

> Liberalism, Populism, and the Backlash Against International Courts

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Abstract

Why do some governments start backlashes against international human rights and economic courts whereas others continue to accept adverse judgments? Existing theories point to the rising implementation costs of court judgments and democratic reversals. I highlight the role of ideology. Theories often portray international courts as efforts to constrain governments. Yet, international courts also protect liberal limits on majoritarianism, such as protecting property and minority rights. I argue that international courts tend to face backlashes from governments that rely on the support of populist movements and over court judgments that reinforce local populist mobilization narratives. Numerous examples of backlashes against human rights and criminal courts as well as investment tribunals illustrate the argument.

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Liberalism, Populism, and the Backlash against International Courts

Both the numbers of international courts¹ and their judgments increased markedly throughout the 1990s and the early 2000s.² More recently, however, these institutions have faced a growing backlash. Several African states have left the International Criminal Court (ICC) or are threatening to do so. Some Latin American and European governments are seeking to diminish their exposure to Investor State Dispute Settlement (ISDS), regional human rights courts, and regional economic courts.

What explains this backlash? Perhaps governments have simply tired of international courts trampling on their sovereignty. This is too simple an answer. Many governments continue to accept consequential adverse rulings. Other governments reject individual rulings but do not initiate assaults on the authority of courts. Moreover, the rulings that trigger backlashes are sometimes relatively easy to implement.

Another promising, yet incomplete, explanation points to reversals in democratization. Most backlashes involve international courts that resolve disputes between private actors and states. Theories typically view such courts as efforts to constrain governments from abusing their power vis-à-vis their publics. In democracies, domestic publics can hold governments accountable for their failure to do so. This gives international law additional weight.

This account misses that government backlashes against international courts are often popular with domestic publics. I argue that any account of backlashes against international courts, and possibly international institutions more broadly, must consider the rise of illiberal ideologies, including in electoral democracies. International courts are not just constraints on governments but also protect property and liberty from the “tyranny of the majority.”

¹ I am going to use the term court liberally to include all international judicial institutions with binding legal authority, including investment arbitration and the WTO’s Dispute Settlement understanding.

² Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014).

Courts are designed to occasionally conflict with domestic public opinion.

Unpopular judgments do not always result in backlash. Governments may begrudgingly implement them or resist individual judgments without attacking the authority of a court. I argue that international courts tend to face backlashes in countries where there are populist surges and over court judgments that reinforce local populist mobilization. Where international courts issue unpopular judgments, populism offers an ideology for why these courts should not have had the authority to decide these cases in the first place. Strong populist movements or populist presidents therefore make it more likely that governments opt for challenging the authority of courts over alternative strategies such as acceptance, non-compliance, or avoidance.

I follow Cas Mudde in defining populism as “a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite.’”³ Despite its thin center, populism sets the stage for conflicts with international courts: populists oppose both counter-majoritarian institutions that protect pluralism and locating authority internationally. Yet, international courts only become salient when they deliver judgments that intersect with the thicker bases of populist mobilization, such as land rights, neoimperialism, nativism, or other local ideological conflict. In other words, international court judgments can provide kindling to already burning populist fires.

This explanation highlights that international courts have distributive consequences. International courts by and large serve to promote a respect for liberal principles such as civil liberties, property rights, free trade, capital mobility, and judicial checks on executive power. Some political parties, media, and civil society groups do not see international courts as tools to protect them from the illiberal tendencies of elites but as tools for liberal elites to cement their preferred policies against the ‘will of the people.’

This paper constitutes a first attempt to connect backlash against international courts and populism in the academic literature.

³ Cas Mudde, “The Populist Zeitgeist,” *Government and Opposition* 39, no. 4 (2004): 543.

Unfortunately, neither concept is well defined nor easily operationalized. This paper concentrates on the exercise of making the theoretical connections and illustrating these with examples. These are plausibility probes rather than rigorous tests of empirical propositions.

What is the Backlash against International Courts?

Scholars have used the term backlash to describe resistance against investment arbitration,⁴ NAFTA dispute settlement,⁵ the Court of Justice of the European Union,⁶ international human rights courts,⁷ the European Court of Human Rights,⁸ the Inter-American Court of Human Rights,⁹ African regional courts,¹⁰ and the International Criminal Court (ICC).¹¹

There is a good deal of consistency in how scholars use the term. Isolated criticisms or instances of non-compliance do not

⁴ Michael Waibel, ed., *The Backlash against Investment Arbitration: Perceptions and Reality* (Austin, Tex: Wolters Kluwer Law & Business, 2010); David D. Caron and Esme Shirlow, “Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 29, 2016), <https://papers.ssrn.com/abstract=2834000>.

⁵ Dana Krueger, “Combat Zone: *Mondev International, Ltd. v. United States and the Backlash Against NAFTA Chapter 11 Note*,” *Boston University International Law Journal* 21 (2003): 399–426.

⁶ Karen J. Alter, “The European Union’s Legal System and Domestic Policy: Spillover or Backlash?,” *International Organization*, July 2000, /core/journals/international-organization/article/european-unions-legal-system-and-domestic-policy-spillover-or-backlash/A95585147F747B3CAF62704D23CFC814.

⁷ Wayne Sandholtz, Yining Bei, and Kayla Caldwell, “Backlash and International Human Rights Courts,” *Paper Prepared for the Contracting Human Rights Workshop at the University of California, Santa Barbara, 26 – 28 January 2017*, 2017.

⁸ Mikael Madsen, “The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash,” *Law and Contemporary Problems*. 79, no. 1 (2016): 141.

⁹ Laurence R. Helfer, “Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes,” *Columbia Law Review* 102, no. 7 (November 1, 2002): 1832–1911, doi:10.2307/1123662.

¹⁰ Karen J. Alter, James T. Gathii, and Laurence R. Helfer, “Backlash against International Courts in West, East and Southern Africa: Causes and Consequences,” *European Journal of International Law* 27, no. 2 (May 1, 2016): 293–328, doi:10.1093/ejil/chw019.

¹¹ Laurence R. Helfer and Anne E. Showalter, “Opposing International Justice: Kenya’s Integrated Backlash Strategy against the <small>ICC</small>,” *International Criminal Law Review* 17, no. 1 (February 19, 2017): 1–46, doi:10.1163/15718123-01701005.

constitute a backlash. Scholars typically locate government responses to adverse rulings on a continuum from compliance to partial compliance¹² and non-compliance.¹³

A backlash refers to a series of governmental and/or non-governmental actions that aim to curb or reverse the authority of an international court. This includes credible efforts to eliminate a court, to withdraw from its jurisdiction, to propose limiting reforms, and or to delegitimize a court. Although a court decision may trigger a backlash, a backlash ultimately targets the system. Backlash is not located at the far end of the compliance-non-compliance spectrum: resisting a specific ruling is a very different thing than threatening to exit or reform a system.

There are different gradations of backlash. Minor reforms that carve out exceptions for access to ISDS are quite common adjustments to lessons learned.¹⁴ Other backlashes are more far-reaching, including actually leaving a court's jurisdiction and eliminating a court's jurisdiction altogether.

For example, Zimbabwe succeeded in eliminating the Southern African Development Community (SADC) tribunal after an unfavorable ruling.¹⁵ The Kenyan government didn't just oppose ICC prosecutions of President Uhuru Kenyatta and Deputy President William Ruto, it also coordinated regional opposition

¹² Darren Hawkins and Wade Jacoby, "Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights," *Journal of International Law and International Relations* 6 (2011 2010): 35; Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, Cambridge Studies in International and Comparative Law (New York: Cambridge University Press, 2014).

¹³ The ease of non-compliance varies across legal regimes. It is hardest in the investment regime, where awards can be enforced (at a cost) in foreign jurisdictions (especially Switzerland, London, and New York). Still, even in the investment regime, governments have tactics to delay or avoid payments, including endless appeals and domestic legal actions against plaintiffs (including criminal trials). Backlash and State Strategies in International Investment Law. Malcolm Langford, Daniel Behn* & Ole Kristian Fauchal. Forthcoming in T. Gammeltoft-Hansen and T. Aalberts (eds.), *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World*, Cambridge University Press, Cambridge, 2017.

