delegated-- where domestic actors come to see international law as higher order law, and themselves as constitutionally bound by this higher order law. It is thus the actions of domestic actors that determine whether or not ICs assume a constitutional role of reviewing the validity of state acts on the basis of conflicts with a higher order international law. The end of this section suggests that ICs exercising constitutional review authority play a role comparable to that of domestic constitutional courts.

Section IV considers how the requirement of domestic support shapes the way ICs exercise their constitutional review authority. At both the international and domestic levels, constitutional review is politically contentious because it involves judges invalidating laws and government acts that from the perspective of national governments may be perfectly valid. Indeed if constitutional review judges take their role seriously, they will inevitably be naming as unconstitutional statutes that were passed by legitimate governments, through legitimate means, often for legitimate reasons. I argue that ICs dependence on national judicial support serves as a helpful limit on ICs exercising their constitutional review authority, reinforcing the domestic rule of law and ensuring that ICs stay in sync with the sentiments of national high courts.

I. Why Delegate Constitutional Review Authority to ICs?

Constitutional Review Authority and Cultures of Constitutional Obedience

Ten ICs have explicitly been delegated constitutional review authority within the legal system they oversee. Explicit delegations of constitutional review authority mostly entail authorizing ICs to review the validity of IO acts, but in some cases ICs have also been
empowered to review the validity of state acts. Why would governments intentionally create international constitutional courts?

Before WWII, very few countries had courts with judicial review powers, meaning the power to question the validity of state acts. The dearth of courts with judicial review power reflected the widespread sentiment that lawmaking bodies should not be subjugated to legal review of their actions. This perspective is consistent with a more Hobbesian notion of legitimate authority. Thomas Hobbes famously suggested that sovereigns should have unlimited authority, lest the political system devolve into chaos. The Hobbesian perspective is often espoused by authoritarian political leaders, and sometimes embraced by publics where there are deep political divisions that can easily erupt into violence. Others see parliamentary sovereignty as reflecting the essence of democratic authority. Jean Jacques Rousseau’s democratic theory sees legislative bodies as articulating the “general will.” Rousseau assumed small polities, where it might be possible for everyone to directly participate in building the general will. But Rousseau also believed that people should be “forced to be free” by which he meant that the general will should trump any individual will. For Rousseau, following the “general will” was the same thing as adhering to the rule of law. This Rousseauian perspective is reflected in the contemporary affinity for parliamentary sovereignty, the view that parliament articulates the collective will of the people and is as such beyond any judicial check.

Chapter 1 articulated a different liberal view associated with John Locke, where judicial checks were considered a key part of ensuring limited and legitimate government. Locke argued that people are poor judges of themselves and their friends, which is why it is better to let disinterested judges adjudicate disagreements. Locke also suggested that governments could not be trusted to rule on behalf of the people, and that systems with checks and balances lead to better governance. Chapter 1 developed these arguments further.

The Lockean perspective gained additional resonance during WWII. In Germany, the laws that are now widely seen as violations of basic human rights had been legally enacted, and upheld by German and collaborationist judges because they were legally valid. WWII made the

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5 The oldest constitutional review systems are the United States, Canada and Austria, where constitutional review dates back to the nineteenth century. For more on the contentious history and spread of constitutional review, see: Ginsburg, Ibid, Stone Sweet, 2002:78-84.
8 Fraenkel, 1969.
dangers of unchecked governments all too clear. Post WWII, democratization movements often brought with them the creation of constitutional courts.9

International constitutional courts are part of this post WWII trend. Government and state actors that are used to constitutional review in the domestic realm find problematic the notion that international legislative actors should escape similar checks and reviews. For people used to the notion of constitutional review, delegating constitutional review authority to ICs is an obvious corollary for whenever international institutions are empowered to make binding decisions that can escape domestic parliamentary or judicial checks.

As was the case for delegation of international enforcement authority, support for international constitutional courts began in Europe. The first IC to have explicitly been granted constitutional review authority was the European Court of Justice (ECJ). In 1952, when six European countries agreed to create a Coal and Steel Community, few were concerned the Coal and Steel Community would undermine democratic governance. The original ECJ was created in part to appease the smaller states, which were concerned that the High Authority would be dominated by powerful states. The original ECJ was primarily an administrative review body for the decisions of the High Authority (see chapter 6 for more on the administrative review role of the ECJ).10 When the ECJ was adapted to become the legal body of the European Economic Community, the founding six European states gave the ECJ constitutional review authority. State and private actors were authorized to raise direct challenges to the validity of European rules in front of the European Court of Justice.11

European officials immediately worried that the constitutional review of community acts could lead to political paralysis. In 1962 ECJ Avocat General voiced the concern that “extremely grave consequences … could follow from even a partial annulment of texts that [have] ‘quasi-legislative character’ and [have] been adopted with considerable difficulty, and sometimes after a compromise reached in the Council.”12 This concern may have been especially acute because of

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9 Alec Stone Sweet discusses this trend, arguing that most democratizing states opt for a Kelsonian Constitutional Court—a separate constitutional review body—implicitly rejecting the American approach to judicial review by courts at all levels. See: Stone Sweet, 2002: 78-80.
10 Boerger-De Smedt, 2008.
11 Private litigants could also raise challenges to the validity of European law in national courts. National courts of last instance were required to refer these challenges to the ECJ. See the original Article 173 and 177 of the Treaty of Rome.
12 Conclusion of the Advocat General Legrange in Confédérations nationnels des producteurs contre Conseil des CEE, Case 16-62. The constitutional illegality of the Luxembourg Compromise seemingly validated the concerns. While the Luxembourg compromise surely violated the Treaty of Rome, challenging its validity in front of the ECJ
the contested nature of the EEC’s central legislative effort of the time, the common agricultural policy. Political concerns about invalidating Community acts influenced the ECJ’s interpretation of the Treaty of Rome; the ECJ created stringent rules limiting the contexts in which private actors can claim legal standing to challenge the validity of community acts.13 While the ECJ has become famous for its constitutional assertion of authority to review the compatibility of domestic law with European law, the ECJ’s early application of its constitutional authority to review the validity of European law was quite timid. Indeed to this day the ECJ has rarely found constitutional limits to the reach of European law.

The formal grant of international constitutional review authority spread with the European model of an IC. Originally regional integration movements replicated the political institutions of the European Community without creating any corresponding legal body. When members of regional blocs wanted to reinvigorate regional integration systems, they often chose to create a permanent court modeled on the ECJ. All of the ICs with constitutional review authority replicate the design of the ECJ.14

Table 7.1 below summarizes the universe of ICs that have explicitly been delegated the authority to assess the validity of legislative acts. All ICs included on the table have the formal authority to assess the validity of binding laws. In all cases, ICs will be comparing the law in question with higher order legal principles—either the founding treaty of the organization or human rights obligations that are binding on the organization and its members. All international constitutional courts have compulsory jurisdiction, a functionally required element of constitutional review authority. The columns to the right identify which actors are allowed to initiate a constitutional challenge. With the exception of the ECOWAS court and the CCJ, all ICs with explicit constitutional review authority allow for private actors to initiate international constitutional review of IO statutes and policies. Chapter five explained how states are often worried about empowering private actors to help enforce international law, since enforcement

would only make the institutional paralysis in Europe worse. Discussed in Vauchez, Antoine L’en-Droit de l’Europe: Chmap Juridique Europeen et Institution d’un Order Politique Transnational, manuscript on file with author, p. 49-50.


14 Table 3.5 shows that every ECJ copy but one includes constitutional review authority. The one exception is the court of the European Free Trade Area, which was not given constitutional review authority. For more on the extent to which ECJ copies closely adhere to the model of the ECJ, see: Alter, 2010.
authority can be sovereignty compromising. Governments seem to be less concerned about extending private actor access to international constitutional review authority. Only six ICs allow private actors to initiate non-compliance suits against states, meanwhile nine ICs allow private actors direct access to the IC to challenge the validity of community acts. 15 The decision to allow any actor—a state, a firm, or an individual—to challenge international acts suggests that the delegation of constitutional review powers is intended to constrain IO action. The appendix provides greater detail on the Court Treaty articles pertaining to the IC’s constitutional authority.

### Table 7.1 ICs Explicitly Delegated Constitutional Review Roles (by year created)

<table>
<thead>
<tr>
<th>ICs with role</th>
<th>Review of community actions</th>
<th>Review of state acts</th>
<th>State Actors</th>
<th>Supranational Actors</th>
<th>Private Access</th>
</tr>
</thead>
<tbody>
<tr>
<td>European Court of Justice (ECJ) (1952)</td>
<td>X</td>
<td>X</td>
<td>Commission</td>
<td>Via national courts</td>
<td></td>
</tr>
<tr>
<td>Andean Tribunal of Justice (ATJ) (1984)</td>
<td>X</td>
<td>X</td>
<td>Secretary General</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Central American Court of Justice (CACJ) (1992)</td>
<td>X</td>
<td>X</td>
<td>Any community institution</td>
<td></td>
<td></td>
</tr>
<tr>
<td>West African Economic and Monetary Union (WAEMU) (1995)</td>
<td>X</td>
<td>X</td>
<td>Council or Commission</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1998)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central African Monetary Community (CEMAC)(2000)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>East African Court of Justice (EACJ) (2001)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Economic Community of Western African States Court (ECOWAS) (economic 2002)</td>
<td>X</td>
<td></td>
<td>Executive Secretary</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Caribbean Court of Justice (2004)</td>
<td>This authority is under discussion</td>
<td>For countries where CCJ replaces the Privy Council</td>
<td>Under discussion</td>
<td>Via national courts on case by case bases15</td>
<td></td>
</tr>
<tr>
<td>Southern African Development Community (SADC) (2007)</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
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</tbody>
</table>

15 The BENELUX, CCJ and EFTA are the only ECJ copies that do not have constitutional review authority vis-à-vis IO acts. For EFTA, presumably the ECJ will be reviewing the validity of any questionable laws being enforced. The CCJ does not yet have a constitutional review role, but such a role is under discussion.
With the exception of the CCJ, all of the above ICs have the formal authority to review the validity of legally binding IO rules and IO acts. International constitutional courts are located within common market systems that also contain international bodies with legislative authority. The constitutional authority delegated to ICs is similar across ICs. A negative IC finding will in effect invalidate illegal acts, if only because “illegal” or “invalid” IO acts will be politically unsustainable. The illegal act will not be applied and must be changed if the IO is to have any claim to being a rule of law institution. This delegation is arguably protective of state authority. It extends to the international level the sort of checks that often exist domestically. International constitutional review also helps to ensure that international acts do not exceed the authority of the international institution. International constitutional review may thus have been intended to ensure that the international realm does not become a political venue where anything states manage to legislate or agree to is ipso facto legally valid.

Three of the ten ICs with constitutional review authority are explicitly authorized to review the validity of state acts. The EACJ allows for challenges to acts in other states. The COMESA court and the CCJ are explicitly authorized to review the legal validity of state acts. The EACJ and SADC also arguably contain provisions that authorize the courts to review state actors. The 1999 East African Community Treaty authorizes the Community to work towards gender mainstreaming, and to promote ‘peace, security and stability and good neighborliness among partner states.’ The East African Community is also expected to adhere to principles of good governance and to respect the provisions of the African Charter on Peoples and Human Rights. The SADC requires members to act in accordance with principles including human rights, democracy and the rule of law. EACJ and SADC arguably exercised constitutional review when they assessed the validity of Kenyan (EACJ) and Zimbabwean elections (SADC). In both situations the rulings were highly criticized. The Caribbean Court of Justice serves as the final court of appeal for a number of Commonwealth countries. In this role, the CCJ has issued a

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16 The Caribbean Court of Justice (CCJ) is unusual in that it lacks the formal authority to invalidate community rules, but it allows states to substitute the CCJ for the British Privy Council, which serves as the final court of appeal for a number of Commonwealth countries.
18 Ibid.: 259.
number of controversial rulings regarding the death penalty. Some of these rulings have been controversial, leading two member to withdraw from the review authority of the CCJ.

