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

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International tribunal backlash remains poorly understood: hampered by conceptual challenges, systematic research into the causes of this phenomenon remains nascent. 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 mixed 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 various instances. The article accordingly provides the building blocks for improved understanding of the causes of – and the potential scope to manage – international tribunal backlash across institutions, regions and sectors.

Keywords: international adjudication, international tribunals, backlash, international relations, pluralism

1. INTRODUCTION

International courts have been described as the ‘lynchpin’ of the post-Cold War ‘rules-based’ international order.1 Elements of this order have come under sustained pressure, however, as government and public attitudes have shifted over time.2 In the context of international 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’.3

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1 Yuval Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’ (2012) 106 American Journal of International Law 225, 226. Kent and co-authors 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 Avidan Kent, Nikos Skoutaris and Jamie Trinidad (eds), The Future of International Courts: Regional, Institutional and Procedural Challenges (Routledge 2018) 1, 7.

2 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 Kent, Skoutaris and Trinidad (n 1) 8, 19.

3 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 PR Romano, Karen J Alter and Yuval Shany, ‘Mapping International Adjudicative Bodies, the Issues, and Players’ in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), The Oxford University Press Handbook of International Adjudication (Oxford University Press 2013) 3, 6.
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 resulted in the shuttering of the South African Development Community (SADC) Tribunal in 2011.4 Backlash against regional courts has also been cited in Latin America and the Caribbean, as well as in further African courts.5 Indeed, the European Court of Human Rights (ECtHR) – the flagship regional human rights court – has not proved to be immune to sustained government complaints about its decision making, including from both the United Kingdom and Russia. Similarly, among 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 refusal by the United States to sanction appointments to the World Trade Organization (WTO) Appellate Body similarly illustrates the susceptibility of international trade governance to backlash.6

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 growing literature on tribunal backlash. To date, however, there is little consensus on the key characteristics of this phenomenon, and still less clarity as to its principal drivers across institutions and sectors. This article charts a path forward in respect of both 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 2) surveys instances cited of tribunal backlash and academic approaches to these, and considers the challenges involved in working with this concept. Section 3 then grapples with the issue of how best to define backlash for the purposes of comparative causal analysis. Thereafter, in Section 4, a theoretical framework is proposed for the study of this phenomenon; this identifies and situates 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

4 Karen J Alter, James T Gathii and Laurence R Helfer, ‘Backlash against International Courts in West, East and Southern Africa: Causes and Consequences’ (2016) 27 European Journal of International Law 293, 294; Tendayi Achiume, ‘The SADC Tribunal: Socio-Political Dissonance and the Authority of International Courts’ in Karen J Alter, Laurence R Helfer and Mikael Rask Madsen (eds), International Court Authority (Oxford University Press 2018) 124.

5 Alter, Gathii and Helfer (n 4); Jorge Contesse, ‘Judicial Backlash in Inter-American Human Rights Law?’, IsCONnect (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’ (2002) 102 Columbia Law Review 1832.

6 See detailed discussion in Section 2.1 below in respect of the experiences of these bodies.
set of circumstances. Section 5 illustrates how this definition and framework may be applied to help in making sense of backlash as a cross-sectoral and cross-regional phenomenon, and considers the advantages and challenges of this approach. A concluding discussion follows.

2. **INTERNATIONAL TRIBUNALS AND THEIR DISCONTENTS**

It is not unusual for international tribunals to experience mixed fortunes as governments fail to implement judicial decisions, or seek to avoid or delay their implementation, and in some cases seek to undermine courts’ operations. The 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-juridical, semi-political body, which nations sometimes accept and sometimes don’t’. There is similarly nothing new in scholars warning of the risk of a ‘return to the law of the jungle’ in international affairs.

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. 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 a greater number of courts entering more contentious arenas. These include the conduct of armed conflict, domestic treatment of states’ own citizens via human rights tribunals, and cross-border trade – and, as Yuval 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’.

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7 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 University Press 2004) 91; Aloysius P Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2007) 18 *European Journal of International Law* 825, fn 56.

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

9 Anthony D’Amato, ‘The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court’ (1986) 80 *American Journal of International Law* 331.

10 Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014) 91–136; Karen J Alter, Emilie M Hafner-Burton and Laurence R Helfer, ‘Theorizing the Judicialization of International Relations’ (2019) 63 *International Studies Quarterly* 449.

11 Grossman, for example, highlights the ‘Solomonic’ character of ICJ judgments: Nienke Grossman, ‘Solomonic Judgments and the Legitimacy of the International Court of Justice’ in Nienke Grossman and others (eds), *Legitimacy and International Courts: Studies on International Courts and Tribunals* (Cambridge University Press 2018) 43.

12 Yuval Shany, *Assessing the Effectiveness of International Courts* (International Courts and Tribunals series, Oxford University Press 2014) 82. In similar vein, Dancy and Sikkink make the point that ‘[h]uman 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
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 substate or transnational constituencies to bolster institutional legitimacy or authority, governments remain their ultimate ‘mandate providers’.13

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 support,14 a particular challenge when the protagonists of some of the most high-profile recent instances of backlash are governments of states that were among the most prominent supporters of these same institutions when they were being set up.15 Against this backdrop the risk is that government disgruntlement with one or another international court will, over time, translate into more systemic ‘dejudicialization’,16 further undermining the ‘rules-based international order’ in what has been referred to as a critical juncture for the ‘liberal consensus’.17

2.1. 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 that face individual courts, often highlighting relatively narrow sets of potential explanatory factors. This notwithstanding, 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 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

Stephen Hopgood, Jack Snyder and Leslie Vinjamuri (eds), Human Rights Futures (Cambridge University Press 2017) 24, 48.
13 International tribunal legitimacy and authority are, of course, themselves the subjects of extensive normative and analytic debate. For recent contributions see, eg, Grossman and others (n 11); Alter, Helfer and Madsen (n 4).
14 For examples of techniques used by courts to facilitate this endeavour, see Arthur Dyevre, ‘Uncertainty and International Adjudication’ (2019) 32 Leiden Journal of International Law 131; Jed Odermatt, ‘Patterns of Avoidance: Political Questions before International Courts’ (2018) 14 International Journal of Law in Context 22.
15 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 (n 2) 20.
16 Daniel Abebe and Tom Ginsburg, ‘The Dejudicialization of International Politics?’ (2019) 63 International Studies Quarterly 521.
17 Alter (n 2) 19.
undermine states’ interests, states have been quick to defer or evade ICC justice. Kurt Mills and Alan Bloomfield in turn have pointed to the risks posed to the ICC by norm ‘antipreneurs’. Franziska Boehme highlights domestic political drivers of South 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.

