

## Review – Saving the International Justice Regime

Written by Franziska Boehme

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### ***Saving the International Justice Regime: Beyond Backlash against International Courts***

**By Courtney Hillebrecht**

**Cambridge University Press, 2021**

Backlash to international courts (ICs) has been in the news quite often over the past decade. From the collapse of the Southern African Development Community's Tribunal in 2010, to the resistance against the International Criminal Court (ICC) from several African states, to Venezuela's withdrawal from the Inter-American Court of Human Rights: The 2010s are aplenty with examples of high-profile backlash incidents. Along with these events, recent academic literature has made inroads into disaggregating resistance and backlash and investigating the causes of backlash.

Courtney Hillebrecht's new book *Saving the International Justice Regime: Beyond Backlash against International Courts* is the first, and so far only, book-length treatment of this topic, and it will surely serve as the benchmark treatment of backlash to international courts for years to come. It will be useful for scholars who seek to identify and explain instances of backlash to ICs across time and space. Apart from being timely, the book expertly provides first answers, and further, hypotheses, on three main research questions: 1. What is backlash and what are the types of backlash? 2. Why do states engage in backlash against the international justice regime? 3. What can stakeholders and supporters of the regime do about these challenges? To answer these questions, Hillebrecht analyses instances of backlash in three courts (ICC, Inter-American Court of Human Rights, European Court of Human Rights), and grounds the book in the notion of authority, specifically the delegated, adjudicative, and moral authority of international courts.

She defines backlash as a "sustained attack on the tribunals that fundamentally challenges their structural, adjudicative, and moral authority" (p.5). This definition is similar to others in that it must be a *sustained* attack on authority, but it usefully adds different forms of authority that ICs possess at which the backlash is targeted. In this understanding, backlash is more than mere non-cooperation and non-compliance, and is instead a sustained attack to undermine a court's authority. This backlash then threatens the norms underlying the institution, as well as the tribunals' capacity to mete out justice.

The book sets out four types of backlash that meet the definition (useful Table 1.1, pp.26-27). The first one is withdrawals and threats to withdraw from ICs, which ultimately question the universality of norms on which the IC rests. The second form of backlash occurs when states advance alternative domestic or international justice mechanisms (which the author usefully calls 'smokescreens'). Note here that attempts such as these *are not* backlash if they would actually work to advance human rights, as additional justice mechanisms could just as well serve to strengthen human rights writ large. The third and fourth types of backlash are imposing financial or bureaucratic restrictions on ICs, such as delays, as well as posing doctrinal challenges to the principles on which the IC is based. These doctrinal challenges limit "the adjudicative authority of international courts vis-a-vis domestic politics" (p.30). Examples of this would be misuses of the complementarity principle (ICC) or the margin of appreciation (European Court of Human Rights). Hillebrecht emphasises that these four forms are not mutually exclusive and that, while at first glance, exits might appear 'worse' for ICs than budgetary cuts, tightening budgets can also do "irreparable harm" to ICs (p.55). Each empirical chapter delves more deeply into these forms of backlash and uses case studies to illustrate the processes and actors.

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The book sets out four explanations for backlash: dependency on states; normative discontent; ICs and their decisions creating domestic winners and losers (domestic distributional consequences of international adjudication); and ICs inspiring domestic mobilisation against sitting governments (likelihood of states and elites engaging in future repression and violence). One of the examples discussed in the book is the effort by the African Union (AU) and several African countries to set up an ICC alternative with the Malabo Protocol that — contrary to the ICC — includes immunity for sitting heads of state. This backlash originated in the AU's "dissatisfaction with the ICC [which] has been a direct result of normative discontent among Rome Statute member states, especially with respect to head of state immunity" (p.96). In another case study, Hillebrecht discusses the 2016 financial crisis at the Inter-American human rights system, which led to state efforts to limit the Commission's authority by restricting individuals' ability to start complaints. She credits "civil society mobilisation and the engagement of steward states" (p.122) with the institutions' survival through the budget crisis and reform process.

The book delves deeper into the third research question in Chapter 7, where the book proposes various ways in which supporters and tribunals can save the international justice regime, suggesting that the challenges posed by backlash are not insurmountable. For one, supporters should do better at "managing public opinion by engaging in targeted and effective self-marketing campaigns as a way to make the tribunals' case to a broader audience" (p.159). Moreover, proponents of the international justice regime can improve the rule of law and the tribunals' functioning by increasing investments to improve legal processes as well as improving transparency with case selection (especially an issue at the ICC). Lastly, publicly reaffirming the courts' underlying norms of individual criminal accountability and human rights would help to show that these institutions serve laudable goals in the international system.

There are many noteworthy contributions in this book. Apart from being the first book-length analysis of backlash covering two different legal regimes (human rights and criminal justice) and three ICs, the book covers a lot of ground by addressing types and causes of backlash as well as policy prescriptions. The book stands out for its clear writing style and the frequent recapitulation of the main theoretical framework centred around the courts' authorities. At points, Hillebrecht also considers non-cases of backlash. For instance, in Chapter 3 on withdrawals, she looks at Colombia, which decided to remain in and engage with the Inter-American human rights system despite plenty of court cases against the country — something that would lead us to expect backlash. Hillebrecht explains the non-exit with the country's domestic politics, including a robust constitution and free and fair elections. For me, the biggest addition to the literature lies in the book's explicit discussion and inclusion of more subtle or hidden forms of backlash. While scholarship has focused a lot on withdrawals and the creation of alternate forms of justice as instances of backlash (see articles [here](#) and [here](#)), Chapters 5 and 6 talk about more hidden challenges involving budget politics and bureaucratic rules as well as doctrinal challenges. The author is right to point out the various advantages that might make these backlash forms more common than we think but also harder to study, precisely because they might be hidden in the pages of annual financial reports.

For me, there are few criticisms of this book. I was less convinced by the first driver of backlash: dependency on states. Rather than a driver, dependency on states is a design feature, a constant, as ICs by design rely on states to implement their rulings. While a court's dependence on states allows governments to engage in backlash because they can easily hamper ICs' work by non-complying, states do not engage in backlash *because* of it. Hence, I am not (yet?) convinced that dependency on states constitutes a driver of backlash as much as the other three.

The second point of critique relates to some missing empirics that would have strengthened the manuscript. In Chapter 3 on withdrawals, the author explains in detail the 3 cases and provides a table about additional instances of withdrawal and threats to exit. I wish the book had provided something similar in the empirical chapters on other backlash forms. While those chapters convincingly show examples of the backlash forms, they do not provide an answer for how widespread these forms are. How often do we see doctrinal challenges? How often do states engage in efforts to adjust budgets? More data on this would have made case selection more transparent in the other empirical chapters, and it would help readers get a sense of how concerned justice advocates really should be about these phenomena.

Taken together, the book provides a compelling overview of the phenomenon of backlash to ICs, its forms and

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drivers, all supported with detailed examples from around the world. It draws our attention to forms of backlash that seldom make the news, and opens up new research questions surrounding backlash: What is the role of liberal democracies in backlash to ICs? To what extent is backlash part of a broader phenomenon of “existential threats to the global order” (p.7)? To what extent does backlash occur at specific times, such as surrounding domestic crises or elections? Is there sequencing between the backlash forms? All in all, the book and these questions point to a relevant and timely assessment of how states use the tools at their disposal in a back and forth with the ICs they joined, but which might not always rule in their favour.

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### **About the author:**

Franziska Boehme is Assistant Professor of Political Science at Texas State University. Her research focuses on the International Criminal Court and transitional justice.