Examining the original grant of authority to ICs can help to understand what states expected or imagined that ICs would do. It cannot, however, tell us whether or not ICs are actually playing a constitutional review role in international relations. For an IC to actually play a constitutional review role, a few more elements are needed. First, there must be legislative acts that are worthy of constitutional challenge. Most common market agreements identify an ambition to build a common market, and generally prohibit states from creating new barriers to trade. But until there is a will to actually build a common market, there may not be any legislative acts—domestic or supranational— that are worthy of challenge. Second, there must be a litigant that is motivated and resourced enough to raise a constitutional complaint. If member states, IO institutions and domestic actors are satisfied with the status quo, and if stakeholders are happy to let each other deviate from common market agreements, the ICs constitutional powers will sit idle. Third, the IC must be willing to challenge political bodies. Even when cases are raised, ICs can choose to avoid ruling against legal acts that enjoy the support of states. Private litigants may sense that an IC is unwilling to challenge IO or state powers that are backed by powerful actors, and therefore not bother to raise a constitutional challenge. Meanwhile participants in the multilateral system may see litigation as an extension of multilateral policy-making, challenging policy that arguably violated prescribed procedure. In the EU, members of European institutions often raise questions about the reach and scope of the powers of European institutions, fiercely defending their policy-making prerogatives. The CACJ has also heard cases raised by members of multilateral governing institutions.

Litigants are more likely to raise cases, and ICs are more likely to reward litigants with helpful rulings, when there is a deeper grass roots support for the laws judges are asked to apply. Where stakeholder support rises to the level of constitutional obedience—a culture wherein

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20 For the two countries that have accepted the CCJ’s appellate authority, Barbados and Guyana, the CCJ is in essence the final constitutional court of appeal. Binding themselves to the CCJ was not really a new delegation of constitutional review powers. Rather, Barbados and Guyana switched from the London based Privy Council to a more locally based legal review body. Eideson, 2008: 175-7 Other CARICOM countries have been slow to accept the CCJ as a replacement appellate body, but the main reason seems to be barriers to changing national constitutions that designate the Privy Counsel as the final national legal authority. See McKoy, 2007 The constitutional delegation of authority to the CCJ has been meaningful. While only a few years old, CCJ has already issued some landmark rulings in death penalty cases. See the special edition of the NOVA law review (Winter, 2005, 27 (2)).

political acts are seen as legitimate to the extent they cohere with the constitution—then litigants and courts are especially likely to demand that political actors respect higher order legal obligations. Constitutional cultures are constituted through political action. Judges are part of creating cultures of constitutional obedience, but they cannot do so on their own. Politicians must acquiesce to the constitutional order, which usually requires that the public tacitly or explicitly demands that governments respect the constitutional order.

Creating a Culture of Constitutional Obedience

The culture of constitutional obedience gives constitutional courts political power. Where people believe that the constitution best represents the collective will, or that state actions must be subordinated to higher order legal principles, governments ignore higher order legal rules at their peril. Constitutional review becomes a tool political opponents can use to challenge the validity of government actions, and a shield that governments can use to defend the validity of their positions. Successful constitutional courts insert themselves as essential arbiters of disagreements about what is and is not constitutional. Constitutional courts, like ICs, have the authority to say what constitutional behavior requires. Through their constitutional interpretations, they define legitimate political action and determine whether specific acts are seen as ‘constitutional.’

Alec Stone Sweet has examined the emergence of constitutional review authority in many contexts, both domestic and international. Stone, and others, have shown how courts can start with limited mandates, incorporate higher order bodies of law into their jurisprudence, and work with opposition politicians to pressure governments to respect minority political demands. Stone Sweet’s argument is not teleological; simply acting like a constitutional court does not ensure that a culture of constitutional obedience will emerge. But where constitutional legal challenges are allowed, political actors are more likely to invoke constitutional discourse to defend and defame policy options and courts are more likely to construct constitutional legal doctrine. Stone Sweet defines a virtuous circle where legislative bodies and governments create rules, litigants invoke judges to interpret existing rules, and judges build law through their legal interpretation. His model of international governance suggests that a culture of constitutional obedience is more likely to emerge wherever there are courts with the power to interpret these

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rules. It seems especially likely that ICs with explicitly delegated constitutional review roles would exercise constitutional review authority both because litigants will be more likely to raise constitutional challenges, and judges will be more likely to assert their constitutional review authority even where both litigants and judges are uncertain as to whether or not the government will respect judicial rulings.

Kim Scheppele adds, however, that for cultures of constitutional obedience to emerge courts must be seen as a moral authority, and as siding with issues of concern to the people.\(^{23}\) Such a view is consistent with the tipping point argument, which suggests that international courts gain power by allying with those actors within and across states that have a stake in building support for the international legal rules in contention.

By all accounts, cultures of constitutional obedience, and with it the establishment of constitutional review authority, take many years and iterations to construct. Constitutional cultures emerge as courts and litigants test out the possibilities of constitutional review authority. During this testing, courts may construct doctrines that they do not apply to the case at hand, and they may allow derogations designed to avoid antagonizing governments in power. Testing may also involve government repudiation of constitutional review authority. Indeed government repudiation may actually contribute to building constitutional obedience cultures, by mobilizing and focusing political opponents on the need to strengthen the constitutional legal order. Kim Scheppele’s account of the growth of constitutional review in Hungary and Russia is a tale of “the separation of powers as a contact sport.” Scheppele invokes Hannah Arendt’s famous argument that “successful constitutions do not just constrain power, they create power through the opposition of interest to interest.” According to Scheppele “States (and courts) can fail. What prevents their failure in the early fragile days of a new constitution is the willingness of new institutions to deploy their power and to parry off the power of others in return.”\(^{24}\)

In the international realm, ICs build constitutional review authority through alliances with domestic judges. National court support, and especially the support of high courts, is necessary for ICs to exercise constitutional review authority because without national judicial support, governments can claim that domestic law permits or requires them to ignore international legal obligations. Where there are powerful national constitutional courts that lend their support IC

\(^{23}\) Scheppele, 2006.

\(^{24}\) Ibid.: 1760.
review, national constitutional court support can be both necessary and sufficient for ICs to gain constitutional review authority.

Whether or not national judges choose constitutional obedience to international law or IC rulings is a political choice, one that does not depend on the clear wording of national constitutions. Indeed French courts for many years refused to accept the supremacy of European law, and the United States Supreme Court also has a history of antagonism to foreign law even though both countries have constitutions that declare the supremacy of international law. Nor can we say that constitutional obedience is more likely in common law systems compared to civil law systems.²⁵

There are reasons both for and against domestic high court judges choosing to defer to international law and IC rulings. National judges in political systems where judicial authority is weak may happily embrace IC rulings that help bolster their own authority. Embracing international law may also be seen as both natural and obvious. Many lawyers believe in the notion of *pacta sunt servanda*, that international commitments should be obeyed. Also, in many cases domestic and international law (and especially human rights law) are similar so that supporters can frame their complaints around both domestic and international law. And national judges and sub-state actors may prefer that their government adhere to international standards, such as human rights and good governance standards. They may also prefer to hide behind ICs in demanding full government respect for such principles. The *Awas Tigni* case discussed in Section III is such an example. The Nicaraguan court agreed that the contested government concession violated the rights of the Awas Tigni people. But the Nicaraguan supreme court had only nullified the illegal lumber concession; it had not created positive obligations to demarcate indigenous lands. The Inter-American Court created a positive obligation, demanding that the Nicaraguan government make indigenous land rights practicable by demarcating indigenous land.

There are also reasons for national judges to reject international law as higher order law and to reject constitutional review rulings by international judges. In the United States, opponents of international legal authority regularly argue that the national democratic will should trump international legal obligations, that governments should not be able to use international

²⁵ Judges within common law systems may be more likely to see IC rulings as a legitimate source of law, but civil law systems are increasingly incorporating both constitutional review and respect for precedent. See Merryman and Pérez-Perdomo, 2007: 47, 138-42.
law to circumvent domestic processes, and that national court rulings should be based purely on analyses of domestic laws and the domestic constitution.\textsuperscript{26} It is also probably the case that the more powerful the domestic constitutional court, the more national judges may see embracing international law is unnecessary and as undermining of the national constitutional order. Setting limits to the reach of international law in the domestic order may be seen as a way to bolster the domestic constitutional order,\textsuperscript{27} and it may be a reflexive act designed to protect the independence and power of national judges vis-à-vis the international court.\textsuperscript{28}

These opposing views are both legally justifiable, underscoring that embracing IC rulings is a political choice. The main point is that it is a choice national judges make. This choice is also independent of whether the IC has formal constitutional review authority. ICs may be more likely to embrace a constitutional review role where they have the formal mandate to do so, but ICs can also construct a constitutional mandate for themselves. All that is really needed for international constitutional review to exist is a culture of constitutional obedience.

This discussion makes clear that constitutional review authority does not turn on the simple binary of compliance versus non-compliance with the law. IC rulings may not be based on any claim that international law is higher order law, and governments may choose to comply with IC rulings because coercive sanctions attached to the ruling are too costly to ignore. But if ICs are relying on coercive sanctions to generate compliance, then IC rulings that do not generate coercive costs—perhaps because the violation does only a small harm that will not give rise to large compensatory remedies—may not generate compliance.

Constitutional obedience is a culture, a shared belief that there are higher order norms and that political actions should respect these norms even if doing so may thwart governments in their pursuit of valid ends. Also worth noting is that this definition of a having a culture of constitutional obedience does not require that ICs develop doctrine of constitutional import (e.g. doctrine that speaks to respecting individual rights, or that addresses issues pertaining to the separation of powers), or that ICs use lofty constitutional rhetoric to justify their rulings. Constitutional rhetoric usually comes with the exercise of constitutional review authority, but

\textsuperscript{26} Rabkin, 2005. Vicky Jackson counters that invoking the rulings of foreign courts is a longstanding practice in American law. Jackson, 2009.
\textsuperscript{27} Benvenisti, 2008.
\textsuperscript{28} Alter, 2001: 52-60.
constitutional legal doctrines are neither necessary nor sufficient for constitutional review authority to exist.

This discussion also allows that constitutional obedience it is not an all or nothing affair. Not all international law is binding, and not all international legal obligations will be seen as higher order law. This makes sense. Why should an international agreement to regulate the hunting of birds, or to promote free trade, take precedence over fundamental rights guaranteed by a domestic constitution? Moreover, it is the job of judges to balance conflicting rights and obligations. Thus we should expect judges to create pecking orders among competing international law and constitutional provisions.

Once given, however, constitutional obedience to a particular international law or international legal right is hard to take back. There must be a compelling reason, probably based in the national constitution itself, for domestic actors to circumscribe a grant of constitutional obedience to international law once such a grant is accepted. More limiting for ICs is that ICs depend on national judicial support to maintain a culture of constitutional obedience. Without national judicial support, governments can claim that domestic law permits or requires them to ignore certain international legal obligations. Moreover, domestic actors may accept constitutional obedience to international law, and still reject an IC’s interpretation of this law as legally binding. The possibility that national judges may ultimately find limits on the domestic legal effect of IC rulings serves as a constraint on IC law-making ensuring that international constitutional review does not become a blank check grant of authority to international actors. Constitutional obedience may be difficult to rescind, but its terms can be constantly renegotiated by domestic and international judges.

The next two sections will discuss ICs as they exercise their constitutional review authority. Section II shows ICs reviewing international legal acts, and acting carefully so as not to overreach. Section III shows ICs being limited by national judicial ambivalence in the face of specific international legal requirements.

