Progress and Pushback in the Judicialization of Human Rights

INTRODUCTION

In 2016, Burundi, The Gambia, and South Africa all made moves to withdraw from the International Criminal Court (ICC). They were not alone. Kenya, Uganda, Rwanda, and a number of other African Union (AU) member states sought to orchestrate a mass withdrawal from the ICC. This withdrawal was precipitated by the ICC’s casework in Africa, including indictments against Kenyan President Uhuru Kenyatta and Deputy President William Ruto, as well as former Sudanese President Omar al-Bashir. While mass withdrawal never came to pass, the damage that these sustained rhetorical and political attacks caused continues to reverberate around the international criminal justice sphere. Indeed, efforts to undermine and assail the ICC are not unique to African Union member states. In 2019, the ICC inched closer to opening a case against the president of the Philippines, Rodrigo Duterte. President Duterte had some choice words to express his discontent with international justice: “I will never, never, never answer any question coming from you. It’s bullshit to me. I am only

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responsible to the Filipino[s]. Filipinos will judge.”

While the ICC has faced some of the more extreme and showy examples of backlash against international justice, it is far from alone in trying to navigate this current wave of attacks. In Lebanon, Hezbollah has undertaken a nearly decade-long – and quite successful – campaign to undermine the Special Tribunal for Lebanon (STL), a hybrid, domestic–international court designed to investigate and try the perpetrators responsible for the 2005 attack that killed Prime Minister Rafic Hariri. Since the STL opened for business in 2009, Hezbollah and its allies in Iran have systematically tried to subvert it, endangering witnesses and dismantling cases.

In Europe, the United Kingdom (UK) has blustered about withdrawing from the European Court of Human Rights (ECtHR) for many years. Long before “Brexit,” British political leaders complained about the ECtHR whenever it handed down a politically unpopular decision and advanced the idea of withdrawing from the Court as a way of drumming up domestic political support. Meanwhile, the Inter-American Court of Human Rights (IACtHR) has undergone a significant structural reform process in order to address systematic noncompliance and outright rejection of the Court by major regional players. At the same time, member states have nearly bankrupted the Inter-American Commission on Human Rights (IACmHR), threatening to disrupt the entire Inter-American Human Rights System (IAHRS).

Taken together, I refer to international human rights and criminal tribunals as the international justice regime.

\[\text{Footnotes:}\]

10 I also use the terms “court” and “tribunal” interchangeably.
regime more broadly have long experienced serious and sustained opposition.11 This opposition has come in many forms, from the United States’ early pledge to do anything in its power to stop the International Criminal Court12 to Canada’s nearly fifty-year-long refusal to join the Inter-American Court of Human Rights.13 Despite these protestations, since the end of World War II, international human rights and criminal accountability have become both highly legalized and judicialized.14 International courts and their legalistic language and methods have become fundamental for the negotiation of political questions surrounding human rights. Moreover, international human rights and criminal law are now central parts of discussions about war and peace.15


Proponents of these trends hold up international human rights and criminal tribunals as proof of a growing normative consensus around accountability, the rule of law, and human rights. These same proponents hail the growing authority and capacity of international tribunals to investigate allegations of abuse, to try the accused, and to offer accountability and reparations to victims. Yet, opponents, both new and old, of the international human rights and criminal law regimes point to the judicialization and increased legalization of human rights and accountability as examples of Western bias, elitism, and the inefficient bureaucratization of global politics.

Overview of the Problem

While resistance to international courts is not new, what is new, or at least newly conceptualized, is the politics of backlash to these institutions. This book asks – and answers – three main questions about backlash politics:

1. What is backlash and what forms does it take?
2. Why do states and elites engage in backlash against international human rights and criminal courts?
3. What can stakeholders and supporters of international justice do about these contemporary challenges?

To answer these questions, I take a broad theoretical and empirical scope. Building on the research from the human rights, international law, international relations, and political science fields, this book offers a multidimensional theoretical framework that guides our understanding of what backlash is, how it develops, and what can be done to combat it.
manifests, and why it occurs, all based on the concept of authority in international adjudication. Moving well beyond the single case studies that have thus far dominated much of the discussion of backlash against human rights and criminal tribunals, *Saving the International Justice Regime* examines backlash politics across two legal regimes – the international human rights and criminal regimes; three court systems – the European Court of Human Rights, the Inter-American Human Rights System, and the ICC; and three continents and nearly a dozen countries. Chapter 2 provides in-depth information about the book’s theoretical framework, empirical approach, and case selection.

