Lovat, H. (2020) International adjudication and its discontents: a pluralist approach to international tribunal backlash. *Israel Law Review*, 53(3), pp. 301-333.

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INTERNATIONAL ADJUDICATION AND ITS DISCONTENTS: A PLURALIST APPROACH TO INTERNATIONAL TRIBUNAL BACKLASH

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ABSTRACT

International tribunal backlash remains poorly understood: hampered by conceptual challenges, systematic research into the causes of this phenomenon remains minimal. The present article makes two contributions to advancing this endeavour. First, building on existing literature, it sets out a working definition of international tribunal backlash, tailored to facilitate multi-method empirical research into the causes of backlash across institutions and sectors. Second, drawing on International Relations' pluralist turn, the article provides an analytically eclectic theoretical scaffold for causal analysis of international tribunal backlash, enabling standardised cross-institutional and sectoral comparison without over-simplifying the complexity of backlash in different instances. The article accordingly provides the building blocks for improved understanding of the causes of - and potential scope to manage - international tribunal backlash across institutions, regions, and sectors.¹

Keywords: International Adjudication; International Tribunals; Backlash; International Relations; Pluralism

INTRODUCTION

International courts have been described as the 'lynchpin' of the post-Cold War 'rules-based' international order.² Elements of this order have come under sustained pressure, however, as government and public attitudes have shifted over time.³ In the context of international

¹ I am grateful to Anne van Aaken, Pierre d'Argent, Franziska Boehme, Geoff Dancy, Cian O'Driscoll, Kevin Jon Heller, Courtney Hillebrecht, Frederic Megret, Kurt Mills, Ian Paterson, Ty Solomon, Scott Strauss, Christian Tams, Shaina Western, and anonymous reviewers for helpful comments and discussions, as well as panellists and participants at the 2018 ESIL Research Forum and ISA Conference.

² Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', *American Journal of International Law* 106, no. 2 (2012): 226. Kent et al observe similarly that: 'the existence of [international courts] is a condition *sine qua non* for the proper functioning of a rule-based international order' (Avidan Kent, Nikos Skoutaris, and Jamie Trinidad, 'What Does the Future Hold for International Courts?', in *The Future of International Courts: Regional, Institutional and Procedural Challenges*, ed. Avidan Kent, Nikos Skoutaris, and Jamie Trinidad (London, UK: Routledge, 2018), 7.)

³ Alter refers to 'the end of the liberal consensus'. (Karen J. Alter, 'Critical Junctures and the Future of International Courts in a Post-Liberal World Order', in *The Future of International Courts: Regional, Institutional and Procedural Challenges*, ed. Avidan Kent, Nikos Skoutaris, and Jamie Trinidad (London, UK: Routledge, 2018), 9.)

tribunals, this has manifested most conspicuously in an apparent increase in hostility from governments and others towards international courts, a tendency that in its more extreme forms has been labelled *backlash*.⁴

A range of instances of so-called tribunal backlash have captured policy and academic concern in recent years. In a particularly infamous case, for example, Zimbabwe-led efforts led to the shuttering of the South African Development Community (SADC) Tribunal in 2011.⁵ Backlash against regional courts has also been cited in Latin America and the Caribbean, as well as in further African courts.⁶ Indeed, the European Court of Human Rights (ECtHR) - the flagship regional human rights court - has not proven immune to sustained government complaints about its decision-making, including from both the UK and Russia. Similarly, amongst global bodies, the International Criminal Court (ICC) continues to labour under pressure from disgruntled developed and developing world governments, including an oft-cited African backlash. Continued US refusal to sanction appointments to the World Trade Organization Appellate Body (WTO AB) likewise illustrates the susceptibility of international trade governance to backlash.⁷

Not all international courts have obviously experienced backlash, nor have those that may have done so encountered this to the same degree. Given the centrality of these institutions to their respective regimes, however, and to the rule-based international order more broadly, the apparently growing prevalence of backlash presents a puzzling, and - for those who see value in preserving the post-Cold War international order - concerning development.

There is a growing literature on tribunal backlash. To date, however, there is little consensus as to the key characteristics of this phenomenon, and still less clarity as to its principal drivers across institutions and sectors. The present article charts a path forward in respect of both

⁴ The terms ‘tribunal’ and ‘court’ are used interchangeably in this article to refer to what may be considered more broadly as ‘international adjudicative bodies’. (See Cesare P. R. Romano, Karen J. Alter, and Yuval Shany, ‘Mapping International Adjudicative Bodies, the Issues, and Players’, ed. Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (Oxford, UK: Oxford University Press, 2014), 6.)

⁵ Karen J. Alter, James T. Gathii, and Laurence R. Helfer, ‘Backlash against International Courts in West, East and Southern Africa: Causes and Consequences’, *European Journal of International Law* 27, no. 2 (2016): 293–328; Tendayi Achiume, ‘The SADC Tribunal: Socio-Political Dissonance and the Authority of International Courts’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford, UK: Oxford University Press, 2018), 124–48.

⁶ Alter, Gathii, and Helfer, ‘Backlash against International Courts in West, East and Southern Africa’; Jorge Contesse, ‘Judicial Backlash in Inter-American Human Rights Law?’, *I-CONnect* (blog), 2 March 2017, <http://www.iconnectblog.com/2017/03/judicial-backlash-interamerican/>; Laurence R. Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes’, *Columbia Law Review* 102, no. 7 (2002): 1832–1911.

⁷ See detailed discussion in Section 1.1. below in respect of the experiences of these bodies.

endeavours, providing a working definition of backlash, designed to enable cross-sectoral identification and causal analysis of this phenomenon, and presenting a pluralist theoretical framework for its systematic study. This framework draws on the growing scholarly literature on tribunal backlash and the pluralist turn in International Relations (IR) to identify factors that, together, may be capable of largely explaining when and in what circumstances backlash is more or less likely to occur.

The article comprises four substantive sections. The first section surveys instances cited of tribunal backlash and academic approaches to these, and considers the challenges involved in working with this concept. The next section grapples with the issue of how best to define backlash for the purposes of comparative, causal analysis. The third section proposes a theoretical framework for the study of this phenomenon, identifying and situating within a pluralist scaffold factors that existing studies and broader IR and associated interdisciplinary International Law (IL)/IR literature suggest may have a bearing on whether backlash is likely to occur in any given set of circumstances. The fourth section illustrates how this definition and framework may be applied to help make sense of backlash as a cross-sectoral, cross-regional phenomenon, and considers the advantages and challenges of this approach. A concluding discussion follows.

1. INTERNATIONAL TRIBUNALS AND THEIR DISCONTENTS

It is not unusual for international tribunals to experience mixed fortunes as governments fail or seek to avoid or delay the implementation of judicial decisions, and in some cases seek to undermine courts' operations.⁸ US withdrawal from the compulsory jurisdiction of the International Court of Justice (ICJ) in 1985 following the *Nicaragua* decision stands out historically in this regard, alongside Jean Kirkpatrick's oft-cited description of the principal judicial organ of the United Nations as a 'semi-legal, semi-judicial, semi-political body, which nations sometimes accept and sometimes don't.'⁹ There is similarly nothing new in scholars warning of the risk of a 'return to the law of the jungle' in international affairs.¹⁰

⁸ The 1949 ICJ decision in the *Corfu Channel* case, for example, was implemented only in 1996. See Constanze Schulte, *Compliance with Decisions of the International Court of Justice*, International Courts and Tribunals Series (Oxford ; New York, NY: Oxford University Press, 2004), 91–99; Aloysius P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', *European Journal of International Law* 18, no. 5 (1 November 2007): 825, at note 56.

⁹ Howard Meyer, 'When the Pope Rebuked the U.S. at the World Court', *Baltimore Sun*, 18 March 1997, http://articles.baltimoresun.com/1997-03-18/news/1997077033_1_court-jurisdiction-world-court-nicaragua.

¹⁰ See: Anthony D'Amato, 'The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court', *American Journal of International Law* 80, no. 2 (1986): 331.

Recent trends stand out in several respects, however. In particular, the apparent scale of the current wave of discontent - across multiple courts spanning issue areas and regions - is remarkable, reflecting the proliferation in specialist and regional international tribunals that accompanied the post-Cold War ‘legalization’ of international affairs.¹¹ The period since the Cold War has also witnessed an upswing in judicial activity in politically sensitive fields: whereas the ICJ has long tended – albeit not always entirely successfully – to avoid unnecessarily provocative judgments, the period since 1989 has seen more courts enter more contentious arenas.¹² These include the conduct of armed conflict, domestic treatment of states’ own citizens via human rights tribunals, and cross-border trade and, as Shany has observed, ‘the more contested is the court’s exercise of jurisdiction, the greater is the expected resistance by states and other relevant actors... and the fiercer the challenge to the court’s consent-based legitimacy’.¹³

The last observation also underlines what is at stake for international tribunals and their associated legal regimes. Lacking the local political, social and legal taproots of domestic courts, international tribunals all depend on the continued collective support of states for their viability. Even where international courts and their supporters seek to appeal to sub-state or transnational constituencies to bolster institutional legitimacy or authority, governments remain their ultimate ‘mandate providers’.¹⁴

Accordingly, international courts concerned about institutional sustainability are likely to navigate their dockets with at least one eye to their ability to command continued government

¹¹ See Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014), 91–136; Karen J. Alter, Emilie M. Hafner-Burton, and Laurence R. Helfer, ‘Theorizing the Judicialization of International Relations’, *International Studies Quarterly* 63, no. 3 (1 September 2019): 449–63, <https://doi.org/10.1093/isq/sqz019>.

¹² Nienke Grossman, for example, highlights the ‘Solomonic’ character of ICJ judgments: Nienke Grossman, ‘Solomonic Judgments and the Legitimacy of the International Court of Justice’, in *Legitimacy and International Courts*, ed. Andreas Follesdal et al., Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2018), 43–61, <https://doi.org/10.1017/9781108529570.002>.

¹³ Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford, UK: Oxford University Press, 2014), 82. In similar vein, Dancy and Sikkink make the point that: ‘Human rights gains are always made through struggle, and virtually always provoke backlash.’ (Geoff Dancy and Kathryn Sikkink, ‘Human Rights, Data, Processes, and Outcomes: How Recent Research Points to a Better Future’, in *Human Rights Futures*, ed. Stephen Hopgood, Jack Snyder, and Leslie Vinjamuri (Cambridge UK; New York, NY: Cambridge University Press, 2017), 48.

¹⁴ International tribunal legitimacy and authority are, of course, themselves subjects of extensive normative and analytic debate. For recent contributions see eg Nienke Grossman et al., eds., *Legitimacy and International Courts* (Cambridge, UK: Cambridge University Press, 2018); Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, eds., *International Court Authority* (Oxford, UK: Oxford University Press, 2018).

support,¹⁵ a particular challenge when the protagonists of some of the most high-profile recent instances of backlash are governments of states that were amongst the most prominent supporters of these same institutions when they were being set up.¹⁶ Against this backdrop, the risk is that government disgruntlement with one or another international court will over time translate into more systemic ‘dejudicialization’,¹⁷ further undermining the ‘rules-based international order’ in what has been referred to as a critical juncture for the ‘liberal consensus’.¹⁸

1.1. Backlash: Instances and Arguments

The apparent upsurge in tribunal backlash has captured both scholarly and policy attention. Examinations to date, however, have tended to focus on making sense of the challenges facing individual courts, often highlighting relatively narrow sets of potential explanatory factors. This notwithstanding though, and while seldom noted, considered in the round the literature on backlash to date has identified remarkably similar sets of factors operating to drive and shape backlash across institutions, sectors and regions.

The travails of the International Criminal Court (ICC), with ongoing accusations of anti-African bias, withdrawals from membership by Burundi, the Philippines, and possibly South Africa, apparent deference to the US, and a decade-long failure to effect the arrest of former Sudanese President Omar Al-Bashir, have been perhaps the most high-profile focus of such concern. In respect of these challenges, Leslie Vinjamuri, for example, has observed that ‘[w]hen the ICC’s pursuits undermine states’ interests, states have been quick to defer or evade ICC justice.’¹⁹ Alan Bloomfield and Kurt Mills in turn, have pointed to the risks posed to the ICC by norm ‘antipreneurs’.²⁰ Franziska Boehme highlights domestic political drivers of South

¹⁵ For examples of techniques used by courts to facilitate this endeavour, see Arthur Dyeve, ‘Uncertainty and International Adjudication’, *Leiden Journal of International Law* 32, no. 1 (March 2019): 131–48; Jed Odermatt, ‘Patterns of Avoidance: Political Questions before International Courts’, *International Journal of Law in Context* 14, no. 2 (2018): 221–36.

¹⁶ As Alter observes, ‘resistance to [international courts] is more widespread (than previously), and it exists in places where [courts] used to find many allies.’ (Alter, ‘Critical Junctures and the Future of International Courts in a Post-Liberal World Order’, 20.)

¹⁷ Daniel Abebe and Tom Ginsburg, ‘The Dejudicialization of International Politics?’, *International Studies Quarterly* 63, no. 3 (1 September 2019): 521–30.

¹⁸ Alter, ‘Critical Junctures and the Future of International Courts in a Post-Liberal World Order’, 19.