**Do International Cultures of Constitutional Obedience Really Exist?**

Ten ICs have been delegated constitutional review authority. Many, if not most, of these ICs have exercised their constitutional review authority. The ECJ and the ATJ are very active ICs, and their constitutional review authority is invoked fairly regularly, which is to say
whenever there is a serious dispute about the validity of a communal rule. The CCJ, ECOWAS, EACJ and SADC have heard constitutional review cases, so at a minimum we can conclude that the political actors subject to review have made meaningful decisions that litigants see as worth challenging, and that these actors saw the international level as an avenue for constitutional review. (The CACJ, COMESA, CEMAC, dockets have not been examined in detail by scholars, thus I cannot say if their constitutional review authority has been invoked or not.)

A more pertinent question is whether or not international constitutional courts are significant actors in domestic or international politics. To answer this question, we need to broaden our focus a bit. My focus on formal delegations of authority means that I have not included enforcement courts as constitutional courts, but it is clear that enforcement power can easily morph into constitutional review. Leaving aside the very heated debate over whether the WTO law developing an international constitutional authority, it is clear that a number of ICs either have built or are building their international constitutional review authority. Table 7.2 overviews the cases discussed in the next two sections, and the cases discussed in chapter 5. The first two cases, where ICs are reviewing the validity of IO acts, are fairly easily classified as constitutional review cases. The next four cases are more ambiguous because there is interactive effect between the willingness of sub-state actors accept an ICs constitutional assertion of authority and the ICs willingness to demand policy change as opposed to simply identifying non compliance and ordering compensation for victims. The four cases are selected to show the importance of national support for ICs asserting constitutional review authority. In the end of the chapter I return briefly to the enforcement cases discussed in Chapter 5.

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29 Some ATJ and ECJ cases are discussed in this chapter. For more on the ECJ see: de Búrca and Scott, 2001. For more on the ATJ, see: Rodriguez Lemmo, 2002.
### Table 7.2: Comparison of International Constitutional Review Cases

<table>
<thead>
<tr>
<th>Issue area</th>
<th>Legal system</th>
<th>IC ruling</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic</td>
<td>ATJ</td>
<td>I-AN-96- Junta v. Decision 387. The Junta challenges a Andean decision allowing Peru to derogate from the Andean Free Trade Area.</td>
<td>Junta finds Decision 387 to be illegal, but rules that its illegality was “purged” by the Sucre Protocol.</td>
</tr>
<tr>
<td>Security/ Human rights</td>
<td>ECJ</td>
<td>Kadi v. Council of the European Union. The European regulation on the freezing of assets of suspected supporters of terrorism violates the due process rights of individuals.</td>
<td>Regulation is invalidated, but the Commission has three months to add in due process protections. After reforms, Kadi is again put on the watch list where his assets are frozen. Case is being appealed again.</td>
</tr>
<tr>
<td>Economic Law</td>
<td>ECJ</td>
<td>Kreil v. Bundesrepublik Deutschland: ECI finds that Germany’s constitutional limitation on the roles women can play in the military violates European Equal Treatment law.</td>
<td>Germany amends its constitution to comply.</td>
</tr>
<tr>
<td>Economic Law</td>
<td>ATJ</td>
<td>General Secretariat v. Colombia- The ATJ repeatedly finds municipal policies on prices, taxation and marketing of alcoholic products discriminate against producers from other member states.</td>
<td>Domestic judges do not see Andean law or ATJ ruling as domestically enforceable; noncompliance persists despite sanctions.</td>
</tr>
<tr>
<td>Human Rights</td>
<td>IACtHR</td>
<td>Awas Tingni Community v. Nicaragua- IACtHR finds that Nicaragua violated the land rights of indigenous people by granting a mining concession and by failing to clearly demarcate the land holdings of indigenous groups.</td>
<td>Nicaraguan Supreme Court concurs in part; government eventually complies in toto.</td>
</tr>
<tr>
<td>Human Rights</td>
<td>ECOWAS</td>
<td>Hadjijatou Mani Koroua v. Niger- ECOWAS Court finds that the customary “5th wife” system constitutes slavery, and that Niger has not done enough to stop the practice of slavery.</td>
<td>Still researching the outcome</td>
</tr>
</tbody>
</table>

#### Enforcement cases discussed in Chapter 5

| Economic Law | WTO | United States Tax Treatment for “Foreign Sales Corporations”: US’s system of Foreign Sales Corporation is an illegal tax subsidy to exporters. | US changes domestic legislation to avoid retaliation, but not because WTO law is considered higher order law. |
| Economic Law | ATJ | 89-AI-2000 (Secretary General v. Peru): Peruvian law allowing second use patents violates Andean intellectual property rules. | Peruvian law remains on the books; national administrative actors apply ATJ ruling instead. |
| War Crimes | ICTR | Prosecutor v. Jean Paul Akayesu: ICTR found that sexual violence was an integral part of genocide in Rwanda and that rape and other forms of sexual violence were independent crimes constituting crimes against humanity. | Akayesu convicted. New legal precedent generated. |
| War Crimes | Special Court for Sierra Leone | Prosecutor v. Charles Taylor: Case is ongoing, but the key point is that an international prosecutor indicted a sitting head of state, leading to his capture and removal from the region. | Taylor is no longer directly involved in Liberian, Sierra Leonean or regional politics. Litigation is proceeding. |

### II. Constitutional Review of International Legislative Acts

Where it exists, international constitutional review in theory extends to the international level the same types of legal checks that exist within national constitutional democracies.\(^\text{31}\)

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\(^{31}\) For more on accountability mechanisms for international institutions, see: Keohane and Grant, 2005
International constitutional review provides a means to challenge and eventually invalidate supranational agreements that expand or scale back the extent of states’ political commitment, that conflict with higher order laws and procedures, or that were made without allowing the full voice and participation of constituent actors. I say in theory because there are relatively few examples of ICs nullifying binding international legal rules. This doesn’t mean that ICs rarely exercise constitutional review; it could equally mean that constitutional challenges rarely succeed. This section considers two cases of constitutional review of IO acts where the plaintiff prevailed. In both cases the ICs were asked to consider the validity of an international rule. In both cases the ICs asserted their power to invalidate the law in question. The Andean ruling represents an attempt to protect the original constitutional bargain from erosion through international deal-making. The ECJ ruling represents an effort to ensure that EC lawmaking faces the same types of constitutional scrutiny as domestic lawmaking. The rulings in many ways represent normal constitutional review politics. In both cases the ICs develop constitutional principles that are judge-made. In both cases the ICs protect their constitutional review prerogatives while constructing their rulings to render them more politically palatable.

Case 7.1: The ATJ Invalidates an Andean Intergovernmental Agreement allowing Peru to be exempted from collective Andean rules (1-AN-96)

The Andean Tribunal of Justice, one of the ten clones of the European Court of Justice, has an explicit nullification procedure that can be used to challenge Andean Secretariat resoluciones (administrative review), as well as Decisions of the collective Andean Council of Foreign Ministers (the body of heads of states) and the Andean Commission (a supranational legislative authority analogous to the European Council of Ministers). By the end of 2009, the ATJ had issued twenty-six nullification rulings. The case discussed here involves a nullification challenge to a collective Andean Decision granting Peru a derogation from the Free Trade Area of the Andean Community.

A cornerstone of a common market agreement is the commitment to eliminate internal barriers to trade. The Andean Community has struggled with this commitment, in part because member states have faced a series of severe domestic disruptions that have limited their economic and political ability to open their market. The Andean General Secretariat has tried to navigate these economic crises by allowing temporary exceptions to Andean provisions, while

32 A number of these rulings are discussed in: Rodriguez Lemmo, 2002: 914-28.
trying to make sure that these exceptions are limited in nature, are sanctioned by supranational agreement, and most of all that they are temporary.

The General Secretariat’s precursor body (the Junta) initiated this constitutional challenge. Starting in August 1992, Andean member states passed a series of Decisions creating exemptions for Peru to the Andean Free Trade Area. The Junta did not like these agreements, but it tried to work within the political process to address Peru’s exceptional situation. After its efforts had repeatedly failed, the Junta challenged Decision 387, the most recent Decision allowing Peru to derogate from the Andean Free Trade area.33

When the case appeared on the ATJ’s docket (November 22, 1996), Peru’s situation in the Andean Community was under active discussion. The ATJ therefore waited to rule on the case. The crisis regarding Peru was resolved in the Sucre Protocol in 1997, which relaunched the Andean integration project while setting 2005 as an end time for Peru’s special status within the Andean Community.34 Once the Sucre Protocol existed, the Junta tried to withdraw its suit since the legal issue was now moot.35 Representatives of the member states also tried to dismiss the suit by arguing that the ATJ cannot pick which Decision applies, only consider whether a specific Decision is ultra vires. The Andean Tribunal, however, refused to dismiss the suit, arguing that the Decisions were “public acts” giving rise to a general interest in ensuring the legality of laws on the books. This interest still existed, the ATJ argued, notwithstanding the Junta’s change of mind.36

The larger issue was that the series of Andean Decisions pertaining to Peru and the Free Trade Area kept revising the terms of Peru’s participation, without setting a clear end to the


34 Sucre Protocol of July 30, 1997 amended a number of provisions of the Cartagena agreement. It was much like the European Union’s Single European Act that relaunched European integration by helping countries (finally) realize the Treaty of Rome’s objective of a Common Market. The Sucre Protocol contained a “transitory provisional chapter” that declared that the Free Trade Area would become operational no later than December 31, 2005, and it allowed Peru to work out with the Commission its entry into the common external tariff system. See: http://www.comunidadandina.org/INGLES/normativa/ande_trie4.htm for a copy of the Protocol. See: http://www.comunidadandina.org/INGLES/press/press/np14-4-03b.htm for a summary of the Protocol’s key achievements.

35 Point 1.4.1 of ATJ ruling 1-AN-1996.

36 Point 2.2 of ATJ ruling 1-AN-1996. In invoking the concept of “public acts”, the ATJ incorporated national constitutional concepts that suggested that even if the questionable law has been superceded, review is still necessary because legal rights could have been violated during the period of time in which the unconstitutional law had been considered valid.
derogations. Also, some of the Decisions allowed Peru to continue to participate in discussions of rules that would not bind it.\textsuperscript{37} Thus while the Sucre Protocol ended the legal crises, the precedent that had been set before was both legally and politically problematic. It was this precedent that the ATJ sought to review through its constitutional ruling. The ATJ also sought to defend its constitutional authority to review the validity of potentially unconstitutional Andean acts.

In its ruling, the ATJ found that Decision 387 did in fact violate Andean law, but that the illegal aspects of Decision 387 had been “purged” by the Sucre Protocol. In other words, Decision 387 did not need to be nullified because it had been superseded by valid law. The ATJ also distinguished between Decisions, which are acts adopted by member states, and the Sucre Protocol which was decided during a “reunión de plenipotenciarios” and which was thus more akin to a constitutional convention than a legislative decision.\textsuperscript{38}

The ruling is politically astute. The ATJ defended its constitutional authority and suggested that if the illegality persisted, Decision 387 would have been illegal. In this respect, the ruling is quite similar to the United States Supreme Court’s Marbury v. Madison and the ECJ’s Costa v. Enel ruling, in that the ATJ asserts the court’s power to nullify illegal rules while finding that the particular situation does not require that the court actually exercise this power in a substantively controversial way.

At the same time, the ATJ incorporated local constitutional ideas when it found that the meeting that gave rise to the Sucre Protocol represented a “reunión de plenipotenciarios.” This aspect of the ATJ’s ruling suggested that states can derogate from Andean legal obligations, so long as they do so by amending the charter via a reunión de plenipotenciarios. The ATJ was likely responding to local legal traditions in its admission that every constitution is subject to amendment. The ease through which the Andean Treaty can be revised, however, saps the political potency of any ATJ finding of a breach of the Cartagena Agreement, because amending the Andean charter offers states a fairly simple way out.

