International Criminal Tribunal Backlash

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The Oxford Handbook of International Criminal Law
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Print Publication Date: Feb 2020 Subject: Law, International Law, Criminal Law
Online Publication Date: May 2020 DOI: 10.1093/law/9780198825203.003.0027

Abstract and Keywords

This chapter explores the phenomenon of backlash against international criminal tribunals, defining backlash as 'intense and sustained government disapproval of tribunal conduct, accompanied by aggressive steps to resist such conduct and to remove its legal force'. After promising beginnings, post-Cold War international criminal tribunals have increasingly faced strident criticism from important constituencies, including previously supportive governments. This has prompted concern about declining support for and 'backlash' against such tribunals, amidst broader debates about similar tendencies affecting international adjudication more generally. Drawing on International Relations theories, this chapter analyzes drivers and inhibitors to backlash against international criminal tribunals, specifically the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the Special Tribunal for Lebanon. It identifies several factors relevant for explaining tribunal backlash: domestic politics and the preferences and interests of powerful elites; external actors, particularly engaged regional and great powers; and transnational social pressure.

Keywords: International criminal law, International Criminal Court ICC, International courts and tribunals, Specific Courts and Tribunals, International Criminal Tribunal for the former Yugoslavia ICTY, Special Tribunal for the Lebanon

I. Introduction

[1]AFTER promising beginnings, post-Cold War international criminal tribunals have increasingly faced strident criticism from important constituencies, including previously supportive governments. This has prompted concern about declining support for and 'backlash' against such tribunals,[2] amidst broader debates about similar tendencies affecting international adjudication more generally.[3] Despite the hand wringing involved, however, backlash remains a poorly understood, ill-defined term, typically utilized as loose shorthand for a range of misgivings about, and forms of opposition to, aspects of international tribunal conduct on the part of a widely disparate range of actors. As interest

has grown, however, a more sophisticated literature has developed (p. 602) examining backlash, its manifestations, causes, and implications in the context of criminal and other international tribunals.[4]

Part II of this chapter reviews historical and more recent examples of opposition to international criminal tribunals. Part III then considers recent scholarly approaches to international tribunal backlash and presents a working definition of this phenomenon. The following part draws on International Relations (IR) theory to identify a set of potential drivers of international criminal tribunal backlash, enabling structured, cross-case comparison. Part V to VII apply this theoretical framework, examining drivers (and inhibitors) of backlash against the ICC, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Special Tribunal for Lebanon (STL) from South African, Serbian, and Lebanese governments respectively. A concluding discussion follows.

II. International Criminal Tribunals: Opposition (and Backlash)

Opposition to international criminal tribunals, and indeed to international adjudicatory bodies generally, is not a new phenomenon.[5] The prototypical Nuremberg trials were controversial even amongst the Allied powers that established the International Military Tribunal,[6] while the counterpart Tokyo tribunal was famously subject to criticism from (p. 603) its own bench.[7] State and non-state resistance also marked the work of the ad hoc international criminal tribunals established in the wake of the Cold War, the ICTY and ICTR encountering overt, robust opposition from (various) Bosnian, Croatian, Serbian, and Rwandan communities and governments at different times, particularly from constituencies targeted by these institutions.[8]

The hybrid tribunals established during the 1990s and since have also experienced varying degrees of opposition from state and non-state parties. As with the ad hoc tribunals, this has been most evident amongst groups targeted (or that have perceived themselves as likely to be targeted) by these institutions: Hezbollah in the case of the STL and the Indonesian leadership in the case of the Special Panels for Serious Crimes in Timor Leste.[9] Domestic opposition similarly stymied a 2000 UNMIK initiative to establish a Kosovo War and Ethnic Crimes Court with jurisdiction over crimes committed against ethnic Serbs. The Specialist Chambers established in 2015 as part of the Kosovo court system remain controversial, moreover, and have yet to hear any cases.[10] The experience of the Extraordinary Chambers in the Court of Cambodia is comparable, with a reluctant government dragging its feet in pursuing indictees and displaying little commitment to sustaining the court financially.[11]

(p. 604) Last, the International Criminal Court (ICC) has encountered hesitancy and on occasion outright hostility from governments, including those of Rome Statute states parties, as well as non-state actors. This has unsurprisingly again included opposition from communities targeted for investigation and/or prosecution. Perhaps less expectedly, how-

ever, opposition has also been evident from governments of (particularly African) states that were formerly at least nominally supportive of the court,[12] and in the South African case from the government of a state that was amongst the ICC's most prominent early supporters, and where there has been no suggestion of 'core crimes' being committed by South African nationals or on South African territory.

Given the proliferation of international criminal tribunals and other international adjudicatory bodies in the last 30 years, involving international judicial actors in new issue areas and arenas, it is perhaps unsurprising that these activities have grown increasingly controversial. Understanding of the dynamics of resistance and backlash remains nascent, however.

III. Defining Backlash

Before considering potential causes of the travails of international criminal tribunals, it is first necessary to unpack the notion of tribunal backlash. Backlash could, of course, be understood so broadly that it encompasses the entirety of opposition by any actor to any international court. This, however, would rob the term of analytic significance. Recognizing this, researchers have increasingly sought to inject rigour into debate by distinguishing backlash from less extraordinary forms of resistance to international tribunals. This has involved not just seeking to specify the nature, extent, and severity of opposition that might qualify as backlash, but also identifying sets of actors and agents whose actions may or may not constitute backlash, as well as associated aims and methods.

Probably the area of broadest consensus is that backlash should be distinguished from 'common or garden-variety' opposition to international tribunals.[13] Sandholtz, Bei, and Caldwell, for example, distinguish backlash from 'perennial forms of resistance (p. 605) to international courts',[14] while Madsen, Cebulak, and Wiebusch refer to 'ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law as constituting "pushback" rather than backlash'.[15]

Backlash, in contrast, is more extensive in nature. For Sandholtz and others, backlash comprises 'actions that go beyond resistance and aim to reduce the authority, competence, or jurisdiction of the court'.[16] Madsen and colleagues define backlash as 'extraordinary resistance challenging the authority of an [international court] with the goal of not only reverting to an earlier situation of the law, but also transforming or closing the [court]'.[17]

These are significant improvements on previous, looser understandings of backlash. Nevertheless, they are limited in important respects. Perhaps the principal challenge is that tribunals and their governing instruments are invariably in a continued process of interpretive and institutional flux as internal and external stakeholders challenge the extent of courts' (and states') legitimate authority and exert different forms of pressure on one another and on institutions. Though perhaps rare, states can also withdraw from courts' jurisdiction for reasons that are not always solely or primarily related to court conduct.[18] In

short, to define backlash as embracing action challenging the authority of a court and aimed at refashioning, withdrawing from, or closing a tribunal may be overly broad.

Operationalizability presents a further difficulty: the above definitions require accurate assessment of actors' aims in resisting tribunals. This, however, is a problematic endeavour: information available on individual, institutional, and social beliefs, ambitions, and intentions is likely to be incomplete, with primary and secondary accounts possibly biased and partial. Indeed, even triangulating sources is an imperfect means of reducing uncertainty in such circumstances.[19] Accordingly, as the primary objective of the present (p. 606) exercise is to explain the causes and dynamics of backlash across multiple contexts, and with a view to facilitating future in-depth case studies and potential quantitative analysis, a definition that reduces the need to decipher intentions and ambitions may hold advantages.

One option in this regard is to seek to identify backlash primarily by reference to the means and methods employed rather than to protagonists' aims. Building on a definition of backlash proffered by David Caron and Esme Shirlow for example, adapting work by Cass Sunstein, we may consider defining international criminal tribunal backlash as '*intense and sustained government disapproval of tribunal conduct, accompanied by aggressive steps to resist such conduct and to remove its legal force*'.[20]

Before continuing, one element of this proposed definition bears highlighting: in this view, backlash is explicitly manifested in individual government behaviour rather than in the activity of sub-state or transnational groups, or of multiple governments acting in concert. This position reflects a mix of principled and pragmatic considerations.

Perhaps most importantly, the privileging of government conduct is consistent with the traditional state-centred nature of international law: as Soley and Steininger succinctly observe: 'State backlash constitutes the greatest challenge to the authority of an [international court]'.[21] Additionally, while the ultimate outcomes of backlash (such as court reform or termination) may depend on the behaviour of multiple governments, individual governments remain the primary agents responsible for bringing about such measures, and states may also withdraw unilaterally from tribunals.[22] Last, and with a view to enabling structured, focused comparison of cases, individual government conduct and policy decisions provide a distinct, clear focus for the identification and comparative analysis of backlash as an empirical phenomenon, enabling the same 'standardized, general' questions to be asked of cases.[23] In short, even if ultimate outcomes depend on a range of actors, it makes sense to look to the behaviour of individual governments in identifying the presence or absence of backlash.