¹⁹ Leslie Vinjamuri, ‘The International Criminal Court: The Paradox of Its Authority’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford, UK: Oxford University Press, 2018), 334, <https://doi.org/10.1093/oso/9780198795582.003.0014>.

²⁰ Kurt Mills and Alan Bloomfield, ‘African Resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm’, *Review of International Studies* 44, no. 1 (2018): 101–27. In similar vein, Bob Clifford has documented the international impact of non-liberal transnational activist communities: Bob

African government attitudes towards the ICC, while Kenneth Rodman underlines the extent to which the effectiveness of international criminal tribunals depends on the preferences of materially powerful states.²¹

Nor is the ICC alone in its high-profile encounter with backlash. While issues of developed state bias have long plagued the World Trade Organization dispute resolution regime, in recent years the WTO Appellate Body (AB) has come under vociferous criticism from the US amid persistent accusations of unwarranted judicial activism. This has led the Obama and Trump administrations to withhold consent to the appointment of new AB members as existing members' terms have expired, resulting in - in effect - in institutional paralysis.²²

Again, the AB has featured prominently in debates around tribunal resistance and backlash, with commentators pointing to a range of possible drivers of US behaviour. The dominant view - akin to Vinjamuri's observation in respect of the ICC - is arguably that the current US position is a rational response to WTO dispute settlement institutions having taken on '[a] growing number of disputes requir[ing] them to adjudicate legal claims and questions that should have been addressed by governments through the negotiation of new rules and the reform of outdated ones'.²³

Delving deeper into US policy-making, however, Fraedrich and Kaniecki and others argue - again, echoing observations made in respect of the ICC - that domestic politics is driving US trade policy, with increasingly aggressive US posturing towards the WTO reflecting growing domestic political pressure on the Trump administration to reassert US autonomy in the face of rapid Chinese economic development.²⁴ Adopting a further, realist-inflected perspective -

Clifford, *The Global Right Wing and the Clash of World Politics* (New York: Cambridge University Press, 2012).

²¹ Franziska Boehme, "'We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court", *International Journal of Transitional Justice* 11, no. 1 (2017): 50–70; Kenneth Rodman, 'When Justice Leads, Does Politics Follow? The Realist Limits of Stigmatizing War Criminals through International Prosecution (CEEISA-ISA Joint Conference, Ljubljana, Slovenia, 25 June 2016)', 25 June 2016, <http://web.isanet.org/Web/Conferences/CEEISA-ISA-LBJ2016/Archive/99175428-d1a3-4b44-84eb-3bcca05ccb5f.pdf>.

²² See eg Rachel Brewster, 'WTO Dispute Settlement: Can We Go Back Again?', *AJIL Unbound* 113 (2019): 61–66, <https://doi.org/10.1017/aju.2019.4>; Cosette D. Creamer, 'From the WTO's Crown Jewel to Its Crown of Thorns', *AJIL Unbound* 113 (ed 2019): 51–55, <https://doi.org/10.1017/aju.2019.1>.

²³ Creamer, 'From the WTO's Crown Jewel to Its Crown of Thorns', 52.

²⁴ See Laura Fraedrich and Chase D. Kaniecki, 'The American Agenda on Trade: What's Happened and What's Next?', *Global Trade and Customs Journal*, 2017, 262–67. Also Edward Alden, 'The Roots of Trump's Trade Rage', *Politico*, 16 January 2017, <https://www.politico.com/magazine/story/2017/01/the-roots-of-trumps-trade-rage-214639>; Linda Lim, 'Trump's Protectionism: Method to the Madness?', *The Straits Times*, 21 March 2018, <https://www.straitstimes.com/opinion/trumps-protectionism-method-to-the-madness>; Matt Peterson, 'The Making of a Trade Warrior', *The Atlantic*, 29 December 2018,

this time consistent with Rodman's observations in respect of international criminal tribunals - Andrew Lang in turn notes that: 'U.S.- China relations are understood to be at the core of the current tension and the present U.S. trade policy is interpreted, not as a wholesale turn away from international openness, but rather as an attempt to rewrite global trade rules to contain the competitive threat posed by China.'²⁵

All of these may be true. The overall impression gleaned from these debates, however, is that, as with African states and the ICC, while it is possible to point to a range of potential drivers of US backlash against the Appellate Body, the relative importance of these and the manner in which they or other factors might interact in shaping US behaviour remains unclear.²⁶

Regional integration and human rights courts have similarly not proven immune to aggressive government criticism. Notably, the European Court of Human Rights – 'the most influential human rights court in the world' - continues to labour under persistent government accusations of wrong-headedness and overreach.²⁷ As with the ICC and WTO AB though, while there has been extensive commentary on the political challenges facing the ECtHR, the causal drivers of this dynamic remain unclear.

Sandholtz et al highlight, for example - again, in line with observations made of the ICC and WTO AB - that backlash against the Strasbourg Court may reflect domestic political costs of

<https://www.theatlantic.com/politics/archive/2018/12/robert-lighthizers-bid-cut-chinas-trade-influence/578611/>; Quinn Slobodian, 'You Live in Robert Lighthizer's World Now', *Foreign Policy* (blog), 6 August 2018, <https://foreignpolicy.com/2018/08/06/you-live-in-robert-lighthizers-world-now-trump-trade/>; Ana Swanson, 'The Little-Known Trade Adviser Who Wields Enormous Power in Washington', *The New York Times*, 9 March 2018, sec. U.S., <https://www.nytimes.com/2018/03/09/us/politics/robert-lighthizer-trade.html>. In similar vein, Shaffer highlights that US hostility to the Appellate Body can 'be viewed historically as symptomatic of the traditional swings in U.S. politics between international engagement and disengagement' and 'reflective of a longstanding strand in U.S. politics.' (Gregory Shaffer, 'A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations (Features Symposium: International Trade in the Trump Era)', *Yale Journal of International Law Online* 44 (25 November 2018): 42.)

²⁵ 'Protectionism's Many Faces', *Yale Journal of International Law Online* 44 (25 November 2018): 57.

²⁶ For an overview of 'contextual factors' affecting WTO AB authority, for example, see Gregory Shaffer, Manfred Elsig, and Sergio Puig, 'The World Trade Organization's Dispute Settlement Body: Its Extensive but Fragile Authority', in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford, UK: Oxford University Press, 2018).

²⁷ See eg Spyridon Flogaitis, Tom Zwart, and Julie Fraser, *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Northampton, MA: Edward Elgar, 2013); Zoë Jay, 'Keeping Rights at Home: British Conceptions of Rights and Compliance with the European Court of Human Rights', *The British Journal of Politics and International Relations* 19, no. 4 (2017): 842–60; Fiona de Londras, 'The New Sovereignism: What It Means for Human Rights Law in the UK', *LSE Brexit* (blog), 24 October 2017, <http://blogs.lse.ac.uk/brexit/2017/10/24/the-new-sovereignism-what-it-means-for-human-rights-law-in-the-uk/>; Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash', *Law and Contemporary Problems* 79 (2016): 141; Wayne Sandholtz, Yining Bei, and Kayla Caldwell, 'Backlash and International Human Rights Courts', in *Contracting Human Rights*, ed. Alison Brysk and Michael Stohl (Cheltenham, UK: Edward Elgar, 2018), 159–78.

regime membership and compliance with court judgments, with backlash benefiting governments publicly seen by domestic constituencies as ‘standing up to Europe’.²⁸ Leach and Donald, Harzl and others, in contrast, have pointed to the importance of perceived incompatibility between dominant domestic discourses (and associated values and political preferences) and court demands, and the limits of human rights adjudication in promoting democratisation - begging the question of the extent to which such discourses may also play a role in other instances of backlash.²⁹

Robust resistance to international tribunals - if not always obviously backlash - has also been cited in a range of other instances. Some of these cases, consistent with Rodman’s and Lang’s observations, underline the extent to which the fortunes of international tribunals may be tied to great power preferences: the ICJ’s advisory opinions in the Wall and Chagos Islands cases, for example, risk alienating the court from Security Council members, the most powerful states in the international system.³⁰ The 2016 decision of the Permanent Court of Arbitration in the South China Sea Arbitration, moreover, appears unlikely to result in conforming Chinese conduct in the foreseeable future.³¹ In similar fashion, apparent UK disaffection with the CJEU has formed a British ‘red line’ throughout Brexit negotiations between London and Brussels.³²

²⁸ Sandholtz, Bei, and Caldwell, ‘Backlash and International Human Rights Courts’, 166. See eg *Hirst v UK* (No. 2) [2005] ECHR 681 and subsequent cases on prisoner voting rights, and eg *Omar Othman (Abu Qatada) v UK* [2012] ECHR 56, and in respect of Russia *Anchugov and Gladov v. Russia* [2013] ECHR 638 (again, on prisoner voting), and *AO Neftyanaya Kompaniya Yukos v. Russia* [2014] ECHR 853.

²⁹ See variously Philip Leach and Alice Donald, ‘Hostility to the European Court and the Risks of Contagion’, *UK Human Rights Blog* (blog), 21 November 2013, <https://ukhumanrightsblog.com/2013/11/21/hostility-to-the-european-court-and-the-risks-of-contagion-philip-leach-and-alice-donald/>; Benedikt Harzl, ‘Nativist Ideological Responses to European/Liberal Human Rights Discourses in Contemporary Russia’, in *Russia and the European Court of Human Rights: The Strasbourg Effect*, ed. Lauri Mälksoo and Wolfgang Benedek (Cambridge UK ; New York: Cambridge University Press, 2017), 355–84; Laurence R. Helfer, ‘The Successes and Challenges for the European Court, Seen from the Outside’, *AJIL Unbound* 108 (January 2014): 74–78; Iryna Marchuk and Marina Aksenova, ‘The Tale of Yukos and of the Russian Constitutional Court’s Rebellion against the European Court of Human Rights’, *Osservatorio Costituzionale*, 6 April 2017, http://www.osservatorioaic.it/download/_rNqUPZ7lCzoX8S2kDDq8rd_vfJT0AMXT3K3lxgeAyy/marchuck-aksenova-definitivo.pdf; Madsen, ‘The Challenging Authority of the European Court of Human Rights’, 172.

³⁰ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, ICGJ 203 (ICJ 2004), 9th July 2004; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ GL No 169, ICGJ 534 (ICJ 2019), 25th February 2019

³¹ PCA Case No. 2013-19: The South China Sea Arbitration (Philippines v. China), award of 12 July 2016, available at: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>. See also Graham Allison, ‘Of Course China, Like All Great Powers, Will Ignore an International Legal Verdict’, *The Diplomat*, 11 July 2016, <https://thediplomat.com/2016/07/of-course-china-like-all-great-powers-will-ignore-an-international-legal-verdict/>.

³² ‘PM: UK Leaving EU Court’s Jurisdiction’, *BBC News*, 23 August 2017, sec. UK Politics, <https://www.bbc.com/news/uk-politics-41012265>. See Nikos Skoutaris, ‘Taking Back Control? Brexit and the Court of Justice’, in *The Future of International Courts: Regional, Institutional and Procedural Challenges*, ed. Avidan Kent, Nikos Skoutaris, and Jamie Trinidad (London, UK: Routledge, 2018), 93–106.

As to other cases, Laurence Helfer has observed how domestic politics and normative commitments rendered it rational for the governments of Jamaica, Trinidad and Tobago, and Guyana to withdraw in the 1990s from the jurisdiction of the UN Human Rights Committee and Inter-American human rights mechanisms in a dispute over the handling of death-row cases.³³ The Inter-American Court of Human Rights has also come under pressure from Peru and Brazil, as well as from Bolivia, Ecuador, and latterly Argentina, following Venezuelan (then) Foreign Minister Nicolás Maduro's 2012 declaration that: '[w]e have to definitively leave these [human rights] agencies, which are agencies of imperialism', and Venezuela's subsequent 2013 withdrawal from the American Convention on Human Rights.³⁴

The intellectual property-focused Court of Justice of the Andean Community has similarly not been spared government opprobrium, with Venezuela withdrawing from the Andean Community (CAN) in 2006, then-President Chavez castigating then-fellow members Colombia and Peru for signing free trade agreements with the US.³⁵ In similar fashion, in 2016 Rwanda withdrew its declaration permitting individuals and NGOs to directly petition the African Court on Human and Peoples' Rights, anticipating an adverse decision in a case brought by an opposition politician.³⁶

Economic-focused international dispute settlement mechanisms have also suffered from so-called backlash, with withdrawals from both the Washington Convention underpinning the

³³ 'When the governments could not reconcile this strong domestic preference for capital punishment with their international commitment to allow defendants to petition the human rights tribunals, they withdrew from the treaties.' (Helfer, 'Overlegalizing Human Rights', 1910. Also Amnesty International, 'Caribbean: Unacceptably Limiting Human Rights Protection (AMR 05/01/99)' (Amnesty International, March 1999), <https://www.amnesty.org/en/documents/document/?indexNumber=amr05%2f001%2f1999&language=en>.

