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BEHIND BACKLASH

THE ICC AND "AFRICAN BACKLASH" IN CONTEXT

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Behind Backlash: the ICC and "African Backlash" in Context

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Abstract

In recent years there has been significant interest among scholars and practitioners in a perceived wave of backlash against the International Criminal Court from African governments. The portrait this growing literature may suggest of African relations with the ICC, however, is somewhat myopic. While there has certainly been strong opposition to the ICC from several African governments, in this paper we put this into broader context, arguing that a focus on "backlash" masks variation and nuance, and even support for the ICC from many African governments. While some governments have expressed opposition to and engaged in antagonistic behaviour towards the ICC, others have expressed views and behaved in manners supportive of the ICC, helping to bolster the Court during this crisis. In this paper, we set so-called "backlash" against the ICC in its broader conceptual context, developing a series of propositions about government attitudes and behaviour towards the ICC, which we then test using an original dataset. In doing so, we make three contributions.

First, building on existing literature on backlash, we provide a detailed typology of state attitudes and behaviour towards international tribunals and institutions generally, ranging from supportive to critical, and accounting for nuances across dimensions. Second, using this reconceptualisation, we find that a focus on "African backlash" against the ICC risks overlooking the variation of attitudes and behaviours over time towards the ICC amongst African governments, including persistent patterns of support manifesting throughout the "wave" of anti-ICC backlash. Third, and finally, we conduct a statistical analysis of behaviours and attitudes towards the ICC: we find that – perhaps unsurprisingly – non-Rome Statute states parties are more likely to express negative attitudes and behaviours towards the ICC than parties to the Rome Statute. We also find that governments from which the ICC has requested cooperation are more likely to express more antagonistic rhetoric towards the ICC than the governments of states that have not received such requests. Moreover, behaviour towards the ICC and domestic human rights records seem to be related, with governments with worse human rights practices being more likely to adopt antagonistic actions towards the ICC. These findings suggest that the ICC may face future challenges and that it is likely necessary for the ICC to engage more with Rome Statute parties and non-parties alike.

Introduction

"Backlash" has become a highly visible theme in academic and policy discussions of international politics generally, as well as in respect of international courts and adjudication.[1] The African travails of the ICC, moreover, feature heavily in and form a particular focus of this literature. Amid allegations of an "African bias" on the part of the Court generally, and the Office of the Prosecutor in particular, observations of backlash have often centred around the Court's decade-long struggle to secure the arrest of former Sudanese President Omar al-Bashir. Events around the indictment and trial of Uhuru Kenyatta and William Ruto have formed another locus of discussion, with the court's investigation of these and other situations giving rise to a range of local and international controversies. These controversies can be seen reflected in turn in the African Union's 2017 call for African states to withdraw from the Court's jurisdiction, and in elements of the AU's 2014 Malabo Protocol,[2] as well as in the attempted withdrawal from the Rome Statute - the ICC's founding treaty - of South Africa and The Gambia (reversed following a court decision in one instance and change of government in the other) and in Burundi's withdrawal from the Statute.[3]

Yet several years on, it appears as though the ICC has weathered the storm. Indeed, the Court has arguably expanded its ambitions: with al Bashir deposed (albeit not to ICC custody), and the Malabo Protocol seemingly moribund, the Court has authorised the Prosecutor to

[1] See variously: Voeten, "Populism and Backlashes against International Courts"; Lovat, "International Criminal Tribunal Backlash"; Caron and Shirlow, "Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences"; Madsen, Cebulak, and Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts"; Sandholtz, Bei, and Caldwell, "Backlash and International Human Rights Courts"; Posner, "Liberal Internationalism and the Populist Backlash"; Helfer and Showalter, "Opposing International Justice"; Brutger and Strezhnev, "International Disputes, Media Coverage, and Backlash Against International Law"; Contesse, "Judicial Backlash in Inter-American Human Rights Law?"; Alter, Gathii, and Helfer, "Backlash against International Courts in West, East and Southern Africa"; Krisch, "The Backlash against International Courts"; Marks, "Backlash"; Waibel, Blackaby, and Bottini, *The Backlash Against Investment Arbitration. Perceptions and Reality*; Helfer, "Overlegalizing Human Rights.";

[2] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

[3] See: Agence France-Presse, "Burundi Becomes First Nation to Leave International Criminal Court"; Elise Keppler, "Gambia Rejoins ICC | Human Rights Watch"; Paul Herman, "ANC Reaffirms Intent to Withdraw from ICC."

investigate potential war crimes and crimes against humanity in and in connection with Afghanistan and the Occupied Palestinian Territories, bringing the US and other Western states' military and civilian agencies within the Court's ambit for the first time. Given the prevailing narrative around backlash to the ICC, the apparent resilience of the Court and the concomitant fizzling out of the "African backlash" against it are puzzling.