Through this broad set of cases and interdisciplinary theoretical framework, this book advances the current thinking about backlash to international courts. In particular, *Saving the International Justice Regime* makes three contributions related to the study of backlash:

1. It provides a new definition and typology of backlash against international human rights and criminal tribunals.
2. It offers an interdisciplinary, multipronged theoretical framework that guides the empirical discussion of backlash politics across a broad scope of cases.
3. It generates a set of concrete policy recommendations to help international justice stakeholders safeguard international human rights and criminal tribunals.

Backlash, as I understand it, is more than noncooperation and noncompliance. It is a sustained attack on the tribunals that fundamentally challenges their structural, adjudicative, and moral authority. I take backlash to mean the politics of states and individual political leaders’ seeking to undermine and subvert the tribunals by working within the judicialized and legalized landscape of international human rights and criminal law.

Backlash politics threaten both the institutional capacity of the tribunals as well as the norms upon which they are built. At its core, backlash is the result of Western liberal democracies and the tribunals’ stakeholders simultaneously overestimating the ability of human rights and criminal courts to restrain state power and underestimating the ability of other powerful actors to usurp these institutions. A global retrenchment of democratic norms has only exacerbated these trends.

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RESISTANCE, RESENTMENT, AND RETRENCHMENT IN GLOBAL POLITICS

While the end of the Cold War brought with it a certain optimism about the future of democracy and human rights, the global war on terror and the more recent turn to populism has threatened the gains made in those areas. From Viktor Orbán in Hungary to Jair Bolsonaro in Brazil to Donald Trump in the United States (USA), leaders across the world have abandoned global governance and the liberal democratic order upon which it rests. This includes, but is not limited to, the international justice regime.

Resistance and retrenchment in global politics reflects a broader rejection of – and disdain for – the rule of law, democratic principles, and basic human rights. The World Justice Project’s Rule of Law Index indicates that declines in the rule of law marked nearly every corner of the globe between 2015 and 2020.19 Growing disaffected with democracy and its unmet promises, voters in Asia, Europe, Latin America, the United States, and beyond have ushered in a wave of populist governments, intent on reversing the democratic gains of the last century.20 According to the Varieties of Democracy (V-Dem) project, in 2019, for the first time in nearly twenty years, the number of autocracies exceeded that of democracies.21 Rates of repression against civil society have increased, as have restrictions on the media and free speech.22 Attacks on democratic liberal institutions and on the procedural consensus upon which democracy is built have only escalated in recent years.23

Attacks against liberal institutions and norms have been met with resistance. Although V-Dem described 2019 as a year in which major democracies risked sliding into autocracies, their data also revealed that 2019 brought more resistance and prodemocratic protests than in previous years. Nearly half of

22 Luhrmann et al., “Authoritarian Surges.”
all countries were host to prodemocratic protests in 2019, up from only a quarter in 2009.  

It is against this backdrop of democratic retrenchment and resistance that backlash against the international justice regime plays out. Backlash against international human rights and criminal courts can, of course, be part of a larger, wholesale rejection of the rule of law, democratic liberalism, and global governance. But, backlash against the international justice regime also can be more restrained in both targets and tactics. The definition and typology of backlash below offer guiding principles for how backlash against international human rights and criminal tribunals fits into both the extraordinary politics of existential threats to the global order as well as more restrained – and even mundane – assaults on specific norms, ideals, and institutions.

Understanding Backlash: A Guide to the Chapter

The rest of this chapter proceeds as follows. It begins by outlining how international human rights and criminal tribunals work and from whence international courts derive their authority. It is only by understanding international courts’ authority, and its precariousness, that scholars and stakeholders can understand what backlash against these courts is, how it manifests, why it occurs, and what to do about it. The centerpiece of the chapter is the unique and novel definition and typology of backlash against human rights and criminal tribunals that follows the discussion of authority. This typology also provides the organizational schema for the empirical chapters in the book. Following a discussion of the definition and typology, the chapter turns to a preview of the remainder of the book.

How International Human Rights and Criminal Tribunals Work: Authority in Context

The international justice regime is fertile ground for exploring various forms of backlash, the multiple drivers of backlash politics, and the variety of actors that can engage in backlash against international courts. International human rights and criminal courts occupy a unique nexus between the international and domestic spheres. International human rights courts litigate the relationship between states and constituents. International criminal courts, meanwhile, attempt to hold domestic political elites accountable based on ineffable international accountability norms. This positioning makes the international

Luhrmann et al., “Authoritarian Surges.”
justice regime an easy target for populist, nationalist, and authoritarian leaders. Moreover, because of their focus on liberal democratic human rights and accountability norms, international human rights and criminal courts are the crown jewels of the liberal democratic world order, and are thus especially vulnerable to backlash politics.