(p. 607) Arguably the principal advantage of the above definition of backlash, however, is its focus on the means and methods employed rather than on actor aims, ambitions, or intentions. Put differently, this definition enables more straightforward assessment of the presence or absence of backlash by focusing attention on a relatively narrowly delineated

set of more—albeit potentially still imperfect—objectively identifiable characteristics of 'backlash'.

This definition requires rather that disapproval of court conduct be 'intense and sustained'—which may be satisfied by such disapproval forming a continuing, high profile (and likely public) element of policy—and that this be accompanied by 'aggressive' steps to resist court conduct and to remove its legal force. The latter requirement underlines that to constitute backlash, behaviour should be an explicitly unfriendly act towards an institution, rather than a 'business as usual' challenge to tribunal conduct and authority. Context accordingly remains critical to assessing whether disapproval and accompanying steps in any given instance should properly be considered to constitute backlash. Directing attention to characteristics that may readily (and relatively objectively) be identified from secondary journalistic and historical material, as well as first-hand accounts of events, should, however, enable more consistent and reliable recognition of backlash than may be possible with a definitional focus on actor aims, ambitions, and intentions.[24]

The above notwithstanding, this definition does imply that not all experiences typically so characterized will constitute backlash *sensu stricto*: popular or domestic elite opposition to a tribunal that fails to translate sufficiently into official disaffection will, for example, fall outside this definition. This should not be understood, however, as implying that issues highlighted in such discussions are not deserving of closer investigation, particularly where these may form part of the potential *explanans* of backlash.[25]

Last, it bears noting that although backlash is necessarily conceived as a *reaction* to a tribunal on the part of a government, previous government support for a tribunal is not (p. 608) considered to be a prerequisite for backlash.[26] There are two reasons for this: first, official expressions of support for a tribunal may be disingenuous, and more importantly, government support and opposition are arguably better viewed as points on a spectrum, capable of varying in degree, rather than as a binary pair of opposing categories. Accordingly, while instances where a state has gone from being a strong supporter of a court to a protagonist of backlash certainly present valuable 'hard' cases for examination, in the following discussion these are considered alongside cases in which official support for tribunals has been variously grudging, pro forma, and even absent altogether.

IV. A Theory-Informed Approach to International Criminal Tribunal Backlash

If there is little agreement over how to define tribunal backlash, there is still less consensus as to its primary drivers, particularly in respect of international criminal tribunals. One promising approach, however, is to draw on what has been termed the 'pluralist turn' in IR theory, harnessing together insights derived from multiple IR research traditions to identify potential factors in tribunal backlash.[27]

Theoretical pluralism is not an unproblematic endeavour.[28] Combining insights drawn from what might be termed 'mainstream' theoretical traditions, however—that is, realist, institutionalist, positivist constructivist, and liberal theoretical approaches to international politics—has much to commend it, in particular recognizing that these traditions persist precisely because they each encapsulate important analytic insights into international affairs. While these approaches present a wide range of theoretical (p. 609) facets, it is also possible to identify a subset of particularly relevant insights that can be derived from each approach, tailored to the subject under examination. These can then be applied together to provide more comprehensive analyses of the drivers and dynamics of international criminal tribunal backlash than may be gleaned from the application of any one such perspective in isolation.[29]

The traditional centrality to realist thought of material state power and interests, for example, suggests that the more materially powerful a state is, absent strong countervailing interests, the less likely its government will be constrained by inconvenient international legal niceties and the more likely it will be to author backlash.[30] Material power differentials amongst states may also affect the likelihood of backlash arising from less powerful states: backlash may be inhibited where great powers are supportive of proceedings in a third country, and more likely where there is great power disinterest in, or opposition to, proceedings.[31] Accordingly, a realist perspective suggests both that *more powerful states may more readily author backlash than less powerful states*, and that *the prospects of backlash from less powerful states may be limited by the preferences and interests of more powerful states*.

Further rationalist insights may be gleaned from institutionalist theory. This approach views institutions such as international criminal tribunals as established to solve collective action problems.[32] From this perspective, defection from an institution is likely to reflect shifts in the anticipated costs and benefits of participation, potentially embracing relatively remote international reputational considerations as well as more pressing local concerns (e.g., where participation or support has domestic political implications). Accordingly, *we would expect to see government decisions to author tribunal backlash (or not) reflecting a potentially broad-ranging cost-benefit analysis*, with relative state power one—but potentially not a determinative—consideration.

(p. 610) What has been termed 'conventional' constructivism furnishes a third mainstream theoretical approach to IR.[33] At the heart of much literature in this vein is the idea that governments can be guided by a 'logic of appropriateness', typically contrasted with a 'logic of consequences'.[34] Where the former operates, rather than pursuing pre-determined rationally-derived objectives and (rationally) adjusting to the similarly pre-existing preferences of other governments, state behaviour is likely to be affected by the application by other governments and transnational non-state actors (including civil society) of forms of social pressure such as persuasion, 'naming and shaming', and rhetorical entrapment aimed at eliciting 'target state' conduct consistent with one or another set of favoured international norms of behaviour.[35] In short, where a 'logic of appropriateness'

operates, *we would expect to see state behaviour reflecting the normative expectations of other governments and transnational civil society groups.*

Liberal IR theory forms a fourth research tradition. This approach directs attention to the domestic determinants of state behaviour, disaggregating the interests and preferences of sub-state and transnational groups, and highlighting how domestic governance structures mediate between these and policy decisions.[36] A focus of liberal research, for example, is the extent to which foreign policy preferences can be linked to democratic or authoritarian forms of national governance. In the present context, a liberal approach suggests that close attention be paid to the governance structures and domestic political drivers of foreign policy. More specifically, *we would expect backlash (or its absence) to reflect the strongly held preferences of sub-state elites, set against the backdrop of dominant domestic social and cultural norms and mediated through governance structures*.

The following parts of this chapter consider the salience of the propositions highlighted above to the presence and absence of backlash against the ICC, ICTY, and STL from South African, Serbian, and Lebanese governments respectively.

(p. 611) V. South Africa and the International Criminal Court: Archetypal Backlash

A. Background

The behaviour of recent South African governments towards the ICC provides perhaps the best-known instance of what many understand by international criminal tribunal backlash. South African antagonism towards the ICC has endured over several years, moreover, and has become increasingly aggressive and high profile with the passage of time, to the point where it is now government policy to withdraw from the Rome Statute, satisfying the definition of backlash above.

In this case, having commenced the new millennium as one of the foremost supporters of the new court, following the transition from the Mandela government to that of Thabo Mbeki, and then to Jacob Zuma and more recently Cyril Ramaphosa, South Africa's enthusiasm for the ICC has waned dramatically, culminating (so far) in 2016's abortive withdrawal from the Rome Statute. The 2015 South African failure to arrest Sudanese (then-) President Omar al Bashir presents a particularly clear inflection point given Zuma's 2009 commitment to arrest the former. Viewed in context, however, this was merely one episode in a long-running process of disillusionment.[37]

By any account, the drivers of backlash in this instance are complex. Some, for example, have identified longer-term shifts in South African foreign policy as a key factor, with the South African government increasingly 'choosing Africa' in a turn to 'revolutionary' regional multilateralism.[38] Others have pointed to norm 'antipreneurship' as an underlying factor, highlighting the casting by powerful domestic actors of resistance (p. 612) to the

ICC as consistent with international norms of sovereignty and regional norms of African solidarity that should trump 'Western, imperialist' anti-impunity norms.[39] The pluralist theoretical approach set out above enables more nuanced analysis, however, identifying a range of potential determinants of South African attitudes towards the ICC.

B. Choosing Africa: A Pluralist Approach

Rationalist approaches to South African backlash against the ICC highlight a series of important considerations. Perhaps most critically, as Mills and Borer have observed, South Africa is 'a regional power with regional power interests'.[40] This observation in turn reflects two distinct elements: first, that though not comparable with the more traditionally conceived great powers, South Africa is perhaps (and certainly militarily) the most powerful African state. At the same time, the traditional great powers, including France and the UK as ICC member states, have espoused little interest in facilitating ICC operations in Africa beyond lending verbal and financial support. The combination of relatively weak and remote international interest, few regional constraints, and little prospect of meaningful sanction for non-compliance with ICC requirements suggests that, all else being equal, South African governments are in any case unlikely to be closely constrained in dealing with the ICC.

Building on the second limb of Mills and Borer's observation, institutionalist thought provides further refinement: given South Africa's status as a regional power, its foreign policy interests are similarly likely to be regionally focused.[41] This view, moreover, appears largely to have been borne out, as South African foreign policy has evolved from an early focus on universal human rights under Mandela to an emphasis on regional solidarity under Mbeki and Zuma, with the al Bashir affair only one illustration of this trend.[42]

Several more specific interest-based drivers of this orientation have also been identified. Perhaps foremost amongst these is a striving for regional pre-eminence, with symbolic leadership becoming an increasingly important element of the South African effort to build regional primacy, as economic and foreign policy hegemony remains incomplete.[43] In this reading, the drive for symbolic leadership has manifested in initiatives (p. 613) such as Mbeki's 'African Renaissance' and participation in and leadership of regional institutions such as the African Union. Put simply, from this perspective, over time support for the ICC has come to be increasingly costly (and to yield relatively remote benefits) to South African governments, to the point where the costs of continued support are outweighed by the advantages of regionally aligned opposition.