Solving this puzzle requires setting "backlash" against the ICC and opposition to the Court more generally in the broader context of state-tribunal relations to improve understanding of state attitudes and behaviour towards international tribunals. Notwithstanding opposition from some governments, broader supportive relations between other regional governments and the ICC, for example, may help explain the ability of the ICC to withstand significant, high-profile pressure from the former. More specifically, and as we show in this article, the focus on "African backlash" masks a more varied set of state-tribunal interactions demonstrating varying degrees of both support for and opposition to the Court amongst different states over time, including during the critical push for collective withdrawal from the withdrawal under the aegis of the African Union. Indeed, concurrent to the withdrawals and attempted withdrawals often cited as evidence of African backlash against the ICC, many African governments also continued to defend the ICC, with governments publicly disagreeing with the push for withdrawal. Similarly, a range of governments were vocal critics of Omar al-Bashir and advocates of (and for) the ICC, letting it be known publicly that if the Sudanese president entered their territory, he would be arrested in compliance with ICC arrest warrants. In short, even if some governments "backlashed" against the ICC, this tendency was not uniform: references to "African backlash" against the ICC accordingly overlook the full range of attitudes and behaviours towards the ICC across African governments, in turn helping to explain the resilience of the ICC in Africa, and likely also elsewhere.

This article makes three main contributions. First, drawing closely on work on state-tribunal relations to date, and particularly on the growing literature on tribunal backlash, we develop a typology of state attitudes and behaviour towards international tribunals, ranging from highly supportive to highly critical in terms of rhetoric and action. Second, this typology enables us to track overall government attitudes towards the ICC with accuracy and nuance over time. We accordingly demonstrate that even during the period of the supposed "wave" of African backlash, there was significant variation amongst attitudes and behaviours towards the Court. In particular, we highlight that many governments continued to strongly support the Court, even while others sought to withdraw from its jurisdiction.

Third, we develop a theoretical argument about drivers of state attitudes and behaviours towards the Court. Specifically, we argue that attitudes and behaviours are influenced by the extent to which states expect to be challenged by the ICC currently or in the future and the degree to which they are embedded within the ICC as an institution. We test this argument quantitatively and find somewhat mixed support for our theoretical argument. We find that, for both behaviours and attitudes, the governments of states that are parties to the Rome Statute are more likely to be supportive of the Court. However, the statistical evidence is mixed for the other factors and there are some indications that rhetoric and behaviours may be driven by different factors: more work is accordingly needed to better understand the nature and causes of tribunal-state interactions. This will in turn help shed light on the broader issues of backlash, state-international tribunal interaction, and international institutional resilience.

Action and Reaction: The ICC and African States

Africa is central to the Rome Statute regime. Many African countries were early supporters of the ICC, featuring prominently in the Like-Minded Group of states advocating for a robust, standing international criminal court, and whose support proved key to the Rome Statute's drafting and subsequent entry into force.[4] In the early years of the Court's operations, moreover, the governments of several African states - the Central African Republic, Democratic Republic of Congo, and Uganda - referred situations in their own countries to the ICC for investigation.[5]

The initially warm relationships between the ICC and many African governments somewhat shifted in 2009, when the Court acceded to the request of then-ICC prosecutor Luis Moreno-Ocampo, following UN Security Council referral of the situation in Sudan, to indict the Sudanese then-president Omar al-Bashir for war crimes and crimes against humanity.[6] This decision sparked concern (and outrage) from several African governments.[7]