¹⁴ Malcolm Langford and Daniel Behn, "Managing Backlash: The Evolving Investment Treaty Arbitrator?," *European Journal of International Law* Forthcoming (2017), <https://papers.ssrn.com/abstract=2835488>; Haftel and Thompson, "When Do States Renegotiate Investment Agreements?"

¹⁵ Alter, Gathii, and Helfer, "Backlash against International Courts in West, East and Southern Africa."

against the court and politicized its previous actions.¹⁶ Bolivia, Ecuador, Indonesia, Poland, South Africa, and Venezuela have sought to withdraw themselves from investment arbitration where possible and have urged others to do the same based on charges that the system is illegitimate.¹⁷ The United Kingdom, Russia, and some other European states have threatened to leave the ECtHR and/or have taken measures to complicate the implementation of its judgments.¹⁸

Most backlashes follow international judgments that involve private parties rather than inter-state dispute settlement or court judgments that constrain international bureaucracies, like the European Commission. This form of adjudication has generated the bulk of legally binding judgments since 1990.¹⁹ Investment tribunals and human rights courts (including criminal tribunals) have received particular scrutiny. That said, the backlash is by no means universal and its impact is limited (at least so far). Two of the three African governments who announced their intention to leave the ICC have at least temporarily withdrawn this decision. Decisions to leave ICSID and eliminate some investment treaties do not exempt governments immediately and fully from the investment arbitration system. Some countries, like China and Germany, have responded to adverse rulings by strengthening investor protections rather than resisting the system.²⁰ As of the spring of 2017, no government has actually left the ECtHR's jurisdiction. Explanations for backlash must explain both why it may occur and why (and where) not.

Explanations for Backlash

There is no literature that I am aware of that analyzes backlash against international courts as a general phenomenon.²¹ Scholars typically describe and analyze backlash in a specific

¹⁶ Helfer and Showalter, "Opposing International Justice."

¹⁷ Clint Peinhardt and Rachel L. Wellhausen, "Withdrawing from Investment Treaties but Protecting Investment," *Global Policy* 7, no. 4 (November 1, 2016): 571–76, doi:10.1111/1758-5899.12355.

¹⁸ Sandholtz, Bei, and Caldwell, "Backlash and International Human Rights Courts."

¹⁹ Alter, *The New Terrain of International Law*.

²⁰ Yoram Z. Haftel and Alexander Thompson, "When Do States Renegotiate Investment Agreements? The Impact of Arbitration," *The Review of International Organizations*, March 30, 2017, 1–24, doi:10.1007/s11558-017-9276-1.

²¹ The closest are the pieces cited in the previous two footnotes, which focus on Africa and human rights courts respectively. The Alter, Gathii and Helfer article explains how courts can resist backlashes rather than why backlashes occur.

context. There are good reasons to do so. Opposition to investment dispute settlement and human rights courts likely has diverse causes. There is no reason to presume that the IACtHR and ECtHR are under scrutiny for the precise same reasons or that Russia's opposition to the ECtHR is driven by the exact same mechanisms as the UK's.

That said we might draw some interesting theoretical lessons from examining backlash as a general phenomenon in the same way that legalization and delegation to international courts have been studied in general ways.²² I draw upon the legalization literature to propose two plausible general theories of backlash: rising sovereignty costs and a reversal in democratization.

Sovereignty Costs

The first, and most obvious, theory links backlash to the rising number of binding international court judgments. Governments should be more likely to trigger backlashes when the cumulative implementation costs increase.²³ It is hardly puzzling that Bolivia, Ecuador, and Venezuela lash out at ICSID following large financial awards to foreign companies. Indeed, there is evidence that states are more likely to renegotiate BITs the more ISDS cases they have been involved in.²⁴

A court 'going too far' in the eyes of the target government sometimes triggers backlashes. For example, Russia had minimally implemented ECtHR rulings for decades; paying monetary compensation but not changing policies to prevent future violations.²⁵ This changed following a judgment that awarded 2,5 billion dollars to Yukos shareholders.²⁶ The Putin government responded with a new law that grants Russian courts the right to decide whether Russia needs to implement ECtHR judgments.²⁷ Not surprisingly, the Russian courts found that there is no reason for

²² E.g. Judith Goldstein et al., "Introduction: Legalization and World Politics," *International Organization* 54, no. 3 (2000): 385–99.

²³ Sandholtz, Bei, and Caldwell, "Backlash and International Human Rights Courts."

²⁴ Haftel and Thompson, "When Do States Renegotiate Investment Agreements?"

²⁵ Hillebrecht, *Domestic Politics and International Human Rights Tribunals*.

²⁶ *Yukos v Russia*

²⁷ Sims, Alexandra. "Vladimir Putin Signs Law Allowing Russia to Ignore International Human Rights Rulings." *The Independent*. December 15, 2015.

Russia to comply with the *Yukos* ruling.²⁸ Paying fines was fine as long as these ran in the thousands of dollars but it became a different proposition when they rose to billions of dollars.

The material cost of judgments surely plays a role in backlash. Yet, this theory does not explain why some countries do not engage in backlash when faced with high cost judgments, why some backlashes are triggered over judgments that are not that costly to implement, and why the highest stakes courts (in material terms), the CJEU and the WTO's DSU, have faced only modest backlashes (if at all). For example, many states (e.g. Mexico) with large ICSID awards stay in the system. Italy has had more than twice as many ECtHR judgments against it as the United Kingdom but it is not seriously considering leaving. In the UK, relatively easy to implement judgments on prisoner voting rights and the extradition of a terrorist spurred a backlash where earlier judgments did not.²⁹

One answer is that sovereignty costs are not just material but also political.³⁰ This makes sense. However, any theory that makes such a claim needs to specify why some judgments at some times in some countries are "politically costly." Without such a theory the argument verges on the circular given that we only observe high political costs when politicians vent their rage about a court.

Democratization

A second theory links the growing importance of international courts in the 1990s and early 2000 to the third wave of democratization. If democracy and democratization were responsible for commitments to international courts, then more recent democratic reversals may be responsible for backlash.

Theories that link democratization and international courts typically pose that domestic and/or international audiences may not believe that a government is sincere when promising to improve

²⁸ Torrey Taussig and Yulia Netesova, "Putin's No Populist, but He Can Gain from Populist Movements Worldwide | Brookings Institution," *Brookings*, March 30, 2017, <https://www.brookings.edu/blog/order-from-chaos/2017/03/30/putins-no-populist-but-he-can-gain-from-populist-movements-worldwide/>.

²⁹ Des McNulty, Nick Watson, and Gregory Philo, "Human Rights and Prisoners' Rights: The British Press and the Shaping of Public Debate," *The Howard Journal of Criminal Justice* 53, no. 4 (September 1, 2014): 360–76, doi:10.1111/hojo.12075.

³⁰ Sandholtz, Bei, and Caldwell, "Backlash and International Human Rights Courts."

human rights, to respect the property rights of foreign investors, to prosecute war criminals, or to adhere to the provisions of trade agreements.³¹ Governments can make such promises more credible by doing something that makes diversions from the promised course costly. Tying hands to an international court seeks to accomplish this.

Democratizing states have strong incentives to make such credible commitments and to ‘lock-in’ democracy.³² Many democratizing states in the 1990s were also transitioning to market economies. These states often did not have strong property rights protections and they needed foreign investment. This provided incentives to sign BITs and commit to ISDS.³³

Moreover, international court judgments have more teeth in democracies. This is so for two reasons.³⁴ First, in democracies the public can hold politicians accountable for promises through elections, civil society mobilization, and the media. International court judgments may inform actors that a government is renegeing on its commitments, thus triggering mobilization. Second, in liberal democracies independent domestic courts can enforce international court judgments. This makes commitments to especially human rights courts more credible (ISDS rulings are often enforceable in third countries).

What are the implications of this theory for backlash? First, if governments lose an interest in democratization or in attracting foreign investment, then they also have incentives to withdraw from human rights courts and investment treaties respectively. Note though, that this is an ideological explanation. If illiberal leaders

³¹ Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201; Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217 (2000); Simmons & Danner, *supra* note 7.

³² Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54, no. 2 (April 1, 2000): 217–52.