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

Again, the Appellate Body 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 requiring 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’.

Delving deeper into US policy making, however, Laura Fraedrich and Chase 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. Adopting a further, realist-inflected

18 Leslie Vinjamuri, ‘The International Criminal Court: The Paradox of Its Authority’ in Alter, Helfer and Madsen (n 4) 331.
19 Kurt Mills and Alan Bloomfield, ‘African Resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm’ (2018) 44 Review of International Studies 101. In similar vein, Clifford has documented the international impact of non-liberal transnational activist communities: Bob Clifford, The Global Right Wing and the Clash of World Politics (Cambridge University Press 2012).
20 Franziska Boehme, “‘We Chose Africa’: South Africa and the Regional Politics of Cooperation with the International Criminal Court’ (2017) 11 International Journal of Transitional Justice 50; 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, http://web.isanet.org/Web/Conferences/CEEISA-ISA-LBJ2016/Archive/99175428-d1a3-4b44-84eb-3bcca05cbb5f.pdf.
21 eg, Rachel Brewster, ‘WTO Dispute Settlement: Can We Go Back Again?’ (2019) 113 AJIL Unbound 61–66; Cosette D Creamer, ‘From the WTO’s Crown Jewel to Its Crown of Thorns’ (2019) 113 AJIL Unbound 51.
22 Creamer (n 21) 52.
23 Laura Fraedrich and Chase D Kaniecki, ‘The American Agenda on Trade: What’s Happened and What’s Next?’ (2017) Global Trade and Customs Journal 262. See also Edward Alden, ‘The Roots of Trump’s Trade Rage’, Politico Magazine, 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, 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
perspective – this time consistent with Rodman’s observations in respect of international criminal tribunals – Andrew Lang, in turn, notes:24

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.

All of this 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.25

Regional integration and human rights courts have similarly not proved to be immune to aggressive government criticism. Notably, the ECtHR – ‘the most influential human rights court in the world’ – continues to labour under persistent government accusations of wrong-headedness and overreach.26 As with the ICC and the WTO Appellate Body, though, while there has been extensive commentary on the political challenges facing the ECtHR, the causal drivers of this dynamic remain unclear.

Wayne Sandholtz and his co-authors highlight, for example – again, in line with observations made of the ICC and WTO Appellate Body – that backlash against the Strasbourg Court may reflect domestic political costs of regime membership and compliance with court judgments, with backlash benefitting governments publicly seen by domestic constituencies as ‘standing up to Europe’.27 Philip Leach and Alice Donald, Benedikt Harzl and others, in contrast, have

Wields Enormous Power in Washington’, The New York Times, 9 March 2018, 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 US politics between international engagement and disengagement’ and ‘reflective of a longstanding strand in US politics’: Gregory Shaffer, ‘A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations in Features Symposium: International Trade in the Trump Era’ (2018) 44 Yale Journal of International Law Online 38, 42.

24 Andrew Lang, ‘Protectionism’s Many Faces’ (2018) 44 Yale Journal of International Law Online 54, 57.

25 For an overview of ‘contextual factors’ affecting WTO Appellate Body authority, eg, see Gregory Shaffer, Manfred Elsig and Sergio Puig, ‘The World Trade Organization’s Dispute Settlement Body: Its Extensive but Fragile Authority’ in Alter, Helfer and Madsen (n 4).

26 eg, Spyridon Flogaitis, Tom Zwart and Julie Fraser, The European Court of Human Rights and Its Discontents: Turning Criticism into Strength (Edward Elgar 2013); Zoë Jay, ‘Keeping Rights at Home: British Conceptions of Rights and Compliance with the European Court of Human Rights’ (2017) 19 The British Journal of Politics and International Relations 842; Fiona de Londras, ‘The New Sovereigntism: What It Means for Human Rights Law in the UK’, LSE Brexit, 24 October 2017, http://blogs.lse.ac.uk/brexit/2017/10/24/the-new-sovereigntism-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’ (2016) 79 Law and Contemporary Problems 141; Wayne Sandholtz, Yining Bei and Kayla Caldwell, ‘Backlash and International Human Rights Courts’ in Alison Brysk and Michael Stohl (eds), Contracting Human Rights (Edward Elgar 2018) 159.

27 Sandholtz, Bei and Caldwell (n 26) 166. See, eg, ECtHR, Hirst v UK (No. 2), App no 74025/01, 6 October 2005, and subsequent cases on prisoner voting rights, eg, ECtHR, Omar Othman (Abu Qatada) v UK, App no 8139/09, 17 January 2012, and in respect of Russia, ECtHR, Anchugov and Gladov v Russia, App nos 11157/04 and 15162/05,
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.28

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 the observations of Rodman and Lang, underline the extent to which the fortunes of international tribunals may be tied to great power preferences: the ICJ 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.29 The 2016 decision of the Permanent Court of Arbitration in the South China Sea Arbitration, moreover, appears unlikely to result in conforming to Chinese conduct in the foreseeable future.30 In similar fashion, apparent UK disaffection with the Court of Justice of the European Union (CJEU) has formed a British ‘red line’ throughout Brexit negotiations between London and Brussels.31

As for other cases, Laurence Helfer has observed how domestic politics and normative commitments made 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.32 The Inter-American Court of Human Rights has also come under pressure from Peru and

4 July 2013 (again, on prisoner voting), and ECtHR, OAO Neftyanaya Kompaniya Yukos v Russia, App no 14902/04, 31 July 2014.