While critical to the changing landscape of ICC-Africa relations, however, the al-Bashir case is but one manifestation of tension. The ICC has also opened preliminary investigations and investigations into, held trials and appeals in respect of, and convicted cases in a variety of African states since Uganda's 2004 self-referral. These have included cases in respect of Kenya (*proprio motu*, investigation opened 2010), Libya (UN Security Council referral, 2011), Côte d'Ivoire (*proprio motu*, 2011), Mali (self-referral, 2013), a second self-referral from the Central African Republic (CAR) (2014), and Burundi (*proprio motu*, 2017). The al-Bashir case remains central to the ICC's activity in Africa, however, with the ICC adopting measures variously requiring, requesting, and condemning non-cooperation in arresting al-Bashir from the

[4] See: Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court*; du Plessis, "South Africa's Implementation of the ICC Statute: An African Example."
[5] In December 2004, April 2004, and January 2004, respectively
[6] See: *Warrant of Arrest for Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-1), 4 March 2009
[7] See: Mills and Bloomfield, "African Resistance to the International Criminal Court"; Boehme, "'We Chose Africa'"; Mills, "Bashir Is Dividing Us"; Oette, "Peace and Justice, or Neither?"

governments of the CAR, Chad, Kenya, Djibouti, Malawi, the Democratic Republic of Congo, Uganda, South Africa, and Nigeria.

The al-Bashir case, alongside the ICC's investigation into 2007 election violence in Kenya, has also been key to a somewhat broader regional backlash against the ICC under the auspices of the African Union (AU). Most notably, in 2017 the AU adopted a non-binding resolution encouraging member states to withdraw from the ICC, amid concerns about the failure of the Court to respect head of state immunity and allegations about a perceived "African bias" on the part of the Court.[8] Burundi, moreover, formally indicated in 2016 its withdrawal from the Rome Statute, with "near-misses" – potential but ultimately abortive steps towards withdrawal – taken by The Gambia, Kenya and South Africa.[9]

Importantly, though, a narrative of "African backlash" centred around the above events also masks the persistent support of many African states for the ICC, including in reaction to the opposition of some African states to the Court. For example, after South Africa, The Gambia, and Burundi announced their intentions to withdraw from the ICC in 2016, the governments of other states lamented these choices and instead called for further ratifications and a stronger ICC.[10] Moreover, after the AU resolution calling on states to withdraw from the ICC was released, Botswana, Burkina Faso, Côte d'Ivoire, DRC, Ghana, Lesotho, Malawi, Mali, Nigeria, Senegal, Sierra Leone, Tanzania, and Zambia instead reaffirmed their commitment to the ICC.[11] These reactions remind us that while "backlash" certainly merits focus given its potentially severe consequences, relationships between states and international tribunals are often more nuanced. Indeed, it is plausible that supportive states may counteract

[8] See African Union, Withdrawal Strategy Document (2017), available at: https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf.
[9] See discussion in: Ssenyonjo, "State Withdrawal Notifications from the Rome Statute of the International Criminal Court."
[10] "ICC victims' only hope if African states don't strengthen their domestic laws" Mail and Guardian. 29 November 2016.
[11] "AU withdrawal from ICC not unanimous" *The Star.* 3 February 2017.

backlash by others by supporting international tribunals (and other organisations) during crises. If support from other states can indeed serve as an antidote to such attacks, it is important to understand the bigger picture of tribunal-state interactions and the factors that can affect variation in state attitudes and behaviour towards international tribunals.

Beyond Backlash

There is a growing literature on backlash to international tribunals, particularly from IL/IR and socio-legal perspectives, with a general sense – there is as yet no consensus amongst researchers – that backlash necessarily involves some form of "extraordinary pushback" against the authority of an international court.[12] It is broadly recognised that a degree of resistance from different sectors is a normal accompaniment to international tribunal conduct: indeed, the failure of a tribunal to elicit any resistance to its conduct may be a sign of institutional ineffectiveness.[13] While a valuable first step, however, researchers continue to debate the extent of pushback necessary to constitute backlash, the types of actors whose conduct is critical to the occurrence of backlash, and the extent to which backlash requires specific intentions or objectives on the part of these actors.