³⁴ Rachel Glickhouse, 'Prior to Election, Venezuela Begins IACHR Withdrawal', *Americas Society / Council of the Americas* (blog), 12 September 2012, <https://www.as-coa.org/articles/prior-election-venezuela-begins-iachr-withdrawal>. See variously discussions in Contesse, 'Judicial Backlash in Inter-American Human Rights Law?'; Jorge Contesse, 'Inter-American Constitutionalism and Judicial Backlash (Draft for SELA 2017 Conference)', 2017,

https://edisciplinas.usp.br/pluginfile.php/3953176/mod_resource/content/1/sela17_Jorge%20Contesse_cv_eng.pdf; Alexandra Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights', in *Cultures of Legality: Judicialization and Political Activism in Latin America*, ed. Javier Couso, Alexandra Huneeus, and Rachel Sieder (Cambridge, UK: Cambridge University Press, 2010), 112–38.

³⁵ Simone Baribeau, 'Chavez: Venezuela to Withdraw from Andean Community of Nations', *Venezuelanalysis.Com* (blog), 21 April 2006, <https://venezuelanalysis.com/news/1706>; 'Venezuela Withdraws from Andean Trade Pact', *United Press International* (blog), 22 April 2011, https://www.upi.com/Top_News/World-News/2011/04/22/Venezuela-withdraws-from-Andean-trade-pact/55211303497073/.

³⁶ 'Rwanda Withdraws Access to African Court for Individuals and NGOs | International Justice Resource Center', accessed 1 December 2019, <https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>; see also Tom Daly and Micha Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 6 March 2018), <https://papers.ssrn.com/abstract=3135130>.

World Bank's International Center for the Settlement of Investment Disputes and associated investment treaties, variously by Bolivia, Venezuela, Ecuador, South Africa, Indonesia, Italy and Russia, and an aborted withdrawal by Argentina.³⁷ Each of these cases has sparked the interest of researchers as well as policy communities, with government decisions again attributed to multiple factors in different accounts.³⁸

1.2. Towards a Cross-Sectoral Perspective

As the above examples illustrate, backlash against international courts has been cited in a variety of situations and has been associated with a multitude of – in some instances common – causal drivers. In addition to studies of individual tribunals, moreover, there are also nascent efforts to address trends in international adjudication more broadly, including a number of studies of international tribunal authority and legitimacy.³⁹

Perhaps most ambitious in scope, the role of what are termed 'contextual factors' in international tribunal backlash are examined in a 2016 Law and Contemporary Problems symposium, a related edited volume, and a 2018 International Journal of Law in Context special edition. Featuring work led variously by Karen Alter, Laurence Helfer and Mikael Rask Madsen, backlash is treated in this literature as a particular form of challenge to tribunal authority, set within and influenced by the particular context of each institution.⁴⁰ This body of research provides extensive insight into the dynamics of international court authority, seeking

³⁷ On withdrawals from investment treaties and associated implications see Clint Peinhardt and Rachel L. Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment', *Global Policy* 7, no. 4 (1 November 2016): 571–76. More generally, see Michael Waibel, Nigel Blackaby, and Gabriel Bottini, eds., *The Backlash Against Investment Arbitration. Perceptions and Reality* (Austin, TX; Alphen aan den Rijn, NL; Frederick, MD: Kluwer Law International, 2010), 339–488.

³⁸ Compare eg Alter, Gathii, and Helfer, 'Backlash against International Courts in West, East and Southern Africa'; Ryan Brutger and Anton Strezhnev, 'International Disputes, Media Coverage, and Backlash Against International Law', 21 May 2018, https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/f/164/files/2018/07/Paper_5-21-2018-2j16nmg.pdf; Leslie Vinjamuri, 'Human Rights Backlash', in *Human Rights Futures*, ed. Stephen Hopgood, Jack Snyder, and Leslie Vinjamuri (Cambridge UK; New York, NY: Cambridge University Press, 2017), 114–34; Achiume, 'The SADC Tribunal: Socio-Political Dissonance and the Authority of International Courts'.

³⁹ See eg Grossman et al., *Legitimacy and International Courts*; Alter, Helfer, and Madsen, *International Court Authority*; Avidan Kent, Nikos Skoutaris, and Jamie Trinidad, *The Future of International Courts: Regional, Institutional and Procedural Challenges* (London, UK: Routledge, 2018).

⁴⁰ See Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, eds., 'Special Issue: The Variable Authority of International Courts', *Law and Contemporary Problems* 79, no. 1 (2016); Alter, Helfer, and Madsen, *International Court Authority*; Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', *International Journal of Law in Context* 14, no. 2 (2018): 197–220, <https://doi.org/10.1017/S1744552318000034> Madsen, Cebulak, and Wiebusch, 'Backlash Against International Courts' (and related contributions in 2018 special edition of International Journal of Law in Context).

to ‘develop a generalizable framework to analyse the variable authority of [international courts] operating in different parts of the world’.⁴¹

This literature remains limited, however, in its ability to generate insights into the causal drivers - or implications - of tribunal backlash. Rather, the focus on broadly conceived ‘contextual factors’ in court authority, while helpful and illuminating, falls short of specifying more or less salient factors in tribunal backlash, let alone causal mechanisms and indicators through which these may operate, impact and be evidenced. Nor have researchers working in this vein to date sought to undertake systematic cross-sectoral analysis of the occurrence or inhibition of backlash, or its potential implications for international adjudication or the rules-based international system generally.

1.3. Backlash: Quo Vadis?

Significant inroads have been made in improving understanding of international tribunal backlash - and of tribunal resistance more generally. Important challenges to cross-sectoral causal analysis of backlash also emerge, however, from existing studies.

Foremost amongst these is the question of what should be understood by ‘tribunal backlash’. Definitional questions aside, further issues also arise. Principally, reflecting the variety of factors that have been identified to date as salient to backlash in different instances, and the scope for further such considerations to be identified, it is not clear that the studies undertaken to date individually or together provide a sufficient basis for causal analysis of backlash as a cross-sectoral phenomenon.

The possible exception to this is the practice-based approach adopted by Alter et al and Madsen and colleagues, which draws on practice theory to ‘reflect the interaction of legal, social, and political structures and the agentic actions of audiences situated within these structures.’⁴² This approach, however, presents further challenges: in particular, the practice theory-based model

⁴¹ Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, ‘Conclusion: Context, Authority, Power’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford, UK: Oxford University Press, 2018), 435.

⁴² Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, ‘International Court Authority in a Complex World’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford: Oxford University Press, 2018), 13, <https://doi.org/10.1093/oso/9780198795582.003.0001>. As put by David McCourt: ‘[p]ractice theory draws attention to everyday logics in world politics. It contends that actors are driven less by abstract forces—such as the national interest, preferences, and social norms—than by practical imperatives, habits, and embodied dispositions.’ (‘Practice Theory and Relationalism as the New Constructivism’, *International Studies Quarterly* 60, no. 3 (2016): 475.)

is simply not designed to serve as a basis for parsimonious ‘if-then’ explanatory theorising about the causes of international tribunal backlash.

The aim of the present endeavour, in contrast, is to develop a generalisable theoretical framework for causal analysis of government backlash against international courts as a cross-sectoral political puzzle. Given this objective and bearing in mind the limitations of both cross-sectoral and institution-specific research to date, an ‘analytically eclectic’ approach to international tribunal backlash drawing on IR’s ‘main theoretical camps’ has much to commend it. Such an approach is potentially capable of embracing many of the factors identified in existing literature on backlash, and fitting these within a coherent, pragmatically constrained, theoretical framework. Before constructing such a lens, however, a critical foundational task remains: how should ‘international tribunal backlash’ be understood for present purposes?

2. CONCEPTUALISING INTERNATIONAL TRIBUNAL BACKLASH

2.1. Introducing Backlash

Backlash has proven a problematic concept with which to grapple. The term has been described by Madsen et al, for example, as ‘not an analytical concept as such, but rather a common language notion of recoil, typically in terms of a negative reaction in the realm of politics.... a folk notion smuggled into social scientific analysis.’⁴³ While this may be correct, so-called ‘backlash’ against international institutions has nevertheless long-formed a focus of policy and scholarly concern.⁴⁴ Indeed, reference to backlash appears, if anything, to be becoming increasingly commonplace in writing on international adjudication, reflecting what Joe Powderly has described as ‘a burgeoning literature unpacking the dynamics of ‘backlash’ against international courts from a socio-legal and international relations theory perspective.’⁴⁵

⁴³ Madsen, Cebulak, and Wiebusch, ‘Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts’, 199.

⁴⁴ See eg Karen J. Alter, ‘The European Union’s Legal System and Domestic Policy: Spillover or Backlash?’, *International Organization* 54, no. 3 (2000): 490, <https://doi.org/10.1162/002081800551307>; Kathryn Sikkink, ‘The United States and Torture: Does the Spiral Model Work?’, in *The Persistent Power of Human Rights: From Commitment to Compliance*, ed. Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (Cambridge, UK: Cambridge University Press, 2013), 150. There is also a developing line of research examining the ‘politics of backlash’: see Karen J. Alter and Michael Zürn, ‘Backlash Politics: Introduction to a Symposium on Backlash Politics in Comparison’, *British Journal of Politics and International Relations (Forthcoming)*, 6 November 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481735; Karen J. Alter and Michael Zürn, ‘Theorizing Backlash Politics’, *British Journal of Politics and International Relations (Forthcoming)*, 25 November 2019, <https://doi.org/10.2139/ssrn.3493079>.

⁴⁵ ‘International Criminal Justice in an Age of Perpetual Crisis’, *Leiden Journal of International Law* 32, no. 1 (2019): 8–9.

Powderly's observation notwithstanding, there is as yet no apparent consensus amongst scholarly or policy communities as to the key attributes of backlash against international courts. Accordingly, before proceeding further, and reflecting both the prevalence and persistence of the term in the literature, it is important to delineate more precisely how tribunal backlash should be understood in the current context.

2.2. Backlash, Pushback, and Methodological Challenges

Perhaps the most fundamental distinction to be drawn is between backlash and less problematic resistance or 'pushback' to international courts, defined by Madsen, Cebulak, and Wiebusch as: 'ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law'.⁴⁶ Backlash, in contrast, is understood by the latter as a form of 'extraordinary resistance challenging the authority of a [tribunal]'.⁴⁷ Sandholtz, Bei, and Caldwell similarly characterise backlash as 'actions that go beyond resistance'.⁴⁸

This distinction is intuitively compelling. Madsen, Sandholtz, et al, moreover, also provide potentially generalisable bases for cross-sectoral examination of backlash, to a greater degree than other proposed definitions.

Writing in a human rights context, for example, Leslie Vinjamuri refers to backlash against international justice as characterised by a 'violent reaction by targeted spoilers who respond to the threat of trials by digging in their heels and fighting to the death'.⁴⁹ Various elements of this vision, however, remain problematic: the requirement for a trial is unnecessary, for example, where backlash may reflect frustration with broader trends in court conduct, potentially absent individual cases or disputes. Indeed, challenges to international court authority and/or viability may reflect a range of actor concerns about specific court measures or about general patterns of court behaviour, with or without a distinct case to 'break the camel's back'. Vinjamuri, moreover, privileges a narrow range of drivers of backlash -

⁴⁶ Madsen, Cebulak, and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 13. See also: Sandholtz, Bei, and Caldwell, 'Backlash and International Human Rights Courts', 160–61.

⁴⁷ Madsen, Cebulak, and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 23.

⁴⁸ 'Backlash and International Human Rights Courts', 160.

⁴⁹ Vinjamuri, 'Human Rights Backlash', 120. Rochelle Terman similarly refers to norm 'defiance' – characterised as 'the net increase in the commitment to or incidence of norm-offending behavior caused by a defensive reaction to norm sanctioning.' ('Rewarding Resistance: Theorizing Defiance to International Norms' (Center for International Security & Cooperation Stanford University, August 2017), 5, http://rochelleterman.com/wp-content/uploads/2014/08/4b_Defiance.pdf.)

opposition to actor interests and values - whereas government and other actors' policy decisions may reflect a much broader constellation of factors.

Madsen, Sandholtz et al, in contrast, provide broader understandings of backlash, where the most critical features are the aims and objectives sought that go beyond common-or-garden variety tribunal resistance: in Sandholtz et al's account, the 'aim to reduce the authority, competence, or jurisdiction of the court',⁵⁰ and in Madsen et al's reading, 'the goal of not only reverting to an earlier situation of the law, but also transforming or closing the [court]' or 'changing the 'rules of the game' by limiting the competences or abolishing an [international court]'.⁵¹ In contrast to Vinjamuri, Madsen, Sandholtz et al also leave open the possibility that backlash may arise from actors other than those directly 'targeted' by a court.

These understandings are still limited in important respects, though. Most importantly, the aims and objectives Madsen, Sandholtz et al associate with backlash may be less extraordinary than they suggest. Governments and other actors regularly engage as a matter of course in various forms of 'voice', including to effect changes in the mandates and working methods of international courts. Indeed, it is far from unusual for these institutions to be in flux as different constituencies challenge and seek to affect court operations, whether characterised as ordinary resistance, pushback or otherwise. In similar fashion, exit or steps towards exit from court jurisdiction may not necessarily constitute backlash, even where associated with longstanding dissatisfaction with elements of court conduct.⁵²

Put simply, to consider as backlash potentially all behaviour aimed at effecting more or less significant institutional change or withdrawal from court jurisdiction, or even institutional closure, even where set against a background of dissatisfaction with a court's conduct, risks mistaking for backlash conduct better considered part of the ordinary course of international law (re-)making and institutional evolution.⁵³

To be fair, Sandholtz, Madsen and colleagues could respond to this last observation by underlining that backlash should go beyond such everyday legal business to encompass only

⁵⁰ 'Backlash and International Human Rights Courts', 160.

