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Special Issue – Resistance to International Courts Introduction and Conclusion

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Today, international courts (ICs) are seemingly under pressure from a range of actors, including states, civil society and even legal professionals.[1] At least that is the impression one gets from reading the press and specialised international law blogs. The question is, however, whether such conclusions are premature or are depicting an exaggerated picture of the state of international legal affairs. Drawing on a set of case-studies of resistance to ICs across the world, this special issue provides a first ever comparative empirical assessment of instances and types of resistance to ICs.

The objective is both theoretical and empirical. The special issue starts with a paper by Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch entitled 'Backlash against international courts: explaining the forms and patterns of resistance to international courts'. The paper develops a general theoretical framework for studying patterns and forms of resistance to ICs against the backdrop of existing scholarship, as well as the other papers included in this issue. It introduces a number of key distinctions to better explain the variability of resistance to ICs. More specifically, it highlights the difference between mere pushback from individual Member States or other actors seeking to influence the future direction of an IC's case-law, and actual backlash in terms of critique seeking to challenge the authority of an IC. This differentiation between two forms of resistance is crucial for developing a roadmap to identify specific forms of resistance and contextual factors (actors, institutional and political context) that need to be taken into account when analysing resistance to ICs.

The opening paper by Madsen, Cebulak and Wiebusch sets out a framework for studying resistance to ICs that is deployed and discussed by all the other papers in this special issue. The paper by Jed Odermatt, 'Patterns of avoidance: political questions before international courts', analyses the avoidance techniques deployed by ICs to evade adjudicating on politically sensitive questions. The motivations for such judicial avoidance include perceived possibility of backlash against an IC in the form of curtailing its powers or withdrawal, which might also put at risk the legitimacy and authority of the court. Judicial avoidance also comes in various forms, which the paper analyses based on the case-law of the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU) and the East African Court of Justice (EACJ). The analysis of the motivations for judicial avoidance in the academic literature, of the nuances among the politically sensitive questions and of the techniques deployed by ICs, shows the lack of a common approach of ICs to the 'political question doctrine'.

Ximena Soley and Silvia Steininger's paper, 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights' (IACtHR), examines resistance against the IACtHR in the form of threats of withdrawal or actual withdrawal. The analysis of the cases of Venezuela, Peru,

[1]In this project, we understand ICs in accordance with the standard definition provided by the Project on International Courts and Tribunals (www.pict-pcti.org) as: (1) permanent institutions; (2) composed of independent judges; (3) that adjudicate disputes between two or more entities, at least one of which is either a state or an international organisation; (4) work on the basis of predetermined rules of procedure; and (5) render decisions that are binding. Using this definition, there are currently twenty-five supra and international courts in operation across the world.

Trinidad and Tobago and the Dominican Republic allows further nuance of the difference between, on the one hand, ordinary critique and resistance to particular norms, such as death penalty rulings, and, on the other hand, backlash against the general authority of an IC. The paper also unveils the contextual factors, in particular the co-operation with compliance partners, that frame the patterns of resistance in the Inter-American system.

In his paper, 'Resistance against the Court of Justice of the European Union', Andreas Hofmann demonstrates various forms of resistance to the CJEU that have been underexplored in the academic literature. The paper identifies non-compliance with the CJEU's rulings or their containment as instances of pushback against the court's authority and, based on empirical evidence, maps the forms of resistance by political authorities and national judiciaries. Instead of focusing on individual prominent cases, the argument is based on mapping the systemic and contextual factors affecting resistance against the CJEU. While the relative strength of the CJEU's authority lies in containing the backlash, the various forms of pushback appear to be inherent in the exercise of the CJEU's authority.

The next paper, 'The limits of international adjudication: authority and resistance of regional economic courts in times of crisis' by Salvatore Caserta and Pola Cebulak, compares the involvement of four ICs in politically sensitive disputes at the national level (constitutional crises or systemic rule-of-law violations). The paper analyses the de jure and de facto authority of the CJEU, the Andean Tribunal of Justice (ATJ), the Central American Court of Justice (CACJ) and the EACJ on legal disputes that mirror constitutional, political and social crises. While the institutional design and the rules on jurisdiction and standing before the ICs are of limited explanatory value, the comparative analysis highlights the importance of contextual factors, such as the support of the regional institutions, transnational expert communities and the national judiciary. These contextual factors appear to be crucial in explaining the limits to the authority of ICs in times of crisis.

The final paper, by Tom G. Daly and Micha Wiebusch, 'The African Court on Human and Peoples' Rights: mapping resistance against a young court', applies the resistance framework to the case-study of the African Court of Human and Peoples' Rights (ACtHPR). The fact that this IC is still a relatively young one results in tight connections between, on the one hand, the authority-building of the court, which is still struggling with legal and political commitment from the national actors, and, on the other hand, pushback and backlash against the ACtHPR. Focusing on the case-studies of Rwanda and Tanzania, the paper also identifies contextual factors of particular importance in Africa, such as the variety of political regimes.