³³ Srividya Jandhyala, Witold J. Henisz, and Edward D. Mansfield, “Three Waves of BITs: The Global Diffusion of Foreign Investment Policy,” *Journal of Conflict Resolution* 55, no. 6 (December 1, 2011): 1047–73, doi:10.1177/0022002711414373.

³⁴ E.g. Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).

come to power, then their interest in commitments to international liberal institutions should decrease even if a country still is an electoral democracy.³⁵

Second, among governments that remain publicly committed to liberalism, those governments who have most to gain from making credible commitments should be the ones that are most reluctant to engage in backlash. For example, in the human rights context, relatively new democracies are faster to implement ECtHR judgments presumably because they benefit more from doing so.³⁶ People might not question the future of UK democracy to the same extent as the future of Polish democracy should each country decide to leave the ECtHR. Similarly, if foreign investors are already uncertain about the security of their investments, then governments should have fewer incentives to challenge the investment dispute system.

Third, the theory assumes that deviating from international court judgments should be politically unpopular. The presumption is that civil society mobilizes on behalf of international courts not against it.³⁷ International courts are supposed to protect a democratic public from the kleptocratic tendencies of elites. Surely, if leaders could gain electorally or otherwise from defying international courts, then a commitment to them does not make policy or institutional reform more credible.

The commitment to international courts is more a commitment to liberalism than to electoral democracy. International courts protect property rights, civil liberties, market integration, and other goals promoted by a liberal ideology. The literature on international law and institutions has focused on regime type. It emphasizes two types of institutions. The first are elections, which hold politicians accountable to large selectorate. The second are constraints on the executive, which create balanced checks that restrict an executive from abusing her power. These institutions only help international courts constrain executives if publics and

³⁵ Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76, no. 6 (December 11, 1997): 22–43.

³⁶ Sharanbir Grewal and Erik Voeten, "Are New Democracies Better Human Rights Compliers?," *International Organization* 69, no. 02 (March 2015): 497–518, doi:10.1017/S0020818314000435.

³⁷ Simmons, *Mobilizing for Human Rights*.

domestic courts are indeed on the side of international law, which is not always the case even in countries that elect their leaders through fair elections. Courts can become politicized because they contradict the wishes of the executive but also because they clash with what majorities want. This suggests a (potentially) democratic but illiberal logic of resistance to international courts. Democratic reversals matter to the extent that they also imply reduced support for liberal internationalism. This suggests that we need to consider ideological as well as institutional changes.

Liberalism, Populism and the International Judiciary

My argument proceeds in three steps. The first step explains why international courts are political actors whose decisions have distributive consequences that could upset majorities. The second part discusses what populism is. The third part connects populism to opposition to liberal international courts.

International Courts as Political Actors

The literature has fiercely debated the extent to which international courts can be swayed by the political interests of governments. On the one hand, principal-agent theorists argue that governments regularly influence courts through the appointment process and threats of non-compliance, override, reform, and exit.³⁸ On the other hand, trustee theorists counter that such levers are rarely used and mostly ineffectual and that international courts enjoy considerable independence from governments.³⁹

³⁸ Manfred Elsig and Mark A. Pollack, “Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization,” *European Journal of International Relations* 20, no. 2 (June 1, 2014): 391–415, doi:10.1177/1354066112448201; Erik Voeten, “The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights,” *International Organization* 61, no. 04 (October 2007): 669–701, doi:10.1017/S0020818307070233; Clifford J. Carrubba, Matthew Gabel, and Charles Hankla, “Judicial Behavior under Political Constraints: Evidence from the European Court of Justice,” *American Political Science Review* 102, no. 04 (2008): 435–52, doi:10.1017/S0003055408080350; Olof Larsson and Daniel Naurin, “Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU,” *International Organization* 70, no. 2 (April 2016): 377–408, doi:10.1017/S0020818316000047.

³⁹ Karen J. Alter, “Agents or Trustees? International Courts in Their Political Context,” *European Journal of International Relations* 14, no. 1 (March 1, 2008): 33–63, doi:10.1177/1354066107087769; Alec Stone Sweet and Thomas L. Brunell, “Trustee Courts and the Judicialization of International Regimes,”

There is a more obvious and direct way in which international courts are political actors whose judgments have domestic distributive implications. The texts that international courts interpret advance core liberal objectives such as increasing civil liberties, advancing the functioning of domestic markets, and promoting the flow of goods, services, capital, and people across borders. Courts that faithfully and expertly interpret these legal texts presumably advance these values. These values are controversial. Liberalism expressly argues that there are legitimate constraints on majoritarianism.⁴⁰ Courts, including international courts, play a role in protecting minorities from “the tyranny of the majority.”

The protection of the property rights of individuals and firms is the most obvious example. Distributive conflict over ownership of natural resources, land, and other wealth is central to politics across the globe. Majorities may be tempted to expropriate minorities if they believe that the initial acquisition of property was unjust or simply if they wish to adjust wealth inequities.

While liberalism is diverse, the idea that individual property rights should be protected through a well-functioning legal system is a core principle. It is also a major preoccupation of international judicial institutions. Most obviously, the purpose of investment treaties is to protect foreign investors from expropriation and other government actions that devalue the investment in a way that is inconsistent with existing treaties and law even if such actions are popular with majorities.⁴¹ Property rights cases (Protocol 1, article 1) are also the second most common kind of ECtHR case and regularly feature in the IACtHR. The Andean tribunal primarily resolves intellectual property rights cases.⁴² Other regional economic courts also have large caseloads concerning the protection of property rights.

Journal of Law and Courts 1, no. 1 (March 2013): 61–88, doi:10.1086/668499; Giandomenico Majone, “Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach,” *Journal of Institutional and Theoretical Economics JITE* 157, no. 1 (2001): 57–78, doi:10.1628/0932456012974747.

⁴⁰ E.g. Jon Elster, “On Majoritarianism and Rights,” *East European Constitutional Review* 1 (1992): 19.

⁴¹ Krzysztof Pelc, “What Explains the Low Success Rate of Investor-State Disputes?,” *International Organization*, Forthcoming.

⁴² Karen J. Alter and Laurence R. Helfer, “Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice,” *International Organization* 64, no. 04 (October 2010): 563–592, doi:10.1017/S0020818310000238.

In addition, liberalism demands that individuals have a core set of civil liberties that states have an obligation not to infringe upon (negative rights) or even an active duty to guarantee (positive rights) even if these rights belong to unpopular minorities.⁴³ The regional human rights courts play the most obvious role in resolving disputes surrounding minority rights. But the CJEU and African regional economic courts have also issued controversial rulings on civil liberties protecting women, LGBT individuals, ethnic minorities, and other vulnerable groups.⁴⁴

The rise of judicial review and the inclusion of human rights in constitutions and international law have contributed to a trend where courts, including international courts, are increasingly asked to offer judgments on what Ran Hirschl calls issues of mega-politics: “[...] core political controversies that define the boundaries of the collective or cut through the heart of entire nations.”⁴⁵ Examples are judicial interference over the outcome of elections or alleged misbehavior by leaders, judicial scrutiny of core executive prerogatives in fiscal policy, foreign affairs, and national security, and, especially, cases that are about the definition of the polity, such as cases that impinge on citizenship, the status of religion or other aspects of identity. Hirschl argues that judicial involvement on such politically charged issues “make the democratic credentials of judicial review most questionable.”⁴⁶

International courts take part in this trend. The ICC makes judgments about whether sitting presidents have committed criminal offenses. Regional human rights courts have issued judgments about citizenship, religion, immigration, and other issues that directly concern the identity of polities. Investment tribunals do not just evaluate straight expropriation but increasingly evaluate regulations

⁴³ Elster, “On Majoritarianism and Rights.”

⁴⁴ Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister, “A NEW INTERNATIONAL HUMAN RIGHTS COURT FOR WEST AFRICA: THE ECOWAS COMMUNITY COURT OF JUSTICE,” *The American Journal of International Law* 107, no. 4 (2013): 737–79, doi:10.5305/amerjintlaw.107.4.0737; Rachel A. Cichowski, “Women’s Rights, the European Court, and Supranational Constitutionalism,” *Law & Society Review* 38, no. 3 (September 1, 2004): 489–512, doi:10.1111/j.0023-9216.2004.00055.x.

⁴⁵ Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science* 11, no. 1 (2008): 93–118, doi:10.1146/annurev.polisci.11.053006.183906.