28 See variously Philip Leach and Alice Donald, ‘Hostility to the European Court and the Risks of Contagion’, UK Human Rights 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 Lauri Mälksoo and Wolfgang Benedek (eds), Russia and the European Court of Human Rights: The Strasbourg Effect (Cambridge University Press 2017) 355; Laurence R Helfer, ‘The Successes and Challenges for the European Court, Seen from the Outside’ (2014) 108 AJIL Unbound 74; Iryna Marchuk and Marina Aksenova, ‘The Tale of Yukos and of the Russian Constitutional Court’s Rebellion against the European Court of Human Rights’ (2017) Osservatorio Costituzionale; Madsen (n 26) 172.

29 See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Rep 136; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion [2019] ICJ Rep 1.

30 The South China Sea Arbitration (Republic of the Philippines/ People’s Republic of China), PCA, 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.

31 ‘Brexit: Theresa May Says UK Leaving EU Court’s Jurisdiction’, BBC News, 23 August 2017, https://www.bbc.com/news/uk-politics-41012265. See also Nikos Skoutaris, ‘Taking Back Control? Brexit and the Court of Justice’ in Kent, Skoutaris and Trinidad (n 1) 93.

32 ‘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 (n 5) 1910. Also, Amnesty International, ‘Caribbean: Unacceptably Limiting Human Rights Protection’, 1 March 1999, AMR 05/001/99, https://www.amnesty.org/en/documents/document/?indexNumber=amr05%2f001%2f1999&language=en.
Brazil, as well as from Bolivia, Ecuador and, latterly, Argentina, following the 2012 declaration of Venezuela’s Foreign Minister at the time, Nicolás Maduro, 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.33

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, President Chavez castigating fellow members at the time, Colombia and Peru, for signing free trade agreements with the United States.34 In similar fashion, in 2016 Rwanda withdrew its declaration that permitted individuals and non-governmental organisations to petition directly to the African Court on Human and Peoples’ Rights, anticipating an adverse decision in a case brought by an opposition politician.35

Economic-focused international dispute settlement mechanisms have also suffered from backlash, with withdrawals from both the Washington Convention underpinning the World Bank’s International Centre 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.36 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.37

33 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 discussions in Jorge Contesse, ‘Judicial Backlash in Inter-American Human Rights Law?’, I-CONnect (blog of the International Journal of Constitutional Law), 2 March 2017, http://www.iconnectblog.com/2017/03/judicial-backlash-interamerican; 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 Javier Couso, Alexandra Huneeus and Rachel Sieder (eds), Cultures of Legality: Judicialization and Political Activism in Latin America (Cambridge University Press 2010) 112.

34 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.

35 ‘Rwanda Withdraws Access to African Court for Individuals and NGOs’, International Justice Resource Center, 14 March 2016, https://ijrc.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-ngo; see also Tom Daly and Micha Wiebusch, ‘The African Court on Human and Peoples’ Rights: Mapping Resistance Against a Young Court’, https://papers.ssrn.com/abstract=3135130.

36 On withdrawals from investment treaties and associated implications see Clint Peinhardt and Rachel L Wellhausen, ‘Withdrawing from Investment Treaties but Protecting Investment’ (2016) 7 Global Policy 571. More generally, see Michael Waibel and others, ‘The Backlash Against Investment Arbitration: Perceptions and Reality’ in Michael Waibel and others (eds), The Backlash Against Investment Arbitration (Kluwer Law International 2010) 339.

37 cf, eg, Alter, Gathii and Helfer (n 4); 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_5-21-2018-2j16mng.pdf; Leslie Vinjamuri, ‘Human Rights Backlash’ in Hopgood, Snyder and Vinjamuri (n 12) 114; Achiume (n 4).
2.2. 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 nascent efforts to address trends in international adjudication more broadly, including a number of studies of international tribunal authority and legitimacy.38

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.39 This body of research provides extensive insight into the dynamics of international court authority, seeking to ‘develop a generalizable framework to analyse the variable authority of [international courts] operating in different parts of the world’.40

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, have an 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.

2.3. 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, however, also emerge from existing studies.

Foremost among these is the question of what should be understood by ‘tribunal backlash’. Definitional questions aside, further issues 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

38 See, eg, Grossman and others (n 11); Kent, Skoutaris and Trinidad (n 1).
39 See Karen J Alter, Laurence R Helfer and Mikael Rask Madsen (eds), ‘Special Issue: The Variable Authority of International Courts’ (2016) 79 Law and Contemporary Problems; Alter, Helfer and Madsen (n 4); Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, ‘Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts’ (2018) 14 (Special Issue 2 Resistance to International Courts) International Journal of Law in Context 197, and related contributions in that issue.
40 Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, ‘Conclusion: Context, Authority, Power’ in Alter, Helfer and Madsen (n 4) 435.
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, 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’.\(^{41}\) This approach, however, presents further challenges: in particular, the practice theory-based model 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 the ‘main theoretical camps’ of IR 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?

3. CONCEPTUALISING INTERNATIONAL TRIBUNAL BACKLASH

3.1. INTRODUCING BACKLASH

Backlash has proven a problematic concept with which to grapple. The term has been described by Madsen and his co-authors, 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’.\(^{42}\) While this may be correct, so-called backlash against international institutions has nevertheless long-formed a focus of policy and scholarly concern.\(^{43}\) Indeed, reference to backlash appears, if anything, to be

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\(^{41}\) Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, ‘International Court Authority in a Complex World’ in Alter, Helfer and Madsen (n 4) 3, 13. As put by 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’: David McCourt, ‘Practice Theory and Relationalism as the New Constructivism’ (2016) 60 International Studies Quarterly 475.

\(^{42}\) Madsen, Cebulak and Wiebusch (n 39) 199.

\(^{43}\) eg, Karen J Alter, ‘The European Union’s Legal System and Domestic Policy: Spillover or Backlash?’ (2000) 54 International Organization 489; Kathryn Sikkink, ‘The United States and Torture: Does the Spiral Model Work?’ in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), The Persistent Power of Human Rights: From Commitment to Compliance (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), https://ssrn.com/abstract=3481735; Karen J Alter and Michael Zürn, ‘Theorizing Backlash Politics’, British Journal of Politics and International Relations (forthcoming), https://ssrn.com/abstract=3493079.
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’.  