**Case 7.2: The ECJ invalidates a European regulation that implements a UN Security Council directive to seize assets of suspected terrorists (Kadi v. Council of the EU and EU Commission)**

\textsuperscript{37} Decision 353 (April 4 1994) had modified the situation allowing Peru to once again be involved in harmonization negotiations. This decision was superceded a few months later by Decision 377. See note 22.

\textsuperscript{38} Points 2.4 & 2.5 of ATJ ruling 1-AN-1996.
The ECJ has an explicitly delegated constitutional role that includes assessing the validity of European rules, and considering issues related to the separation of powers among EU institutions (the Council, Commission, Parliament, and Member States). The ECJ has also developed a morphed constitutional role, which will be discussed in the next case study. It is hard to assess how many times the ECJ has been asked to conduct constitutional review of community acts. There are thousands of direct action cases where the ECJ is called upon to assess the validity of a Community act, but direct actions also include administrative review challenges to Commission decisions and labor disputes involving Community employees. Meanwhile, preliminary ruling references can include constitutional challenges to European law, administrative review challenges to Commission decisions, and morphed constitutional challenges to the validity of national rules. Neither the ECJ nor scholars who work with the ECJ’s data have broken down the litigation data so that we can see which cases involve challenges to Commission actions, to Council actions, or to national actions. There are quite a number of ECJ decisions evaluating the competences of the Commission and whether the European Parliament has been able to fully participate in EU lawmaking. There are also a number of cases challenging the validity of EU acts. These rulings are studied in the many very thick casebooks on the constitutional doctrine of the European Court of Justice. I am most interested in whether ICs actually exercise their authority to invalidate community acts. The European law scholars I consulted could identify very few ECJ rulings that invalidated Community acts. Indeed the ECJ has a reputation for being less critical of EC legal acts than it is of national legal acts.

The ECJ’s recent *Kadi* decision provides a good (although rather rare) example of the ECJ exercising its explicitly delegated constitutional review authority to invalidate a community act. This decision, reversing a ruling by the Tribunal of First Instance, was highly controversial because the law in question implemented an act of the United Nations Security Council (UNSC). Not only are European states bound to implement UN Security Council acts, the ECJ invalidated the European regulation despite the legal arguments put forth by the legal representatives of the Commission and the Council of Ministers, Spain, France, the Netherlands and the United Kingdom.

Yassin Abdullah Kadi and Al Barakaat International Foundation had separately challenged the validity of a European regulation that froze assets of actors identified by the
Sanctions Committee of the UNSC as supporters of terrorism. Kadi is a Saudi Arabian national with substantial assets in the EU, while Al Barakaat is a Swedish organization with links to a Somali financial network. The Sanctions Committee constituted the “consolidated list” of actors that supported terrorism, and UN procedures did not allow individuals or organizations listed to see evidence against them or to challenge their listing. Even national governments had a hard time learning about the evidence that led to their nationals’ classification on the UN terrorist watch list. With assets frozen, the entire operation of entities had to cease and individuals faced significant hardships (notwithstanding amendments that allowed for the release of funds for food, medical expenses and legal fees). The Swedish government had intervened on behalf of Al Barakaat, trying to determine why Al Barakaat had been listed as a supporter of terrorism. Swedish representatives had worked with the United Nations, and they continued to do so after the ECJ ruling, though Sweden did not formally participate in the ECJ’s case.

The cases were first heard in the ECJ’s Tribunal of First Instance which refused to explore whether the EU regulation implementing the Security Council regulation violated European law, suggesting that UN legal obligations ipso facto trump European law. The Kadi and Al Barakaat cases were combined in the appeal that was lodged in front of the ECJ. The ECJ’s ruling has many important components. Here I focus on the issues surrounding the constitutional question of whether or not the ECJ has the authority to review the legality of EU policies that implement UN Security Council directives.

In the appeal, member states argued that the ECJ lacks the authority to review UN acts, and that the act in question concerns a “political question” that does not lend itself to judicial review. The United Kingdom’s legal representative went the furthest in suggesting that judicial review would interfere with government efforts to fight terrorism. The Tribunal of First Instance had accepted these arguments. By contrast, the ECJ found that acts of the UN Security Council have primacy over secondary European legislation but not over primary European law. The ECJ argued member state have discretion as they implement UN acts, and that respect for human rights is a condition for the lawfulness of Community acts, thus “the obligations imposed by an

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39 Case T-315/01 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities ruling of the Tribunal of First Instance, 21 September 2005. Article 103 of the UN Charter states: ‘in the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ For a discussion of the limitations of a “radical monist” view regarding the supreme authority of UN obligations, see: Murkens, 2009.
international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness...”  

The ECJ found wanting the UN Sanctions Committee’s procedures because applicants who request their removal from the sanctioning list may not be represented during the review. Also, the Sanctions Committee was not obligated to communicate any reason or evidence that led to the applicant to be included in the UN list, or give any reasons why an appeal is denied. The ECJ argued that it follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.  

The ECJ’s ruling indicated which elements of the Sanction Committee process needed reform: evidence used against individuals must be communicated, and plaintiffs must have a way to contest such evidence. Because no legal body could review the appropriateness of the Council’s listing of Kadi and the Al Barakaat International Foundation, the ECJ found that the plaintiffs had not been given their fundamental right to a legal remedy. The ECJ nullified the offending regulation, and ordered the Community to pay half of applicant’s legal fees. But, the ECJ allowed the European Council to continue its restrictive measures vis-à-vis Kadi and Al Barakaat for three more months. Thus like the ATJ, the ECJ used caution as it exercised its power.

This decision has been very controversial because the ECJ reversed the Tribunal of First Instance and because the ECJ rejected arguments that had the strong backing of the European Commission, the European Council, and at least four member states (Spain, France, the Netherlands and the United Kingdom). But we know that that there were silent non-participants who supported the legal arguments of Kadi and Al Barakaat, though not per se their complaint

40 Case c-402/05 P and C- 415/05 P Kadi v. Council, decision of 3 September 2008. See para 281-5.
41 Ibid at para 320-6.
42 Ibid at para 351.
43 The number of legal briefs on the ruling is large and growing. For a discussion of this debate see: Murkens, 2009.
that they were wrongly listed as supporters of terrorism. Jo Murkens notes that at its core, the case involved the issue of executive authority as part of the War on Terror. For critics of extensive executive authority doctrines, working through the United Nations should not create a shield of legality. Whether or not one agrees with this concern, the ECJ faced the very real proposition that national courts within member states might find the EU regulation to be unconstitutional. Murkens quotes from an interview with the president the German Constitutional Court, issued before the Kadi decision, in which the judge suggested that if a case arose involving a German national, the German Constitutional Court would need to explore a number of legal questions because Security Council resolutions lacked effective judicial protections for affected persons.44 The German Constitutional Court has a historically confrontational relationship with the ECJ, which makes the German threat very credible.45 Murkens suggests that if the ECJ did not find limits to the authority of UN Security Council resolutions, national courts would find such limits.

The Tipping Point Politics of Constitutional Review of International Acts

In both cases, ICs rejected arguments put forward by powerful political actors, namely member states and the political bodies of the IOs, and they strongly defended their own constitutional prerogatives. The political effect of international constitutional review, however, depends firstly on what courts demand of legislative bodies and secondly on how difficult it is to amend the constitution instead of changing the condemned law.

The ATJ’s ruling was of greater doctrinal than substantive importance. The ATJ’s ruling clearly states that illegal Decisions can and will be nullified by the ATJ. The ATJ’s ruling requires states to meet at the Presidential level and issue a formal Protocol in order to amend the Treaty, but it actually is not very hard to amend the Andean Treaty because there were only five (now four) states in the Andean Community, and because it is fairly easy for Andean leaders to convince their national legislative bodies to ratify Andean Treaty amendments.46

45 On the relationship between the ECJ and the German Constitutional Court, see (Alter, 2001: 87-117). More recently the German Constitutional Court invalidated a European Arrest Warrant, though it did so on a technicality, refraining from directly challenging the EEC’s or the ECJ’s authority. Europäischer Haftbefehl decision of 18 July 2005 113 BVerfGE 273 (2005), reprinted in 32 EuGRZ 387. For more, see: Nohlen, 2008.
46 The ATJ has through its doctrine made it relatively easy for member states to amend the Cartagena agreement. See: Alter and Helfer, Manuscript in progress.
The ECJ demanded changes to European rules and, in essence, to Security Council procedures. Formally speaking, amending the European Union’s Treaties involves the same procedural hurdles that exist in the Andean system. States must unanimously agree to the change the founding treaty, in a meeting that takes place at the presidential level. Then, all states must ratify the amendment. In practice, however, amending European Treaties is very hard because of the different interests of the many European member states combined with national checks and balances that make domestic ratification far from automatic. For the issue litigated in the Kadi case, no European political leader seriously considered trying to amend the European Treaties so as to enhance executive power and undermine human rights protections for individuals. This political reality gave the ECJ a strong trumping hand. At the same time, the ECJ was hesitant to second guess whether or not Kadi or Al Barakaat were deservedly targeted as supporters of terrorism. The ECJ is not alone here. Even the US Supreme Court has demanded greater due process while hesitating to second guess whether Guantánamo Bay detainees are being held for good reason.47

In the aftermath of the ECJ’s ruling, insider accounts suggest that the UNSC has become more willing to divulge the reasoning behind an individual or entities’ listing by the Sanction’s Committee. This outcome has pleased Sweden’s government, which had been frustrated at its inability to garner a serious response by the UN Sanction Committee.48 Based on this divulged information, the EU again decided to maintain its sanctions on Kadi and Al Barakaat. This new decision is again being litigated before the Tribunal of First Instance. [I am not yet sure of whether or not Europe changed either the regulation or the procedures for appealing a person’s listing]

The Kadi ruling has been controversial, but not uniformly so. European governments surely would have preferred no judicial oversight of their own or UNSC policies. But was this a realistic option? Even if the ECJ had upheld the European regulation in question, the United Nation’s Sanction Committee’s decisions would have been scrutinized by others. Civil liberties groups in Europe have raised a number of concerns about the set of policies governments have

48 Based on informal contacts with the legal representative of the Swedish Foreign Ministry who was involved with this case.
adopted to monitor and detain terrorists, triggering political reviews of these policies.\textsuperscript{49} Litigants are likely to appeal to the European Court of Human Rights and to national constitutional bodies, each of which can create barriers to the freezing of assets. The extensive claims of executive prerogatives involved in the UN Security Council system were also likely to be challenged in front of national constitutional courts. In this respect, the reforms undertaken to address the ECJ’s concerns may, in the end, help governments defend the legality of their policies in front of legislative committees and national courts.

Perhaps the relevant question to ask is what would have happened had there been no IC oversight? Andean countries continue to adapt to political upheaval by allowing ad hoc exceptions to Andean rules. Member states may well be meeting the ATJ’s procedural requirement as they adopt these exceptions, but that is not saying too much. The ECJ, because it has the backing of some member states and a number of constitutional courts and civil society groups, is politically more able to play the role of constitutional policeman. While some European governments have complained bitterly about ECJ’s ruling, which after all questioned the limits of executive authority, the ECJ’s ruling has the tacit support of domestic constitutional courts and human rights groups. The ECJ’s \textit{Kadi} ruling means that UN Security Council acts cannot be assumed to be constitutional, and it provides leverage for domestic actors to demand that international actions to address terrorism adhere to national and international constitutional requirements. The ECJ has also clearly asserted its authority to assess the constitutional validity of international acts.

\textbf{III. International Constitutional Review of State Acts}

That ICs should review the validity international acts makes sense. Lawyers worry about the international legal order becoming fragmented, which would be likely if multiple national courts regularly reviewed the legal validity of international acts without any supranational body to resolve disagreements across countries.\textsuperscript{50} The more controversial question involves international constitutional review of state acts. The question remains whether in enforcing international rules ICs, and the many quasi judicial bodies involved in enforcing international rules, become de facto constitutional review bodies. Thirty years ago, most lawyers would have

\textsuperscript{49} There are debates taking place in a number of member states. A summary of the House of Lords Debates about this issue is available at: \url{http://www.theyworkforyou.com/lords/?id=2007-03-05b.127}.