Illustrating these challenges, while the view that backlash is fundamentally a form of "aggravated pushback" against international tribunals is common across much of the literature, important differences persist. Sandholtz, Bei and Caldwell for example, include in their view of backlash a set of aims or objectives on the part of would-be authors of backlash, defining this phenomenon as: "actions that go beyond resistance and aim to reduce the authority,

[12] Sandholtz, Bei, and Caldwell, "Backlash and International Human Rights Courts." Indeed, earlier work on backlash fails to provide an explicit definition of this phenomenon. (Alter, Gathii, and Helfer, "Backlash against International Courts in West, East and Southern Africa.")
[13] Shany, *Assessing the Effectiveness of International Courts*.

competence, or jurisdiction of the Court",[14] as distinct from "perennial forms of resistance to international courts". [15] Madsen, Cebulak and Wiebusch adopt a similar goal-oriented approach, contrasting "ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law" with "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]".[16] This view is also consistent with the focus of Alter, Gathii, and Helfer on the efforts on the part of African governments to shutter or radically reform African sub-regional courts.[17]

Soley and Steininger, however, - writing in the same volume as Madsen, Cebulak and Wiebusch - omit intentionality, describing backlash rather 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."[18] Adding further complexity, Madsen, Cebulak and Wiebusch also differentiate a range of actors and "contextual factors" potentially implicated in backlash, including at sub-state and societal level.[19]

We identify a series of issues with these definitions and their operationalisation. First, for "backlash" to be operationalised it needs to be presented in a manner that allows

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[14] "Backlash and International Human Rights Courts," 3. (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." (4.) (Semicolons added.))

[15] "Backlash and International Human Rights Courts," 3.

[16] "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," 203. Elsewhere, Madsen et al 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." (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.

[17] "Backlash against International Courts in West, East and Southern Africa."

[18] "Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights," 238.

[19] "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," 204. (also p 205 – "although only very few actors can in principle eliminate an IC, it is likely to be the interaction between different IC audiences that causes processes of resistance. Moreover, it is likely that there is, for instance, pushback towards an IC in some milieus – very often starting in expert legal quarters – while the public at large or the political world is unaware of these disagreements. It is also possible that pushback starts in the political realm. Yet, for pushback to transform into backlash seems to require more than strong expert disagreement or strong government resistance to an IC. It seems in most cases to involve mobilisations of more audiences.")

straightforward identification and measurement of this concept, minimising the need to "read the minds" of its authors. In short, rather than focus on the *intentions* and/or *objectives* of the critics of international tribunals, which are likely to be problematic to discern with any reliable accuracy, backlash is better identified by reference to more objectively identifiable features of relevant conduct. Reflecting this requirement and drawing on previous work by one of the co-authors of this article, our starting point in respect of backlash is accordingly to understand this phenomenon as "intense government disapproval of international tribunal conduct, accompanied by aggressive steps to resist such conduct or against such tribunal more broadly."[20]

Even then, however, while backlash is often distinguished in the literature from "pushback" of one sort or another, the literature to date does not tend to position either backlash or pushback on the broader spectrum of government attitudes and behaviours towards international courts and/or other institutions, particularly not in a manner readily susceptible to empirical operationalisation distinguishing these various state positions clearly from associated intentions, or causes or consequences.[21] As noted above, moreover, focusing on "negative" interactions between states and tribunals risks overlooking what states might do or say to support institutions in crisis, in consequence omitting potentially significant elements of the larger state-tribunal puzzle. Accordingly, we argue that is more helpful to look at government behaviour and attitudes towards tribunals more broadly instead of focusing solely on backlash, or on backlash as distinct from "ordinary" pushback. By placing backlash and pushback into this broader conceptual context – with the former understood as a particularly extreme form of opposition to an international tribunal - we will in turn be able to evaluate state-tribunal

[20] Lovat, "International Adjudication and Its Discontents," 316.
[21] An important exception to this is the practice-oriented framework set out in: Alter, Helfer, and Madsen, *International Court Authority*. Though see in this regard observations below ("Support or Critique: Explaining Government Reactions") in respect of Madsen, Cebulak, and Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts.".

interaction more holistically, taking into account and tracing broader variations in state (and court) positions, than would be possible with a narrower focus on extreme behaviour.

Reflecting this position, and building on the definition of backlash presented above, we propose that backlash and pushback be conceptualised and presented as forming part of a continuum of state positions in respect of international tribunals, as set out in the following table.