A rationalist explanation alone is not persuasive, however, failing to provide a convincing explanation for why South African governments 'bandwagoned' with the governments of states such as Kenya and Zimbabwe, rather than 'balancing' against these governments, alongside more ICC-supportive states such as Botswana.[44] International social and domestic political and cultural considerations assist, however, in making sense of this puzzle.

In this case, two such factors can be identified: social pressure from other regional governments for South Africa to display ‘appropriate’ regional solidarity, and cultural alignment on the part of domestic elites. Both tendencies can be seen, for example, in Mbeki’s encouraging: ‘South Africans to embrace an African identity and [promoting] the continent’s political, economic and social renewal’.[45] The Mbeki government was similarly a leading actor in the establishment of the African Union and in its promotion as the primary vehicle for regional cooperation. Accordingly, taking into account the expectations and preferences of other prominent African governments to maintain notional regional leadership, South African governments have had little option but to align with dominant regional views of the ICC as these have evolved over time, in light of, for example, Burundian, Kenyan, Sudanese, and Ugandan government experiences.[46] In short, in this reading South African policy choices regarding the ICC have primarily reflected regional normative expectations.[47]

That said, it is unlikely that external expectations would have had quite so much bearing on South African foreign policy choices, had the experiences of much of the ANC (p. 614) leadership during apartheid not also inculcated a widespread predisposition towards anti-colonialism and regional solidarity. This affinity, in this account, resulted in a widespread domestic political preference for regional, African initiatives over broader multilateral solutions to cooperation problems, and discomfort with Western-dominated approaches.[48]

In respect of the ICC, accordingly, it seems reasonable to view South African government preferences as having been closely affected by dominant regional views of the court, in large part owing to the socialized preference for regional solidarity on the part of the ANC leadership, against a background of minimal great power engagement and a rational privileging by successive South African governments of regional interests. Taken together, these factors may also assist in explaining individual manifestations of backlash, such as the evident readiness of the South African executive to override domestic judicial actors (and international and local human rights organizations) in permitting al Bashir to leave South Africa in 2015.[49]

VI. Serbia and the ICTY: Persistent Backlash

A. Background

If South African obligations to the ICC have over time become honoured more in the breach than in the observance, the evolution of Serbian government attitudes to the ICTY illustrates the opposite dynamic, with persistent, aggressive opposition fading with time into grudging compliance and latterly tactical support. The Serbian case also illustrates well the extent to which backlash can be constrained by strong countervailing interests and engaged great powers, notwithstanding the domestic dominance of ‘non-compliance constituencies’.[50]

The tortured path of Serbian and other Western Balkan governments' compliance with the ICTY has been the subject of innumerable scholarly and policy tracts.[51] In brief, however, it was evident when the ICTY was established in 1993 that there was little (p. 615) prospect of the Milošević-dominated Yugoslav government recognizing the court's legitimacy, let alone cooperating with the court, even though 'Serbian war crimes [lay] at the epicenter of the Balkan wars and comprise[d] the primary focus of the Tribunal's prosecutions'.[52] This position evolved little during Milošević's period of dominance, with a minimal number of 'voluntary surrenders' from Serbia to The Hague between 1993 and 2001.[53] Rather, throughout this period, Milošević and domestic partners sought to cast the ICTY 'as a political anti-Serb Tribunal, one more instrument that other nations would use to victimise the Serbs'.[54]

The prospects for Serbian cooperation were not improved by the Tribunal's indictment of Milošević in the midst of NATO's military intervention in Kosovo in March 1999, nor by the subsequent refusal by ICTY prosecutors Louise Arbour and Carla del Ponte to investigate the NATO conduct during that conflict.[55] Matters improved in fits and starts following Milošević's removal from power, however, as the US and EU increasingly utilized conditionality to promote Serbian cooperation, resulting in the surrender to the Tribunal of Milošević (2001), Radovan Karadžić (2008), and Ratko Mladić (2011).

The Serbia-ICTY case provides a particularly interesting illustration of a situation where backlash was essentially the default setting throughout most of the relevant period, with national authorities persistently refusing to recognize the Tribunal's authority.[56] This enables the Serbian case to be examined to highlight not only drivers of tribunal opposition, but also factors contributing to what might be termed the eventual 'normalization' of government attitudes towards the ICTY.

B. 'It is an incredible situation. We always have a problem with Serbia. Always'[57]

In terms of realist factors, the Serbian experience highlights the importance of great power engagement in enabling or preventing backlash. In this instance, the coalition of great powers responsible for establishing the Tribunal via the UN Security Council displayed relatively little concern to ensure Serbian cooperation with the court for several years. Instead, the Clinton administration initially promoted the Milošević government as an interlocutor for the Bosnian Serbs, prioritizing peace in Bosnia over justice.[58] (p. 616) The Dayton Agreement, moreover, led to US pressure on Serbia lessening, with a series of wartime sanctions lifted.[59]

The situation began to shift with the Kosovo conflict, with NATO governments increasingly seeing value in the ICTY.[60] Following opposition victory in the 2000 elections, the US and EU then began to tie the provision of financial aid, potential NATO membership, and closer regional integration to the surrender of indictees to The Hague. There is consensus, for example, that the 2001 arrest of Milošević resulted specifically from the prospect of the US withholding a $100m aid package.[61] Compliance with arrest warrants (and re-

quirements for provision of records) then continued to improve over time as Serbia was 'exposed to the full force of international conditionality',[62] culminating in the surrender to the ICTY of Karadžić and Mladić, along with other longstanding indictees.

Shifts in external pressure on Serbia were also mirrored by shifts in the decisional calculi informing Serbian government decision-making. Viewed by the US and allies as a necessary interlocutor with the Bosnian Serb leadership at the time, for example, the Milošević government risked little by non-compliance with ICTY demands in the immediate post-Dayton environment, and indeed stood to gain in terms of domestic and wider regional support from continued, high profile defiance.

This view changed over time, however, with the Kosovo conflict and subsequent deposal of Milošević amid growing popular discontent with his leadership. The former raised the costs of continued non-cooperation, refocusing international attention on Serbian obligations to the ICTY, particularly in respect of high-profile indictees such as Milošević, and foreshadowing US and European conditionality to come. The latter, meanwhile, reduced the domestic costs and highlighted benefits of cooperation with the ICTY, as the Milošević-era political leadership was, over time, marginalized. Indeed, while not without setbacks, in the aftermath of the 2003 assassination of Zoran Đinđić (the reformist post-Milošević Serbian prime minister), in an operation titled by its authors 'Stop The Hague', the successor government led by Zoran Živković (a Đinđić ally) went as far as to utilize cooperation with the ICTY tactically, requesting that the Tribunal indict former senior members of the state security service, subsequently transferred to The Hague.[63]

With respect to international and transnational social pressure, the Serbian experience highlights the limits of such pressure in ameliorating backlash in a political environment with marginal aligned domestic support and limited support from powerful states. More specifically, despite extensive use by the ICTY and civil society supporters, the Milošević government proved largely immune to transnational civil society's usual technique of 'naming and shaming',[64] failing to make even the instrumental adaptation that (p. 617) might in other circumstances be expected.[65] Underlying this lack of impact would appear to be Serbia's pre-existing international pariah status, and Milošević's ability to retain the support of key domestic elites despite this, alongside the 'ambivalent and at times seemingly contradictory approach' of the international community to the issue of Serbian cooperation with the ICTY.[66]

At the same time though, the case also highlights another indirect avenue for such pressure: ultimately tribunal requirements and Serbian obligations were adopted by policy makers in the US and EU following extensive lobbying and the garnering of domestic support in key states by the ICTY itself, most visibly through the activities of its chief prosecutors.[67] It was only when pressure exerted by the ICTY and transnational civil society actors on the Serbian leadership was allied to the support of powerful states that persuasion began to bear fruit—though polling data suggests that even following Milošević's deposition there was minimal popular support within Serbia for the ICTY on the grounds that 'cooperation would be "just" '.[68] On occasion, moreover, the post-Milošević Serbian

government appeared to engage in normative pressure of its own: attempting to shame the ICTY and its supporters by highlighting the risk of instability following further cooperation with the court.[69]

As this discussion illustrates, domestic politics formed a key determinant of Serbian attitudes to the ICTY throughout its life. A combination of determined elite opposition to cooperation, with broad popular support for this position (and minimal visible dissent), made a predisposition to backlash all but inevitable during the period of Milošević's dominance, with little opening for transnational advocacy, particularly in the absence of committed support from strong, engaged great powers.[70]

Perhaps more puzzling from this perspective, however, is the persistence of backlash beyond the fall of Milošević, especially with political change accompanied by an apparent increase in the strength of domestic liberal sentiment.[71] Again, however, domestic political structures and arrangements were critical: even after Milosevic's loss in elections, key political actors, with popular and elite support,[72] were strongly opposed to improving cooperation with the ICTY—famously, the post-Milošević Yugoslav government under Vojislav Koštunica initially favoured the continuation of Milošević's oppositionist (p. 618) position.[73] Indeed, the halting progress towards cooperation under Đinđić and successors illustrates well the fragile and primarily instrumental (rather than principled) basis of post-Milošević Serbian acquiescence to US and European demands to cooperate with the ICTY.[74]

VII. Lebanon and the Special Tribunal: Absent Backlash

In contrast to permanent or externally-imposed ad hoc courts, hybrid tribunals may be more likely to be designed collaboratively between international and domestic actors to fit individual sets of circumstances, and so may be expected to be less likely to experience backlash than the former. That said, the extent of domestic assent to such courts may vary: in this regard, the STL presents a particularly interesting case, having been established by the UN Security Council, rather than jointly by international and domestic authorities.