\textsuperscript{50} Broude, 2008, Kingsbury, 1999.
answered this question with a resounding “no.” They would have explained how IC rulings leave domestic acts legally intact, and pointed to examples where states choose to ignore IC rulings.

The formal authority of ICs has not changed. But the political power of certain ICs has changed. Some IC condemnations of state actions render the condemned state act politically unsustainable. Knowing that their rulings will be respected, some ICs have stepped beyond any formal grant of authority and they have explicitly reviewed the validity of state acts making demands that are substantively and politically identical to the demands domestic constitutional courts make. In some cases, these extensions of authority have been embraced by domestic lawyers and judges, with the result that some IC have arguably assumed a morphed constitutional review role. The IC may lack the formal authority to invalidate state acts, but their rulings have the same substantive effect as a national constitutional review of the state act.

Section II argued that the key to constitutional review of state acts—intentional or morphed—is that domestic actors must see the law in question, and the IC ruling applying the law, as generating a higher order legal obligation. Where domestic actors display constitutional obedience, the legal authority behind the IC invalidations is anchored in both international law and in domestic constitutional law. This creates a double authority. Ignoring an IC would be akin to violating the domestic constitution. It may even be the case that changing either the domestic constitution or the international covenant would be in itself be insufficient since the obligation is anchored in both domestic and international constitutional law.

The economic and human rights cases below emphasize the importance of national actors accepting the higher order authority of international rules. In both European and the Andean legal systems community rules have primacy over conflicting national laws and practices. In *Kreil v. Bundesrepublic Deutschland* the issue involved a clash between the national constitution and community law, but Germany nonetheless displayed constitutional obedience. The Andean case did not involve a conflict between the constitution and Andean rules. Even though Colombian courts acknowledge the primacy of Andean law, they refused to see any internal legal obligation coming from the primacy of Andean law.

The assumed preeminence of human rights obligations are the same across international human rights systems. But the willingness of ICs to act as a constitutional review body demanding that governments do more than simply compensate victims for violations that occur varies. In *Awas Tingni v. Nicaragua* the IACtHR clarified and elevated the constitutional rights...
of the plaintiff, requiring the government to not only void the illegally granted logging rights, but that go beyond what was required under Nicaraguan law so as to protect the land rights of indigenous communities. By contrast, even though the Hadijatou Mani case clearly also involved a violation of the basic rights, the ECOWAS court stuck to its more limited explicitly mandated role of requiring compensation for Hadijatou Mani while not demanding that national actors actively work to avoid future violations of basic rights.

Together these cases show an interactive relationship between the willingness of domestic actors to accept IC rulings and the IC’s willingness to demand constitutional obedience.

**Case Study 7.3: ECJ condemns Germany’s constitutional ban on women in combat-related roles (Kreil v. Bundesrepublic Deutschland)**

This case study shows how the ECJ’s condemnation on a German policy excluding women from combat support rules triggered a fundamental change in Germany’s military. The contested provision was actually part of the German constitution, thus compliance with the ECJ ruling required a constitutional amendment. Compliance led to a significant change in Germany’s military system and culture to allow women to serve alongside men a number of roles. By all accounts, the ECJ’s ruling instigated the changes, which were seen as required because of the ECJ’s ruling. But it is also true that the German government welcomed the impetus to change its policy.  

Included in the European Community’s Treaty of Rome is a stipulation that there must be equal pay for men and women (Article 119). In the 1970s, with Social Democratic governments in power in a number of European countries, member states adopted a directive extending equal pay to include equal treatment for men and women. Article 2(2) of the Equal Treatment directive allowed for derogations to the requirement of equal treatment, noting:

> This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training

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51 This case discussion is adapted from Alter, 2009: 252-256.  
52 This social objective came to be part of the Common Market for economic reasons: France was required by its constitution to pay men and women equally, and it did not want other countries to gain a competitive advantage by relying on inexpensive female labor Hoskins, 1996.
leading thereto, for which by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.  

The military was generally understood to be one of the domains exempted under article 2(2) because organization of the national military lay beyond the reach of European Community authority, and because historically women had been excluded from many areas of the national military establishment. In Germany, the prohibition of women in the military was part of the German Constitution which stated:

If, while a state of defense exists, civilian service requirements in the civilian public health and medical system or in the stationary military hospital organization cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a law. They may on no account render service involving the use of arms.

This exception was arguably consistent with Article 2(2) of the Equal Treatment Directive, and it was never challenged by the European Commission as a violation of European law.

In 1996 Tanja Kreil applied for a job in the German Bundeswehr in weapon electronics maintenance. Kreil’s role required working with arms—something expressly prohibited in the German Basic Law. In the suit before the ECJ, the German, Italian and United Kingdom governments all argued that decisions concerning the organization and combat capacity of the armed forces lay outside the scope of Community law. This argument had already been implicitly rejected. In 1999, the ECJ had found in the Sirdar case that it could review gender discrimination provisions related to the military.

The European Court again rejected the states’ argument, asserting that “Although it is for the Member States…to take decisions on the organization of their armed forces, it does not follow that such decisions must fall entirely outside the scope of Community law.” Instead the

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54 German Basic Law Article 12 a (4).
55 Points 12-13 summarized in the ECJ Kreil ruling.
56 In the Sirdar case, the ECJ asserted its authority to review gender discrimination in the military, but it ultimately allowed the United Kingdom to exclude women from serving as a cook in a special service division that was only for men. See: Sirdar v. Army Board, Case C-273/97, 1999 E.C.R. I-7403, [1999] 3 C.M.L.R. 559 (1999). The European Court of Human Rights 1999 decision condemning the British practice of dismissing homosexuals from the military also suggested that international judicial oversight of military related issues is allowed. The British government had responded by changing its policy. Judgment in the case of Smith and Grady v. The United Kingdom, ECHR, (Applications nos. 33985/96 and 33986/96) (27 September 1999).
ECJ required states to justify any derogation from the general requirement of equal treatment for men and women. Whereas in the *Sirdar* case the ECJ had accepted that sometimes national militaries could deny women access to certain jobs, in the *Kreil* case it found that the blanket exclusion of women from many roles in the German military violated the European Communities’ equal treatment directive.\(^{57}\)

The ECJ’s ruling suggested that the German constitution needed to be changed. German opinion on the role of women in the military had been evolving. In the 1970s, the peace movement was a chief opponent of a greater role for women, mainly because without an army of sufficient size, deployment would not be an option. But shortages led to adjustments in the German constitution. In 1975 the German Parliament agreed to allow women in the military’s medical services, thereby relieving a shortage of medical service staff in the Bundeswehr.\(^{58}\) In 1991 women were granted the right to serve in the band.\(^{59}\) Then in the 1990s, Germany’s Red-Green coalition agreed to deploy the German military as part of NATO operations, which in itself signified a defeat of the peace movement and a change in German attitudes. This shift also put the military under new resource constraints. By law, German conscripts may not be sent out of Germany. If the German government wanted to continue to participate in international missions, it needed to grow its volunteer army. Participation in multi-national efforts also led to attitudinal shifts within the military. While the German military initially opposed a broader role for women, in the late 1990s German soldiers got to experience serving alongside women servicewomen from NATO countries.

While the time for a change was ripe, German policy would not have changed without the ECJ decision—at least not when it changed. Writing in *Die Zeit* the week of the ECJ decision, Constanze Stelzenmüller argued that it was not a question of “if” Germany would change its constitution--- since it *must* in light of the ECJ ruling—but rather how Germany would change its constitution.\(^{60}\) Gerhard Kuemmel concurs with the idea that the ECJ decision was the catalyst: “recent steps to open the Bundeswehr to women do not stem from genuinely political initiatives as one may have thought, but from a court ruling that required to political sphere to take some

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\(^{58}\) In the 1970s, notwithstanding the Social Democrats general desire to promote “The Year of the Woman,” opposition to women in the military was such that the German Parliament could only agree to allow women in the military’s medical services, thereby relieving a shortage of medical service staff in the Bundeswehr Liebert, 2002.


\(^{60}\) Stelzenmüller, 2000.
Indeed most observers credit the ECJ’s *Kreil* ruling with provoking the change in the German constitution. And most observers see the change as required by the ECJ’s ruling. Changing the German constitution did not, in the end, prove difficult. Only one member of the Bundestag spoke against the ECJ decision as “a clear transgression” because the domain of the military did not fall under European Union authority. Within ten months of the ruling Germany had changed its constitution, and initiated an extensive transformation of the German military, allowing in women and working to shift social attitudes of soldiers so as to dismantle resistance to women in the military.

The ECJ has not been immune to political influence regarding the issue of women in the military. The ECJ likely ascertained that its *Kreil* ruling would be well received in Germany. A few years after the *Kreil* decision, Alexander Dory invoked European law to challenge the validity of Germany’s policy of compulsory military service. The German government again argued that the organization of the military remained part of member state’s exclusive powers, and thus was entirely outside the scope of Community law. The ECJ again rejected this argument, but it found that conscription did not violate European law and suggested that certain aspects of military organization did remain fully within national control. The *Dory* decision seemed to concede terrain to member states, at the cost of interpretive clarity in the ruling. Beate Rudolf notes that some commentators interpreted the *Dory* decision as a response to the harsh criticism of the *Sirdar* and *Kreil* decisions, and she suggests that the ECJ avoided for political reasons the logical finding that either Germany had to also draft women or the draft itself must be eliminated. The ECJ is not, however, alone in seemingly contorting clear equality provisions in the constitution to allow for gender biased military drafting laws. In *Rostker v. Goldberg*, the United States Supreme Court also found the practice of requiring only men to register for the draft to be constitutional.

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62 Liebert, 2002.
63 The number of women in the military went from 4173 in 1999 to 7734 in 2002, with 2752 women serving in armed troops. For more on the larger changes brought by the incorporation of women into a wider variety of military roles see Kuemmel, 2003 and Liebert 2002.
66 Ibid.: 678.
Case Study 7.4: The ATJ Condemns Colombia’s illegal system of municipal alcohol taxation, but the Colombian Constitutional Court and the Consejo de Estado nonetheless uphold the validity of municipal alcohol practices

The ATJ has incorporated the ECJ’s doctrines so that as a matter of law Andean countries have the same legal obligations as Germany faced in the Kreil case. But the Andean Community has not been able to create the sort of constitutional obedience one finds in Europe. Andean law is embedded into member states’ legal orders. Chapter 5 discussed the ATJ’s ruling regarding second use patents, where national intellectual property agencies disregarded national statutes that conflicted with Andean law. This case study, however, shows that national courts remain hesitant to grant to Andean law a higher order legal status.

The Colombian Alcohol case had four separate phases. Ecuador complained to the Andean Junta (the predecessor of the General Secretariat) in 1991 about municipal practices in Colombia that discriminated against alcohol products from Colombia. Ecuador’s case settled out of court, without full compliance. Venezuela resurrected the dispute, bring a new complaint against Colombia’s alcohol policy in February 1996. The Andean Junta passed a binding Resolucion 453 condemning Colombia for violating Andean law. When Colombia ignored the Resolucion, the Junta raised a noncompliance suit in front of the Andean Tribunal. These Junta actions are important background for the subsequent litigation, since they exposed in clear terms the fact that Colombian policy violated Andean law. The case discussion begins at this point.