In sum, this special volume provides both theoretical innovation with regard to better explaining resistance to ICs and a broad set of empirical case-studies exploring instances of pushback and backlash to ICs using our framework. The opening framing paper discusses an array of ICs addressed in existing scholarship, including the Southern African Development Community Tribunal (SADC Tribunal), the European Court of Human Rights (ECtHR) and the Caribbean Court of Justice (CCJ), to mention just a few. The special issue then presents fresh empirical studies of seven ICs: the International Court of Justice (ICJ), the CJEU, the EACJ, the IACtHR, the ATJ, the CACJ and the ACtHPR. While we do address the ICJ (Odermatt, 2018) and other global courts such as the International Criminal Court (ICC) and the World Trade Organisation's Appellate Body (Madsen *et al.*, 2018), our emphasis is generally on regional ICs in the areas of trade and human rights. This emphasis allows us to make general conclusion that are valid at least with regard to such regional institutions. But, as the framing paper suggests, the forms of resistance to global courts do no seemingly deviate from regional ICs.

A first major conclusion from our inquiry is that cases of backlash in terms of an assault on ICs seeking to diminish or obliterate their authority are very scarce. Many writings on backlash to ICs start with the example of the SADC Tribunal and its suspension in the wake of a ruling on land rights in Zimbabwe. Our inquiry suggests that the case of the SADC Tribunal is in fact an outlier and not representative of the general situation of ICs and the forms and patterns of resistance they face and have faced. Therefore, understanding resistance to ICs requires a different starting point than the extreme case of the SADC Tribunal. We suggest that it requires first a theoretical refinement of the

framework of understanding that does not aggregate all resistance to ICs as backlash, as suggested by the opening paper. Second, we suggest that it is necessary to take a comparative view of resistance to ICs and one that includes contextual and empirical study of ICs. And, consequently, we note that sweeping and more normative statements about a world 'renationalising' with grave consequences for multilateral institutions like ICs should be nuanced in view of actual empirical studies.

We do not find many instances of backlash, but we do find many instances of pushback – that is, instances of resistance to ICs that is challenging not the authority of ICs, but rather the directions of its case-law and jurisprudence. Our inquiry suggests that such pushback should not always to be regarded as an existential threat to ICs and their operation. In light of the fact that pushback is a continuously occurring phenomenon and that most ICs survive such critical interfaces with their audiences, we suggest that it is better seen as part of the operation of ICs. Pushback is in fact integral to ICs – that is, it is inherent to the functioning of modern international legal regimes rather that the source of their destruction. In that sense, it becomes the counterpart of the authority-building of ICs.

We will argue that this has two main explanations. First, critique of law and participation in debate about legal change is part of all legal systems. International legal systems are not different in this regard. Second, in light of the absence of conventional checks and balances in international legal systems, some of the debates that are channelled into parliamentary arenas and legitimate democratic discourse more generally in domestic systems will, in the case of ICs, occur via different channels due to the absence – in most cases – of such deliberative arenas. A key to the improvement of judicialised international regimes is therefore the need for rethinking how legitimate critique is channelled into the right fora in order to avoid it transforming into backlash and thereby no longer a critique of law, but a critique of the institutional authority of ICs.

In view of these findings, what can we say about the more general state of affairs of the international legal system? Considering our observation of limited backlash but continuously occurring pushback, we cannot support the more alarmist writings about the end of ICs. One of the reasons for the continuous existence of ICs, notwithstanding backlash and pushback, is probably the functional need for ICs and other global institutions capable of settling conflicts over international rules and transactions. This certainly seems to be the case with regard to international trade. Although the US currently is pursuing a more unilateral 'America first' foreign policy, most major economies of the world are still supportive of international regulation in the area, including various forms of dispute-resolution bodies such as ICs. We will not claim that ICs are the only way of solving such issues. As any other institutional innovation, they adapt and transform over time, but the core idea – and demand – for international dispute resolution does not seem to be declining overall in this area.

International human rights is naturally a slightly different matter. The paradox – to some – is that it is an international legal regime in which states bestow upon themselves an external international control. Seen in this perspective, it is indeed surprising that we find ICs in the area of human rights. But some scholars have, however, also pointed out that human rights are not simply a question of self-binding via external control (Moravcsik, 2000). They are also, and above all, about locking in certain value sets of geopolitical importance. The ECtHR, for example, was originally produced as a Cold War instrument (Madsen, 2007). In more recent times, notably since the 1990s, it has adapted to geopolitical changes and effectively turned into a key institution with regard to the democratisation of wider Europe. Similarly, the IACtHR has complex historical origins in the Cold War but has also transformed itself into an important institution of democratic consolidation in Latin America. The creation of the ACtHPR was also in part triggered by the new geopolitical conditions of the late 1990s (Viljoen, 2004).

All of this suggests that geopolitical conditions matter to those courts, just as trade liberalism has mattered to ICs adjudicating global and regional economic matters. The movement in favour of the international rule of law and democratisation might be already past its peak, but the effects of increased globalisation over the past decades have nevertheless created a structural demand for legal capacity at the regional and global levels. Today, we find visible resistance to these global developments and its institutions, but this inquiry does not support the claim that this resistance is generally

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undermining ICs. What it does suggest, however, is that many ICs lack adequate channels for voicing disagreement. Even courts, including ICs, have to adapt over time to the new realities of their contexts of operation. But that adaptation is best done incrementally and as part of continuous debate – not by assault on the institutional authority of ICs.

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