Accordingly, compared to the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, the legal basis of the STL does not include domestic primary legislation (though its jurisdiction does include some domestic offences). Rather, in formal terms the court more closely resembles the externally-imposed ad hoc tribunals. This is of course only part of the story, though: the Lebanese government under Fouad Siniora was instrumental in establishing the Tribunal, efforts to establish a domestic legal basis for the court failing due to parliamentary paralysis. The failure to achieve parliamentary ratification, however, is itself testament to the domestic tensions that have affected the STL from the outset.

Despite significant domestic pressure, primarily from Hezbollah, successive Lebanese governments have continued to provide nominal support to and participation in STL activities, including providing Lebanese judges to the court as well as ongoing financing. Accordingly, the Lebanese attitude to the STL cannot be said to constitute an example of backlash. However, given the limited extent of Lebanese cooperation with the STL, this case presents a valuable opportunity to consider the extent to which the pluralist taxonomy assists in understanding the absence as well as the presence of backlash.

(p. 619) A. Background

The STL was established in the aftermath of the 14 February 2005 assassination of Lebanese former Prime Minister Rafic Hariri. At the time of the assassination, there was growing international concern (primarily from the US and France) and domestic dissatisfaction with continued Syrian domination of Lebanon, with Hariri at the forefront of efforts to diminish this influence. Unsurprisingly, there was initially a widespread view amongst the 'March 14' Lebanese anti-Syrian coalition,[75] and French and US officials, that Syria was responsible for Hariri's assassination.[76]

With support from France and the US, and amidst Syrian military withdrawal from Lebanon, in April 2005 the Security Council established an international Commission to support anticipated domestic prosecutions. At the request of then-Prime Minister Fouad Siniora and March 14 allies following parliamentary opposition from Hezbollah and Syrian opposition, the Security Council subsequently proceeded to establish the STL without Lebanese legislative consent, the court commencing operations in March 2009.[77]

The work of the STL during its first several years has been described in detail elsewhere.[78] For present purposes, however, it is important to bear in mind that while the Tribunal pursued its mandate at a deliberate pace, events in Lebanon moved much more rapidly. Indeed, even before the STL formally commenced work, growing tension between a weakened March 14 coalition and an increasingly assertive Hezbollah-led opposition ('March 8') led to the 2008 Doha Accords, resulting in a government of national unity led by Siniora but with Hezbollah participation, in a settlement providing each bloc a veto over government initiatives. At the same time, the US and France (March 14's primary foreign backers) shifted position, signalling growing rapprochement with Syria. Reflecting these developments, by September 2010 then-Prime Minister Saad al-Hariri, Siniora's successor and Rafic Hariri's son, distanced himself from earlier accusations of Syrian involvement in the 2005 assassination.[79]

With domestic politics dominated by an uneasy coexistence between March 14 and Hezbollah/March 8, the January 2011 issuance by the STL of indictments against four Hezbollah members heralded crisis. Fuelled by a breakdown in a Saudi-Syrian mediation process over how to handle the indictments, Hezbollah-aligned ministers withdrew (p. 620) from the Hariri government, causing its collapse and the formation of a government under Najib Mikati, more closely aligned with Hezbollah and March 8. The Mikati government in turn collapsed in March 2013 following further cabinet splits, having

failed to agree a unified position on handling the STL, though in the meantime having maintained financial support for and judicial participation in the Tribunal at Mikati's insistence.[80] Tammam Salam, appointed to succeed Mikati in April 2013, included in his government members of both the March 14 and March 8 coalitions, and continued Mikati's provision of support to the STL.[81] At the same time though, there was little indication during either premiership that the Lebanese government would be able to detain any indictees given vociferous Hezbollah opposition.[82] In consequence, there was evidently little surprise in Lebanese government circles when the STL opened trials *in absentia* in January 2014.[83]

Salam resigned in December 2016 in the wake of growing tension between Saudi Arabia and Hezbollah,[84] and was replaced as prime minister by Saad al-Hariri,[85] with trials *in absentia* continuing to progress in The Hague. There has been little indication, however, that al-Hariri's reappointment is likely to result in a revised approach to the STL, to date signified primarily by continued financial support, but with little readiness (let alone ability) to entertain detaining indictees over Hezbollah objections.

B. Lebanon and the STL: reassuringly undemanding

Since its establishment, the P5 and regional powers have taken relatively little interest in the work of the STL, focusing attention more on preventing a recurrence of violence and promoting narrower interests in the Lebanese arena. The US, for example, has most recently viewed Lebanese politics primarily through Syrian and Iranian lenses. Similarly, while successive French governments have voiced support for the STL, France has more recently focused on maintaining Saad al-Hariri in power domestically, and both Syria and Saudi Arabia (the dominant regional actors) have to date favoured (p. 621) continuing current Lebanese 'undemanding cooperation' with the STL. Given the extent to which successive Lebanese governments have been fractured and hamstrung by internal divisions, it is accordingly relatively straightforward to understand Lebanese policy towards the STL as dominated by the views of stronger regional and international players.

That said, it is also important to note that the Tribunal itself has not so far required Lebanese governments to take measures comparable to those which proved so problematic (for example) for the post-Milošević Serbian government. In particular, the STL accepted in fairly short order following the indictments that there was little likelihood of either the voluntary surrender of indictees, or of any of those concerned being detained by Lebanese forces.[86] Indeed, the explicit inclusion of trials *in absentia* in the STL's repertoire (in contrast to the options available to other international tribunals) appears to have been critical to the continued ability of the STL to claim successful Lebanese cooperation, without actually requiring Lebanese governments to take more than *de minimis* steps to support the Tribunal.

This last observation is also important in respect of the calculations that have been made by successive Lebanese premiers to maintain support for the STL in line with Western and regional government preferences, but in a manner that manages disruption to rela-

tions with Hezbollah. Instructive to this end is (March 8-aligned) Mikati's threatened resignation in 2001 over the issue of Lebanese financing for the STL, taking the view—potentially with Syrian assent—[87] that Lebanon should comply with its obligations to fund the STL, but also committing to 'protecting the Resistance'.[88]

While successive Lebanese governments have sought to square the circle of cooperating with the STL without causing a violent reaction from (a domestically increasingly powerful) Hezbollah and further destabilizing Lebanese politics,[89] the ambivalent official Lebanese position on the STL also reflects a relative absence of transnational pressure from the STL and broader transnational human rights communities for more extensive cooperation with the Tribunal.[90] To a degree, this may simply reflect broader (p. 622) international normative shifts since the Tribunal was established.[91] Even then, however, domestic civil society initiatives that might in other circumstances be expected to support more extensive cooperation with the Tribunal have also been thin on the ground.[92]

This 'missed point of entry' for the STL, however, makes more sense when the constellations of domestic actors supportive of or opposed to the Tribunal are mapped. Put simply, cooperation with the STL has become a domestically politicized issue, with the extent of cooperation at any given time hostage to continued internal and external efforts to avoid a recurrence of violence by maintaining the fragile equilibrium between March 8 and March 14, entrenched in the Doha Accords.[93] In other words, whereas backlash may well have resulted from unfettered Hezbollah and March 8 dominance of Lebanon,[94] as long as the current power-sharing structures endure, bolstered by more or less supportive external governments, and the STL itself does not make more extensive demands on the Lebanese government, it seems likely that the current Lebanese position of providing minimally domestically intrusive support to the Tribunal will continue.

VIII. Conclusion

If current trends are anything to go by, international criminal tribunal backlash is likely to remain a focus of concern amongst practitioners, governments, and scholars for some time to come. Against this backdrop, the means-and-methods-focused definition of backlash and accompanying pluralist theoretical framework presented in the present chapter have much to commend them.