Powderly’s observation notwithstanding, there is as yet no apparent consensus among 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.

### 3.2. 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’.  

Backlash, in contrast, is understood by the latter as a form of ‘extraordinary resistance challenging the authority of a [tribunal]’.  

Sandholtz, Bei and Caldwell similarly characterise backlash as ‘actions that go beyond resistance’.

This distinction is intuitively compelling. Madsen, Sandholtz and their respective co-authors, 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, 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’. 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 judicial 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 – opposition to actor interests and values – whereas the policy decisions of government and other actors may reflect a much broader constellation of factors.

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44 Joseph Powderly, ‘International Criminal Justice in an Age of Perpetual Crisis’ (2019) 32 Leiden Journal of International Law 1, 8–9.
45 Madsen, Cebulak and Wiebusch (n 39) 203. See also Sandholtz, Bei and Caldwell (n 26) 160–61.
46 Madsen, Cebulak and Wiebusch (n 39) 203.
47 Sandholtz, Bei and Caldwell (n 26) 160.
48 Vinjamuri (n 37) 120. 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’: Rochelle Terman, ‘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.
Madsen, Sandholtz and their respective co-authors, 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 the account of Sandholtz, Bei and Caldwell, the ‘aim to reduce the authority, competence, or jurisdiction of the court’,\(^49\) and in the reading of Madsen, Cebulak and Wiebusch, ‘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]’.\(^50\) Madsen, Sandholtz and their co-authors also leave open the possibility that backlash may arise from actors other than those directly ‘targeted’ by a court, in contrast to Vinjamuri.

These understandings are still limited in important respects, though. Most importantly, the aims and objectives that Madsen, Sandholtz and co-authors 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 exiting from court jurisdiction may not necessarily constitute backlash, even where associated with long-standing dissatisfaction with elements of court conduct.\(^51\)

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 that is better considered part of the ordinary course of international law (re)making and institutional evolution.\(^52\)

To be fair, Sandholtz, Madsen and their respective colleagues could respond to this last observation by underlining that backlash should go beyond such everyday legal business to encompass only extraordinary forms of resistance aimed at ‘changing the rules of the game’.\(^53\) 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. Moreover, beyond this measure and reflecting the integral position of the ICJ in the UN Charter, there are few avenues for

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\(^49\) Sandholtz, Bei and Caldwell (n 26) 160.
\(^50\) Madsen, Cebulak and Wiebusch (n 39) 209.
\(^51\) Andreas Hofmann, ‘Resistance against the Court of Justice of the European Union’ (2018) 14 International Journal of Law in Context 258, 259 (‘The CJEU hardly topped the list of villains in the “Leave” camp’).
\(^52\) See in this vein Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65 The Modern Law Review 377.
\(^53\) Madsen, Cebulak and Wiebusch (n 39) 203.
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’.\(^\text{54}\) Requiring instances of backlash to manifest such specific intentions or aims overlooking cases that should be so categorised.

Restricting understanding of backlash to cases that fit 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 and their co-authors, 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 on which they rely as intrinsic to that phenomenon. 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 and co-authors 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 that promote and participate in international tribunal opposition in order 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 the true aims of actors. Even triangulating among multiple primary and secondary sources may prove to be misleading.\(^\text{55}\)

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 competence or jurisdiction. This presumption can make it more difficult to distinguish the drivers of backlash – its \textit{explanantia} – from its manifestations, insofar as tribunal or actor claims about such behaviour or features may

\(^{54}\) eg, Francesco Francioni, ‘From Utopia to Disenchantment: The Ill Fate of “Moderate Monism” in the ICJ Judgment on the Jurisdictional Immunities of the State’ (2012) 23 \textit{European Journal of International Law} 1125, 1128. In similar vein 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”: Marko Milanovic, ‘Palestine Sues the United States in the ICJ Re Jerusalem Embassy’, \textit{EJIL: Talk!}, 30 September 2018, https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy.

\(^{55}\) Alan M Jacobs, ‘Process Tracing the Effects of Ideas’ in Andrew Bennett and Jeffrey T Checkel (eds), \textit{Process Tracing: From Metaphor to Analytic Tool} (Cambridge University Press 2015) 41, 45.
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 lawmaking and remaking. Similarly, 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.

3.3. 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 in resisting international tribunals, rather than seeking to discern and rely on actor aims and objectives. This proposal reflects the greater 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, opens a potentially 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’.

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. First, 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

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56 David Caron and Esme Shirlow, ‘Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences’ in Andreas Froellesdal and Geir Ulfstein (eds), The Judicialization of International Law: A Mixed Blessing? (Oxford University Press 2018) 159, 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’ (2007) 42 Harvard Civil Rights-Civil Liberties Law Review 435. See in a similar vein (i.e. focusing on behaviour and attitudes towards tribunals) the definition of backlash of Soley and Steininger 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’: Ximena Soley and Silvia Steininger, ‘Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights’ (2018) 14 International Journal of Law in Context 237, 241.
‘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 facto, as well as in an 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.57

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 with 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’.58

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 the approach of Caron and Shirlow and Sunstein, 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.59 Substate and transnational discontent with international adjudication are, of course, phenomena worthy of study. 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

57 See the discussion of Serbian government attitudes to the International Criminal Tribunal for the former Yugoslavia (ICTY) in Henry Lovat, ‘International Criminal Tribunal Backlash’ in Kevin Jon Heller and others (eds), Oxford Handbook of International Criminal Law (Oxford University Press 2020) 601.
58 Oxford English Dictionary, OED Online, March 2020 (Oxford University Press), https://www.oed.com/view/Entry/97479?redirectedFrom=intensity.
59 Shany (n 1).
notwithstanding popular support or opposition. In contrast, even if there is widespread transnational/substate 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’.\(^\text{60}\) Madsen, Cebulak and Wiebusch 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’.\(^\text{61}\) State support is likewise recognised by Alter, Helfer and Madsen as the ‘Achilles heel’ of international tribunals.\(^\text{62}\)

Several further studies similarly examine resistance to international tribunals through the lens of government disaffection.\(^\text{63}\) For present purposes, therefore, reflecting the above adaptations to the conceptions of Caron and Shirlow, and Sunstein, 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.