⁵¹ 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 13.

⁵² See Andreas Hofmann, 'Resistance against the Court of Justice of the European Union', *International Journal of Law in Context* 14, no. 2 (June 2018): 259. ('The CJEU hardly topped the list of villains in the "Leave" camp.')

⁵³ See in this vein Hilary Charlesworth, 'International Law: A Discipline of Crisis', *The Modern Law Review* 65, no. 3 (2002): 377–92.

extraordinary forms of resistance aimed at ‘changing the rules of the game’.⁵⁴ It can be challenging, though, to distinguish the ordinary from the extraordinary by reference to actor aims. The evolution of the mandates, composition and operation of the ECtHR and CJEU, for example, illustrates that even fundamental institutional transformation may not be associated with what might usually be thought of as backlash on the part of one or another group of actors.

Equally, backlash may conceivably manifest in respect of tribunals absent any apparent intention to change the rules of the game. States may, for example, withdraw ICJ optional clause declarations without evincing any such intention, let alone hope. Beyond this measure, moreover, and reflecting the integral position of the ICJ in the UN Charter, there are few avenues for governments to seek to ‘reduce the authority, competence, or jurisdiction’ of that institution, let alone ‘transforming or closing’ it. This notwithstanding, there are arguably instances of state behaviour and attitudes towards the ICJ, particularly where the court has been publicly denigrated or where domestic actors have sought to vitiate its measures, that should properly be considered - and indeed have been referred to - as “backlash”.⁵⁵ Requiring instances of backlash to manifest such specific intentions or aims risks overlooking cases that should properly be so categorised.

Restricting understandings of backlash to cases fitting within such a narrow lens also risks utilising a definition that is not capable of ‘travelling’ effectively across (at least) all permanent international judicial institutions, particularly those integral to complex multilateral institutions. As US and Israeli experiences with the ICJ attest, for example, there is no realistic prospect of reshaping or altogether withdrawing from the reach of that court: the same may also arguably be said of (to name one further example) the CJEU. In short, the definitions provided by Madsen, Sandholtz et al, while valuable in many respects, are poorly placed to identify instances of backlash against tribunals where structural or institutional features preclude the manifestation of the objectives they rely on as intrinsic to that phenomenon.

⁵⁴ Madsen, Cebulak, and Wiebusch, ‘Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts’, 203.

⁵⁵ See eg Francesco Francioni, ‘From Utopia to Disenchantment: The Ill Fate of “Moderate Monism” in the ICJ Judgment on The Jurisdictional Immunities of the State’, *European Journal of International Law* 23, no. 4 (17 December 2012): 1128, <https://doi.org/10.1093/ejil/chs076>. In similar vein Marko Milanovic also notes in respect of the recent suit brought by Palestine against the US the risk of opening “the door to the Court deciding disputes over territorial sovereignty without the consent of the parties (think e.g. Crimea) which could provoke the type of backlash that the Court has historically been quite wary of.” (‘EJIL: Talk! – Palestine Sues the United States in the ICJ Re Jerusalem Embassy’, accessed 12 November 2019, <https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy/>.)

Rather, a more context-neutral definition of backlash, capable of speaking to the experiences of the broadest possible range of international tribunals, would be preferable.

The focus of Madsen, Sandholtz et al on actor aims and objectives also gives rise to methodological difficulties. Perhaps most critical is the need to effectively ‘look inside the heads’ of the actors promoting and participating in international tribunal opposition to identify aims and objectives. While this may be feasible to some degree in the narrow confines of an in-depth case study, or even a limited group of such studies, conceived on a broader scale accurately identifying actor aims and objectives becomes extremely challenging. Evidentiary impediments are particularly significant: contemporaneous - including first-hand - accounts of apparent backlash may not reveal actors’ true aims. Even triangulating amongst multiple primary and secondary sources may prove misleading.⁵⁶

A further conceptual challenge arises from limiting identification of cases of backlash to instances where actor behaviour arises from dissatisfaction with or concern about a relatively narrow range of tribunal behaviour or features such as tribunal competences or jurisdiction. This presumption can make it more difficult to distinguish the drivers of backlash – its *explanantia* – from its manifestations, insofar as tribunal or actor claims about such behaviour or features may themselves form part of the causal pathways *leading to* backlash. While not necessarily an issue in other contexts, this presents a further potential impediment where the object of the exercise is to identify the causes of backlash.

In short, actor aims and objectives are a problematic basis from which to infer the presence or absence of international tribunal backlash. Actors may seek to transform, withdraw from, or close tribunals simply as part of the ordinary course of international law making and remaking. Likewise, governments and others may present significant challenges to institutional authority and viability even absent any attempt to reshape, transform, or withdraw from a tribunal and/or associated regime.

2.3. From *Aims and Objectives* to *Attitudes and Behaviour*

Given the difficulties set out above, it may make more sense to seek to identify backlash as manifested in the *behaviour* and *attitudes* of actors resisting international tribunals, rather than seeking to discern and rely on actor aims and objectives. This proposal reflects the greater

⁵⁶ See Alan M. Jacobs, ‘Process Tracing the Effects of Ideas’, in *Process Tracing: From Metaphor to Analytic Tool*, ed. Andrew Bennett and Jeffrey T. Checkel, Strategies for Social Inquiry (Cambridge: Cambridge University Press, 2015), 45.)

susceptibility of the former to (more) reliable, objective identification than the latter, as well as the distinction that can be drawn between actor behaviour and attitudes (as outcomes) and the causal factors underlying and shaping these. This approach accordingly enhances both the prospect of arriving at a conception of backlash capable of being deployed across the broadest possible range of international tribunals, and in turn scope to conduct causal analysis of backlash at scale across sectors and institutions.

With these considerations in mind, the definition of backlash put forward by David Caron and Esme Shirlow, adapting Cass Sunstein's work on public backlash against US Supreme Court rulings, may open a valuable avenue to facilitate analysis. Caron and Shirlow, working primarily in the context of investment arbitration, define backlash as '[i]ntense and sustained public disapproval of a system accompanied by aggressive steps to resist the system and to remove its legal force'.⁵⁷ The emphasis on 'intense and sustained', and 'aggressive' actor behaviour as hallmarks of backlash resonates particularly closely with the call for a shift to more context-neutral, objectively measurable criteria for the identification of this phenomenon.

That said, a few further modifications are required for present purposes. Firstly, where Caron and Shirlow refer to disapproval of a 'system', and Sunstein to disapproval of 'judicial ruling[s]', it makes sense to refer more broadly in the context of international courts to disapproval of 'tribunal conduct'. While retaining the sense of backlash as a *response* to some stimulus, this language is agnostic as to the forms of tribunal behaviour to which backlash may respond. This phrasing also recognises that backlash may occur against court conduct *ex post*, as well as in anticipatory fashion: indeed, the *prospect* of tribunal conduct may be sufficient to prompt backlash, especially in respect of issues of particular sensitivity to the actor(s) concerned.⁵⁸

⁵⁷ David Caron and Esme Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences', in *The Judicialization of International Law: A Mixed Blessing?*, ed. Andreas Follesdal and Geir Ulfstein (Oxford, UK: Oxford University Press, 2018), 160. This definition is adapted from Sunstein's definition of public backlash in the context of US Supreme Court rulings as '[i]ntense and sustained public disapproval of a judicial ruling, accompanied by aggressive steps to resist that ruling and to remove its legal force.' (Cass R. Sunstein, 'Backlash's Travels', *Harvard Civil Rights-Civil Liberties Law Review* 42, no. 2 (2007): 435.) See in similar vein (i.e. focusing on behaviours and attitudes towards tribunals) Soley and Steininger's definition of backlash as 'a process of systematic and consistent criticism of the institutional set-up of an [international court] as well as severe instances of non-compliance'. ('Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', *International Journal of Law in Context* 14, no. 2 (2018): 241.)

⁵⁸ See discussion of Serbian government attitudes to the ICTY in Henry Lovat, 'International Criminal Tribunal Backlash', in *Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al. (Oxford, U.K.: Oxford University Press, 2020), 601–25.

Second, the reference to ‘removing legal force’ may be removed. In the context of a domestic court, this is readily understandable. In an international context, however, Caron and Shirlow are unnecessarily restrictive. As noted above, backlash may conceivably take place without any specific attempt to reverse a legal measure, let alone challenge or revoke the formal authority of an institution. An actor could conceivably denounce a measure, institutional behaviour, or the relevant institution generally - in all instances potentially meriting the label of backlash - without necessarily taking any steps to ‘remove the legal force’ of an institution or an impugned measure. Moreover, just as backlash may be a reaction to actual or potential tribunal conduct, opposition to a tribunal may also manifest in resistance to or ‘concern about’ one or more forms of tribunal behaviour, as much as in straightforward opposition to or denunciation of a tribunal.

The reference to disapproval as necessarily ‘sustained’ may also be removed. In an international context, where tribunals are relatively more fragile in terms of authority and institutional sustainability than their domestic counterparts, and where jurisdiction is typically founded on state consent, institutions may be more susceptible to backlash in the form of ‘short, sharp shocks’ – particularly from the governments of relatively powerful states - in comparison to their domestic counterparts facing broader-based social or political pushback/backlash. Reflecting this, for present purposes, the requirement for disapproval to be sustained is omitted in favour of a better-tailored requirement for such disapproval to be intense - that is, manifest to ‘a strained or very high degree’.⁵⁹

One further adaptation of Caron and Shirlow’s/Sunstein’s understanding of backlash should be highlighted. The present enquiry is interested above all in opposition to international courts as manifested in the behaviour and attitudes of *particular governments* rather than other actors, or groups of actors or governments collectively. While a departure from Caron and Shirlow’s and Sunstein’s approach, this focus on governments is ultimately reflective of the political and institutional reality in which international tribunals exist and operate.

Fundamentally, the focus on government behaviour and attitudes recognises that states remain the ultimate ‘mandate providers’ of international courts.⁶⁰ Sub-state and transnational discontent with international adjudication are of course phenomena worthy of study.

⁵⁹ See Oxford English Dictionary, “‘intensity, n.’”, n.d., <https://www.oed.com/view/Entry/97479?redirectedFrom=intensity&>.

⁶⁰ Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’.

International tribunals are essentially insulated from direct public and civil society pressure, however: if governments continue to support an international court it may continue to operate or even thrive notwithstanding popular support or opposition. In contrast, even if there is widespread transnational/sub-state support for an international tribunal, this is no guarantee that governments will continue to support the institution in question.

These considerations are recognised, albeit in many cases implicitly, throughout current literature on international adjudication. Frédéric Mégret, for example, highlights that the ICC, like other international courts, is ‘highly dependent on the good will of sovereigns’, and ‘embedded... in the fabric of sovereignty.’⁶¹ Madsen et al similarly observe that: ‘certain forms of actions require the involvement of governments, notably in many of the actions we describe as backlash: institutional reform, blocking appointments or withholding funding’.⁶² State support is likewise recognised by Alter, Helfer, and Madsen as the ‘Achilles heel’ of international tribunals.⁶³

A range of further studies similarly examine resistance to international tribunals through the lens of government disaffection.⁶⁴ For present purposes, therefore, reflecting the above adaptations to Caron and Shirlow’s/Sunstein’s conceptions, backlash may be understood as: *intense government disapproval of international tribunal conduct, accompanied by aggressive steps to resist such conduct or against such tribunal more broadly.*

2.4. Indicators and Evidence

The principal advantage of the definition of backlash set out above is that it enables backlash to be identified across tribunals by reference to the behaviour and attitudes of a specified set of actors. Conceptualising backlash in this fashion in turn facilitates cross-institutional and

⁶¹ Frédéric Mégret, ‘ICC, R2P, and the International Community’s Evolving Interventionist Toolkit’, in *Finnish Yearbook of International Law: Volume 21, 2010*, ed. Jan Klabbers, 1st ed., Finnish Yearbook of International Law (London: Hart Publishing, 2013), 36, <http://www.bloomsburycollections.com/book/finnish-yearbook-of-international-law-volume-21-2010/icc-r2p-and-the-international-community-s-evolving-interventionist-toolkit/>.

⁶² Madsen, Cebulak, and Wiebusch, ‘Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts’, 215.

⁶³ ‘Conclusion: Context, Authority, Power’, 451.

⁶⁴ See eg Alter, Gathii, and Helfer, ‘Backlash against International Courts in West, East and Southern Africa’; Boehme, ‘“We Chose Africa”’; Helfer, ‘Overlegalizing Human Rights’; Laurence R. Helfer and Anne E. Showalter, ‘Opposing International Justice: Kenya’s Integrated Backlash Strategy against the ICC’, *International Criminal Law Review* 17, no. 1 (2017): 1–46; Lovat, ‘International Criminal Tribunal Backlash’; Susan Marks, ‘Backlash: The Undeclared War against Human Rights’, *European Human Rights Law Review* 4 (2014): 319–327; Sandholtz, Bei, and Caldwell, ‘Backlash and International Human Rights Courts’; Soley and Steininger, ‘Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights’; Øyvind Stiansen and Erik Voeten, ‘Backlash and Judicial Restraint: Evidence from the European Court of Human Rights’, *SSRN ELibrary*, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166110.

sectoral causal analysis of backlash by focusing attention on relatively objectively identifiable characteristics of this phenomenon. Two sets of indicators can be specified as associated with backlash so conceived.