The former builds on existing work on backlash to provide a clear, workable focus for empirical research, particularly into the causal factors explaining this phenomenon. The adoption of a pluralist theoretical approach then provides a framing device capable of (p. 623) identifying a range of factors potentially explaining the prevalence and/or absence of backlash in individual cases.

Indeed, in the three cases examined, this framework draws attention to critical domestic, international, and transnational drivers and inhibitors of backlash. Domestic politics and the preferences of powerful sub-state elites emerge as key, for example, in the Serbian and South African experiences of backlash. The framework similarly directs attention to

the manner in which attitudes to international courts are capable of shifting over time as governments' decisional calculi and the associated costs and benefits of tribunal support or backlash evolve, with (for example) ICC support becoming increasingly costly within the context of an increasingly regional-focused South African foreign policy, and ICTY compliance becoming increasingly attractive to Serbian governments as the costs of non-cooperation rose sharply following the Kosovo conflict. The framework also highlights the importance of external actors, particularly the governments of more or less-closely engaged regional and great powers, in catalyzing (regional governments in the South Africa case) or limiting the prospects of backlash (the US and EU in post-Milošević Serbia and the US, France, Syria, and Saudi Arabia in Lebanon), illustrating the importance of taking into account relative state power differentials, as well as foreign policy situations and calculations, as factors in backlash.

At the same time, while transnational social pressure can be seen to have played an important role in shaping South African and (indirectly) Serbian attitudes to the ICC and ICTY respectively, the absence of such pressure, including from domestic civil society, is initially puzzling in respect of Lebanon and the STL—until the Lebanese domestic political constellation is taken into account, highlighting the co-option of the STL as a partisan issue in Lebanese politics, dividing March 8 and March 14.

It does not follow from this discussion that these findings are generalizable to other cases. Nevertheless, the salience of the four sets of factors in all three instances suggests it will be worth exploring the extent to which similar constellations of factors are together capable of explaining the dynamics of backlash in other cases. In particular, to the extent that hybrid tribunals involve closer 'target' state participation in tribunal design and operation than might otherwise be the case, it would be instructive to examine whether the former are indeed less susceptible to backlash than ad hoc or permanent courts, and if so what the drivers of this tendency might be.[95] The contrast between the 'slow-burn' of South African backlash against the ICC and persistent Serbian backlash against the ICTY similarly invites further consideration of the extent to which backlash might be more inhibited where a state has voluntarily acceded to a court's jurisdiction than where this has been externally imposed.[96]

It may also be worth considering the utility in other contexts of the government-focused 'means and methods'-based definition of backlash presented above, and the (p. 624) scope this presents to enable more rigorous qualitative and potentially quantitative analysis of this phenomenon, including thinking methodically about the mechanisms linking causal drivers and manifestations of tribunal backlash. Improving understanding of the drivers and dynamics of backlash should also enhance understanding of the implications of this tendency for individual courts and so aid tribunals and supporters in seeking to ameliorate backlash in individual instances and more generally.

The definition and theoretical approach presented here also point the way towards additional questions and issues for future consideration. The chapter has focused on backlash as manifested in the attitudes of individual governments towards individual tribunals: this

leaves open, however, the question of how widespread such backlash may need to be in the context of different types of court to significantly impede tribunal operations or to effect institutional reform or closure. It is conceivable, for example, that a 'norm cascade' might operate in certain contexts, with antipathy towards a tribunal diffusing over time across governments, making institutional failure increasingly likely if not checked.[97]

It is also important not to neglect the role of tribunals themselves in provoking or forestalling backlash. In the present instance, the extent of tribunal demands on states has been treated as one background condition amongst others informing government positions. Tribunals are political as well as judicial actors, however, and the discretionary demands of judges and prosecutors—regardless of whether framed as more or less inflammatory—are also likely to be calibrated to and considered in light of assessments of their likely success or failure, as well as broader implications for the institutions and cases involved.[98]

The experience of the STL suggests, for example, that a 'low-aiming' court is less likely to provoke backlash than an institution that makes heavier demands on domestic interlocutors: in contrast, the ICC and ICTY encountered significant resistance from South African and Serbian authorities facing unpalatable demands. This in turn, however, invites consideration of whether a criminal tribunal that does not provoke some degree of serious opposition—at least from targeted constituencies—can be said to be performing effectively. As such, while there may be advantages in bracketing the drivers of judicial decisions and actors' behaviour for some purposes, it will also be helpful to investigate how assessments and expectations of target-state behaviour colour tribunal conduct, and the extent to which internal tribunal actors consider anticipated responses in framing decisions and measures.

Understanding of the manifestations, drivers, and implications of international criminal tribunal backlash continues to evolve, with scholarship in this vein potentially capable of enabling enhanced, better-calibrated government and judicial behaviour. With this last in mind, and building on existing research on international tribunal backlash, (p. 625) the present chapter provides a set of tools designed to move debate towards methodical, evidence-based assessment of the dynamics of international criminal tribunal backlash. The first element in this 'toolkit' is the provision of a definition of backlash conducive to structured, focused empirical analysis and comparison; the second is the provision of a theoretical framework enabling the derivation and testing of hypotheses about the drivers and inhibitors of international criminal tribunal backlash. The three instances considered are, of course, examined all too briefly: nevertheless, these discussions helpfully illustrate the scope for a methodical, theoretically-informed approach to specific empirical puzzles to improve understanding of the trials and tribulations of international criminal tribunals.

Notes:

(1) Lord Kelvin Adam Smith Research Fellow, School of Law, University of Glasgow. I am grateful to Anne van Aaken, Pierre d'Argent, Franzizka Boehme, Geoff Dancy, Cian

O'Driscoll, Courtney Hillebrecht, Kurt Mills, Ian Paterson, Yael Ronen, Yuval Shany, Ty Solomon, Scott Strauss, Shaina Western, colleagues at the University of Glasgow International Law Working Group, as well as the volume editors, for helpful comments and discussions.

(2) See, e.g., Florian Jessberger and Julia Geneuss, 'Down the Drain or Down to Earth? International Criminal Justice under Pressure' (2013) 11(3) *J of Intl Crim Justice* 501 (and others in same volume).

(3) See 'The Observer View on the Effectiveness of International Law: Observer Editorial' (*The Guardian*, 17 December 2017) <http://www.theguardian.com/commentisfree/2017/dec/17/observer-view-international-law-criminal-court> accessed 20 October 2018; Mark J Osiel, 'The Demise of International Criminal Law' (*Humanity Journal*, 10 June 2014) <http://humanityjournal.org/blog/the-demise-of-international-criminal-law/> accessed 20 October 2018; David Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11(3) *J of Intl Crim Justice* 505.

(4) For recent examples see, e.g., Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14(2) *Intl J of L in Context* 197 (hereafter Madsen and others, 'Backlash against Intl Courts') (and accompanying articles in special issue); David Caron and Esme Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (OUP 2018) 159 (hereafter Caron and Shirlow, 'Dissecting Backlash'); Laurence R Helfer and Anne E Showalter, 'Opposing International Justice: Kenya"s Integrated Backlash Strategy against the ICC' (2017) 17 *Intl Crim L Rev* 1; Wayne Sandholtz, Yining Bei, and Kayla Caldwell, 'Backlash and International Human Rights Courts' ([NOTE – NOW PUBLISHED AS CHAPTER IN: Contracting Human Rights: Crisis, Accountability, and Opportunity, EDS. Alison Brysk, Michael Stohl, ELGAR 2018. PP. 159–178. ALL REFERENCES NOW UDPATED TO REFLECT.) (hereafter Sandholtz and others, 'Backlash and IHR Courts'); Karen J Alter, James T Gathii, and Laurence R Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *European J of Intl L* 293.

(5) See, e.g. Jean Kirkpatrick's 1984 (in)famous characterization of the International Court of Justice as a 'semi-legal, semi-juridical, semi-political body, which nations sometimes accept and sometimes don't' cited in Roman Rollnick, 'World Court Has Prestige but Little Power' (*UPI Archives*, 12 May 1984) <https://www.upi.com/Archives/1984/05/12/World-court-has-prestige-but-little-power/8585453182400/> accessed 20 October 2018.

(6) Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21(4) *European J of Intl L* 1085; Francine Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order' (2008) 113(3) *The American Historical Rev* 701;

Sheri Rosenberg, 'An Introduction' (2006) 27 *Cardozo L Rev* 1549; Telford Taylor, 'The Nuremberg Trials' (1955) 55(4) *Columbia L Rev* 488.

(7) Radhabinod Pal, *International Military Tribunal for the Far East: Dissentient Judgment of Justice RB Pal* (Kokusho Kankokai 1999).

(8) See generally Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (CUP 2008) (hereafter Peskin, *International Justice in Rwanda and the Balkans*). See also James Gow, Rachel Kerr, and Zoran Pajic (eds), *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2013).