The first legal case discussed is a domestic challenge raised in the Colombian Constitutional Court where conflicts between the Colombian Constitution and Andean law were one of many charges made by the plaintiff. While the Colombian Constitutional Court case was never referred to the Andean Tribunal, its ruling came out before the ATJ issued its decision on the Junta’s noncompliance case (the first ATJ ruling on the issue). The litigant who lost in the Constitutional Court went on to raise a case in the Consejo de Estado challenging the contested Colombian policy. The Consejo’s case was referred to the Andean Tribunal leading to the

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68 For evidence of the reticence of Andean domestic courts, see: Helfer and Alter, 2009.
69 See ATJ decision 3-AI-97 p. 4. At the time, the Junta was avoiding raising suits in front of the ATJ. It arbitrated the dispute without resolving the underlying problem. In 1996 Andean countries adopted a series of reforms, allowing private actors to raise non-compliance suits directly in front of the ATJ. The Junta used this change to encourage states to accept non-compliance suits, arguing that if the Junta did not pursue the suit, a private litigant would. These changes are discussed in: Alter, Helfer and Saldias, 2011.
70 For a number of years the Junta insisted that its resoluciones had the same legal affect as an ATJ decision. The case was raised October 20, 1997. See the ATJ ruling 3-AI-97.
second ATJ ruling on the issue. The result of all of this litigation has been continued noncompliance leading to retaliatory sanctions by Venezuela.

Colombia’s latest constitution includes a provision, that has been part of Colombian constitutions for a long time, which creates an alcohol monopoly. The Colombian constitution authorizes the creation of a monopoly, but it does not define the terms of this monopoly. By all accounts, the problem is not the monopoly per se, but rather the way the monopoly policy is implemented by municipalities. For this reason alone, the constitutional challenge was likely to fail. But the Constitutional Court’s ruling is still important for its statement that Andean rules have legal primacy but that conflicting domestic law is nonetheless allowed.

Throughout the dispute, Colombia has asserted that its policy does not violate Andean rules. The problem is really that municipalities set minimum price and licensing requirements, and these policies make it onerous for alcohol produced outside of Colombia to be sold locally. In response to the Junta’s noncompliance case, the Colombia government argued that the Junta “does not have legal status to be part in an internal process in any of the member countries,” an argument that suggests that Resolucion 453 exceeded the Junta’s authority.71 While the noncompliance case was still pending, a private citizen (Maria Carolina Rodriguez Ruiz) asked the Colombian Constitutional Court to review the constitutionality of the base law that allowed for a state monopoly on alcohol sold.

Rodriguez Ruiz suggested a number of legal problems with the alcohol monopoly, one of which was its incompatibility with the Andean Cartagena agreement. The Colombian Court was well aware of the Resolucion against the Colombian taxing system. Still, it found that enforcing this Resolucion was not its responsibility. According to the Colombian Constitutional Court, certain international treaties (namely human rights treaties) are part of a “bloque de constitucionalidad” (defined in Article 93 of the Colombian Constitution),72 which gives them a higher authority than national law. But Andean law is not part of this “bloque;” instead its status is equal to domestic legislation. Because ‘international treaties and the constitution do not share the same hierarchy, nor are [international treaties] an intermediate legal source between the

71 “La República de Colombia esgrimó la posibilidad de que la Secretaría solicite la nulidad de las disposiciones legales colombianas que supuestamente favorecen el trato discriminatorio, a lo cual, la Secretaría, señala que ella “no tiene personería jurídica para ser parte en un proceso interno en cualquiera de los Países Miembros, precisamente porque su competencia es en el ámbito subregional.”

72 Article 93 of the Colombia’s 1993 constitution states that. “International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically.”
Constitution and regular domestic laws… contradictions between a domestic law and Andean Laws will not have as a consequence the non-execution of the law’ thus a constitutional challenge is not the correct means to determine a contravention between domestic and Andean laws.” The Constitutional Court refused to nullify the alcohol monopoly legislation, leaving it for the government to find a way to make the implementation of the alcohol monopoly policy compatible with Andean law.

The ATJ issued its infringement ruling about six months after the Constitutional Court ruling. The ATJ went out of its way to agree with the Colombian Constitutional Court, quoting from its ruling and concurring there was no inherent conflict between the Colombian Constitution’s authorization of an alcohol monopoly and Andean law. It was the implementation of this monopoly that was a problem. Each municipality set the terms for selling alcohol, forcing exporters to apply for a license in each municipality. The Colombian government had tried to introduce a common system of taxation for alcohol products, but municipal licensing and price floor policies persisted. The ATJ found that municipal practices did create restrictions on the circulation of alcohol products, and that Colombia was obliged under Andean law to correct the problem.

The private litigant of the Constitutional appeal went on to raise a preliminary ruling case, asking the Colombian Consejo de Estado to nullify the Colombian law authorizing the alcohol monopoly. This case was referred to the ATJ.

One can sympathize with the predicament of the Consejo de Estado. The alcohol law in question had a long and contested history, with many legal precedents upholding its validity. Also, nullifying a municipal practice based on a conflict with Andean law would be a fairly radical step, and it could potentially infringe on the separation of powers in violation of the Colombian Constitution. It was highly unlikely that the Consejo de Estado would enter a political fray that the Colombian Constitutional Court had already avoided. At the same time, there is arguably an Andean legal obligation to rule against practices that violate Andean law.

The ECJ had faced a similar situation when the Italian Constitutional Court had ruled that within the Italian legal order European law has the force of ordinary law only. The ECJ nonetheless

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73 Constitutional Court (CC) of Colombian Decision c-256/98 of 27 May 1998.
74 The ATJ acknowledge la Ley 223 de 1995 sobre Racionalización Tributaria.
declared the supremacy of European law, relying on Article 5 of the Treaty of Rome which required member states to “take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty” to suggest that national courts were implicitly authorized to set aside conflicting national legislation.76

The ATJ invoked both the ECJ’s legal precedents and the analogous Andean legal obligations.77 The ATJ reiterated that the Colombian government was legally bound to change the practices that conflicted with Andean law, and it noted that the government was obligated to introduce into its national legal order the changes needed to fulfill its obligations under the Cartagena agreement. But it did not require national courts to on their own initiative fill in for what their governments had failed to do.78 So Andean law is hierarchically supreme to national law, but the Andean Tribunal has been unable or unwilling to confront national judges who refuse to condemn or render inexecutable conflicting national rules.

The Andean Secretariat (which replaced the Junta) continued the noncompliance procedure against Colombia. In March 2000 the ATJ found that Colombia was in non-compliance with its ruling, and in November 2001 the ATJ authorized retaliatory sanctions against Colombia.79 In essence, Colombia has been allowed to choose whether or not it complies with the ATJ ruling.

Why is Colombia refusing to change its policies? The larger problem is that municipalities use revenue from their alcohol monopolies to fund key projects, such as education. The central government lacks the resources to replace this funding with another source, and given the constant war with the Revolutionary Armed Forces of Colombia (FARC), it lacks either the will or the capacity to lean on the municipal governments regarding this issue.

The continued violation of Andean law is, in the eyes of a number of people I interviewed, evidence that the Andean legal system does not work. The refusal of the Constitutional Court and the Consejo de Estado to lend their support to the Andean community is, in part, a result of the fact that Andean law is not constitutionally supreme to national law. This legal status is a bit puzzling in that even the Colombian Constitutional Court recognizes that

77 The ATJ quoted this provision in its 29-IP-98 ruling (conclusion 3). The ATJ had also invoked this provision in earlier decisions: See 2-IP-88.
78 ATJ decision 29-IP-98. 22 January 1999. See conclusions 1 and 2.
79 All of these decisions are listed along with the original infringement decision 3-AI-97. See: http://www.comunidadandina.org/canprocedimientosinternet/Detalle Expediente1.aspx?idExp=2008&idProced=7&codExp=TJCA+3-AI-97.
Andean law has primacy over national law. But according to the Colombian Constitutional Court, the constitution does not include provisions that require it to elevate Andean law, and thus there is no constitutional violation when Andean law is not respected.

**Case Study 7.5: The Inter-American Court of Justice demands that the Nicaraguan Government give effect to indigenous land rights (Awas Tingni Community v. Nicaragua)**

In the case of *Awas Tingni v. Nicaragua*, the IACtHR transformed the land claims of the small Awas Tingni indigenous group into a constitutional right for indigenous groups to own their ancestral lands. The Awas Tingni are a group of roughly a thousand individuals (150 plus families) that traditionally hold their land communally. Each family has their own small plot of land, which they farm until the soil is depleted. The family then moves, letting the land idle for about 15 years. The community also hunts, and maintains ancestral burial grounds. These customary practices mean that the Awas Tingni community claims land rights over lands that it is not at present occupying.

In 1993 the Awas Tingni became concerned because the Nicaraguan government authorized a Dominican company to enter Awas Tingni lands to inventory the tropical forest resources, with the intent of logging them. In 1994 the Awas Tingni community worked with the World Wildlife Fund and the University of Iowa College of Law to negotiate a lumber contract with the Nicaraguan-Dominican lumber company and the Nicaraguan government. The contract was designed to be a community-based natural forest management project, one that promoted both indigenous rights and environmental protection. To guarantee this arrangement, the Awas Tingni community began formal procedures to recognize its territorial claims. The Awas Tingni community worked with Harvard anthropologist Theodore MacDonald, from the Weatherhead Center for International Affairs' Program on Nonviolent Sanctions and Cultural Survival (PONSACS), to document the land claims of the Awas Tingni community. In the process of filing for land rights and mapping its land claims, the community discovered that the Nicaraguan government had sold a lumber concession on another part of their lands to a large

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81 Vuotto, 2004: 226-7. Slightly different numbers are given in Anaya and Campbell, 2009: 117, but it could be that the population grew or that groups that were considered separate merged.

South Korean corporation, SOCARSA. The Nicaraguan government claimed that the land in question was not marked or in use by the community, and thus that it belonged to the state. The Awas Tingni community consulted with human rights lawyers and began litigation to demand its land rights.

The community first tried to file for an injunction to stop the logging. But the effort failed because the Community had not filed its claim within 30 days of learning of the concession.\textsuperscript{83} Based on this ruling, the Awas Tingni community appealed to the Inter-American Commission on Human Rights. The Inter-American Commission tried for nearly three years to negotiate a friendly settlement, but its efforts failed. In 1998 it referred the case to the IACtHR. Meanwhile, in March 1996 the Regional Council of the North Atlantic Coast Autonomous Region tried again, on behalf of the Awas Tingni community, to get a constitutional revocation of the SOLCARSA concession. This time the Nicaraguan Supreme Court found the concession unconstitutional, primarily for procedural reasons. The government tried a number of ways to address the procedural concerns while maintaining the SOLCARSA concession. After more legal suits, eventually the concession was annulled. The back and forth over the concession concerned procedure, which meant that the fundamental constitutional issues remained unresolved.\textsuperscript{84}

The central issue in the case was Nicaragua’s failure to provide formal recognition of the land rights of indigenous communities. Nicaragua's 1985 constitution affirms indigenous rights to communal land and natural resources. This right was restated in 1987 when the Nicaraguan National Assembly granted regional autonomy to Nicaragua's Atlantic Coast region. But affirming this right is not the same as formally recognizing land holdings.

At the IACtHR proceedings, the Nicaraguan government claimed that the Awas Tingni lacked both the legal title and the ancestral right to the land in question.\textsuperscript{85} The Awas Tingni community had tried create a formal recognition, working via PONSACS to document their land rights. Also, while this dispute was being investigated in the Inter-American system, the World Bank funded a study to map the land rights in the region. The World Bank report noted that there were unclear, often overlapping local perceptions of land tenure. The World Bank report was

\textsuperscript{83} Anaya and Campbell, 2009: 123.
\textsuperscript{84} Awas Tingni, Inter-American Court of Human Rights (Series c) No. 79 discusses some of the proceedings, in terms of where they stood, at para 103. Noted in Vuotto, 2004: 230. For fuller details see: Anaya and Campbell, 2009: 128-9.
\textsuperscript{85} Vuotto, 2004: 220.
delivered to the Nicaraguan government, but neither distributed nor acted upon.\(^{86}\) The suppression of the report, combined with the reality that the government had ignored the Nicaraguan Supreme Court’s ruling that had found the concession to be unconstitutional, revealed that the government was aware of the problem but unwilling to address the issue.