⁴⁶ *Ibid.*

and policies of democratically elected governments, including on identity related issues such as the habitat of indigenous peoples.⁴⁷

My point is not that international courts are always maximally liberal in their interpretations or that the judges are themselves biased towards liberal interpretations. Indeed, international courts have developed interpretive strategies that allow them to proceed conservatively. For example, investor-state arbitral tribunals have adapted the ECtHR's margin of appreciation doctrine to allow democratic states leeway in how they respect property and minority rights.⁴⁸ Investors lose many cases where they claim that regulatory actions by democratically elected governments have harmed the value of their investments.⁴⁹

My point is simply that international courts are often in a position where they have to decide whether a domestically unpopular minority deserves protection from international law. Many of these cases impinge on religion or some other aspect of a polity's identity. This makes international courts political actors quite irrespective of how they reach their final judgments. And if they do find that a government has violated international law, then it is more often than not a judgment in favor of a more liberal position than the one pursued by the government. In this sense the "judicialization of politics"⁵⁰ almost inevitably spurs a politicization of the judiciary.⁵¹ And it does so along predictable ideological lines.

What is Populism?

There is an emerging convergence in the literature on Cas Mudde's definition of populism as a thin-centered "ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite

⁴⁷ Pelc, "What Explains the Low Success Rate of Investor-State Disputes?"

⁴⁸ José E. Alvarez, "The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 23, 2016), <https://papers.ssrn.com/abstract=2875089>.

⁴⁹ Pelc, "What Explains the Low Success Rate of Investor-State Disputes?"

⁵⁰ Stone Sweet and Brunell, "Trustee Courts and the Judicialization of International Regimes."

⁵¹ John Ferejohn, "Judicializing Politics, Politicizing Law," *Law and Contemporary Problems* 65 (2002): 41.

and which argues that politics should be an expression of the *volonté générale* (general will) of the people.”⁵²

Melvin Hinich and Michael Munger argue that political ideologies have implications for: “(a) what is ethically good, and (therefore) what is bad; (b) how society’s resources should be distributed; and (c) where power appropriately resides.”⁵³ In other words, political ideologies say something about what (or who) is virtuous, who gets what, and who should rule. Populism as a thin ideology does not have strong implications on all these dimensions. It is clearest about the third part: the people should rule. However, populists vary in their thicker ideologies about distribution and virtue.

Populist parties, leaders, and movements around the world agree that goods, land, and wealth should be distributed towards the people and away from a corrupt elite. Yet, they differ in what can best accomplish this. For example, Latin American populist presidents of the last two decades have included those who have advocated for more market oriented policies, such as Peru’s Fujimori and Argentina’s Carlos Menem.⁵⁴ These populists often attack special interests, such as organized labor or corporatist interests, that prevent deserving people from succeeding. They tend to succeed in inflationary crises when more left-wing policies seem less attractive.⁵⁵ But Latin American populists have also included leftist politicians like Venezuela’s Hugo Chavez, Bolivia’s Evo Morales, and Ecuador’s Rafael Correa who have mobilized around their opposition to neoliberalism and neoimperialism.⁵⁶ Despite their differences on socio-economic policy, these leaders are united by claims that they were restoring power to the people and away from a corrupt elite.

⁵² Mudde, “The Populist Zeitgeist,” 543.

⁵³ Melvin J. Hinich and Michael C. Munger, *Ideology and the Theory of Political Choice* (University of Michigan Press, 1996), 11.

⁵⁴ Kurt Weyland, “Neoliberal Populism in Latin America and Eastern Europe,” *Comparative Politics* 31, no. 4 (1999): 379–401, doi:10.2307/422236; Kenneth M. Roberts, “Neoliberalism and the Transformation of Populism in Latin America: The Peruvian Case,” *World Politics* 48, no. 1 (October 1995): 82–116, doi:10.1353/wp.1995.0004.

⁵⁵ Weyland, “Neoliberal Populism in Latin America and Eastern Europe.”

⁵⁶ Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism in Europe and the Americas: Threat Or Corrective for Democracy?* (Cambridge University Press, 2012).

Populism's core claim is that a virtuous and unified people should rule. As Margaret Canovan puts it:

“Populists claim legitimacy on the grounds that they speak for the people: that is to say, they claim to represent the democratic sovereign, not a sectional interest such as an economic class.”⁵⁷

Populists appeal to thicker ideologies about who belongs and doesn't belong to 'the virtuous people.'⁵⁸ Some populists adopt a full-on nativist ideology. But populists have also used race, ethnicity, gender, sexuality and other categories as criteria of exclusion. Populism is also often (but not necessarily) linked with an authoritarian ideology of virtue, which presumes a strong role for governments to act firmly against terrorists, criminals and other deviants. The Philippines' Rodrigo Duterte is perhaps the clearest contemporary example.

The commonality is the presumption that a virtuous people exists that should have the right to rule as it wishes. Contrary to liberals, populists are not concerned about oppression by the majority. Instead, the populist claim is that a corrupt elite pushes dominant values of tolerance for minorities that repress a silent majority.⁵⁹

Populism and International Courts: A Double Whammy

Populists around the world have diverse views on many, if not most, policy issues. Yet, populism has relatively clear implications for international judicial institutions with liberal mandates: International courts fail to reflect the *vox populi* both because they are international *and* because they are countermajoritarian. How could an institution located far away with foreign judges and without clear democratic accountability reflect the true will of the people? Populism offers an ideology that opposes the very idea that international courts should have authority over

⁵⁷ Margaret Canovan, “Trust the People! Populism and the Two Faces of Democracy,” *Political Studies* 47, no. 1 (March 1, 1999): 2–16, doi:10.1111/1467-9248.00184., p.12

⁵⁸ Jan-Werner Müller, *What Is Populism?* (Philadelphia: University of Pennsylvania Press, 2016).

⁵⁹ Canovan, “Trust the People! Populism and the Two Faces of Democracy.”

issues of distribution, identity, or other matters that fall within the normal provenance of democratic politics.⁶⁰

This does not mean that populists will always mobilize against international courts. Jan-Werner Müller warns that populists are not necessarily against institutions, just those that:

“[...] in their view, fail to produce the morally (as opposed to empirically) correct political outcomes. Populists in power are fine with institutions—which is to say: *their* institutions.”⁶¹

Populist leaders typically do not get rid of domestic constitutional courts but they do often curtail them and/or stack their benches with like-minded judges if these courts stand in the way. Two implications are important here. First, populists should only mobilize against international courts when these issue judgments that interfere with the basis of populist mobilization in a country, for instance because they protect the civil liberties or property of unpopular minorities who fall outside of the way populists have locally defined virtue.

Second, it is harder to stack or reform international courts than domestic courts. This makes other types of backlash more likely. An illustration is Ecuadorian President Correa’s attempt to curb the Inter-American Commission on Human Rights (IACHR) after the Commission interfered with domestic legal actions against journalists who wrote about the business dealings of one of Correa’s relatives and opened up other investigations into Ecuador’s treatment of journalists.⁶² Correa, together with the other three leftist populist leaders from countries that make up the ALBA group (Venezuela, Bolivia, and Nicaragua) proposed reforms that would limit external funding for the Commission’s free speech

⁶⁰ This objection does not necessarily translate to courts that primarily resolve inter-state disputes, which cannot always be resolved through democratic politics.

⁶¹ Jan-Werner Müller, *Populist Constitutions — A Contradiction in Terms?*, Int’l J. Const. L. Blog, Apr. 23, 2017, at <http://www.icconnectblog.com/2017/04/populist-constitutions-a-contradiction-in-terms/>

⁶² “Thorny Human Rights Reform Put off at OAS Meeting,” *Reuters News*, June 6, 2012, <http://global.factiva.com/redirect/default.aspx?P=sa&an=LBA0000020120606e8660004y&cat=a&ep=ASE>.

investigations and move the Commission out of Washington DC. As Correa put it:

The thing is that the IACHR creates conflicts. Based in Washington, it thinks that it knows the reality of our peoples and on many occasions it has allied itself with the powers that be, which are part of the problem and not the solution, in the name of the sublime concept of freedom of expression. It is one thing for that to belong to businesses dedicated to the communications media and another for freedom of expression to be turned into a capacity for blackmail and manipulation. I believe that it is a bureaucracy that got used to acting at its own risk; it is heavily influenced by the vision of hegemonic countries who see freedom of expression as free enterprise.⁶³

Correa did not want to get rid of the institution altogether but he wanted to eliminate "the last vestiges of neoliberalism and neocolonialism," and "look for something that is new, better, and truly ours."⁶⁴

Correa's reform proposals failed. The episode nicely encapsulates the populist challenge and its limits. Correa was not satisfied with simply ignoring or minimally implementing unfavorable rulings, a common practice in Latin America and Europe.⁶⁵ His populism provided the ideological underpinnings for challenging the authority of the institution that produced the ruling. His domestic mobilization narrative centered on opposition to the United States and its neo-imperialism. Arguing that US funded inquisitions into free speech violations violated Ecuadorian democracy fit into his domestic mobilization strategy.