3.4. 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 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 and prominent element of government policy: accordingly we may 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.

\(^{60}\) Frédéric Mégret, ‘ICC, R2P, and the International Community’s Evolving Interventionist Toolkit’ in Jan Klabbers (ed), Finnish Yearbook of International Law: Volume 21 (Hart 2013) 21, 36.

\(^{61}\) Madsen, Cebulak and Wiebusch (n 39) 215.

\(^{62}\) Alter, Helfer and Madsen (n 40) 452.

\(^{63}\) eg, Alter, Gathii and Helfer (n 4); Boehme (n 20); Helfer (n 5); Laurence R Helfer and Anne E Showalter, ‘Opposing International Justice: Kenya’s Integrated Backlash Strategy against the ICC’ (2017) 17 International Criminal Law Review 1; Lovat (n 57); Susan Marks, ‘Backlash: The Undeclared War against Human Rights’ (2014) 4 European Human Rights Law Review 319; Sandholtz, Bei and Caldwell (n 26); Soley and Steininger (n 56); Øyvind Stiansen and Erik Voeten, ‘Backlash and Judicial Restraint: Evidence from the European Court of Human Rights’, SSRN ELibrary, 17 August 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166110.
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, for example, may seek 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.64 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 and their co-authors, 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 movable feast. This need not mean, though, that the concept should be abandoned as an underspecified ‘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 systematic cross-sectoral examination of the causes – and accordingly the prospects for effective management and amelioration – of tribunal backlash.

4. A PLURALIST APPROACH TO TRIBUNAL BACKLASH

4.1. 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 examination65 – or have focused on only a narrow set of pre-specified factors that contribute to tribunal backlash and resistance.66

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 and 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 that shape

64 Alter (n 2) 21.
65 eg, Alter, Gathii and Helfer (n 4).
66 eg, Mills and Bloomfield (n 19).
government behaviour. Recent developments in IR 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 various important aspects of international political behaviour. In the context of backlash, a pluralist theoretical lens accordingly enables progress to be made by situating work to date 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 are available in the current literature.

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.

4.2. WHICH PLURALISM?

Analytical eclecticism, as developed principally by Rudra Sil and Peter 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’. 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:

67 On the ‘pluralist turn’ in IR see variously, eg, Jeffrey T Checkel, ‘Theoretical Pluralism in IR: Possibilities and Limits’ in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), Handbook of International Relations (2nd edn, Sage 2013) 220; Nicholas Rengger, ‘Pluralism in IR Theory: Three Questions’ (2015) 16 International Studies Perspectives 32; Colin Wight, Tim Dunne and Lene Hansen, ‘The End of International Relations Theory?’ (2013) 19 European Journal of International Relations 405. See also related discussion in Henry Lovat, Negotiating Civil War: The Politics of International Regime Design (Cambridge University Press 2020) Ch. 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 (University of California Press 1978) 80.

68 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’ (2002) 26 International Security 153, 154.

69 Rudra Sil and Peter Katzenstein, Beyond Paradigms: Analytic Eclecticism in the Study of World Politics (Palgrave Macmillan 2010) 10; Rudra Sil and Peter Katzenstein, ‘Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions’ (2010) 8 Perspectives on Politics 411.
indeed, eclecticism has ‘rapidly become part of mainstream debates about the kind of knowledge … to pursue and how (this) is best attained’.70

Rather than seek to synthesise insights from existing traditions by generating novel self-standing theories, with the risk of further cramping a crowded field already prone to conceptual proliferation,71 an eclectic approach is instead built around and retains reference to concepts situated in the theoretical contexts in which they have been developed.72 This approach accordingly is relatively well placed to render the resultant insights intelligible to audiences both more and less well versed in IR theory, as well as ‘capturing the interactions among different types of causal mechanisms normally analyzed in isolation from each other’.73

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

Taking these in turn, a key difficulty with developing an analytically eclectic theoretical framework in a disciplinary context that embraces a range of theoretical perspectives is in identifying ‘where to stop’, such that it is possible to say more than that ‘everything – somehow – matters’.74 There are a number of potential means of addressing this issue. Perhaps the most straightforward 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 socio-logical structure’: in the present context – realism, rationalism, liberalism and conventional constructivism.75 This choice also assists in ensuring theoretical coherence by enabling the adoption of a lens with a consistently positivist epistemological orientation: this reflects the traditional

70 Christian Reus-Smit, ‘Beyond Metatheory?’ (2013) 19 European Journal of International Relations 589, 591. Lake has similarly termed analytic eclecticism ‘the only real alternative to the status quo’: David A Lake, ‘Why “Isms” Are Evil: Theory, Epistemology, and Academic Sects as Impediments to Understanding and Progress’ (2011) 55 International Studies Quarterly 465, 472.

71 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 (n 70) 473.

72 For alternative ‘pluralist’ approaches see, eg, Colin Elman, ‘Explanatory Typologies in Qualitative Studies of International Politics’ (2005) 59 International Organization 293; Jörg Friedrichs and Friedrich Kratochwil, ‘On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology’ (2009) 63 International Organization 701; Andrew Moravcsik, ‘Theory Synthesis in International Relations: Real Not Metaphysical’ (2003) 5 International Studies Review 131.

73 Sil and Katzenstein, ‘Analytic Eclecticism in the Study of World Politics’ (n 69) 412.

74 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, Helfer and Madsen 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 Alter, Helfer and Madsen (n 4) 24, 36.

75 Peter Marcus Kristensen, ‘International Relations at the End: A Sociological Autopsy’ (2018) 62 International Studies Quarterly 245. Kristensen refers to realist, liberal institutionalist, and constructivist ‘isms’: these categories, however, may, 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.
(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 and more effective policy responses to this phenomenon.

4.3. AN ANALYTICALLY ECLECTIC APPROACH TO TRIBUNAL BACKLASH

Building on the previous discussion, this 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 that contribute 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.