The different international efforts on behalf of the Awas Tingni group created a long paper trail of documented land claims, which made the Awas Tingni a perfect test case. The case was supported by the Indian Law Resource Center.\(^{87}\) At the IACtHR proceedings, three Mayagna Indians from the community of Awas Tingni, the PONSACS anthropological researcher who provided the ethnographic study and related maps, and more than a dozen "expert witnesses" from Nicaragua and throughout the Americas testified on behalf of the community. The IACtHR ruled against Nicaragua. The ruling recognized the Awas Tingni community as an indigenous group that was part of a larger group of individuals, that the land in dispute was indeed owned by the community, and that the Nicaraguan government had failed to provide the land rights guaranteed by its own constitution and the Inter-American Convention on Human Rights. The IACtHR ordered that the land right be recognized, that the government create a process for all indigenous groups to demarcate their lands and that the government abstain from any acts that “affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities.”\(^{88}\) The government was also ordered to by the Awas Tingni legal fees, and it must provide reparations in the form of investing in works or services to help the Awas Tingni peoples.\(^{89}\) By recognizing the validity of customary land right claims, and by requiring governments to create a procedure to demarcate and recognize these rights, the IACtHR created a general human right for indigenous groups that was broader than what Nicaragua’s constitution required.

At first, the Nicaraguan government ignored the ruling. The SOLCARA concession had by then been cancelled, so no ongoing violation of the land rights existed. The Indian Law Center continued to push the issue, filing more legal suits to demand that the government respect

\(^{86}\) Diagnóstico general sobre la tenencia de la tierra en las comunidades indígenas de la Costa Atlántica. (1998) available at [www.ccarconline.org/Resumenejecutivo.pdf](http://www.ccarconline.org/Resumenejecutivo.pdf). There were also other agreements that the government had made, seemingly recognizing the land right, but then not following through. See: Anaya and Campbell, 2009: 122.


\(^{88}\) Awas Tingni, Inter-American Court of Human Rights (Series c) No. 79 conclusion 4.

\(^{89}\) Ibid.
the ruling. The government covered legal costs in 2002, and it worked out a system to invest funds into the Awas Tingni community as required by the IACtHR. The government agreed to create a joint committee of government and Awas Tingni representatives, which worked with a local consultant to perform a diagnostic land use study of the areas in question. The Committee’s final report was released in October 2003. The Nicaragua legislature then adopted a comprehensive law for the demarcation and titling of indigenous lands along the Atlantic Coast. The law created a process to demarcate lands, requiring first that overlapping land right claims be resolved. It took a number of years to resolve disputing and overlapping claims. Finally, the president of Nicaragua assigned his personal advisor to supervise the implementation of the IACtHR’s decision. In December of 2008, the Awas Tingni were granted a formal title to their land. In light of the IACtHR ruling, indigenous groups in Belize and Paraguay have raised claims demanding formal recognition of their land rights.

**Case Study 7.6: ECOWAS Tribunal Condemns Slavery in Niger (Hadjatou Mani Koroua v Niger)**

The Economic Community of West African States (ECOWAS) is a regional economic integration institution, founded in 1975 and currently comprised of 15 West African states. The ECOWAS Court was founded in 2002, but it was little used at first in part because private actors lacked any ability to access the ECOWAS Court of Justice. In 2005, after realizing that it would take a while for the African Court of Human and Peoples’ Rights to become a reality, states gave the ECOWAS court jurisdiction regarding human rights cases, and authorized private actors to bring human rights complaints directly to the court. Thus starting in 2005, the ECOWAS became a rare international legal institution with both an economic and a human rights mandate.

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90 Anaya and Campbell, 2009: 143.
91 Law 445 discussed in Ibid.: 144-5.
95 Member states include: Benin, Burkina Faso, Cabo Verde, Cote D’ivoire, Gambia, Ghana, Guinea, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. I will be updating this discussion after field work in Abuja in March 2011.
97 The ECJ can review the compatibility of European law with human rights obligations, but not the compatibility of national practices with human rights obligations. The CCJ is the only other trade court with a partial human rights authority.
In 2008 the ECOWAS court issued a landmark ruling of constitutional import. Hadijatou Mani was the daughter of a slave. Hadijatou Mani was sold by a representative of her mother’s owner when she was 12, after which she became a sadaka, a fifth wife. Muslim law allows men to take up to four wives. Sadaka is the name given to the many other women who serve the masters sexual as well as manual labor desires. As a sadaka, Hadijatou Mani had three children with her master. She was also forced to work seven days a week without remuneration, and in degrading conditions. In 2005 her master decided to ‘liberate’ her so that he could make her his wife. He gave her a “liberation certificate” expecting that she would then marry him. The certificate said “I El Hadj Souleymane Naroua have liberated Mme Hadijatou Koreau on this day 18 August and she is now free and is no-one’s slave.” The certificate was signed by the “chef du village” the “master” and the “beneficiary.” Once freed, Hadijatou Mani refused to marry her former master. Instead she tried to have her right to freedom recognized, and she married a man of her choosing. When Hadijatou Mani became pregnant by another man, her former master sued for bigamy. Hadijatou Mani’s independence suit and her former master’s bigamy charge brought a domestic disagreement into the realm of state authority.

During Hadijatou Mani’s suit to recognize her freedom, her former master argued that under local tradition she was married to him. The lower court found that she was free to leave her former master, but she had needed consent, a dowry and a religious ceremony to do so. For a former slave whose master claimed her as his wife, these requirements were unreachable. This ruling was reversed on appeal, with the Tribunal de Grand Instance finding that under Niger’s customary law, a slave girl is de facto married to her master once she is released. The appeal court ordered Hadijatou to return to her former master. This ruling was appealed to the Supreme Court, which acknowledged that Hadijatou Mani was a slave, although it did not make this fact determinative of the outcome. Instead, it ruled that advisors unduly influenced the Tribunal de Grand Instance, and thus it sent the matter back for another determination.98 Meanwhile, Hadijatou Mani’s former master won his case involving the bigamy charge. Hadijatou Mani was detained, convicted and sentenced to six months imprisonment. She spent two months in prison and was released pending the ECOWAS court’s ruling.

The ECOWAS court found the system of sadaka and wahiya, the 5th wife system that does not allow woman to move from being someone’s wife without the consent of the husband,

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98 These cases are fully referenced and discussed in: Duffy, 2009: 155.
amounted to forced slavery. While the government of Niger had not created or condoned these practices, the ECOWAS Court found that the Republic of Niger had not sufficiently protected Hadijatou Mani Koraou from the local practices, and thus the government did not protect her rights against the practice of slavery. The Court also rejected the government’s attempt to defend its actions using the cover of marriage, instead finding that its judicial and administrative authorities had failed to protect Hadijatou Mani. It criticized especially national judges who had accepted that there were customary circumstance where slavery became lawful. The Court ordered Hadijatou’s release from detention under charges of bigamy, as well as compensation for Hadijatou. Implicitly the ruling also required local courts to grant Hadijatou the divorce she sought yet was denied, so that she could marry again.99

Hadijatou Mani’s case was litigated with the support of Interights, a London based NGO dedicated to using strategic litigation to promote the development of new human rights standards.100 The ruling was important in recognizing that customary family practices are equivalent to slavery. The Niger government had criminalized slavery in 2003. In 2004 the Niger government began enforcing the ban, announcing to 7,000 slaves that they were free.101 This ruling capitalized on the building momentum of the anti-slavery movement by extended the category of slavery to family law practices. The ruling created an obligation for courts to enforce the ban against slavery by allowing women to escape marital relationships that were not of their choosing. The ECOWAS ruling also gave the case an international profile.

It is too early to say if the Niger government, or other regional governments, have been meaningfully shamed into addressing the customary practices that contribute to slavery in the region. It is also too early to say if national courts will change their practices so as to better protect the rights of slaves. But even if these changes do not occur, Hadijatou Mani has felt the effects of the litigation.

Helen Duffy, a director at Interights and a co-counsel in the case, argues that the ruling’s

“primary significance lies in the recognition and vindication it provides for the victim. As a slave, Hadijatou Mani was devoid of legal personality. During her testimony before the court in April 2008, she told how she was treated ‘like a goat.’ This judgment reasserts her rights as a human being. In the face of denial by the state, the Court’s clear acknowledgement of the ‘ongoing’ nature of Sadaka slavery, and the extent of her own tremendous suffering and enslavement, is

100 See: http://www.interights.org/
http://www.guardian.co.uk/world/2005/mar/05/sarahleft last visited 1/21/11.
itself of real value. The award of compensation and recognition of her entitlement to assistance in
reinserting herself in the society from which she has been alienated since birth, provides hope for a
different future for her and her children.”

Hadijatou Mani herself noted that the financial resources would allow here to build a
house, raise animals, and send her children to school “so they can have the education I was never
allowed as a slave.” Even if the compensation is never paid, Hadijatou Mani was served by
the litigation. While the ECOWAS case was pending, the authorities decided not to pursue the
bigamy case further. Also her former master dropped his legal claim to her newborn child who
was conceived with the man she later married.

The constitutional implications of this ruling are clear, but the ECOWAS court did not
create any concrete obligations for either national judges or national governments in this ruling.
In other rulings the ECOWAS court has been more explicit. For example, in SERAP vs. Federal
Republic of Nigeria and Universal Basic Education Commission the ECOWAS court did assert
that education was a fundamental right in Nigeria. I don’t as yet have a copy of the ruling, and
thus I am unsure if the court declared or authorized any remedies.

The Tipping Point Politics of Morphed Constitutional Review Roles

The ICs in all four of these cases acted like typical constitutional courts. They built law,
defended their prerogatives, and confronted powerful state actors that disagreed with them. But
they also were sensitive to political constraints. Comparative constitutional law scholars have
long recognized that constitutional courts operate within constraints. These constraints stem
from the inability of courts to force the hand of governments, the at times very real possibility
that judges will be sanctioned for their boldness and the reality that some questions really are
political questions that are better decided by political branches. The cases discussed in this
section suggest that ICs gauged the extent of support for their rulings, and considered political
factors as they applied the law.

In the Kreil case, the ECJ gauged that there were many actors within Germany who
actually wanted to change the restrictions on women in the military in order to facilitate a wider
German participation in multilateral military operations. While there are also many Germans

102 Ibid. p. 169.
103 http://www.interights.org/ Niger-slavery last visited 1/21/11.
104 ECW/CCJ/APP/08/08 reported at http://www.right-to-education.org/node/717
who want to end conscription, the ECJ refused to take the more radical next step in the *Dory* case, leaving the decision to dismantle the draft a question for political branches. The ATJ gauged that national courts were not ready to embrace a role enforcing Andean law supremacy. The ATJ’s earlier jurisprudence had seemingly incorporated the ECJ’s doctrine that required national courts to set aside conflicting law, but the ATJ did not demand this action when it ruled on the reference from the Colombian Consejo de Estado.\footnote{106} The IACtHR gauged that domestic efforts had run their course, and that both domestic and international actors were clambering for a stronger legal obligation to protect indigenous land rights. It pushed Nicaragua’s government in this direction, arguably demanding more from the government than Nicaragua’s Supreme Court was willing to demand.