But Correa was only able to garner the support of the other ALBA countries, which had governments based on similar domestic

⁶³ "Ecuadoran President Interviewed on Regional Human Rights Body," *BBC Monitoring Americas*, June 8, 2012, <http://global.factiva.com/redirect/default.aspx?P=sa&an=BBCMAP0020120608e8680002t&cat=a&ep=ASE>.

⁶⁴ "Correa Calls for New Inter-American Human Rights System," *EFE News Service*, October 10, 2016, <http://global.factiva.com/redirect/default.aspx?P=sa&an=WFEF000020161010ecaa000gp&cat=a&ep=ASE>.

⁶⁵ Courtney Hillebrecht, "The Cost of Compliance: Signaling, Credible Commitments and Compliance with International Human Rights Tribunals," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2009), <http://papers.ssrn.com/abstract=1452275>; Hawkins and Jacoby, "Partial Compliance."

mobilization narratives. This illustrates the limits of populism in a multilateral context. Given diverse thicker sources of ideological mobilization, it can be difficult to amass successful coalitions.

Some Evidence

My core empirical claim is not that populism is sufficient for mobilization against international courts. International courts are not always high on the political agenda and they sometimes issue edicts that populists like. Rather, what I claim is that backlashes are most likely to occur in places with strong populist mobilization and where international courts issue a ruling that intersects with the thicker ideological mobilization of that populist movement over issues of property rights and/or identity. In those cases, populism provides an ideology for why the authority of the international court was misplaced to begin with, making a backlash more likely than non-compliance, acceptance, or other strategies to respond to adverse judgments.

In this paper, I offer no more than a plausibility probe of this idea. The absence of measurements of both the independent and dependent variables complicate systematic testing. There is no authoritative database on what leader, party, or movement is populist.⁶⁶ Moreover, mainstream parties sometimes, but not always, adopt language, strategies, and policies from populist parties and movements.⁶⁷ For example, the British Conservative Party and Prime Minister Theresa May would not qualify as populists but they have certainly used populist rhetoric with regard to the ECtHR. I will rely on secondary sources to motivate my characterization of leaders, language or movements as populist but I have not created a comparative measure of the strength of populism.

Backlash is equally difficult to measure. The easiest should be exits from treaties. But even that is more complicated than it seems. It is not so clear what it means if a state resigns its membership in ICSID given that it might still be subject to

⁶⁶ Matthijs Rooduijn and Teun Pauwels, “Measuring Populism: Comparing Two Methods of Content Analysis,” *West European Politics* 34, no. 6 (November 1, 2011): 1272–83, doi:10.1080/01402382.2011.616665.

⁶⁷ Gijs Schumacher and Kees van Kersbergen, “Do Mainstream Parties Adapt to the Welfare Chauvinism of Populist Parties?,” *Party Politics* 22, no. 3 (May 1, 2016): 300–312, doi:10.1177/1354068814549345.

arbitration elsewhere. It is not straightforward to observe canceled investment treaties. It is even harder to systematically observe exit threats, reform attempts, domestic legal changes that change the status of international court rulings and so on.

The remainder of this paper offers some short narratives of well-known instances of backlash against international court judgments protecting property and minority (identity) rights as well as a slightly more in depth look at the UK.

The traditional narrative associates protecting property rights with the political right and minority protections with the left. Yet, populists from both sides of the ideological spectrum have fought battles with both types of international countermajoritarianism. Ecuador and Venezuela's leftist populist presidents have rallied against both the Inter-American Human Rights system and investment arbitration. The same is true for the right-wing populist leaders of Hungary and Poland.⁶⁸ Hungarian President Viktor Orban said that a verdict on two Bangladeshi asylum seekers backed "smugglers, Brussels bureaucrats and foreign-funded organizations."⁶⁹ Both Poland and Hungary are in battles with the ECtHR over the independence of their domestic judiciaries.⁷⁰ Poland is threatening to leave all BITs.⁷¹ The Hungarian government has expelled the IMF and has great difficulties assuring its investors.⁷² Populism as a thin ideology ties these cases together.

⁶⁸ Orecki, "Bye-Bye BITs?"

⁶⁹ "Hungary Won't 'Compensate' Invaders," accessed June 23, 2017, <http://www.newobserveronline.com/2017/03/hungary-wont-compensate-invaders.html>.

⁷⁰ University College London-Gower Street- London- WC1E 6BT Tel: +4420 7679 2000, "Poland – Judicial Independence in Jeopardy? President Duda Refuses Appointment of Ten Further Judges | UCL UCL SSEES Research Blog," accessed June 23, 2017, <https://blogs.ucl.ac.uk/ssees/2016/07/25/poland-judicial-independence-in-jeopardy-president-duda-refuses-appointment-of-ten-further-judges/>.

⁷¹ Jan Krcmar, "Poland Wants to Scrap Investment Protection | Global Investment Protection," accessed June 14, 2017, <http://www.globalinvestmentprotection.com/2016/04/06/poland-wants-to-scrap-investment-protection/>.

⁷² "Hungary Seeks Rapprochement with Bruised Foreign Investors," accessed June 23, 2017, <https://www.ft.com/content/e0c44550-0ad2-11e6-b0f1-61f222853ff3?mhq5j=e1>.

Moreover, there is evidence that elites anticipated majoritarian opposition to property rights and designed international courts explicitly to manage majoritarianism. The most extensive historical account comes from Europe. For example, French and British leaders on the right, most notably Winston Churchill, actively campaigned for a strong ECtHR and the inclusion of a Protocol on property rights out of fear that future left-wing majorities would not respect individual property rights.⁷³ The ECtHR became “a mechanism for realizing what Socialists described as a discredited conservative agenda too unpopular to be enacted through democratic means.”⁷⁴ Friedrich von Hayek wrote in the final chapter of the *Road to Serfdom* that:

“An international authority which effectively limits the powers of the state over the individual will be one of the best safeguards of peace. The International Rule of Law must become a safeguard as much against the tyranny of the state against the individual as against the tyranny of the new super-state over the national communities”⁷⁵

In contrast, most existing institutionalist theories see international courts, especially human rights courts, as a safeguard against authoritarianism⁷⁶ as opposed to majoritarianism. I suggest that the ECtHR is better understood as an attempt to lock in liberalism than it is as an attempt to lock in democracy.

Property Rights

Populists often mobilize around claims that those who control land, natural resources or other property are morally undeserving of this ownership. They propose either redistribution to deserving others or nationalization such that the people rather than the corrupt elite benefit from natural resource wealth. International court judgments that constrain domestically popular redistribution initiatives have instigated several backlashes.

⁷³ Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (New York, NY: Oxford University Press, 2017).

⁷⁴ *Ibid.*, 7.

⁷⁵ Friedrich A. von Hayek, *The Road to Serfdom*, 50th anniversary ed. / with a new introd. by Milton Friedman (Chicago: University of Chicago Press, 1994).

⁷⁶ Moravcsik, “The Origins of Human Rights Regimes.”