4.3.1. REALIST BACKLASH

Realism in IR has been associated traditionally 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. Perhaps most (in)famously in respect of 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.

76 See Hans J Morgenthau, Politics Among Nations: The Struggle for Power and Peace (4th edn, Knopf 1967); Kenneth Neal Waltz, Theory of International Politics (McGraw-Hill 1979). Also, generally, Jack Donnelly, ‘Realism’ in Scott Burchill and others (eds), Theories of International Relations (3rd edn, Palgrave Macmillan 2005) 29; John Mearsheimer, ‘Structural Realism’ in Timothy Dunne, Milja Kurki and Steve Smith (eds), International Relations Theories: Discipline and Diversity (4th edn, Oxford University Press 2016) 51; William C Wohlforth, ‘Realism’ in Christian Reus-Smit and Duncan Snidal (eds), The Oxford Handbook of International Relations (Oxford University Press 2008) 132.

77 John Mearsheimer, ‘The False Promise of International Institutions’ (1994) 19(3) International Security 5. As observed by Strange: ‘All those international arrangements dignified by the label regime are only too easily
It is arguably futile to attempt to identify a fixed core of realist thought.78 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. Rodman, for example, underlines that the effectiveness of international criminal tribunals can depend on the preferences and capacities of materially powerful states.79 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.

4.3.2. 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 work of Barbara Koremenos on international institutional design provides a particularly relevant body of research from which to derive rationalist insights relating to backlash.80

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 upset when either the balance of bargaining power or the perception of national interest (or both together) change among those states who negotiate them: Susan Strange, ‘Cave! Hic Dragones: A Critique of Regime Analysis’ (1982) 36 International Organization 479, 487 (cited in Stephen D Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’ (1982) 36 International Organization 185, 190).

78 Jeffrey Legro and Andrew Moravcsik, ‘Is Anybody Still a Realist?’ (1999) 24(2) International Security 5. Also, Peter Feaver and others, ‘Brother, Can You Spare a Paradigm? (Or Was Anybody Ever a Realist?)’ (2000) 25 International Security 165.

79 Rodman (n 20). See in similar vein David Bosco, Rough Justice: The International Criminal Court’s Battle to Fix the World, One Prosecution at a Time (Oxford University Press 2013).

80 Barbara Koremenos, The Continent of International Law: Explaining Agreement Design (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’ (1982) 36 International Organization 325; Robert O Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (Princeton University Press 1984); Lisa Martin, ‘An Institutionalist View: International Institutions and State Strategies’, in TV Paul and John A Hall (eds), International Order and the Future of World Politics (Cambridge University Press 1999) 78; Barbara Koremenos, Charles Lipson and Duncan Snidal, ‘The Rational Design of International Institutions’ (2001) 55 International Organization 761; James D Morrow, Order within Anarchy: The Laws of War as an International Institution (Cambridge University Press 2014).
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 substate 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 United States and the ICC – formally be subject to tribunal jurisdiction.

This perspective is again consistent with notable interventions in debates over tribunal backlash. Sandholtz, Bei and Caldwell 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’.81 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 court through some form of backlash’.82 Moreover, perceived costs and benefits may change over time, 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.

4.3.3. CONSTRUCTIVIST BACKLASH

Constructivism provides a third research tradition, forming a meta-theoretical counterpoint to rationalist approaches to IR.83 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

81 Sandholtz, Bei and Caldwell (n 26).
82 Abebe and Ginsburg (n 16).
83 On constructivism generally see, eg, Emanuel Adler, ‘Constructivism in International Relations: Sources, Contributions and Debates’ in Carlsnaes, Risse and Simmons (n 67) 112; Ian Hurd, ‘Constructivism’ in Reus-Smit and Snidal (n 76) 298; Alexander Wendt, ‘Anarchy Is What States Make of It: The Social Construction of Power Politics’ (1992) 46 International Organization 391.
international tribunals. 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 with a given identity’, 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, which potentially include other governments as well as non-state actors such as civil society and tribunals themselves. Such pressure is brought to bear through the operation of a ‘logic of appropriateness’, the efficacy of which may vary depending, among other circumstances, on broader international discursive trends: the prevailing normative Zeitgeist. At the heart of the constructivist claim here is that where realist 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. 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’. This perspective accordingly suggests that backlash may reflect social pressure on governments – accounts often refer to norm entrepreneurs ‘teaching’ governments – to conform to norms advocated by broader communities of actors. The efficacy of such agency is, in turn, likely

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84 Ted Hopf, ‘The Promise of Constructivism in International Relations Theory’ (1998) 23 International Security 171.
85 Peter J Katzenstein, ‘Introduction: Alternative Perspectives on National Security’ in Peter J Katzenstein (ed), The Culture of National Security: Norms and Identity in World Politics (Columbia University Press 1996) 5.
86 See, eg, Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 International Organization 887; Audie Klotz, Norms in International Relations: The Struggle against Apartheid (Cornell University Press 1999); Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds), The Power of Human Rights (Cambridge University Press 1999); Kathryn Sikkink, The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics (WW Norton 2011); Adam Bower, Norms Without the Great Powers: International Law and Changing Social Standards in World Politics (Oxford University Press 2016).
87 As put by Fehl, 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 Fehl, ‘Explaining the International Criminal Court: A “Practice Test” for Rationalist and Constructivist Approaches’ (2004) 10 European Journal of International Relations 357, 366.
88 Katzenstein and Okawara observe, eg, 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 (n 68) 174.
89 Elizabeth Stubbins Bates, ‘Sophisticated Constructivism in Human Rights Compliance Theory’ (2014) 25 European Journal of International Law 1169, 1179. This term, it should be noted, is itself contested: see, eg, differing visions in Finnemore and Sikkink (n 86); Alastair Iain Johnston, Social States: China in International Institutions, 1980–2000 (Princeton University Press 2014) 20, 155, 165.
to be affected by the extent to which the behaviour or attitudes sought are consistent with broader international or regional normative trends. 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.