It is an open question whether ICs are more constrained in their decision-making than their domestic counter-parts.\footnote{107} Gerald Rosenberg questioned the capacity of the United States Supreme Court to produce significant change without the support of the government.\footnote{108} Michael McCann and Charles Epp argue that courts can contribute to political change, but they need to work with societal actors to promote mobilization and change.\footnote{109} Georg Vanberg argues that the German Court’s decision-making will be affected by the extent of public support for the court, the extent to which constitutional violations are transparent and thus whether violations are something that the public might know and care about, and public opinion on specific issues in question.\footnote{110} Gretchen Helmke traces the willingness of judges to rule against the government over time, finding that judges respond to the changing political winds around them.\footnote{111} In other words, scholars of constitutional courts recognize that even powerful courts are constrained. We lack any real way to assess if international judges are more constrained by their political environment.\footnote{112}

While the cases discussed in this section cannot help us answer this deeper political question, they do suggest that ICs face a political constraint that domestic judges do not. ICs are also constrained by the reality that ICs lack any clear legal authority make their rulings or

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\footnote{106}{Alter and Helfer, 2010: 570-1.}
\footnote{107}{Conventional wisdom expects ICs to be more constrained, but no scholar has really examined whether or not this is true. For discussions on the constraints of ICs see: Ibid, Ginsburg, 2005, Steinberg, 2004.}
\footnote{108}{Rosenberg, 1993.}
\footnote{109}{Epps, 1998, McCann, 1994.}
\footnote{110}{Vanberg, 2005.}
\footnote{111}{Helmke, 2005 (especially chapter 6).}
\footnote{112}{Staton and Moore, manuscript.}
international law legally supreme in the domestic sphere. International judges must thus walking the fine line between demanding governments respect international law while not overstepping their formal grant of legal authority, lest they lose the support of their domestic legal interlocutors. Walking this line does not require that ICs accept or bend to the arguments offered by states. The ATJ did rule against Colombia in the alcohol case discussed above, even though it knew that its ruling was likely to be ignored. And the IACtHR ruled against Nicaragua. The ECOWAS court ruled against Niger in *Hadijatou Mani v. Niger*. The constraints are most manifest when it comes to the remedies IC judges order. The IACtHR was quite bold in demanding that the Nicaraguan government create a process to guarantee indigenous peoples’ land rights. The ECOWAS court was not as bold in its *Hadijatou Mani v. Niger* where it required compensation for Hadijatou Mani, but it didn’t demand that the government do anything specific to stop the customary practices that created her situation in the first place.

The cases discussed in chapter 5 provide more data for this question of under what circumstances to ICs assert a more constitutional role of creating higher order legal principles and demanding that policy adhere to these principles. Chapter 5 also had two economic cases where ICs condemned policies as illegal, implicitly if not explicitly suggesting that international law takes precedence over conflicting domestic law. In the WTO case involving the United State’s Foreign Sales Corporation (FSC), the issue of whether WTO law constitutes higher order law was not really salient. The American political debate about compliance revolved around whether or not US policy violated WTO rules, and the costs of continued noncompliance. The supremacy of Andean law was an understood part of the second use patent case. National intellectual property agencies were primarily looking for a signal and for political cover so that they could disregard what they also saw as an illegal, if not corrupt, national statute. Since the national intellectual property agencies were ready to apply the ATJ noncompliance ruling, the ATJ could effectively circumvent national judges, who tend to be more ambivalent regarding the supremacy of Andean law, as shown in the alcohol case discussed in this chapter.

The international criminal cases of chapter 5 provide another window into what is arguably a constitutional role of defining the legal terms that will guide both domestic and international enforcement of war crimes rules. In *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda (ICTR) found Akayesu responsible for mass rape in his bureau even though he himself had not participated in any rapes. In subsequent cases the ICRY found
that rape and forced nudity can be tools of torture that can constitute war crimes if part of a pattern of gross violations of individual rights. The Special Court of Sierra Leone’s assertion of jurisdiction over a sitting head of state from a neighboring country suggests a further compromise in the notion of foreign sovereign immunity. These are all arguably examples of international judges asserting a higher order authority for international law. We do not know if or whether these precedents will elicit constitutional obedience going forward. Indeed the discussion of the ICTR’s precedent for prosecuting rape suggests that international prosecutors remain ambivalent about prosecuting rape as a war crime.

There is much to suggest that ICs are bolder when they suspect that they will find support for their rulings. Most judges do not want to admit that they apply the law differentially across cases, but recently James Cavallaro and Stephanie Brewer actually made the case that the Inter-American Court should actively cultivate the support of transnational and substate actors.\(^{113}\) This suggests that international judges pay attention to the pathways towards compliance, rather than whether the government of the moment likes the ruling or is likely to comply with the judgment. International criminal tribunals may be more ready to build law, both because the law in their domain is yet to be fully developed and because they need not worry about compliance with their ruling because indicted criminals must already be in custody for the case to proceed. For the rest of the ICs, we are still early on. It is too early to say what their constitutional authority will become.

ICs can contribute to reshaping politics and ultimately changing state actions through one of three pathways: voluntary government compliance, appealing to actors within the state who might use their power to ensure state compliance, or mobilizing and/or providing resources to transnational actors who are working to influence government policy. ICs choose which pathway both fits with what law requires and is pragmatic. Sometimes ICs appeal to the preferences of governments in power, and other times they appeal to national judges or advocates within a state. Where there is an established tradition of constitutional obedience, international courts have an extra resource they can draw on, namely support of domestic courts and of many other actors committed to constitutional democracy and the rule of law. Because judges, rather than governments, can decide what constitutes higher order law and whether IC rulings are legally binding, time may actually be on the side of international constitutional courts.

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\(^{113}\) Cavallaro and Brewer, 2008.
In the domestic context, governments are sometimes successful in thwarting judicial assertions of constitutional authority because they can fire supreme court judges en mass, and trim the jurisdiction of courts that challenge their authority. International courts, however, can only be crushed through collective multilateral decision-making. A single government opposing an IC ruling will not be able to mobilize such a rebuke if the IC is seen as exercising legitimate authority. International judges will change when their terms expire, but so will national governments. Eventually angry politicians will leave office. Meanwhile, the IC’s legal precedent exists as law on the books, if not law in action. Successor governments may be more open to the IC review, indeed successor governments may actually rise to power because of their opposition to the previous government. Embracing a contested IC ruling, and self-binding to the constitutional authority of an IC, may be a way to signal a deeper change towards embracing the rule of law.

IV. Conclusion: Constitutional Review Politics in the Shadow of International Courts

The discussion has shown that international constitutional review exists as a category. There are ICs that have explicitly been authorized to review the validity of IO acts. Explicit delegations of constitutional review authority provide a means for state and non-state actors to complain about international violations of the rules of procedure, and constitutional grund-norms, and thus they create checks on international level action. The possibility of such complaints arguably enhances the shadow of the IO’s constitutional structure over international policy-making, and it is arguably enhances the political accountability of multilateral institutions.114 This chapter discussed an Andean case regarding Peru’s derogations from the Andean Free Trade area and the Kadi case, where the ECJ pushed back against a European regulation adopted to implement a UN Security Council directive. The ECJ’s ruling is not without question. But I argued that in the end it may help European rules, and national government policy withstand domestic legal challenges. It may thus be bolstering of democracy at both the national and supranational level.

Perhaps the more interesting category of international constitutional review concerns ICs conducting constitutional review of state acts. The COMESA court and EACJ are explicitly empowered to assess the validity of domestic policies and law, and the CCJ has replaced the role

114 Keohane and Grant, 2005.
of the Privy Council for certain Caribbean countries. But for the rest of the ICs discussed in this chapter, the courts were not explicitly empowered to conduct constitutional review of state acts. For these courts, the ICs constitutional review role is a morphed role, created by the assertions of constitutional authority by the ICs.

Some may see ICs as transgressing their authority when they assert that that international law is higher order law compared to domestic law. After all, ICs do not have the authority to determine the legal affect of international rules within domestic legal orders. The ECJ has often been accused of having moved beyond its formal mandate, especially but not exclusively with respect to its role assessing the compatibility of national law with European law in its preliminary rulings.\footnote{Hartley, 1996, Hartley, 1999, Rasmussen, 1986.} For human rights courts and international criminal tribunals, however, it is harder to claim that they are transgressing their formal mandate. International human rights courts were empowered to declare violations of human rights and war crimes laws and to authorize remedies. While they were not empowered to nullify illegal statutes or demand broader policy change, it may well be impossible for human rights courts to avoid suggesting that policies that violate human rights are invalid. To the extent that international human rights law and international criminal law is considered to be higher order law, courts that apply these laws cannot help but act as precedent setting international constitutional bodies.

In the end, it may not matter whether or not the IC was constituted with a formal grant of constitutional review authority.\footnote{See van der Mei, 2009.} Notwithstanding the EACJ’s formal authority, the EACJ finding that Kenyan election rules infringed on the EAC treaty was not welcome. The EACJ was careful. It condemned the election violations but did not declare the election null and void. Perhaps even more problematically, the EACJ developed a rather questionable doctrine of “prospective annulment” whereby unconstitutional acts are not nullified but future unconstitutional acts are barred.\footnote{Ibid.} The SADC Court and ECOWAS Court have run up against similar political pressures.\footnote{Ibid.} These cases suggest that formal authority is insufficient in any event to protect ICs from retribution for acting as constitutional review bodies.

The argument of this chapter suggests that such domestic and political barriers to ICs constitutional authority are not surprising. For the IC to gain a constitutional review authority,
morphed or otherwise, ICs need domestic actors to agree that international legal obligations constitute a higher order legal obligation. Such a step may require that international law be embedded into national constitutions themselves. But it also requires that domestic actors—judges, governments and social actors—give a constitutional obedience to the IC. Meanwhile in contexts where domestic courts are unable to encourage respect for the constitution it is hardly surprising that ICs also fail. Building a culture of constitutional obedience takes time, and it often involves political battles where judges are challenged and the extant legal order seems threatened. Most ICs are in the early stages of operation, and they are operating in contexts where constitutional democracy is far from established. It is far too early to conclude that ICs’ constitutional review authority will remain paper tigers.

A separate concern arises where international constitutional review coexists with strong domestic constitutional orders. Where domestic supreme courts are weak, they may welcome international judicial backing to bolster their rulings. Where domestic supreme courts are strong, however, they may dislike the notion that international judges should have a say within their constitutional system. The more established the democracy, the more established national constitutional courts, the more domestic judges and lawyers may fear that international constitutional law threatens the domestic constitutional system. That powerful domestic courts may be more likely to reject IC authority presents an irony. Section I suggested that the support of powerful domestic courts is necessary and sufficient for governments to give constitutional obedience to IC rulings. Yet the very strength of domestic courts may lead them to deny ICs a constitutional authority. This reality does not, however, preclude the possibility that governments may choose to see an IC ruling in constitutional terms, as occurred in the Kreil case.

The push-back created by domestic high court judges is worrisome to lawyers who fret that international legal systems may fragment or be inconsistently respected if domestic high courts begin to question the validity of international law. But if one can live with a little inconsistency, then the dependence of ICs on national courts can be seen as a strength of the international constitutional system. That IC constitutional review authority depends upon domestic constitutional obedience means that domestic actors ultimately define the borders of IC authority, inserting themselves as mediators between international and domestic law by

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anchoring their authority international law only to the extent that doing so promotes and protects
the national constitutional order.\textsuperscript{120} ICs may strengthen the domestic constitutional order by
providing external support for positions that domestic actors may lack the power or courage to
demand, as was the case in the \textit{Awas Tigni} ruling discussed in this chapter. Or national
constitutional concerns may serve as political checks on the multilateral order, inspiring ICs to
be bolder as was the case in the \textit{Kadi} decision discussed in this chapter.

This debate about the influence of international constitutional review tends to have a
missing actor. Judges—national and international- are given starring roles while the decisions of
governments become the objects of judicial inquiry. The finding that government’s preferences
are not at the center of constitutional review politics makes sense. The whole point of
constitutional review is to limit the exercise of political power, to create a constitutional check on
the actions of governments and legislative bodies. For some the checks created by international
constitutional courts may be too weak, while for others they may be presumptuous. The fact that
international constitutional review exists at all, however, suggests that there are meaningful legal
checks beyond the nation state, and thus that the international realm is not beyond legal review.

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