The international justice regime has experienced a panoply of backlash politics, from threatened withdrawals to near bankrupting to doctrinal challenges and more. International human rights and criminal courts are regularly on the receiving end of toxic vitriol and are the subject of countless angry op-eds. Understanding backlash against the international justice regime is critical for scholars, stakeholders, and supporters alike. Not only is the international justice regime important in its own right, but its experience with such a wide array of backlash politics can prove instructive for better understanding backlash against the global order more broadly.

The International Justice Regime: An Overview

The international human rights and criminal justice regime is expansive, covering nearly all corners of the globe and a wide array of individual and collective rights. All of the courts that are embedded in this regime, broadly speaking, share a set of common goals: demanding accountability for human rights abuses, whether during times of war or peace; providing reparations for victims; deterring future violence; and upholding normative standards of human rights and dignity. Both international human rights and criminal courts promote a vision of (nearly) universal human rights, one in which individuals are endowed with inherent and inalienable rights, regardless of how much power their state yields.

The regional human rights courts in Africa, the Americas, and Europe have their roots in international human rights law, including both civil and political rights, as well as economic, social, and cultural rights. The tribunals’ legal ambit is broad and the list of rights protected by these courts is long, ranging from the right to fair trial to intellectual property rights. These courts are part of regional organizations, like the African Union, the Council of Europe (COE), and the Organization of American States (OAS). States ratify regional human rights conventions, which then bind them to the jurisdictional powers of the tribunals. In doing so, states open themselves up for the adjudication of complaints brought by individuals against their government.25

25 Vanda Lamm, Compulsory Jurisdiction in International Law (Cheltenham, UK: Edward Elgar, 2014).
These tribunals reconceive the very notion of state sovereignty. While other forms of international law, such as international trade or security law, are based on the principle of reciprocity and address how governments treat each other, international human rights law concerns how governments treat their citizens. Human rights courts, however, upend that relationship by allowing individuals to file petitions against their governments at these courts. States, in turn, agree to be subject to rulings based on petitions brought by an individual plaintiff and handed down by an international court. While the regional courts are now a staple of international human rights law, it is important not to lose sight of the radical experiment with sovereignty that they represent.26

International criminal tribunals have a different objective, of course, but one that is related to the broader mandate of upholding individuals’ rights when governments fail to do so. International criminal tribunals are focused on individual criminal responsibility rather than state responsibility. The range of violations over which they have jurisdiction is often much narrower than those adjudicated at the human rights tribunals and typically includes war crimes, crimes against humanity, and genocide.27 International criminal courts aim to convict the worst perpetrators of the worst crimes. Underlying their mission is the idea that some human rights norms are inviolate. These *jus cogens* norms are few and far between (e.g., genocide, torture, and war crimes), but given their severity and the fact that they “deeply shock the conscience of humanity”28 these norms, advocates argue, cannot be limited by time or space. They can be tried anywhere, from the halls of the ICC to the Extraordinary Chambers in the Courts of Cambodia (ECCC).29 Sovereignty and head of state immunity cannot shelter perpetrators from accountability for the crimes they committed, or so the thinking goes.30


27 Collectively I refer to these as “atrocity crimes.”


29 This is to say nothing of the principle of universal jurisdiction as it manifests in national trials.

The international criminal tribunals’ relationship to states is also different than that of the regional human rights tribunals. In the case of the ICC, states can ratify the Rome Statute, which then means that the ICC can bring their leaders to trial, either through self-referrals from the states or the referral powers of the ICC Prosecutor. The United Nations Security Council (UNSC) also can refer cases, a process I discuss in more detail below. In the case of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), the United Nations (UN) created and paid for the tribunals, with varying levels of state consent. For the so-called hybrid tribunals in Cambodia, Lebanon, and Sierra Leone, the state and the UN collaborated on creating and running the courts.

From Whence the Power of International Courts

There is a broad and lively scholarly debate about the authority of international courts, as well as about the very concept of authority itself. While there are multiple ways of categorizing this scholarly dialogue, the scholarship on the authority of international courts generally falls into three categories: formalist and structural accounts of authority; accounts of authority derived from the courts’ performance; and normative and sociolegal approaches to authority. Formalist and structural approaches suggest that international courts derive their authority from the basic tenets of principal–agent theory. The principals, which are the member states, create international courts to adjudicate on their behalf. Scholars operating in this tradition emphasize the structural relationship between states and international courts, particularly the degree of independence international courts enjoy.

31 The ways in which cases get brought to the ICC complicates, somewhat, this relationship.