The first set of indicators flows from ‘intense’ disapproval, manifest to ‘a strained or very high degree’. This may be seen, for example, in such disapproval forming a distinct, prominent element of government policy: we may accordingly anticipate international courts experiencing backlash to be the subject of *pointed, public government criticism*. Importantly, to constitute tribunal backlash, the institution itself, or its actual or potential conduct, should be the subject of such critical comment, though this may of course be situated within (and enabled by) criticism of the broader legal or political regimes in which courts are situated.

Second, backlash should also be characterised by *aggressive steps to resist* court conduct or opposing a tribunal more generally. Such steps may take a variety of conceivable forms, including but not limited to non-compliance with tribunal requirements, ranging into treaty denouncement, explicitly seeking to reshape or otherwise constrain or denigrate a court or its conduct, or seeking to close a tribunal altogether.

Measures may also be substantively aggressive without necessarily being overtly so. A government may seek, for example, to resist tribunal behaviour by technical or ‘rule by law’ means (such as withholding consent where consensus is required for judicial appointments), rendered no less aggressive by being pursued within the four corners of a tribunal’s constitutive or regulative agreement.⁶⁵ Similarly, governments may pursue political understandings which, while falling short of placing legally binding constraints on tribunals, may nevertheless be understood by tribunal members and staff as boding poorly for continued support for the tribunal if not heeded. That said, in each case, and even where not aimed at achieving one of the measures specified by Sandholtz, Madsen et al, the steps taken and measures pursued may be expected to be confrontational rather than conciliatory vis à vis the tribunal(s) in question.

Pace Hemingway, backlash is a moveable feast. This need not mean, though, that the concept should be abandoned as an under-specified ‘folk notion’. Rather, by focusing identification of backlash on two sets of ex ante identified characteristics and associated indicators, the definition set out above provides a solid conceptual and methodological foundation for

⁶⁵ See Alter, ‘Critical Junctures and the Future of International Courts in a Post-Liberal World Order’, 21.

systematic cross-sectoral examination of the causes - and accordingly the prospects for effective management and amelioration - of tribunal backlash.

3. A PLURALIST APPROACH TO TRIBUNAL BACKLASH

3.1. Why a Pluralist Approach?

Existing research highlights a range of potential drivers of backlash and other forms of tribunal resistance. Notwithstanding the growing sophistication of this literature, however, exercises to date have either been largely inductive - highlighting factors that are predominantly identified in the course of empirical examination⁶⁶ - or have focused on only a narrow set of pre-specified factors contributing to tribunal backlash and resistance.⁶⁷

Each approach may identify important factors with a bearing on backlash. They also, however, harbour potentially significant weaknesses where the object of the exercise is to provide a coherent, comprehensive explanatory account of backlash across multiple contexts. Inductive studies, for example, risk focusing on micro-factors at the expense of less immediately apparent background drivers of state-tribunal interaction. Focusing on only a narrow set of pre-selected factors similarly risks overlooking potentially important further considerations shaping government behaviour. Recent developments in International Relations theory, however, may provide a means to ameliorate these handicaps, by enabling the adoption of a tailored, theoretically structured 'pluralist' lens for the analysis of tribunal backlash.

At the heart of the shift towards theoretical pluralism in IR lies recognition that multiple research traditions have persisted within the discipline primarily because they each shed light on different, important aspects of international political behaviour.⁶⁸ In the context of backlash, a pluralist theoretical lens accordingly enables progress to be made by situating work to date

⁶⁶ Eg Alter, Gathii, and Helfer, 'Backlash against International Courts in West, East and Southern Africa'.

⁶⁷ Eg Mills and Bloomfield, 'African Resistance to the International Criminal Court'.

⁶⁸ On the 'pluralist turn' in IR see variously eg Jeffrey T. Checkel, 'Theoretical Pluralism in IR: Possibilities and Limits', in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth Simmons, 2nd Edition (London, UK: Sage, 2012), 220–41; Laura Neack, ed., 'Forum: Pluralism in IR Theory', *International Studies Perspectives* 16, no. 1 (2015); Colin Wight, Tim Dunne, and Lene Hansen, eds., 'Special Issue: The End of International Relations Theory?', *European Journal of International Relations* 19, no. 3 (2013). See also related discussion in Henry Lovat, *Negotiating Civil War: The Politics of International Regime Design* (Cambridge, UK: Cambridge University Press, 2020), chap. 1. The term 'research tradition' (and equally 'theoretical approaches' or 'camps') refers to 'a set of methodological and ontological "do's" and "don'ts"'. (Larry Laudan, *Progress and Its Problems: Towards a Theory of Scientific Growth* (Berkeley and Los Angeles, CA: University of California Press, 1978), 80.)

within these research traditions and by using insights informed by these bodies of theory to inform analysis of backlash in different contexts.

In short, IR's pluralist turn can provide a theoretical scaffold, capable of embracing a range of likely important determinants of backlash within a single, problem-oriented analytic framework. By drawing attention to a range of potential drivers of backlash structured in this fashion, such a framework is more likely to provide more comprehensive, persuasive and valuable accounts of both individual manifestations of backlash, and of the potential causes of backlash more broadly across sectors and institutions, than available in the current literature.⁶⁹

Theoretical pluralism is not necessarily a straightforward endeavour, however. With this in mind, the following section sets out the basis for an 'analytically eclectic' approach to theorising about international tribunal backlash, setting out the principal attributes of this approach, along with its advantages and associated challenges.

3.2. Which Pluralism?

Analytical eclecticism, as developed principally by Sil and Katzenstein, envisions a 'tool-kit' approach to theorising about international politics, 'seek[ing] to extricate, translate, and selectively integrate analytic elements... of the theories or narratives that have developed within separate [theoretical] paradigms but that address related aspects of substantive problems'.⁷⁰ The focus on building on existing traditions without seeking to supplant, replace, or synthesise these positions analytic eclecticism well to generate cumulative knowledge about international affairs: indeed, eclecticism has 'rapidly become part of mainstream debates about the kind of knowledge... to pursue and how (this) is best attained.'⁷¹

Rather than seek to synthesise insights from existing traditions by generating novel self-standing theories, risking further cramping a crowded field already prone to conceptual

⁶⁹ As put by Katzenstein and Okawara, 'the complex links between power, interest, and norms defy analytical capture by any one paradigm.' (Peter Katzenstein and Nobuo Okawara, 'Japan, Asian-Pacific Security, and the Case for Analytical Eclecticism', *International Security* 26, no. 3 (2002): 154.)

⁷⁰ Rudra Sil and Peter Katzenstein, *Beyond Paradigms: Analytic Eclecticism in the Study of World Politics* (New York, NY: Palgrave Macmillan, 2010), 10; Rudra Sil and Peter Katzenstein, 'Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions', *Perspectives on Politics* 8, no. 02 (2010): 412.

⁷¹ Christian Reus-Smit, 'Beyond Metatheory?', *European Journal of International Relations* 19, no. 3 (2013): 591. David Lake has similarly termed analytic eclecticism "the only real alternative to the status quo". ('Why "Isms" Are Evil: Theory, Epistemology, and Academic Sects as Impediments to Understanding and Progress', *International Studies Quarterly* 55, no. 2 (2011): 472.

proliferation,⁷² an eclectic approach is instead built around and retains reference to concepts situated in the theoretical contexts in which they have been developed.⁷³ This approach is accordingly relatively well-placed to render the resultant insights intelligible to audiences both more and less well versed in IR theory, as well as ‘captur[ing] the interactions among different types of causal mechanisms normally analyzed in isolation from each other.’⁷⁴

Developing and applying an analytically eclectic theoretical framework still requires care, however, in particular to address: (a) the risk of open-ended, ‘kitchen-sink’ theorising, and (b) the risk of incoherence arising from adapting together insights reflecting varying ontological and epistemological commitments.

Taking these in turn, a key difficulty with developing an analytically eclectic theoretical framework in a disciplinary context embracing a range of theoretical perspectives is identifying ‘where to stop’, such that it is possible to say more than that ‘everything - somehow - matters’.⁷⁵ There are a number of potential means of addressing this issue. Perhaps the most straightforward, however is to seek to derive insights from those research traditions in IR that have been identified as constituting the main ‘camps... that give international relations its distinctive sociological structure’: in the present context, realism, rationalism, liberalism, and conventional constructivism.⁷⁶ This choice also assists in ensuring theoretical coherence by enabling the adoption of a lens with a consistently positivist epistemological orientation: this

⁷² Lake suggests, for example, the development of ‘modular theories - separate, self contained, and partial theories - that connect more or less well to other theories to carry out larger explanatory tasks.’ (Lake, ‘Why “Isms” Are Evil: Theory, Epistemology, and Academic Sects as Impediments to Understanding and Progress’, 473.)

⁷³ For alternative ‘pluralist’ approaches see eg Colin Elman, ‘Explanatory Typologies in Qualitative Studies of International Politics’, *International Organization* 59, no. 2 (2005): 293–326; Jörg Friedrichs and Friedrich Kratochwil, ‘On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology’, *International Organization* 63, no. 04 (2009): 701–31; Andrew Moravcsik, ‘Theory Synthesis in International Relations: Real Not Metaphysical’, *International Studies Review* 5, no. 1 (2003): 131–36.

⁷⁴ Sil and Katzenstein, ‘Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions’, 412.

⁷⁵ The extent to which tribunal backlash may reflect a multiplicity of institutional, constituency, and political contextual factors, and the challenge in making sense of these in the absence of an ex ante theoretical lens, may be seen in the recognition by Alter et al, that the framework of eight ‘contextual’ factors they identify as having a bearing on tribunal authority ‘is only illustrative rather than exhaustive and points to the overlap and interdependence across different categories of context’. (Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, ‘How Context Shapes the Authority of International Courts’, in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (Oxford: Oxford University Press, 2018), 36, <https://doi.org/10.1093/oso/9780198795582.003.0002>.)

⁷⁶ Peter Marcus Kristensen, ‘International Relations at the End: A Sociological Autopsy’, *International Studies Quarterly* 62, no. 2 (2018): 245. Kristensen refers to realist, liberal institutionalist, and constructivist ‘isms’: these categories may, however, of course be debated - and indeed, the second is reconfigured and disaggregated for present purposes, reflecting the prominence of ‘liberal’ theorising in international law scholarship.

reflects the traditional (scientific) positivist associations of these camps, consistent with the objective of providing causal analysis of tribunal backlash.

This selection is not cost-free: the turn to epistemic positivism in particular excludes interpretivist, post-positivist approaches to ‘understanding’ international affairs. This choice may be justified, however, by the consistency of a positivist approach with much of mainstream social science, optimally positioning the resultant eclectic lens to contribute – to the extent possible - to the cumulation of knowledge about international affairs. Whereas an interpretivist epistemological orientation may be more closely associated with close reading of texts and discourse to uncover the hermeneutic significance of phenomena, a positivist orientation is better positioned to facilitate a mixed methods approach to causal, explanatory analysis, embracing both case studies and traditional statistical methodologies. This combination in turn enhances the robustness of the endeavour to systematically (and systemically) identify the principal drivers of tribunal backlash, with a view to deriving insights capable of enabling improved, more effective policy responses to this phenomenon.

3.3. An Analytically Eclectic Approach to Tribunal Backlash

Building on the previous discussion, the present section identifies realist, rationalist, liberal and conventional constructivist-derived insights into international tribunal backlash. This exercise starts from the presumption that insights derived from these different traditions are likely to illustrate a significant portion of the repertoire of causal factors and mechanisms contributing to backlash and recognises the valuable taxonomic function of these traditions. The discussion also illustrates how existing work on tribunal backlash can be accommodated within this theoretical framework.

3.3.1. *Realist Backlash*

Realism in IR has traditionally been associated with an emphasis on the extent to which state behaviour and international politics generally is shaped by material power and its pursuit by states in an anarchic international environment, with Kenneth Waltz’s structural (or ‘neo-’) realism - emphasising the significance of differentials in the relative power of states - arguably the most influential variant of this school of thought.⁷⁷ Perhaps most (in)famously in respect of

⁷⁷ See Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 4th ed. (New York, N.Y.: Knopf, 1967); Kenneth Neal Waltz, *Theory of International Politics* (New York, NY: McGraw-Hill, 1979). Also generally Jack Donnelly, ‘Realism’, in *Theories of International Relations*, ed. Scott Burchill et al., 3rd ed. (New York, NY: Palgrave Macmillan, 2005), 29–54; John Mearsheimer, ‘Structural Realism’, in *International Relations Theories: Discipline and Diversity*, ed. Timothy Dunne, Milja Kurki, and Steve Smith,

international law, John Mearsheimer has argued that international legal regimes are likely to reflect the interests and preferences of the most powerful states in the international system, and so less (if at all) determinative of the behaviour of the latter than that of less powerful states.⁷⁸

It is arguably futile to attempt to identify a fixed core of realist thought.⁷⁹ In line with Mearsheimer's position though, and consistent with the tenets of Waltzian structural realism, backlash is perhaps best understood from a realist perspective as a policy choice reflecting the relative power of a given state in a regional or global setting. This would suggest that governments of more powerful states are more likely to be inclined to resist – including authoring backlash against – inconvenient international legal constraints and institutions than those of less powerful states. The latter in contrast, are likely to be more constrained by international legal institutions, not least where these have the backing of powerful states.