(9) Caitlin Reiger and Marieke Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect' (International Center for Transitional Justice, March 2006) <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> accessed 20 October 2018; Herbert D Bowman, 'Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor' (2004) 18 *Emory Intl L Rev* 371; 'Justice Denied for East Timor: Indonesia's Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of U.N. Action' (*Human Rights Watch,* 20 December 2002) <https://www.hrw.org/report/2002/12/20/justice-denied-east-timor/indonesias-sham-prosecutions-need-strengthen-trial> accessed 20 October 2018.

(10) 'New Prosecutor Named as Kosovo War Crimes Court Keeps Working on First Indictments' (*Reuters*, Amsterdam, 7 May 2018) <https://www.reuters.com/article/us-war-crimes-kosovo/new-prosecutor-named-as-kosovo-war-crimes-court-keeps-working-on-first-indictments-idUSKBN1I81KZ> accessed 20 October 2018.

(11) Jonathan Birchall, 'Concerns over Bid to Wrap Up Outstanding Investigations at Cambodia's ECCC' (*International Justice Monitor,* 16 June 2017) <https://www.ijmonitor.org/2017/06/concerns-over-bid-to-wrap-up-outstanding-investigations-at-cambodias-eccc/> accessed 20 October 2018. The Special Court for Sierra Leone and AU/Senegal Extraordinary African Courts have been held up as more successful hybrid institutions. See 'Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia' (*No Peace Without Justice,* September 2012) <http://www.npwj.org/ICC/Making-Justice-Count.html> accessed 20 October 2018; Jason Burke, 'Hissène Habré Trial Provides Model for International Justice' (*The Guardian*, 30 May 2016). Caution should also be observed in these instances, however: the trials of Charles Taylor and Hissène Habré took place in institutions established in partnership with states other than Liberia and Chad, the states from which those individuals originated. Important constituencies in both men's home states also adopted at best ambiguous attitudes towards these trials. See Pierre Hazan, 'The Trial of Hissène Habré: A Pivotal Case for International Justice in Africa' (*The Conversation*, 16 June 2016) <http://theconversation.com/the-trial-of-hisse-ne-habre-a-pivotal-case-for-international-justice-in-africa-61052> accessed 20 October 2018; Randy Kreider, 'Liberia: Opposition Would Welcome Warlord Charles Taylor Home', ABC News, 11 October 2011, <https://

abcnews.go.com/Blotter/liberia-opposition-warlord-charles-taylor-home/story?id=14713509> accessed 30 September 2019.

(12) For a helpful overview, see Sanji Mmasenono Monageng, 'Africa and the International Criminal Court: Then and Now' in Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (eds), *Africa and the International Criminal Court* (T.M.C. Asser Press 2014) 13.

(13) Related distinctions might be drawn between (potentially widespread) government ambivalence or wariness about international adjudication generally and instances of (e.g.) objection, contestation, resistance, and backlash. See Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14(2*) Intl J of L in Context* 240 (hereafter Soley and Steininger, 'Parting Ways').

(14) Sandholtz and others, 'Backlash and IHR Courts' (n 4) 160.

(15) Madsen and others, 'Backlash against Intl Courts' (n 4) 203.

(16) Sandholtz and others, 'Backlash and IHR Courts' (n 4) (examples provided are, 'When a state acts, or threatens, to: 1. Cease completely to cooperate or comply with the court; 2. Narrow the court's jurisdiction; 3. Restrict access to the court (limit standing); 4. Withdraw from the court's jurisdiction or denounce its underlying treaty; 5. Abolish the court' at 160 (semicolons added)).

(17) Madsen and others, 'Backlash against Intl Courts' (n 4) 203. Elsewhere, Madsen and others refer to backlash as 'resistance that goes beyond the ordinary playing field of law and includes a critique of not only law but also the very institution—the court—and its authority' (ibid 199). This wording omits explicit reference to aims and motivations, but nevertheless also presents difficulties, particularly in respect of identifying the 'ordinary playing field of law' in any given instance. See n 21.

(18) As observed by Andreas Hofmann in the context of Brexit: 'The CJEU hardly topped the list of villains in the "Leave" camp' in 'Resistance against the Court of Justice of the European Union' (2018) 14(2) *Intl J of L in Contex*t 259 (hereafter Hofmann, 'Resistance against the CJEU') This is not to say that CJEU conduct was not a factor in the formation of UK negotiating 'red lines', but rather that (likely) withdrawal probably has less to do with the conduct of the CJEU per se than with the UK's troubled relationship with the European Union.

(19) As put by Jacobs: '[T]he most readily interpretable manifestation of actors' cognitive commitments—their own verbal expressions of their ideas—is often a systematically biased indicator. … Politics generates strong pressures for actors to employ verbal communication to strategically misrepresent the reasoning underlying their choices'. Alan M Jacobs, 'Process Tracing the Effects of Ideas' in Andrew Bennett and Jeffrey T Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool* (CUP 2015) 45. See also Andrew Bennett and Jeffrey T Checkel, 'Process Tracing: From Philosophical Roots to Best Prac-

tice' in Andrew Bennett and Jeffrey T Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool* (CUP 2015) 27–8.

(20) Cass R Sunstein, 'Backlash's Travels' (2007) 42(2) *Harvard Civil Rights-Civil Liberties L Rev* 435 (emphasis added); Caron and Shirlow, 'Dissecting Backlash' (n 4) 160. In a similar vein drawing on Caron and Shirlow, Soley and Steininger define backlash as 'a process of systematic and consistent criticism of the institutional set-up of an [international court] as well as severe instances of non-compliance'. Soley and Steininger, 'Parting Ways' (n 13) 241.

(21) ibid 238. Similar sentiments are expressed by Madsen and others in 'Backlash against Intl Courts' (n 4) 199 (though as the latter acknowledge, it is also important to look (as the present examination does) beyond government conduct to understand processes of resistance and backlash, '[A] state-centric approach to backlash is insufficient, as it tends to reduce the complexity of the processes of resistance to [international courts] to mainly (or only) the final actions of governments. The processes leading to government [actions], such as pulling the trigger on an [international court] or clipping its wings, are crucial for understanding both pushback and backlash' at 204).

(22) See related discussion in ibid 204.

(23) Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) 69.

(24) Given that backlash in this formulation requires tribunal opposition to be sustained, high profile, and accompanied by aggressive steps to resist, this might also be expected to normally encompass the challenges to institutional authority highlighted by Madsen and others. An additional advantage of the present formulation is that it does not require a potentially problematic conceptual distinction to be drawn between 'seeking to reverse … practices … within the accepted field of the [court's] institutional framework' and seeking 'to clip the wings of [a court] by limiting its powers or altogether eliminating its authority' (Madsen and others, 'Backlash against Intl Courts' (n 4) 204). Though behaviour may often clearly fit into one or the other category, there are also likely to be significant analytic grey areas between these, reflecting difficulties in accurately assessing actors' aims and in identifying the outer bounds of the 'accepted field' of a court's 'institutional framework and authority' as these vary over time in respect of different groups of actors.

(25) For examples of media, popular, and other manifestations of backlash (more broadly defined), see, e.g., Hofmann, 'Resistance against the CJEU' (n 18); Eric A Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 *Arizona State L J* 795; Susan Marks, 'Backlash: The Undeclared War against Human Rights' (2014) 4 *European Human Rights L Rev* 319 (hereafter Marks, 'Backlash'); Michael Waibel, Nigel Blackaby, and Gabriel Bottini (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

(26) Marks succinctly characterizes backlash as ‘a striking back in the form of a strongly negative reaction against something which is deemed to have gained popularity, prominence, influence or power’ (Marks, ‘Backlash’ (n 25) 322). See also the discussion in Madsen and others, ‘Backlash against Intl Courts’ (n 4) 200–1.

(27) Whereas previous generations of IR scholarship were dominated by a series of ‘paradigm wars’ amongst proponents of different theoretical approaches, the ‘pluralist turn’ reflects growing recognition that complex empirical phenomenon are more likely to be effectively explained by combinations of insights drawn from multiple theoretical traditions, than by a limited set of insights drawn from a single such tradition. The approach presented in this chapter arguably reflects most closely Sil and Katzenstein’s vision of ‘analytical eclecticism’, insofar as existing bodies of theory are used as parts of a ‘toolkit’ to better understand a complex empirical puzzle. Peter Katzenstein and Nobuo Okawara, ‘Japan, Asian-Pacific Security, and the Case for Analytical Eclecticism’ (2002) 26(3) *International Security* 177; Rudra Sil and Peter Katzenstein, *Beyond Paradigms: Analytic Eclecticism in the Study of World Politics* (Palgrave Macmillan 2010).

(28) One challenge, for example, is tracing interaction amongst causal factors. See, e.g., more generally discussions in Jeffrey T Checkel, ‘Theoretical Pluralism in IR: Possibilities and Limits’ in Walter Carlsnaes, Thomas Risse, and Beth Simmons (eds), *Handbook of International Relations* (2nd edn, Sage 2012) 220; Laura Neack (ed), ‘Forum: Pluralism in IR Theory’ (2015) 16(1) *Intl Studies Perspectives* 1.