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. Karen Alter, James Gathii and Laurence Helfer, for example, highlight how the efficacy of tribunal backlash in subregional African contexts has been affected by the mobilisation of transnational non-governmental communities (government-independent bureaucracies, subregional parliaments and civil society). Taking a contrasting tack, Mills and Bloomfield highlight the risks posed to the ICC by norm ‘antipreneurs’.

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

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 that lead governments to initiate or support backlash and accompanying international normative

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90 On the extent to which norm entrepreneurship can be affected and/or facilitated or constrained by the broader ‘Zeitgeist’, see Lovat (n 67). See also related literature on the impact of a shared normative ‘lifeworld’ on international lawmaking, especially Thomas Risse, “‘Let’s Argue!’: Communicative Action in World Politics” (2003) 54 International Organization 1. 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’ (2004) 39 Government and Opposition 288, 296. See also Jürgen Habermas, The Divided West (Ciaran Cronin tr, Polity Press 2006) 115, 119.
91 See related discussion in Lovat (n 67) Ch 1.
92 Alter, Gathii and Helfer (n 4).
93 Mills and Bloomfield (n 19). See in similar vein Clifford (n 19).
94 See, eg, Inken von Borzyskowski and Felicity Vabulas, ‘Hello, Goodbye: When Do States Withdraw from International Organizations?’ (2019) 14 The Review of International Organizations 335.
95 Alter (n 2) 28–32.
96 Bryce Baschuk, ‘US Raises Prospect of Blocking Passage of WTO Budget’, Bloomberg, 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.
contexts. We may see, for example, transnational campaigns focused on building public or behind-the-scenes coalitions to put pressure on governments to pursue certain goals, set against a normative backdrop more or less conducive to sustaining international rule of law institutions and governance. 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.

4.3.4. Liberal Backlash

Liberal IR theory comprises a further research tradition from which backlash-related insights may be derived. Particularly prominent in cross-disciplinary IL/IR literature, at the heart of this approach lies the insight that domestic politics – including substate constituency identities and interests, as well as governance structures – matter for foreign policy formulation. As Anne Marie Slaughter and Thomas Hale observe, ‘[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’.99

Much research in this vein has focused on the salience of democratic and democratising state governance features to foreign policy preferences, most commonly in relation to human rights regimes.100 Studies in this vein have focused, for example, on domestic cultural causes of state behaviour.101

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 substate constituencies.102 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.103

97 Kai Alderson, ‘Making Sense of State Socialization’ (2001) 27 Review of International Studies 415; Finnemore and Sikkink (n 86).

98 See Andrew Moravcsik, ‘Liberal International Relations Theory: A Scientific Assessment’ in Colin Elman and Miriam Fendius Elman (eds), Progress in International Relations Theory: Appraising the Field (The MIT Press 2003) 159; Andrew Moravcsik, ‘Liberalism and International Relations Theory’, Center for International Affairs, Harvard University, 1992; Andrew Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’ (1997) 51 International Organization 513; Andrew Moravcsik, ‘The New Liberalism’ in Reus-Smit and Snidal (n 76) 234; Anne-Marie Slaughter, A New World Order (Princeton University Press 2004).

99 Anne-Marie Slaughter and Thomas Hale, ‘International Relations, Principal Theories’, Max Planck Encyclopedia of Public International Law, September 2013, para 17.

100 See, eg, Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54 International Organization 217; also Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press 2009).

101 Gary J Bass, Freedom’s Battle: The Origins of Humanitarian Intervention (Knopf 2008); Gary J Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton University Press 2002).

102 Alter, Helfer and Madsen (n 74).

103 Eric A Posner, ‘Liberal Internationalism and the Populist Backlash’ (2017) 49 Arizona State Law Journal 795; Caron and Shirlow (n 56); Waibel and others (n 36). Recent work by Alter and Zürn (n 43) similarly highlights the role of public discourse in the broader ‘politics of backlash’.
Second, as observed by Ryan Brutger and Anton Strezhnev, 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. 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.

4.4. 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 shown in Table 1.

Table 1 is, of course, shorthand, highlighting only the principal factors, agents and causal mechanisms connecting the former with government propensities towards tribunal backlash. The bodies of theory concerned, moreover, are much broader than those 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 various contexts. Nevertheless, the table helpfully focuses attention on the main emphases of different traditions, and the most likely factors, agents and causal mechanisms that might be expected to be seen in operation in various spheres.

Perhaps most critical to acknowledge is that while Table 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 3,

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104 Brutger and Strezhnev (n 37); Vinjamuri (n 37) 127. Also discussions variously in Leach and Donald (n 28); Harzl (n 28); Helfer (n 28); Marchuk and Aksenova (n 28); Madsen (n 26) 172.

105 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, Cornell University Press 2003) 13.
Table 1

| Theoretical perspective/sphere of operation | Realist | Rationalist | Constructivist | Liberal |
|--------------------------------------------|---------|-------------|----------------|---------|
| Domestic                                   |         | Factors: International and domestic political/economic/other costs and benefits<br>Agents: Intragovernment<br>Mechanisms: Cost–benefit analysis |                | Factors: Impact of domestic constituency interests, values and affiliations on government attitudes and behaviour<br>Agents: Substate political actors<br>Mechanisms: Domestic social and political institutions/structures |
| Transnational                              |         | Factors: Transnational social pressure on governments, international normative Zeitgeist<br>Agents: Coalitions of transnational/domestic actors<br>Mechanisms: Social pressure on target governments |                | Factors: Impact of transnational constituency interests, values and affiliations on target government attitudes and behaviour<br>Agents: Transnational constituencies/networks<br>Mechanisms: Transnational-domestic constituency engagement |
| International                              | Factors: Relative material power differentials among states<br>Agents: Intragovernment<br>Mechanisms: Relatively weaker international legal constraints on more powerful states | Factors: International and domestic political/economic/other costs and benefits<br>Agents: Intragovernment<br>Mechanisms: Cost–benefit analysis | Factors: Government-government social pressure, international normative Zeitgeist<br>Agents: External governments<br>Mechanisms: Social pressure on target governments | }

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may be used to provide more sophisticated causal analysis of this phenomenon than is available in existing literature.

5. 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.