Perhaps unsurprisingly, realist accounts form a prominent strand in scholarship on international adjudication. Kenneth Rodman, for example, underlines that the effectiveness of international criminal tribunals can depend on the preferences and capacities of materially powerful states.⁸⁰ This is not, of course, to rule out the possibility of backlash being driven by the governments of relatively less powerful states: in such instances, though, we might also expect to see evidence of accompanying support from regional or global powers.

3.3.2. Rationalist Backlash

Rationalist approaches to international politics emphasise that foreign policy choices tend to be determined by reasoned assessments of costs and benefits. While this research tradition embraces a multiplicity of perspectives on international cooperation and its limits, the recent

4th ed. (Oxford, UK: Oxford University Press, 2016); William C. Wohlforth, 'Realism', *The Oxford Handbook of International Relations*, 14 August 2008, <https://doi.org/10.1093/oxfordhb/9780199219322.003.0007>.

⁷⁸ John Mearsheimer, 'The False Promise of International Institutions', *International Security* 19, no. 3 (1994): 5–49. As observed by Susan Strange: "All those international arrangements dignified by the label regime are only too easily upset when either the balance of bargaining power or the perception of national interest (or both together) change among those states who negotiate them." ('Cave! Hic Dragones: A Critique of Regime Analysis', *International Organization* 36, no. 2 (1982): 487; cited in Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *International Organization* 36, no. 2 (1982): 190.)

⁷⁹ See Jeffrey Legro and Andrew Moravcsik, 'Is Anybody Still a Realist?', *International Security* 24, no. 2 (1999): 5–55. Also: Peter Feaver et al., 'Brother, Can You Spare a Paradigm? (Or Was Anybody Ever a Realist?)', *International Security* 25, no. 1 (2000): 165–93.

⁸⁰ Rodman, 'When Justice Leads, Does Politics Follow? The Realist Limits of Stigmatizing War Criminals through International Prosecution (CEEISA-ISA Joint Conference, Ljubljana, Slovenia, 25 June 2016)'. See in similar vein David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (New York, NY: Oxford University Press, 2013).

work of Barbara Koremenos on international institutional design provides a particularly relevant body of research from which to derive rationalist insights relating to backlash.⁸¹

Building on neoliberal institutionalist foundations, Koremenos makes the case that states design dispute resolution mechanisms rationally to solve collective action problems. Accordingly, tribunal backlash might be expected to arise where the costs of continued support for (or tolerating) a given tribunal significantly exceed the associated benefits. Put simply, governments can be expected to defect from - or *in extremis* author backlash against - international tribunals when court behaviour imposes or is likely to impose upon them potentially onerous costs.

Such costs may take the form, for example, of harm to important sub-state constituencies or interests (such as domestic industries, or prominent, strong social groups), or the imposition of domestically unpopular measures (such as banning the death penalty). Moreover, just as court behaviour will vary over time, so will government preferences and expectations, potentially rendering tribunal conduct considered advantageous in one context ineffective or worse in other instances. Indeed, governments may have incentives to undermine or otherwise oppose tribunals perceived as negatively affecting their interests, even where the states in question may not - as with the US and the ICC - formally be subject to tribunal jurisdiction.

This perspective is again consistent with notable interventions in debates over tribunal backlash. Sandholtz et al have argued, for example, that ‘governments are more likely to deem the costs... excessive the more [court decisions] are seen by national leaders as harming their domestic political interests.’⁸² In similar fashion, Daniel Abebe and Tom Ginsburg observe that: ‘[i]f the draw of costs and benefits reveals payoffs that are dramatically lower than those anticipated at the moment of institutional design, states may attempt to limit the activity of the

⁸¹ See Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (Cambridge, UK: Cambridge University Press, 2016). For examples of other ‘classic’ rationalist arguments (and underlying functionalist logic) see eg Robert O. Keohane, ‘The Demand for International Regimes’, *International Organization* 36, no. 2 (ed 1982): 325–55; Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984); Lisa Martin, ‘An Institutional View: International Institutions and State Strategies’, in *International Order and the Future of World Politics*, ed. T. V. Paul and John A. Hall (Cambridge, UK: Cambridge University Press, 1999), 78–98; Barbara Koremenos, Charles Lipson, and Duncan Snidal, ‘The Rational Design of International Institutions’, *International Organization* 55, no. 04 (2001): 761–99; James D. Morrow, *Order within Anarchy: The Laws of War as an International Institution* (Cambridge, UK: Cambridge University Press, 2014).

⁸² Sandholtz, Bei, and Caldwell, ‘Backlash and International Human Rights Courts’, 159.

court through some form of backlash.’⁸³ Perceived costs and benefits may change over time, moreover, even absent significant changes in court conduct: what may be a cost-effective adjudicatory regime for a state at time X may impose unacceptably high costs for that same state at time Y.

In terms of evidence enabling the identification of this expectation in operation, rational design should be characterised by a cost/benefit calculus on the part of government policy makers. While this may not be made explicit (it may be socially unacceptable for a government to state bluntly that the costs of regime support are outweighed by the benefits of backlash), it is nevertheless reasonable to expect informed observers and participants in policy-making to be aware that this is the case. Accordingly, even where public statements indicating the operation of a cost/benefit calculus are lacking, it should still be possible to glean information about the operation of such a mechanism in any given instance of backlash indirectly from the views of informed observers and participants in decision-making.

3.3.3. *Constructivist Backlash*

Constructivism provides a third research tradition, forming a meta-theoretical counterpoint to rationalist approaches to IR.⁸⁴ Within constructivism’s broad church, the positivist epistemological orientation of what has been termed ‘conventional constructivism’ makes this approach well-suited to the derivation of substantive hypotheses about state behaviour in relation to international tribunals.⁸⁵ Work in this vein seeks to illustrate the manner in which foreign policy behaviour and international politics more generally are shaped by social, as well as material and strategic factors. At the heart of much constructivist research lies the concept of international norms, understood as: ‘collective expectations for the proper behavior of actors

⁸³ Daniel Abebe and Tom Ginsburg, ‘The Dejudicialization of International Politics?’, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 29 November 2018), 525, <https://papers.ssrn.com/abstract=3293261>.

⁸⁴ On constructivism generally, see eg Emanuel Adler, ‘Constructivism in International Relations: Sources, Contributions and Debates’, in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, 2nd ed. (London, UK: Sage, 2013), 112–44; Ian Hurd, ‘Constructivism’, in *Oxford Handbook of International Relations* (Oxford, UK: Oxford University Press, 2008), 298–313; Alexander Wendt, ‘Anarchy Is What States Make of It: The Social Construction of Power Politics’, *International Organization* 46, no. 02 (1992): 391–425.

⁸⁵ Ted Hopf, ‘The Promise of Constructivism in International Relations Theory’, *International Security* 23, no. 1 (1998): 171–200.

with a given identity’,⁸⁶ with an accompanying focus on the factors that establish such norms, and strengthen and weaken their influence on state identity and behaviour.

Conventional constructivism is capable of embracing a range of means through which international norms may affect governments. Perhaps most prominent, however, is a focus on the susceptibility of governments to social pressure from transnational communities of norm entrepreneurs, potentially including other governments as well as non-state actors such as civil society and tribunals themselves.⁸⁷ Such pressure is brought to bear through the operation of a ‘logic of appropriateness’, the efficacy of which may vary depending, amongst other circumstances, on broader international discursive trends: the prevailing normative *Zeitgeist*.⁸⁸ At the heart of the constructivist claim here is that where realists and rationalists of various stripes commonly view state preferences as fixed, constructivism views state identities and preferences as socially constructed, and hence subject to change.

This is not to say that state identities are readily malleable, or that such identities are likely to be ‘at stake’ in everyday interstate interactions.⁸⁹ Rather this observation enables a more modest claim, that actor preferences are capable of being affected by social pressure, including in particular persuasion - the ‘quintessential constructivist mechanism.’⁹⁰

This perspective accordingly suggests that backlash may reflect social pressure on governments - accounts often refer to norm entrepreneurs ‘teaching’ governments - to conform to norms

⁸⁶ Peter J. Katzenstein, ‘Introduction: Alternative Perspectives on National Security’, in *The Culture of National Security: Norms and Identity in World Politics*, ed. Peter Katzenstein (New York, NY: Columbia University Press, 1996), 5.

⁸⁷ See eg Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization* 52, no. 4 (1998): 887–917; Audie Klotz, *Norms in International Relations: The Struggle against Apartheid* (Ithaca, NY: Cornell University Press, 1999); Thomas Risse, Stephen Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights* (Cambridge, UK: Cambridge University Press, 1999); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York, NY: W. W. Norton, 2011); Adam Bower, *Norms Without the Great Powers: International Law and Changing Social Standards in World Politics* (Oxford, U.K.: Oxford University Press, 2016).

⁸⁸ As put by Fehrl, the ‘constructivist moment’ here lies ‘in the process of persuasion, which contradicts the rationalist assumption that states act on the basis of fixed preferences’. (Caroline Fehrl, ‘Explaining the International Criminal Court: A “Practice Test” for Rationalist and Constructivist Approaches’, *European Journal of International Relations* 10, no. 3 (2004): 365.)

⁸⁹ Katzenstein and Okawara observe, for example, that: ‘[t]he redefinition of collective identities... is a process measured in decades, not years... Collective identity is [often] therefore less directly at stake than are trust and reputation.’ (Katzenstein and Okawara, ‘Japan, Asian-Pacific Security, and the Case for Analytical Eclecticism’, 174.)

⁹⁰ Elizabeth Stubbins Bates, ‘Sophisticated Constructivism in Human Rights Compliance Theory’, *European Journal of International Law* 25, no. 4 (2014): 1179. This term is itself, it should be noted, contested. See eg differing visions in Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’; Alastair Iain Johnston, *Social States: China in International Institutions, 1980–2000* (Princeton, NJ: Princeton University Press, 2014), 20, 155, 165.

advocated by broader communities of actors. The efficacy of such agency is in turn likely to be affected by the extent to which the behaviour or attitudes sought are consistent with broader international or regional normative trends.⁹¹ Viewed from this perspective, therefore, backlash and/or its absence may be expected to result from (a) social pressure from such communities to oppose or support an international tribunal in (b) a normatively permissive international environment, which may in turn be constituted by broader trends in regional or global political hostility towards or support for international governance institutions and regimes. Agent characteristics such as soft power, moral authority, and/or technical expertise may also be germane here, rendering one or another group of agents more or less potent norm entrepreneurs.⁹²

As with rationalist and realist-flavoured accounts, the salience of domestic and transnational social pressure to backlash and resistance against international tribunals is recognised in existing literature. Alter, Gathii, and Helfer, for example, highlight how the efficacy of tribunal backlash in sub-regional African contexts has been affected by the mobilisation of transnational non-governmental communities (government-independent bureaucracies, sub-regional parliaments, and civil society).⁹³ Taking a contrasting tack, Mills and Bloomfield highlight the risks posed to the ICC by norm ‘antipreneurs’.⁹⁴

In similar fashion in respect of the extent to which tribunal backlash may be facilitated or impeded by broader international normative tendencies, a growing literature on resistance to and withdrawal from international organisations also suggests that tribunal backlash may be linked to a broader trend amongst governments to disparage international institutions and regimes.⁹⁵ Alter, for example, raises the prospect of international courts and the liberal international order suffering a ‘joint fate’ with the potential waning of governments’ ‘political

⁹¹ On the extent to which norm entrepreneurship can be affected and/or facilitated or constrained by the broader ‘Zeitgeist’, see Lovat, *Negotiating Civil War: The Politics of International Regime Design*. See also related literature on the impact of a shared normative ‘lifeworld’ on international law-making, esp. Thomas Risse, “‘Let’s Argue!’: Communicative Action in World Politics”, *International Organization* 54, no. 01 (2003): 1–39. As Risse notes elsewhere: ‘[t]he common lifeworld provides arguing actors with a repertoire of collective understandings to which they can refer when making truth claims.’ (Thomas Risse, ‘Global Governance and Communicative Action’, *Government and Opposition* 39, no. 2 (2004): 296.). See also Jurgen Habermas, *The Divided West*, ed. and trans. Ciaran Cronin (Cambridge, UK: Polity Press, 2006), 115, 119.

⁹² See related discussion in Lovat, *Negotiating Civil War: The Politics of International Regime Design*, chap. 1.

⁹³ Alter, Gathii, and Helfer, ‘Backlash against International Courts in West, East and Southern Africa’.

⁹⁴ Mills and Bloomfield, ‘African Resistance to the International Criminal Court’. See in similar vein Bob Clifford, *The Global Right Wing and the Clash of World Politics*.