Land rights have been the most important engine for populist movements in Africa.⁷⁷ The populist charge centers on inequitable and undeserving disproportionate landownership by ethnic or racial minorities, often dating back to colonial times. In most sub-Saharan countries property rights are poorly protected in domestic law. This creates incentives for majorities to expropriate minorities.⁷⁸

International courts have not had much success in substituting for poor domestic property rights protections. The most dramatic example is the SADC tribunal, which was eliminated altogether after ruling in favor of a white farmer in a dispute over land seizures.⁷⁹ Mugabe described the ruling as “nonsense, absolute nonsense, [...] We have courts here in this country that can determine the rights of people.”⁸⁰

Mugabe could have left it at this. Instead, his government immediately launched a campaign to delegitimize the tribunal, challenging its legal mandate and refusing to supply a Zimbabwean judge, ensuring that the tribunal did not have sufficient judges to hear new cases. Eventually, his tactics succeeded and the tribunal was abandoned altogether. The ideological connotations of land reform played a major role in getting the region’s democratic powers, most notably South Africa, to support shutting down the court.⁸¹ South Africa’s Constitutional Court validated the SADC ruling and awarded its plaintiff a modest amount of monetary compensation. This made the SADC issue part of the domestic struggle between a populist government and a liberal constitutional court.

A second form of populist mobilization around property rights targets “neoliberalism” or at least the version of it pushed by

⁷⁷ Catherine Boone, “Electoral Populism Where Property Rights Are Weak: Land Politics in Contemporary Sub-Saharan Africa,” *Comparative Politics* 41, no. 2 (2009): 183–201.

⁷⁸ *Ibid.*

⁷⁹ Alter, Gathii, and Helfer, “Backlash against International Courts in West, East and Southern Africa.”

⁸⁰ Chinaka, ‘Mugabe Says Zimbabwe Land Seizures Will Continue’, *Mail and Guardian* (28 February 2009), available at <http://mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue>. Also quoted in *Ibid.*

⁸¹ Hulse, Merran, “Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal,” *E-International Relations*, accessed May 18, 2017, <http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/>.

foreign actors. The clearest examples are the left-wing populist movements in especially Latin America, which have mobilized around their opposition to neoliberalism and its imperialist advocates, especially the World Bank, the IMF, and the United States. Elite and foreign control of natural resources and domestic policies are at the center of the local populist mobilization.⁸²

The backlash against investment arbitration serves as the most straightforward illustration. It is no coincidence that Latin America's four left-wing populist governments, Bolivia, Ecuador, Nicaragua, and Venezuela, are the ones who have ended their commitments to ICSID.⁸³ Bolivia and Ecuador have even altered their constitutions to prohibit international investment arbitration. The opposition to ICSID was in part driven by costly adverse judgments but it was also ideological.⁸⁴ These governments had been arguing for some time that foreign direct investment promotes imperialism and hinders the distribution of benefits from natural resources to the people.

Yet, Latin-American left-wing populists aren't the only ones who have lashed out at investment arbitration using populist rhetoric. Investment state dispute settlement mechanisms are the most criticized provisions in newly proposed trade agreements.⁸⁵ Protestors charge that the investment arbitration provisions in the Transatlantic Trade and Investment Partnership (TTIP) allow unelected multinational corporations to dictate the policies of democratically elected governments.⁸⁶ The concerns do not center on opposition to property rights or even foreign investment but on the undemocratic restrictions placed on how governments can manage the domestic effects of globalization.⁸⁷ Politicians on both

⁸² Jorge G. Castaneda, "Latin America's Left Turn Essay," *Foreign Affairs* 85 (2006): 28–44.

⁸³ Waibel, *The Backlash against Investment Arbitration*.

⁸⁴ Ignacio A. Vincentelli, "The Uncertain Future of ICSID in Latin America," *Law and Business Review of the Americas* 16 (2010): 409.

⁸⁵ Caron and Shirlow, "Dissecting Backlash."

⁸⁶ Lee Williams, "What Is TTIP? And Six Reasons Why the Answer Should Scare You" *The Independent* (6 October 2015) <<http://www.independent.co.uk/voices/comment/what-is-ttip-and-sixreasons-why-the-answer-should-scare-you-9779688.html>>.

⁸⁷ Irene M. Ten Cate, "International Arbitration and the Ends of Appellate Review," *New York University Journal of International Law and Politics* 44 (2012 2011): 1109–1204.

the left and the right have made these types of arguments.⁸⁸ The right-wing government in Poland has announced its intention to get rid of BITs.⁸⁹ U.S. President Donald Trump has announced an “America First” strategy that is similarly opposed to investment arbitration in new trade treaties. Right-wing populists have typically displayed much less enthusiasm for institutionalizing markets than non-populist right wing parties.⁹⁰ They are even less enthusiastic about foreign and undemocratic control, even if it is for the purpose of attracting investment.

Minority Rights and Identity

A second liberal countermajoritarian task for international courts concerns the protection of unpopular minorities. Such judgments could stir backlashes when they map onto populist mobilization around the identity of the polity.

A striking example comes from the Dominican Republic, where the Constitutional Tribunal in 2013 ordered the executive to review and retroactively rescind the citizenship of Dominicans of Haitian descent.⁹¹ This was a popular measure against a minority group that has long suffered discrimination. The IACtHR found that Dominican ruling breached Inter-American prohibitions on discrimination, forcible expulsions, and a duty to prevent statelessness. The Tribunal responded not just by criticizing or ignoring the IACtHR judgment but by ruling that the Dominican Republic’s acceptance of the IACtHR’s jurisdiction was unconstitutional.⁹² Its reasoning was that accepting jurisdiction is equivalent to a treaty and should thus be ratified as a treaty, a

⁸⁸ Colin Crouch, “Democracy at a TTIP’ing Point: Seizing a Slim Chance to Reassert Democratic Sovereignty in Europe,” *Juncture* 21, no. 3 (2014): 176–181, doi:10.1111/j.2050-5876.2014.00802.x; Matthias Bauer, “Campaign-Triggered Mass Collaboration in the EU’s Online Consultations: The ISDS-in-TTIP Case,” *European View* 14, no. 1 (June 1, 2015): 121–29, doi:10.1007/s12290-015-0346-6.

⁸⁹ Marcin Orecki, “Bye-Bye BITs? Poland Reviews Its Investment Policy,” *Kluwer Arbitration Blog*, January 31, 2017, <http://kluwerarbitrationblog.com/2017/01/31/bye-bye-bits-poland-reviews-investment-policy/>.

⁹⁰ Weyland, “Neoliberal Populism in Latin America and Eastern Europe.”

⁹¹ Dinah Shelton and Alexandra Huneus, “In Re Direct Action of Unconstitutionality Initiated Against the Declaration of Acceptance of the Jurisdiction of the Inter-American Court of Human Rights,” *The American Journal of International Law* 109, no. 4 (2015): 866–72, doi:10.5305/amerjintlaw.109.4.0866.

⁹² *Ibid.*

position that was not seriously considered anywhere in Latin America but that did appeal to majoritarianism. In this case, a populist court led a backlash against an international court.

In Venezuela, the Chavez government had long fought with the IACtHR. But the sovereignty costs of its rulings were low. Chavez stacked the domestic constitutional court with sympathetic judges. The domestic court concluded that the IACHR is not superior to the Venezuelan Constitution and that they could hold IACtHR judgments unenforceable; a practice that is not entirely uncommon for domestic courts to resist the IACtHR.⁹³ Still Chavez found the need to withdraw from the IACtHR in 2012 over a ruling that a convicted terrorist, who had since moved to the United States, was ill-treated in prison. Chavez could have continued non-compliance but the opportunity to confront an organization that could be accused of being in cahoots with both neo-imperialists and terrorists proved irresistible.

The ECtHR has also faced populist backlashes following judgments on identity issues. A well-known example is its 2009 *Lautsi* judgment, which reasoned that an Italian law that mandates a crucifix in each public school classroom violates freedom of religion. The decision caused immediate uproar. President Silvio Berlusconi, not known for his piousness, called it “one of those decisions that make us doubt Europe’s common sense.”⁹⁴ The populist right-wing Northern League, again not exactly a religious party, used local government control to distribute crucifixes in the main squares of villages and to enact bylaws that compel shopkeepers to display the crucifix.⁹⁵ Italian populists argued that the crucifix had become a symbol of Italian identity (rather than religion) with an undertone of excluding Islam from that identity.⁹⁶

⁹³ Alexandra Huneus, “Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights,” *Cornell International Law Journal* 44 (2011): 493; Alexandra Valeria Huneus, “Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 17, 2011), <https://papers.ssrn.com/abstract=1911383>.