5.1. 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 the alternatives utilised in the literature to date. In particular, the proposed wording forgoes the need to ‘look inside actors’ heads’ to determine whether or not behaviour constitutes backlash.

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 readily be 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 ICC, and earlier Serbian opposition to the International Criminal Tribunal for the former Yugoslavia (ICTY). Similarly – as noted above in respect of the ICJ, WTO Appellate Body 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 other institutions can also reasonably

106 Daniel Chandler and Rod Munday, Dependent and Independent Variables (Oxford University Press 2016).
107 Lovat (n 57).
be expected to provide valuable clarity as to the extent to which they can be said 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.

5.2. 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.108

Reflecting the inclusion within this analytic lens of insights derived from multiple theoretical traditions, this approach permits the possible operation of and interaction among 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 among 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.

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 issue 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 various contexts. An eclectic analytic lens, however, allied with the definition

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108 Andrew Bennett and Alexander L George, ‘Process Tracing in Case Study Research’, paper presented at the MacArthur Foundation Workshop on Case Study Methods, Harvard University, 17–19 October 1997, 5.
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 the 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’.\textsuperscript{109} As Seva Gunitsky notes:\textsuperscript{110}

\textit{[T]heories, 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.}

The 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 for a granular understanding of the causal processes through which factors that drive and impede 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 among 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.\textsuperscript{111} In making these assumptions explicit – in this case deriving from the principal theoretical camps of IR – a further 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.

5.3. \ldots 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

\textsuperscript{109} Waltz (n 76) 10.
\textsuperscript{110} Seva Gunitsky, ‘Rival Visions of Parsimony’ (2019) 63 \textit{International Studies Quarterly} 707, 711.
\textsuperscript{111} As observed by Carr, ‘[i]t used to be said that facts speak for themselves. This is, of course, untrue. The facts speak only when the historian calls on them’: EH Carr, \textit{What Is History?} (2nd edn, Penguin 1990) 11 (cited in Gunitsky (n 110) fn 17).
to IR and IL, reliance on framing enquiry in these terms holds out the risk of reifying camps the boundaries of which have in reality often proved to be fuzzy, warranting caution in utilising these labels too loosely, even as shorthand.\textsuperscript{112} 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.\textsuperscript{113}

Second, the definition and lens set out above reflect a preference for a pragmatically parsimonious, generalisable, problem-solving, causal explanation of tribunal backlash as a cross-sectoral phenomenon.\textsuperscript{114} 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 for outcomes in particular instances. Accordingly, while the model may be 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, however, does not shed light directly on variation in tribunal behaviour.

This reflects a number of considerations, not least the challenges that are likely to be encountered in seeking to explain court behaviour by reference to what might be considered extralegal policy considerations. Judges may be reluctant, for example, to reveal the role that such factors might play in decision making.\textsuperscript{115} 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’.\textsuperscript{116} This finding is also consistent

\begin{itemize}
\item \textsuperscript{112} eg, Feaver and others (n 78).
\item \textsuperscript{113} eg, McCourt (n 41). Also, for broader international law and international relations perspectives see, eg, Andrew Linklater, ‘The English School’ in Scott Burchill and others (n 76) 84; Oona Hathaway and Harold Hongju Koh, \textit{Foundations of International Law and Politics} (Foundation Press 2005); Jeffrey Dunoff and Mark Pollack (eds), \textit{Interdisciplinary Perspectives on International Law and International Relations: The State of the Art} (Cambridge University Press 2013). Clarke’s recent work on the role of affect on conceptions of justice in Africa in the context of the ICC provides a further avenue for exploration by IL/IR scholars: Kamari Maxine Clarke, \textit{Affective Justice: The International Criminal Court and the Pan-Africanist Pushback} (Duke University Press 2019).
\item \textsuperscript{114} 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, \textit{Beyond Paradigms: Analytic Eclecticism in the Study of World Politics} (n 69) 3, 17.
\item \textsuperscript{115} Cassese, eg, 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 (entered into force 1 July 2002) 2187 UNTS 90: Antonio Cassese, ‘The Judge: Interview with Antonio Cassese’ in Heikela Verrijn Stuart and Marlise Simons, \textit{The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings} (Amsterdam University Press 2009) 52–53.
\item \textsuperscript{116} Alter, Helfer and Madsen (n 40) 447.
\end{itemize}
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’.117

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. Moreover, the extent to which and manner in which such factors interact with court behaviour to produce policy outcomes in any given instance is likely to be highly dependent on circumstances. Accordingly, while the 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.

6. 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.118 Backlash may conceivably be capable of eliciting similar responses. Indeed, as Alter has observed, like other forms of tribunal resistance, backlash may also be grounded in respectable principled positions.119

In contrast to common-or-garden variety resistance to tribunals, however, backlash harbours potentially far greater 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 who are concerned to maintain the legitimacy capital of courts, and that the extent to which judicial behaviour contributes to this phenomenon is at best uncertain.120

117 Geoff Dancy, ‘Searching for Deterrence at the International Criminal Court’ (2017) 17 International Criminal Law Review 625, 655.
118 As put by Madsen and co-authors, ‘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 (n 39) 217.
119 ‘[R]esistance to [courts] may be a deeply democratic phenomenon, an effort to reclaim national control over issues of central importance’: Alter (n 2) 21.
120 As noted, eg, by Harlan Grant Cohen and others, ‘Legitimacy and International Courts – A Framework’ in Grossman and others (n 11) 1, 7 (‘[t]o the extent that standards of global justice apply to all international actors, they may affect how judges in 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’). On legitimacy capital and related concepts of international court normative and sociological legitimacy see Cohen and others, ibid 4–9. See also Yuval Shany, ‘Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions’ in Grossman and others, ibid 354; and, in respect of international court authority, Alter, Helfer and Madsen (n 41) 5–14.
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 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 that are likely to play a significant role in determining the presence or absence of backlash in different instances.

Backlash against various 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 that shape 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, the 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 and 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 for policy actors to seek to prevent or ameliorate backlash.121

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.

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121 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, enhanced understanding of the drivers of tribunal backlash may equally facilitate the work of those who seek to further undermine such institutions.