⁹⁵ See eg Inken von Borzyskowski and Felicity Vabulas, ‘Hello, Goodbye: When Do States Withdraw from International Organizations?’, *The Review of International Organizations* 14, no. 2 (1 June 2019): 335–66, <https://doi.org/10.1007/s11558-019-09352-2>.

commitment to [international] legality as an indicator of whether or not a policy or action is legitimate.⁹⁶ Indeed, experience at the WTO illustrates particularly well how dissatisfaction with tribunal performance may also affect government behaviour towards broader regime institutions.⁹⁷

In terms of evidence that would enable us to track the impact of suasion and normative environment on tribunal backlash, the emphasis in this instance would be on the discursive processes leading governments to initiate or support backlash and accompanying international normative contexts. We may see, for example, transnational campaigns focused on building public or behind-the-scenes coalitions to pressure governments to pursue certain goals, set against a normative backdrop more or less conducive to sustaining international rule of law institutions and governance.⁹⁸ Even where views are expressed *sub rosa*, moreover, once again informed observers and participants in policy-making are likely to be aware that this has been the case.

3.3.4. *Liberal Backlash*

Liberal IR theory comprises a further research tradition from which backlash-related insights may be derived.⁹⁹ Particularly prominent in cross-disciplinary IL/IR literature, at the heart of this approach lies the insight that domestic politics - including sub-state constituency identities and interests as well as governance structures - matter for foreign policy formulation. As Anne Marie Slaughter observes, '[s]tates are not simply "black boxes" seeking to survive and prosper in an anarchic system. They are configurations of individual and group interests who then project those interests into the international system through a particular kind of government.'¹⁰⁰

⁹⁶ Alter, 'Critical Junctures and the Future of International Courts in a Post-Liberal World Order', 28–32.

⁹⁷ 'U.S. Raises Prospect of Blocking Passage of WTO Budget', *Bloomberg.Com*, 12 November 2019, <https://www.bloomberg.com/news/articles/2019-11-12/u-s-is-said-to-raise-prospect-of-blocking-passage-of-wto-budget>.

⁹⁸ Kai Alderson, 'Making Sense of State Socialization', *Review of International Studies* 27, no. 03 (2001): 415–33; Finnemore and Sikkink, 'International Norm Dynamics and Political Change'.

⁹⁹ See Andrew Moravcsik, 'Liberal International Relations Theory: A Scientific Assessment', in *Progress in International Relations Theory: Appraising the Field*, ed. Colin Elman and Miriam Fendius Elman (Cambridge, MA: MIT Press, 2003), 159–204; Andrew Moravcsik, 'Liberalism and International Relations Theory' (Center for International Affairs, Harvard University, Working Paper No. 92-6, 1992); Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', *International Organization* 51, no. 4 (1997): 513–53; Andrew Moravcsik, 'The New Liberalism', in *The Oxford Handbook of International Relations*, ed. Christian Reus-Smit and Duncan Snidal (Oxford, UK: Oxford University Press, 2008), 234–54; Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

¹⁰⁰ Anne-Marie Slaughter and Thomas Hale, 'International Relations, Principal Theories', *Max Planck Encyclopedia of Public International Law*, 2013, para. 17, http://www.princeton.edu/~slaughtr/Articles/722_IntlRelPrincipalTheories_Slaughter_20110509zG.pdf.

Much research in this vein has focused on the salience of democratic and democratising states' governance features to foreign policy preferences, most commonly in relation to human rights regimes.¹⁰¹ Studies in this vein have focused, for example, on domestic cultural causes of state behaviour.¹⁰²

This body of work gives rise to two potential implications for tribunal backlash. First, as recognised by Alter, Helfer, and Madsen, government attitudes and behaviour in respect of international tribunals at any given point are likely to reflect the concerns and preferences of important sub-state constituencies.¹⁰³ A range of work, including by Eric Posner as well as Caron and Shirlow, also highlights the manner in which (so-called) backlash against international courts may manifest in popular as well as elite discontent - though as observed above, the impact of such popular opposition may be limited if not accompanied by government disaffection.¹⁰⁴

Second, as observed by Brutger and Strezhnev, Leslie Vinjamuri, and others, the cultural affiliations and value-commitments of domestic constituencies and decision-makers (such as a traditional culture of legalism in Western, liberal democracies) may also inform government attitudes and behaviour towards international courts.¹⁰⁵ Once again, and in line with the approaches to data-gathering outlined in respect of the other insights considered above, it should be possible to glean evidence of the operation of such factors on government attitudes and behaviour from public statements and participant and secondary accounts of decision-making processes.

¹⁰¹ See eg Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization* 54, no. 02 (2000): 217–52. Also Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge, UK: Cambridge University Press, 2009).

¹⁰² Gary Bass, *Freedom's Battle: The Origins of Humanitarian Intervention* (New York, NY: Knopf, 2008). Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2001).

¹⁰³ See Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts', *Law and Contemporary Problems* 79 (2016): 36.

¹⁰⁴ E. A. Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 *Arizona State Law Journal* 795; Caron and Shirlow, *Dissecting Backlash*; Waibel, Blackaby, and Bottini, *The Backlash Against Investment Arbitration. Perceptions and Reality*. Recent work by Alter and Zürn similarly highlights the role of public discourse in the broader 'politics of backlash'. ('Backlash Politics: Introduction to a Symposium on Backlash Politics in Comparison'; 'Theorizing Backlash Politics'.)

¹⁰⁵ See Brutger and Strezhnev, 'International Disputes, Media Coverage, and Backlash Against International Law'; Vinjamuri, 'Human Rights Backlash', 127. Also discussions variously in Philip Leach and Alice Donald, 'Hostility to the European Court and the Risks of Contagion'; Harzl, 'Nativist Ideological Responses to European/Liberal Human Rights Discourses in Contemporary Russia'; Helfer, 'The Successes and Challenges for the European Court, Seen from the Outside'; Marchuk and Aksenova, 'The Tale of Yukos and of the Russian Constitutional Court's Rebellion against the European Court of Human Rights'; Madsen, 'The Challenging Authority of the European Court of Human Rights', 172.

3.4. A Pluralist Taxonomy

It may be helpful to provide a taxonomy of the different insights generated by the four theoretical traditions, mapped against the level of analysis at which these are likely to manifest, the causal factors and actors (agents) involved and the likely causal mechanisms through which these factors may operate (and interact) to produce outcomes in any given case.

This may be set out as follows:

Theoretical perspective / sphere of operation	<i>Realist</i>	<i>Rationalist</i>	<i>Constructivist</i>	<i>Liberal</i>
<i>Domestic</i>		<p><i>Factors:</i> International and domestic political/economic/other costs and benefits</p> <p><i>Agents:</i> Intra-government</p> <p><i>Mechanisms:</i> Cost-benefit analysis</p>		<p><i>Factors:</i> Impact of domestic constituency interests, values and affiliations on government attitudes and behaviour</p> <p><i>Agents:</i> Sub-state political actors</p> <p><i>Mechanisms:</i> Domestic social and political institutions/structures</p>
<i>Transnational</i>			<p><i>Factors:</i> Transnational social pressure on governments, international normative <i>Zeitgeist</i></p> <p><i>Agents:</i> Coalitions of transnational/domestic actors</p> <p><i>Mechanisms:</i> Social pressure on target governments</p>	<p><i>Factors:</i> Impact of transnational constituency interests, values and affiliations on target government attitudes and behaviour</p> <p><i>Agents:</i> Transnational constituencies/networks</p> <p><i>Mechanisms:</i> Transnational-domestic constituency engagement</p>
<i>International</i>	<p><i>Factors:</i> Relative material power differentials amongst states</p> <p><i>Agents:</i> Intra-government</p> <p><i>Mechanisms:</i> Relatively weaker</p>	<p><i>Factors:</i> International and domestic political/economic/other costs and benefits</p> <p><i>Agents:</i> Intra-government</p> <p><i>Mechanisms:</i> Cost-benefit analysis</p>	<p><i>Factors:</i> Government-government social pressure, international normative <i>Zeitgeist</i></p> <p><i>Agents:</i> External governments</p> <p><i>Mechanisms:</i> Social pressure on target governments</p>	

	international legal constraints on more powerful states			
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(Figure 1)

This table is of course shorthand, highlighting only the principal factors, agents and causal mechanisms connecting the former to government propensities towards tribunal backlash. The bodies of theory concerned are, moreover, much broader than reflected in the table and may conceivably be adapted to highlight a similarly broad range of potentially relevant factors, agents and mechanisms. In consequence, the absence of content in a given cell should not be understood as implying that a given theoretical tradition is not capable of speaking to the sphere in question. Case studies and statistical analysis may also highlight further, inductively identified factors and associated sets of actors and causal mechanisms that should be taken into consideration ‘abductively’ in seeking to account for tribunal backlash, or its absence, in different contexts.¹⁰⁶ Nevertheless, the table helpfully focuses attention on the main emphases of different traditions, and most-likely factors, agents, and causal mechanisms that might be expected to be seen in operation in different spheres.

Perhaps most critical to acknowledge is that while Figure 1 could be read as suggesting that these various factors and agents may act independently in bringing about or impeding backlash, in practice policy decisions regarding international tribunals are likely to reflect a mix of factors, actors and causal mechanisms operating across domestic, transnational and international spheres. With this in mind, the following section of this article considers how the pluralist theoretical framework set out above, in combination with the definition of backlash developed in Section 2, may be used to provide more sophisticated causal analysis of this phenomenon than available in existing literature.

4. INTERNATIONAL TRIBUNAL BACKLASH: A PLURALIST AGENDA

Taken together, the definition of tribunal backlash set out above and the set of theoretical insights derived in the preceding section provide a strong foundation for rigorous, cross-sectoral/tribunal analysis of the causes of international tribunal backlash.

¹⁰⁶ Abduction may be understood as ‘neither deduction nor induction but a dialectical combination of the two... supplement(ing)... deductive arguments with inductively derived insights’. (Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force*, Cornell Studies in Security Affairs (Ithaca, NY: Cornell University Press, 2003), 13.)

4.1. Conceptual Underpinning: Backlash as Government Attitudes and Behaviour

The principal strength of the definition proposed above is that it presents tribunal backlash as a clear dependent variable, capable of application across institutions and sectors, and identifiable on the basis of more objectively and readily measurable attributes than alternatives utilised in the literature to date.¹⁰⁷ In particular the proposed wording forgoes the need to ‘look inside actors’ heads’ to determine whether behaviour constitutes backlash or not.

Identification of backlash in this way in turn facilitates investigation of government behaviour and attitudes towards international tribunals on a much broader canvas than has typically been the case. In particular it enables large-scale cross-sectoral study of the causes - and by extension the management and amelioration - of backlash by directing attention to attitudes and behaviour that can be readily identified across a broad range of tribunals on the basis of publicly available information.

Establishing government behaviour and attitudes as the locus for backlash also helpfully narrows the empirical focus for examination, recognising the continuing centrality of states to international law and institutions. Indeed, reflecting this centrality, the proposed definition highlights that if backlash is going to be ameliorated, whether in individual instances or as a broader tendency, this will require a focus not simply on enhancing the design and operational features of tribunals, but also appreciation of the main drivers of government behaviour and attitudes vis à vis tribunals, and in turn consideration of how these might be addressed.

It also bears underlining that the definition proffered fits well with and lends rigour to the study of cases where backlash has been identified to date. This has already been illustrated, for example, in the context of international criminal tribunals, where an earlier version of this definition has proved well-suited to exploration of South African backlash against the International Criminal Court, and earlier Serbian opposition to the International Criminal Tribunal for the former Yugoslavia.¹⁰⁸ Similarly, as noted above in respect of the ICJ, WTO AB and CJEU, this definition is likely to be better suited than others previously proposed to the analysis of backlash against courts that are closely integrated into broader regimes and institutions. Application of this definition to the experiences of further institutions can also reasonably be expected to provide valuable clarity as to the extent to which these can be said

¹⁰⁷ See Daniel Chandler and Rod Munday, *Dependent and Independent Variables* (Oxford University Press, 2016), <https://www.oxfordreference.com/view/10.1093/acref/9780191800986.001.0001/acref-9780191800986-e-669>.

¹⁰⁸ See Lovat, ‘International Criminal Tribunal Backlash’.

to have encountered backlash understood in this fashion, and if so in which instances and circumstances. As such, this definition provides a sound basis for mixed-method, cross-sectoral examination of the causes – and accordingly potential mitigants – of tribunal backlash.

4.2. The Pluralist (Eclectic) Virtues...

The eclectic theoretical lens set out in the previous section, consistent with the establishment of analytic eclecticism as the most prominent approach to theoretical pluralism in IR, in turn provides a well-suited starting point for such examination, enabling the telling of ‘complex causal stories’ about tribunal backlash.¹⁰⁹

Reflecting the inclusion within this analytic lens of insights derived from multiple theoretical traditions, this approach permits the possible operation of and interaction amongst causal factors to be considered both *ex ante* as well as traced in case studies and evaluated systemically via quantitative analysis. In addition to identifying putative, likely relationships amongst these factors, moreover, the posited framework may also be abductively adapted and tailored as further insights are derived from case studies and quantitative analysis.

By way of illustration of the various manners in which the hypothesised causal factors might be expected to interact, domestic political ‘Liberal’ factors in one or another state may, for example, favour backlash: such tendencies may be affected variously by the domestic presence, strength, or absence of democratic culture and/or structures. Even where domestic politics incline a government to backlash, however, the government of a weak state where this is the case may hesitate - rationally - to embark on a campaign of tribunal backlash where there is countervailing ‘Realist’ support from more powerful regional or global actors.