⁹⁴ Quoted in: Susanna Mancini, “The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty,” *European Constitutional Law Review; Dordrecht* 6, no. 1 (February 2010): 6, doi:<http://dx.doi.org/10.1017/S1574019610100029>.

⁹⁵ Mancini, “The Crucifix Rage.”

⁹⁶ The *Lautsi* case was filed by a Finnish immigrant (an atheist) but similar cases were pursued by Muslims.

The ruling also faced the unprecedented opposition of 13 state parties who joined in amicus briefs.

In 2011, the ECtHR's Grand Chamber reversed the unanimous Chamber judgments 15-2, arguing that [“.the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State.”⁹⁷ In other words, ECtHR wrote that it should grant a great deal of deference to states in deciding cases of identity.

In this instance, the ECtHR may have issued a ruling that prevented a backlash. There is, so far, no systematic evidence of whether courts do become more restraint when governments threaten broader pushback, although there is evidence that investment tribunals have become more predisposed towards states after states have sent signals of displeasure through withdrawals from ICSID or investment agreements.⁹⁸

The United Kingdom and the European Court of Human Rights

The case of the UK and the ECtHR illustrates how politicians can use an international court ruling to tap into populist sentiment stirred up by the media. The UK had long been embroiled in controversies with the ECtHR. That said, the country is also among the fastest implementers of ECtHR judgments.⁹⁹ In 1998 the UK passed the Human Rights Act, which incorporated the ECHR into domestic law. This constituted a major redistribution of power to the courts (and the ECtHR's jurisprudence) but invited little public opposition at the time.¹⁰⁰ Interest in the Court was mostly limited to elites.

Figure 1 illustrates how this has changed. The figure plots mentions of the ECtHR in the country's quintessential elite newspaper, *The Guardian*, and its three main tabloid newspapers aimed at the masses: *The Daily Mirror* (from the left), *The Sun*, and

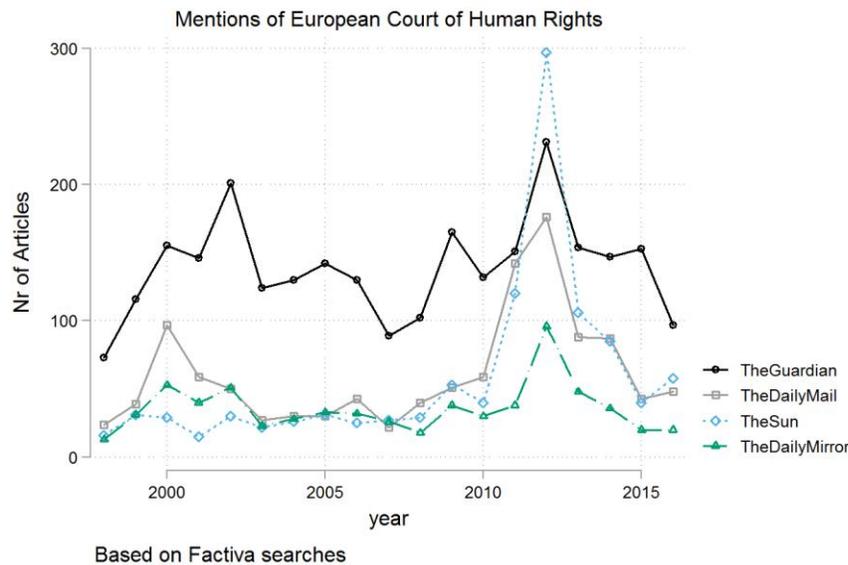
⁹⁷ “LAUTSI AND OTHERS v. ITALY,” accessed June 22, 2017, [http://hudoc.echr.coe.int/eng#{"fulltext":\["Lautsi"\],"documentcollectionid2":\["GRANDCHAMBER"\],"itemid":\["001-104040"\]}](http://hudoc.echr.coe.int/eng#{).

⁹⁸ Langford and Behn, “Managing Backlash.”

⁹⁹ Hillebrecht, “The Cost of Compliance.”

¹⁰⁰ K.d. Ewing, “The Human Rights Act and Parliamentary Democracy,” *The Modern Law Review* 62, no. 1 (January 1, 1999): 79–99, doi:10.1111/1468-2230.00192.

The Daily Mail (from the political right). *The Guardian* has paid attention to the court at a relatively consistent pace. By contrast, the attention of the tabloids has been much less consistent and stems primarily from two out of the 1628 judgments that found a violation against the UK during this period.



In the early 2000s, the tabloids paid scant attention to the ECtHR but they did start to focus on how British judges interpreted the 1998 Human Rights Act. For example, in 2003 the Daily Mail ran a populist editorial saying that:

“Britain’s unaccountable and unelected judges are openly, and with increasing arrogance and perversity, usurping the role of Parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own, in their zeal to interpret European legislation.”¹⁰¹

Michael Howard, the leader of the Conservative Party, tapped into this sentiment:

I believe that these are essentially matters for Parliament - for elected representatives, accountable directly to the people - to decide. [...] The Act has led to taxpayers' money being used for a burglar to sue the

¹⁰¹ MICHAEL CLARKE; SAM GREENHILL, “SO WHAT HAVE OUR JUDGES GOT AGAINST BRITAIN? - Another Devastating Verdict on Asylum Laws Denies Elected ...,” *Daily Mail*, February 20, 2003, <http://global.factiva.com/redirect/default.aspx?P=sa&an=daim000020030306dz2k0020b&cat=a&ep=ASE>.

man whose house he broke into and a convicted serial killer being given hard-core porn in prison because of his "right to information and freedom of expression".¹⁰²

The ECtHR more visibly entered the public domain through two judgments. First, in *Hirst v. UK* (2005), the Court ruled that a British law that banned all prisoners from voting constituted a violation of the ECHR.¹⁰³ This launched a perfect storm.¹⁰⁴ The plaintiff had murdered his landlady with an axe and was photographed allegedly celebrating his court victory while smoking a joint and drinking champagne.¹⁰⁵

While the tabloid media feasted on this story, the issue did not raise to the forefront until the UK government had to deal with implementation. The ECtHR awarded thousands of individual prisoners monetary compensation for their inability to vote, costing taxpayers millions of pounds. It would not have been difficult to comply with the ECtHR judgment and avoid future payments. The UK government needed to provide a rational basis for why some prisoners should not be able to vote, such as those who had committed a felony. But when the government proposed such a bill in 2011 it was defeated by an overwhelming majority (234 to 22).¹⁰⁶ Few parliamentarians wanted to be on the record as supporting prisoner voting rights amidst growing populist sentiment. Prime Minister David Cameron, supposedly arguing for the cabinet's proposal, stated during the debate that: "It makes me physically ill to even contemplate having to give the vote to anyone in prison."¹⁰⁷

Most of the 2011 bump in figure 1 was due to the prisoner voting rights issue. The negative attention also affected public opinion: whereas 71 percent of the British public supported the

¹⁰² "Judges Must Bow to the Will of Parliament - Telegraph," October 8, 2005, <https://web.archive.org/web/20071202012948/http://www.telegraph.co.uk/opinion/main.jhtml?xml=%2Fopinion%2F2005%2F08%2F10%2Fdo1002.xml>.

¹⁰³ *Hirst v. UK*

¹⁰⁴ C. R. G. Murray, "A Perfect Storm: Parliament and Prisoner Disenfranchisement," *Parliamentary Affairs* 66, no. 3 (July 1, 2013): 511–39, doi:10.1093/pa/gsr071.

¹⁰⁵ McNulty, Watson, and Philo, "Human Rights and Prisoners' Rights."

¹⁰⁶ *Ibid.*

¹⁰⁷ Andrew Hough, "Prisoner Vote: What MPs Said in Heated Debate," February 11, 2011, sec. News, <http://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in-heated-debate.html>.