(29) One advantage of such a pluralist approach is that it provides a structured taxonomy to situate and build on existing work on the nature and causes of tribunal backlash, much of which implicates factors and mechanisms that can be situated in these traditions. See, e.g., Madsen and others, ‘Backlash against Intl Courts’ (n 4) (‘[w]hat seems to have the most influence on the direction of pushback and backlash are a set of contextual factors, including institutional factors, the constellation of actors involved in resisting or counter-resisting [international courts], and the broader social and political contexts of the processes’ at 215). See also Henry Lovat, ‘International Adjudication and Its Discontents: A Pluralist Approach to Tribunal Backlash’ (Unpublished manuscript 2018).

(30) John Mearsheimer, ‘The False Promise of International Institutions’ (1994) 19(3) *Intl Security* 5. See also Stephen D Krasner, ‘Global Communications and National Power: Life on the Pareto Frontier’ (1991) 43(3) *World Politics* 336.

(31) Strongly-held US preferences may, for example, colour Afghan government attitudes towards the prospect of an ICC investigation (and associated prospects for cooperation).

(32) See Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (CUP 2016); Lisa Martin, ‘An Institutionalist View: International Institutions and State Strategies’ in T V Paul and John A Hall (eds), *International Order and the Future of World Politics* (CUP 1999) 78; Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton UP 1984).

(33) See Ted Hopf, 'The Promise of Constructivism in International Relations Theory' (1998) 23 *Intl Security* 171.

(34) See James March and Johan Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52(4) *Intl Organization* 943.

(35) Norms, in this context, should be understood as sets of 'collective expectations for the proper behavior of actors within a given identity' (Peter J Katzenstein, 'Introduction: Alternative Perspectives on National Security' in Peter J Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Columbia UP 1996) 5). In much (though not all) of this literature, the 'constructivist moment' lies 'in the process of persuasion, which contradicts the rationalist assumption that states act on the basis of fixed preferences' (Caroline Fehl, 'Explaining the International Criminal Court: A "Practice Test" for Rationalist and Constructivist Approaches' (2004) 10(3) *European J of Intl Relations* 365). See, e.g. more generally Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (CUP 2013).

(36) Andrew Moravcsik, 'The New Liberalism' in Christian Reus-Smit and Duncan Snidal (eds), *The Oxford Handbook of International Relations* (OUP 2008) 234; Oona Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51(4) *J of Conflict Resolution* 588; Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton UP 2001).

(37) Reflecting the prominence of this case, there is a vast and growing literature on South African and broader African backlash against the ICC. See, e.g., Kurt Mills and Alan Bloomfield, 'African Resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm' (2018) 44 *Rev of Intl Studies* 101 (hereafter Mills and Bloomfield, 'African Resistance'); Max du Plessis and Guénaël Mettraux, 'South Africa's Failed Withdrawal from the Rome Statute: Politics, Law, and Judicial Accountability' (2017) 15(2*) J of Intl Crim Justice* 361; Franziska Boehme, ' "We Chose Africa": South Africa and the Regional Politics of Cooperation with the International Criminal Court' (2017) 11 *Intl J of Transitional Justice* 50 (hereafter Boehme, 'We Chose Africa'); Erika de Wet, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13(5) *J of Intl Crim Justice* 1049; Tim Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?' (*Africa Portal*, 1 March 2013) <https://www.africaportal.org/publications/the-african-union-and-the-international-criminal-court-an-embattled-relationship/> accessed 20 October 2018.

(38) Max du Plessis and Christopher Gevers, 'South Africa's Foreign Policy and the International Criminal Court: Of African Lessons, Security Council Reform, and Possibilities for an Improved ICC' in Jason Warner and Timothy M Shaw (eds), *African Foreign Policies in International Institutions* (Palgrave Macmillan 2018) 199 (hereafter du Plessis and Grevers, 'South Africa's Foreign Policy'); Boehme, 'We Chose Africa' (n 37).

(39) Mills and Bloomfield, 'African Resistance' (n 37).

(40) Tristan Anne Borer and Kurt Mills, 'Explaining Postapartheid South African Human Rights Foreign Policy: Unsettled Identity and Unclear Interests' (2011) 82 *J of Human Rights* 82.

(41) See discussion of South African multilateralism in du Plessis and Grevers, 'South Africa's Foreign Policy' (n 38).

(42) See, e.g., Merle Lipton, 'Understanding South Africa's Foreign Policy: The Perplexing Case of Zimbabwe' (2009) 16(3) *South African J of Intl Affairs* 331. See also Karen Smith, 'South Africa and the Responsibility to Protect: From Champion to Sceptic' (2016) 30(3) *Intl Relations* 391; Laurie Nathan, 'Interests, Ideas and Ideology: South Africa's Policy on Darfur' (2011) 110(438) *African Affairs* 55; Eduard Jordaan, 'Fall from Grace: South Africa and the Changing International Order' (2010) 30 *Politics* 82.

(43) Karen Smith highlights, for example, 'the image of South Africa as a champion of the causes of Africa and the developing world' and 'its bridge-building role between North and South' (Karen Smith, 'Soft Power: The Essence of South Africa's Foreign Policy' (2012) South African Foreign Policy Rev 73, quoted in du Plessis and Grevers, 'South Africa's Foreign Policy' (n 38) 203). See also Chris Alden and Maxi Schoeman, 'South Africa's Symbolic Hegemony in Africa' (2015) 52(2) *Intl Politics* 239. On regional suspicion of South African intentions, see Alexander Beresford, 'A Responsibility to Protect Africa from the West? South Africa and the NATO Intervention in Libya' (2015) 52(3) *Intl Politics* 288.

(44) Stephen M Walt, 'Alliance Formation and the Balance of World Power' (1985) 9(4) *Intl Security* 3.

(45) Adekeye Adebajo, 'Mbeki's Dream of Africa's Renaissance Belied South Africa's Schizophrenia' (*The Conversation,* 24 April 2016) <http://theconversation.com/mbekis-dream-of-africas-renaissance-belied-south-africas-schizophrenia-58311> accessed 20 October 2018.

(46) See Mills and Bloomfield, 'African Resistance' (n 37); Jean-Baptiste Jeangène Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis' (2016) 92(6) *Intl Affairs* 1319; Kurt Mills, ' "Bashir Is Dividing Us": Africa and the International Criminal Court' (2012) 34(2) *Human Rights Q* 404.

(47) See also Max du Plessis, 'Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders' (Institute for Security Studies Paper 278, November 2014) <https://www.files.ethz.ch/isn/185934/Paper278.pdf> accessed 20 October 2018; Garth Abrahams, 'Africa's Evolving Continental Court Structures: At the Crossroads?' (South African Institute for International Affairs, Occasional Paper 209, January 2015) <http://www.saiia.org.za/research/africas-evolving-continental-court-structures-at-the-crossroads/> accessed 20 October 2018.

(48) See Christopher Vandome, ‘Consistent or Confused: The Politics of Mbeki’s Foreign Policy 1995–2007’ (2018) 94 *Intl Affairs* 214–15. See also Boehme, ‘We Chose Africa’ (n 37) 61.

(49) On ‘non-compliance constituencies’, see Mark S Berlin, ‘Why (Not) Arrest? Third-Party State Compliance and Noncompliance with International Criminal Tribunals’ (2016) 15(4) *J of Human Rights* 509.

(50) ibid.

(51) See, e.g., Diane Orentlicher, *Some Kind of Justice: The ICTY’s Impact in Bosnia and Serbia* (OUP 2018) (hereafter Orentlicher, *Some Kind of Justice*); Nikolas Rajkovic, *The Politics of International Law and Compliance: Serbia, Croatia and The Hague Tribunal* (Routledge 2011); Peskin, *International Justice in Rwanda and the Balkans* (n 8); Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (OUP 2004); ‘Suspension of U.S. Aid to Serbia and Montenegro for Noncooperation with ICTY’ (2004) 98(4) *American J of Intl Law* 850; ‘U.S. Pressure on Serbia to Transfer ICTY Indictees’ (2002) 96(3) *American J of Intl L* 729.

(52) See also Orentlicher, *Some Kind of Justice* (n 51) 61.

(53) Milošević was President of Serbia from 1989–1997 (until 1991 within the Socialist Federal Republic of Yugoslavia), and latterly President of the rump Federal Republic of Yugoslavia (1997–2000).

(54) Dan Saxon, ‘Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia’ (2005) 4(4) *J of Human Rights* 566 citing interviews with Mirko Kların and Predrag Dojcinovic (The Hague, 4 and 11 May 2004).

(55) Peskin, *International Justice in Rwanda and the Balkans* (n 8) 58.

(56) Bosnia and Croatia adopted domestic legislation implementing the ICTY statute in 1995 and 1996 respectively. Serbia and Montenegro adopted a law on cooperation with the ICTY only in 2003.

(57) Former ICTY Prosecutor, Carla Del Ponte (December 2003). Quoted in Peskin, *International Justice in Rwanda and the Balkans* (n 8) 29.