In similar fashion, even relatively powerful governments with strong domestic incentives to stymie a tribunal may find their ability to attract allies in this endeavour limited where this would cut against the grain of the regional or international normative *Zeitgeist*, or - by the same token - facilitated by broader discontent with international organisations and legal regimes. Tendencies towards backlash may also be inhibited where supportive transnational actors – or courts themselves - succeed in constructing coalitions of committed, albeit less materially powerful, pro-tribunal governments.

¹⁰⁹ Bennett and George, “Process Tracing in Case Study Research, Paper Presented at the MacArthur Foundation Workshop on Case Study Methods,” 5.

Eclectic analysis facilitates systematic analysis of the causes and mitigants of backlash, by providing a taxonomy of factors and associated likely causal mechanisms and relationships capable of application across tribunals and sectors. Material power differentials, rational calculation, social pressure, and domestic political considerations are likely to influence policy decisions across issues areas spanning - to name but a few - human rights, the conduct of armed conflict, and economic relations and governance. These considerations may of course operate and interact differently in different context. An eclectic analytic lens, however, allied with the definition set out above, enables us to shed light not just on the causes and mitigants of backlash in individual instances, but also on patterns in manifestations and management of backlash and government-tribunal relations more generally.

This is not to claim that the framework set out above, or indeed any other particular eclectic lens, will fully explain all features of individual instances or absences of backlash. Rather, such lenses perform a ‘cartographic’ function, simplifying reality in order to ‘lay bare the essential elements in play and indicate the necessary relations of cause and interdependency-or suggest where to look for them.’¹¹⁰ As Gunitsky notes, ‘theories, like maps, necessarily distort and simplify in order to be useful... This simplification is not a limitation of the cartographer’s skill, but a way of focusing on the salient features of the landscape in order to make the map legible and functional.’¹¹¹

Adoption of an eclectic lens alone also does not vitiate the need for in-depth, detailed examination of individual cases. Indeed, such examinations remain vital to granular understanding of the causal processes through which factors driving and impeding backlash operate and bear on policy outcomes. They are accordingly invaluable resources both for policy actors variously seeking to ameliorate, avoid or propagate backlash, as well as for researchers seeking to identify previously unanticipated factors and interactions amongst factors that may have significant bearing on outcomes.

Given the inability of facts to ‘speak for themselves’, however, in-depth case studies are also likely to reflect particular sets of assumptions about what matters.¹¹² In making these assumptions - in this case deriving from IR’s principal theoretical camps - explicit, a further

¹¹⁰ Waltz, *Theory of International Politics*, 10.

¹¹¹ Seva Gunitsky, ‘Rival Visions of Parsimony’, *International Studies Quarterly* 63, no. 3 (1 September 2019): 711, <https://doi.org/10.1093/isq/sqz009>.

¹¹² As observed by E.H. Carr: ‘It used to be said that facts speak for themselves. This is, of course, untrue. The facts speak only when the historian calls on them.’ (*What Is History?*, 2nd ed. (London, UK: Penguin, 1990), 11; cited in Gunitsky, ‘Rival Visions of Parsimony’, n. 17.)

advantage of the theoretical lens set out above is that it enables these to be critiqued and challenged. This again enables researchers to make better informed sense of tribunal backlash in both individual cases and across sectors.

4.3. ... and Limitations

While the definition and theoretical lens proposed in this article hold out the prospect of enhanced understanding of tribunal backlash, this approach is also not without its challenges and limitations.

First, as noted above, many of the decisions taken in the course of developing the proposed analytic lens may be challenged, including relating to (for example) the research traditions from which insights may be derived, the insights derived therefrom, and the manner in which these may be utilised together in broaching empirical puzzles. In particular, while the set of insights derived above may be said to represent central elements of mainstream theoretical approaches to IR and IL, reliance on framing enquiry in these terms holds out a risk of reifying camps the boundaries of which have in reality often proven to be fuzzy, warranting caution in utilising these labels too loosely, even as shorthand.¹¹³ A vast range of further relevant insights may also be derived from the ever-growing universe of IR and IL theory, including less conventional constructivist theories, and broader perspectives on international law and politics.¹¹⁴

Second, the definition and lens set out above reflect a preference for pragmatically parsimonious, generalisable problem-solving causal explanation of tribunal backlash as a cross-sectoral phenomenon.¹¹⁵ While consequently well-placed to identify broad patterns and commonalities in manifestations, management, and amelioration of backlash across sectors, however, a limitation of this approach is that it does not account for idiosyncratic factors that may be critical to outcomes in particular instances. Accordingly, while the model may be

¹¹³ See eg Feaver et al., 'Brother, Can You Spare a Paradigm?'

¹¹⁴ See eg Risse, "'Let's Argue!': Communicative Action in World Politics'; McCourt, 'Practice Theory and Relationalism as the New Constructivism'. Also for broader IL and IR perspectives eg Andrew Linklater, 'The English School', in *Theories of International Relations*, ed. Scott Burchill et al., 3rd ed. (New York, NY: Palgrave Macmillan, 2005), 84–109; Oona Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics* (New York, NY: Foundation Press, 2005); Jeffrey Dunoff and Mark Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge, UK: Cambridge University Press, 2013). Kamara Clarke's recent work on the role of affect on conceptions of justice in Africa in the context of the ICC provides a further, potentially highly fruitful avenue for exploration by IL/IR scholars. (Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham, NC: Duke University Press, 2019).

¹¹⁵ Sil and Katzenstein refer to eclecticism as reflecting a 'pragmatist ethos': 'a flexible approach that needs to be tailored to a given problem and to existing debates over aspects of this problem.' (Sil and Katzenstein, *Beyond Paradigms*, 3, 17.

adapted to reflect empirical patterns and trends uncovered as examination proceeds, it is unlikely to be able to account entirely for all instances and absences of backlash – a caveat it is important to bear in mind in seeking to apply insights derived from such a general model in individual cases.

Last, it is also important to note that as currently framed the proposed lens focuses solely on state behaviour: it does not speak directly to tribunal behaviour. It is, of course, likely that court activities will form part of the causal story of individual instances of backlash: it is difficult, for example, to imagine Jean Kirkpatrick denouncing the ICJ quite so pungently in the absence of the *Nicaragua* decision. The model does not, however, shed light directly on variation in tribunal behaviour.

This reflects a number of considerations, not least the challenges likely to be encountered in seeking to explain court behaviour by reference to what might be considered extra-legal policy considerations. Judges may be reluctant, for example, to reveal the role such factors might play in decision-making.¹¹⁶ Equally though, it is far from certain that court conduct necessarily plays a determinative role in government policy choices to engage in backlash. Alter, Helfer and Madsen conclude, for example, that ‘context’ trumps ‘agentic decisions of [international court] creators and judges in building authority in fact’.¹¹⁷ This finding is also consistent with a range of empirical observations: Serbian backlash against the ICTY, for example, preceded the commencement of court activities. In similar vein, Geoff Dancy has observed that the ICC ‘has been more influential for what it *is* than what it *does*’.¹¹⁸

This is not to suggest that court behaviour is necessarily epiphenomenal to tribunal backlash – this seems unlikely. It is, however, at least as likely that government decisions to engage in backlash will be driven, shaped, facilitated, and constrained by factors that go significantly beyond one or another, or even a series of adverse court decisions. The extent to and manner in which such factors interact with court behaviour to produce policy outcomes in any given instance, moreover, is likely to be highly dependent on circumstances. Accordingly, while the

¹¹⁶ Antonio Cassese, for example, recognised the concern that the ‘Cassese approach’ – ‘judges overdoing, becoming dangerous by, say, producing judgments that can be innovative’ - engendered in the drafters of the Rome Statute of the International Criminal Court. (‘The Judge: Interview with Antonio Cassese’, in *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings*, by Heikelina Verriijn Stuart and Marlise Simons (Amsterdam, NL: University of Amsterdam, 2009), 52–53.)

¹¹⁷ Alter, Helfer, and Madsen, ‘Conclusion: Context, Authority, Power’, 447.

¹¹⁸ Geoff Dancy, ‘Searching for Deterrence at the International Criminal Court’, *International Criminal Law Review* 17, no. 4 (2017): 655.

lens above provides a valuable starting point for theoretically informed, pluralist analysis of tribunal backlash, it is unlikely to form the last word on this matter.

CONCLUSION

Resistance to international tribunals can provide judges with valuable information, assisting them in better calibrating court behaviour to the expectations and preferences of governments and other audiences, and potentially even bolstering court authority or legitimacy in the eyes of some constituencies.¹¹⁹ Backlash may conceivably be capable of eliciting similar responses. Indeed, as Karen Alter has observed, like other forms of tribunal resistance, backlash may also be grounded in respectable principled positions.¹²⁰

In contrast to common-or-garden variety resistance to tribunals, however, backlash harbours potentially much more significant ramifications for the institutions concerned, as well as for international adjudication and global governance more generally. Whether modified court conduct will suffice to address backlash is also doubtful, given the institutional and doctrinal frameworks constraining judges concerned to maintain courts' legitimacy capital, and that the extent to which judicial behaviour contributes to this phenomenon is at best uncertain.¹²¹

With these concerns in mind, this article has sought to contribute to debate about international tribunal backlash by making two connected advances. First, the article has developed and presented a conceptualisation of backlash that builds on existing definitions and associated empirical studies, but that is better tailored to facilitate cross-institutional and sectoral

¹¹⁹ As put by Madsen et al, 'the critical input of governments or civil society actors might in the long run be beneficial to them, as it provides information – legal or political – that they might otherwise not have been aware of. In that sense, critique of [international courts] – even harsh critique from failed backlash attempts – might help the [court] in the long run.' (Madsen, Cebulak, and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 217.)

¹²⁰ '[R]esistance to [courts] may be a deeply democratic phenomenon, an effort to reclaim national control over issues of central importance.' (Alter, 'Critical Junctures and the Future of International Courts in a Post-Liberal World Order', 21.)

¹²¹ As noted eg by Cohen, Follesdal, Grossman, and Ulfstein: 'To the extent that standards of global justice apply to all international actors, they may affect how judges on international courts should reason when interpreting vague terms and specifying the treaty obligations and may create a tension between legal legitimacy based on an interpretation of the obligations as set out in the treaty and justice-based legitimacy.' ('Legitimacy and International Courts – A Framework', in *Legitimacy and International Courts*, ed. Andreas Follesdal et al., Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2018), 7, <https://doi.org/10.1017/9781108529570.001>.) On legitimacy capital and related concepts of international court normative and sociological legitimacy see Ibid. pp. 4-9. See also Yuval Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions', in *Legitimacy and International Courts*, ed. Andreas Follesdal et al., Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2018), 354–71, <https://doi.org/10.1017/9781108529570.013>; and in respect of international court authority, Alter, Helfer, and Madsen, 'International Court Authority in a Complex World', 5–14.

qualitative and quantitative study of the causes of backlash. Second, the article has presented a sophisticated theoretical framework for such analysis. Capable of application in both quantitative and qualitative settings, this framework provides a starting point for the identification of factors likely to play a significant role in determining the presence or absence of backlash in different instances.

Backlash against different international tribunals may manifest in different, context-specific challenges. In-depth, inductive investigation into the causes of backlash in such cases, however, risks overlooking potentially material but less apparent factors shaping government attitudes and behaviour, and in consequence missing opportunities to identify and address the causes of backlash rather than treating (more or less effectively) its symptoms.

In contrast, application of a context-neutral conceptualisation of backlash combined with a carefully constructed, cross-sectoral analytic lens, minimises the likelihood of overlooking significant causal factors, as well as enabling the identification of patterns - critical commonalities and differences - in the manifestation, avoidance, and management of backlash. Viewing particular experiences against this broader backdrop in turn has the potential to inform the design of more effective, systematic measures to enhance the resilience and adaptability of international courts rather than *ad hoc* reactive policy interventions by tribunals, government and civil society actors concerned about tribunal backlash.

As the eclectic lens reflects, tribunal backlash is likely to be a multi-causal phenomenon, not readily susceptible to explanation solely in terms of national material capacities, national interests or preferences traditionally conceived, or transnational or domestic social or cultural factors or pressure. Rather, backlash - and tribunal resistance more generally - is likely to be driven by dynamic, varying combinations of these and potentially other factors that the approach set out in the present article may assist in identifying and analysing. To the extent that the presence or absence of backlash in different instances reflects distinct combinations of such identifiable drivers of government attitudes and behaviour, there may accordingly also be multiple avenues available to policy actors to seek to prevent or ameliorate backlash.¹²²

¹²² Indeed, this approach may conceivably be adapted to assist policy actors concerned about the sustainability of other elements of the rules-based order in what appears to be an increasingly turbulent international political, economic and security environment. In similar fashion, enhancing understanding of the drivers of tribunal backlash may equally facilitate the work of those seeking to further undermine such institutions.

This is not, it should be noted, to suggest that the rules-based international order is devoid of flaws, or that global governance cannot be made fairer or more effective. To the extent that institutional evolution is preferable to collapse, however, the conception of backlash set out above and the accompanying pluralist approach and agenda form potentially highly valuable tools to inform the (re)construction of more resilient, adaptive international adjudicatory institutions.