ECtHR in 1996, in 2011 only 19 percent believed that the ECtHR had been a “good thing” and only 24 percent agreed that the UK should remain a member of the Court.¹⁰⁸ Some Tory MPs tried to capitalize on the attention by organizing a parliamentary vote to leave the ECtHR. Richard Bacon, the MP introducing the initiative, stated the populist rationale:

Although I do object to the idea of prisoner voting, my much more fundamental objection is to the idea that a court sitting overseas composed of judges from, among other countries, Latvia, Liechtenstein and Azerbaijan, however fine they may be as people, should have more say over what laws should apply in the UK than our constituents do through their elected representatives.”¹⁰⁹

The motion received support from only 71 MPs and was not backed by the government. But negative sentiment against the ECtHR increased following its 2012 judgment that prohibited the UK from extraditing Islamic preacher and suspected terrorist Abu Qatada to Jordan for fears that he might be tortured there. The judgment upset then home secretary Theresa May so much that she argued that: “it isn’t the EU we should leave but the ECHR and the jurisdiction of its court.”¹¹⁰ Prime Minister David Cameron responded that:

"He has no right to be here, we believe he is a threat to our country. We have moved heaven and earth to try to comply with every single dot and comma of every single convention to get him out of our country. It is extremely frustrating and I share the British people's frustration with the situation we find ourselves in.”¹¹¹

As a *Guardian* editorial puts it: “this strategy allows the Conservative party to bang a populist drum on crime and

¹⁰⁸ Erik Voeten, “Public Opinion and the Legitimacy of International Courts,” *Theoretical Inquiries in Law*, n.d., 418.

¹⁰⁹ Tim Ross, “Tories Vote to Scrap ‘Undemocratic’ Human Rights Act,” *Telegraph*, December 4, 2012, sec. News, <http://www.telegraph.co.uk/news/politics/9722668/Tories-vote-to-scrap-undemocratic-Human-Rights-Act.html>.

¹¹⁰ Anushka Asthana and Rowena Mason, “UK Must Leave European Convention on Human Rights, Says Theresa May,” *The Guardian*, April 25, 2016, sec. Politics, <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>.

¹¹¹ “Cameron ‘Fed Up’ With Abu Qatada Still In UK,” *Sky News*, accessed May 23, 2017, <http://news.sky.com/story/cameron-fed-up-with-abu-qatada-still-in-uk-10464064>.

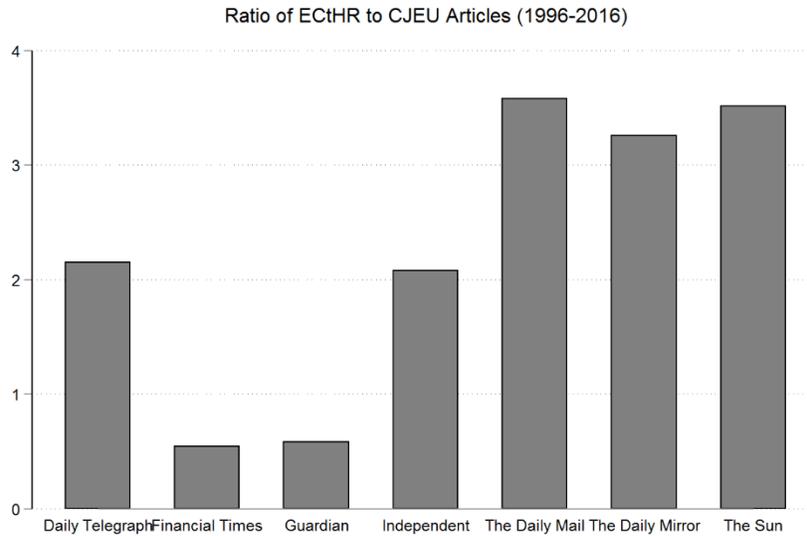
immigration while blaming foreign European judges – all in one hit.”¹¹² Cameron used the UK’s chairmanship of the Council of Europe to propose reforms that were “a blueprint for clipping the Strasbourg Court’s wings and weakening supranational review of member states’ human rights practices.”¹¹³ The final Brighton Declaration was much milder than the initial draft. So, like Correa’s effort to reform the IACHR, Cameron’s attempt fell short because he failed to garner support from other governments, which did not face populist domestic opposition to the Court.

In future research, I will explore this case further by analyzing both the media and politicians more systematically. The case nicely illustrates both the logic and limits of populist backlash against international courts. Some initial findings are worth reporting: over half the articles about the ECtHR in both *The Sun* and *The Daily Mail* also contain the words “prisoner” or “terrorist.” Figure 1 plots the ratio of newspaper articles that are about the ECtHR versus the CJEU in the six largest UK newspapers over the past twenty years.¹¹⁴ The CJEU is generally seen as the more consequential court but ECtHR cases have much greater populist appeal. The three tabloid papers (the *Daily Mail*, the *Sun* (tabloids from the right) and the *Daily Mirror* (tabloid from the left) each report about 3-4 times as much about the ECtHR as the CJEU. By contrast, the *Guardian* and the *Financial Times* (elite papers from both the left and right) writes about twice as many CJEU stories as ECtHR stories.

¹¹² Alan Travis and Home Affairs Editor, “Grieve, Clarke and Green Were Last Protectors of Our Human Rights Laws,” *The Guardian*, accessed February 1, 2015, <http://www.theguardian.com/law/2014/jul/15/grieve-clarke-green-human-rights-conservatives-europe>.

¹¹³ Laurence R. Helfer, “The Burdens and Benefits of Brighton | European Society of International Law,” 2012, <http://esil-sedi.eu/node/138>.

¹¹⁴ Based on a search in Factiva.



Conclusions and Implications

The most general implication is that domestic politics theories of international institutions ought to go beyond theorizing about variation in regime type and domestic institutions. Ideology is crucially important if we wish to understand why states opt in and out of international institutions. I have focused on one type of opposition to liberal ideology: populism and one kind of international institution: courts. But I suspect that this argument applies more generally. If we believe that the international institutional order is a liberal order, then we must understand ideological support for and opposition to the principles the order embodies.

Institutional approaches tend to argue that a large selectorate increases the costliness of breaking international legal commitments. But it may be that defying international law has greater electoral benefits than upholding international law at least some of the time for some political leaders. Governments could withdraw from courts against the wishes of societal actors or at the urging of societal actors. There are majoritarian but non-liberal rationales for resisting international courts. Populism as an “illiberal democratic response to undemocratic liberalism”¹¹⁵ offers perhaps

¹¹⁵ Mudde, “The Populist Zeitgeist.”

the broadest ideological challenge to liberalism, at least in advanced democracies.

Just because the rhetoric of opposition to international courts is populist doesn't mean that (some of) the critiques aren't valid or that there is no good reason to reform investment tribunals or human rights courts. The opposition to these courts usually has substantive roots. Populism provides the ideology for resisting the authority of the courts rather than just their output.

Some suggest that courts could avoid backlash by not 'overlegalizing' sensitive issues.¹¹⁶ Courts have developed strategies for this purpose. For example, the ECtHR's margin of appreciation doctrine allows the court to grant governments some leeway in implementing the European Convention on Human Rights. The ECtHR also explicitly uses comparative evidence of developing policy trends in its judicial analyses.¹¹⁷ Allowing third party submissions may provide courts with useful information about the position of societal and political actors.

But international courts may still not have enough information to assess the political sensitivity of their judgments.¹¹⁸ A good illustration is the aforementioned *Lautsi* case on crucifixes in Italian classrooms. The ruling didn't elaborate much on its societal implications and there was little attention and no third party government submissions for the initial Chamber judgments. That changed for the Grand Chamber judgment.

Karen Alter, James Gathi, and Laurence Helfer explain the abilities of African regional courts to withstand backlashes by variation in how they mobilize transnational actors.¹¹⁹ But it is not clear whether those opportunities are always present. Either way, it depends on the presence of sufficiently strong transnational actors that can come to the court's rescue.

¹¹⁶ Helfer, "Overlegalizing Human Rights."

¹¹⁷ Laurence R. Helfer and Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe," *International Organization* 68, no. 01 (January 2014): 77–110, doi:10.1017/S0020818313000398.

¹¹⁸ Yonatan Lupu, "International Judicial Legitimacy: Lessons from National Courts," *Theoretical Inquiries in Law* 14, no. 2 (2013): 437–54.

¹¹⁹ Alter, Gathii, and Helfer, "Backlash against International Courts in West, East and Southern Africa."

Another piece of advice may be to practice “patience.” Populism comes in waves and populists face difficulties organizing large multilateral coalitions in favor of reform, as the various failed attempts to reform international courts illustrate.