(58) Peskin, *International Justice in Rwanda and the Balkans* (n 8) 35.

(59) See ibid 47–53.

(60) ibid 55–60.

(61) ibid 68.

(62) M Spoerri and A Freyberg-Inan, 'From Prosecution to Persecution: Perceptions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Serbian Domestic Politics' (2008) 11(4) *J of Intl Relations and Development* 365; Peskin, *International Justice in Rwanda and the Balkans* (n 8) 76.

(63) See Peskin, *International Justice in Rwanda and the Balkans* (n 8) 81.

(64) ibid, 35.

(65) See Thomas Risse, Stephen Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights* (CUP 1999) ch 1.

(66) Peskin, International Justice in Rwanda and the Balkans (n 8) 38; Christopher K. Lamont, *International Criminal Justice and the Politics of Compliance* (Ashgate, 2010) 66 (hereafter *Politics of Compliance*).

(67) See generally Peskin, *International Justice in Rwanda and the Balkans* (n 8) ch 3.

(68) Belgrade Center for Human Rights polling data cited in Lamont, *Politics of Compliance* (n 66) 67, fn 20.

(69) Peskin, *International Justice in Rwanda and the Balkans* (n 8) 91.

(70) Izabela Steflja, 'Identity Crisis in Post-Conflict Societies: The ICTY's Role in Defensive Nationalism among the Serbs' (2010) 22(2) *Global Change, Peace & Security* 240.

(71) See 'Analysis: Otpor's Challenge to Milosevic' (*BBC News,* 15 May 2000) <http://news.bbc.co.uk/1/hi/world/europe/749469.stm> accessed 20 October 2018.

(72) See Rory Carroll, 'Serbs Split over Fate of Milosevic' (*The Guardian*, 6 June 2001) <http://www.theguardian.com/world/2001/jun/06/balkans> accessed 20 October 2018.

(73) See, e.g., Steven Erlanger, 'Yugoslav Chief Says Milosevic Shouldn't Be Sent to Hague' (*The New York Times*, 3 April 2001) <https://www.nytimes.com/2001/04/03/world/yugoslav-chief-says-milosevic-shouldn-t-be-sent-to-hague.html> accessed 20 October 2018. See also Peskin, *International Justice in Rwanda and the Balkans* (n 8) ch 3; Orentlicher, *Some Kind of Justice* (n 51) chs 5, 7; Lamont, *Politics of Compliance* (n 66) 66.

(74) See Orentlicher, *Some Kind of Justice* (n 51) 66; Lamont, *Politics of Compliance* (n 66) 70; Peskin, *International Justice in Rwanda and the Balkans* (n 8) 64–65, 75.

(75) Named for the date of mass anti-Syrian protests that followed the Hariri assassination.

(76) 'Trial by Fire: The Politics of the Special Tribunal for Lebanon' (International Crisis Group, 2 December 2010) 2 <https://d2071andvip0wj.cloudfront.net/100-trial-by-fire-the-politics-of-the-special-tribunal-for-lebanon.pdf> accessed 21 October 2018 (hereafter ICG, 'Trial by Fire').

(77) See Nicolas Michel, 'The Creation of the Tribunal in its Context' and Bahige Tabbarah 'The Legal Nature of the Special Tribunal for Lebanon' in Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 10, 32.

(78) See, e.g., William Harris, 'Investigating Lebanon's Political Murders: International Idealism in the Realist Middle East?' (2013) 67 *The Middle East J* 9.

(79) See ICG, 'Trial by Fire' (n 76) 7; Ronen Bergman, 'The Hezbollah Connection' (*The New York Times*, 19 January 2018) <https://www.nytimes.com/2015/02/15/magazine/the-hezbollah-connection.html> accessed 21 October 2018 (hereafter Bergman, 'The Hezbollah Connection').

(80) See: 'Lebanon: Mikati to Quit If STL Funding Fails' (*Arab American News*, 28 November 2011) <http://arabamericannews.com/2011/11/28/lebanon-mikati-to-quit-if-stl-funding-fails/> accessed 21 October 2018 (hereafter 'Lebanon: Mikati to Quit If STL Funding Fails').

(81) Ernst Dijxhoorn, *Quasi-State Entities and International Criminal Justice: Legitimising Narratives and Counter-Narratives* (Routledge 2017) 125.

(82) Bergman, 'The Hezbollah Connection' (n 79).

(83) On trials in absentia and legal and broader implications for the STL, see Göran Sluiter, 'Responding to Cooperation Problems at the STL' and Paolo Gaeta, 'Trial In Absentia Before the Special Tribunal for Lebanon' in Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 134, 229.

(84) Toi Staff, 'Lebanon's PM Issues Ultimatum over Hezbollah' (*Times of Israel*, 26 February 2016) <http://www.timesofisrael.com/lebanons-pm-issues-ultimatum-over-hezbollah/> accessed 21 October 2018.

(85) 'New Government Announced under PM Saad Al-Hariri' (*Al Jazeera*, 18 December 2016) <https://www.aljazeera.com/news/2016/12/lebanon-announces-government-saad-al-hariri-161218201145680.html> accessed 21 October 2018.

(86) See Gilbert Kreijger and Jon Boyle, 'Lebanon Tribunal Asks for Hariri Trial in Absentia' (*Reuters*, 17 October 2011) <https://www.reuters.com/article/us-lebanon-trial/lebanon-tribunal-asks-for-hariri-trial-in-absentia-idUSTRE79G3X820111017> accessed 21 October 2018; 'Rafik Hariri Murder: Suspects to be Tried in absentia' (*BBC News*, 2 February 2012) <http://www.bbc.co.uk/news/world-middle-east-16849508> accessed 21 October 2018.

(87) Fidaa Itani, 'Funding the STL: Mikati's Gains, Hezbollah's Losses, and the Role of Syria' (*Al Akhbar English*, 1 December 2011) <http://english.al-akhbar.com/content/fund-

ing-stl-mikati%E2%80%99s-gains-hezbollah%E2%80%99s-losses-and-role-syria> accessed 21 October 2018.

(88) 'Lebanon: Mikati to Quit If STL Funding Fails' (n 80). See also Wafiq Qanso, 'Hezbollah vs Mikati: The Inside Battle Over STL Mandate' (*Al Akhbar English*, 15 January 2012) <http://english.al-akhbar.com/content/hezbollah-vs-mikati-inside-battle-over-stl-mandate> accessed 21 October 2018.

(89) See, e.g., 'Can There Be Justice as Well as Stability?' (*The Economist*, 11 November 2010) <https://www.economist.com/node/17463379?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e> accessed 21 October 2018.

(90) The publications list of No Peace Without Justice, for example, contains extensive commentary on the ICC and Sierra Leone tribunals, and more generally on transitional justice, but no thematic publications on Lebanon (see 'List of NPWJ Thematic Publications' <http://www.npwj.org/Newsroom/List-NPWJ-Thematic-Publications.html> accessed 21 October 2018). Similarly, of the 23 reports that Human Rights Watch have published since 2006 on Lebanon, none focuses on the STL (<https://www.hrw.org/publications?keyword=&date%5Bvalue%5D%5Byear%5D=&country%5B0%5D=9641> accessed 21 October 2018). A search for Amnesty International reports on international justice in Lebanon similarly produces a single report on the STL: Both the latter organizations also have, moreover, extensive publications on other courts, particularly the ICC. The reasons for this relative lack of engagement are beyond the scope of this chapter: this presents a potentially interesting topic for future investigation, however.

(91) See observations in 'The Special Tribunal for Lebanon and the Quest for Truth, Justice and Stability: Meeting Report' (*Chatham House*, 16 December 2010) 11 <https://www.chathamhouse.org//node/6043> accessed 21 October 2018.

(92) Are Knudsen and Sari Hanafi, 'Special Tribunal for Lebanon (STL): Impartial or Imposed International Justice?' (2013) 31(2) *Nordic J of Human Rights* 178.

(93) See Tamirace Fakhoury, 'Assessing the Political Acceptance of Hybrid Courts in Fractured States: The Case of the Special Tribunal for Lebanon' in Susanne Buckley-Zistel, Friederike Mieth, and Marjana Papa (eds), *After Nuremberg: Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* (International Nuremberg Principles Academy 2017) 2.

(94) See ICG, 'Trial by Fire' (n 76) 14.

(95) It would similarly be interesting to explore how backlash against international criminal tribunals compares in these regards with backlash against international tribunals in other sectors.

(96) That said, a comparison between the Serbian and South African experiences may be less valuable in this respect than one between Serbia and e.g. Kenya (where there has been an ICC investigation into the commission of 'core crimes').

(97) Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *Intl Organization* 887.

(98) See related discussions in Madsen and others, ‘Backlash against Intl Courts’ (n 4), 212–14; Jed Odermatt, ‘Patterns of Avoidance: Political Questions before International Courts’ (2018) 14(2) International Journal of Law in Context 221–36.

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