Table 1: State Positions Towards Tribunals

Position	Unqualified support	Qualified support	Neutral	Pushback	Backlash
Working description	Strong, unqualified government approval of international tribunal conduct, accompanied by extensive, potentially costly steps to support such conduct or a tribunal more broadly	Mild or qualified government approval of international tribunal conduct, accompanied by some limited steps to support such conduct or a tribunal more broadly	Neither approval nor disapproval of international tribunal conduct. No steps to resist or support such conduct.	Mild or qualified government disapproval of international tribunal conduct, accompanied by non-aggressive steps to resist such conduct or against such tribunal more broadly	Intense government disapproval of international tribunal conduct, accompanied by aggressive steps to resist such conduct or against such tribunal more broadly

In line with the preceding discussion, and as Table 1 illustrates, the components of this spectrum form a typology that delineates a range of government positions regarding international tribunals. Building on the definition of backlash set out above, each of these types is presented in a manner designed to facilitate empirical measurement of the presence or absence of the relevant phenomenon without reference to any posited intentions on the part of the actors involved, nor to any presumed underlying or proximate drivers or anticipated or actual consequences of these positions.

The types themselves are, in turn, formed by a pair of mirror opposites, with a "neutral" position in-between. Accordingly, backlash is conceived as forming the most extreme form of tribunal opposition, mirrored by "unqualified support" as its counterpart at the other side of the

spectrum. Similarly, "pushback" is positioned in between backlash and a neither-supportive-nor-opposing "neutral" position at the centre of the typological spectrum, mirrored in turn by "qualified support" between the neutral, central position and "unqualified support". Critically, it should be noted that the classification presented above consists of ideal types developed for the purposes of the present exercise: even if providing a broader overview of the range of likely government positions regarding international tribunals, these involve significant conceptual flattening of a shifting reality.

To provide further nuance and granularity, we accordingly split each element of our typology further into two dimensions termed "rhetoric" and "action". Reflecting the social science mainstreaming of speech act theory, and within IR in particular, recognition of the relevance to international politics of Habermasian communicative action, this distinction may be thought of – and indeed may in some instances be – problematic.[22] Nevertheless, for the purposes of the present exercise we suggest that such a division is both conceptually viable and likely to add value to our understanding of government positions, attitudes and behaviour towards international tribunals.

In terms of conceptual foundations, distinctions between "saying" and "doing", variously conceived, continue to permeate social science. Arguably reflecting fundamental philosophical dualism, this and similar distinctions can be seen in Economics,[23] Psychology[24] and Sociology,[25] as well as in Political Science,[26] including IR. Scheipers and Sicurelli, for example, distinguish the EU's rhetoric from its behaviour.[27] Similarly, Krebs and Jackson observe that: "Talk is often thought to belong to the realm of diplomacy, war to the realm of

[22] See e.g. Mitchell, "Rhetoric and International Relations: More Than 'Cheap Talk'"; Risse, "'Let's Argue!': Communicative Action in World Politics."
[23] See distinction between "cheap talk" and (more costly) behavioural signals (actions) in e.g. Duffy and Feltovich, "Do Actions Speak Louder Than Words?"
[24] See e.g. Bosson, Haymovitz, and Pinel, "When Saying and Doing Diverge.".
[25] Harris Chaiklin, for example, distinguishes "behaviour" from "attitudes": "Attitudes, Behavior, and Social Practice," 31.
[26] See e.g. Bolsen, "A Light Bulb Goes On."
[27] Scheipers and Sicurelli, "Normative Power Europe."

action."[28] Adam Humphreys has even drawn a distinction between "rhetoric" and "practice" in the foundational disciplinary work of Kenneth Waltz.[29] In short, notwithstanding widespread recognition within IR of the performative character of statements, distinctions between rhetoric and practice - between saying and doing – remain prominent within the discipline.

This distinction, however, is often more implicit than explicit, with relatively little attention focused on how these categories should be distinguished. Reflecting this, we adopt what might be termed a common-sense approach to these terms, using the term "rhetoric" to refer to things said – "verbal or textual communications"[30] - and the term "actions" to refer to things done. For analytic purposes, moreover, speech-acts – that is, statements that themselves constitute acts – may be understood as comprising elements of both rhetoric and action.[31]

Drawing this distinction, moreover, reflects a further common-sense assumption: an expectation that the political costs and benefits to governments of making either negative or positive statements about the ICC are likely – in general – to be lower than the costs and benefits associated with taking an action. In other words, we expect that use of "rhetoric" will generally allow governments to express opinions on ICC behaviour or the Court generally in ways that are relatively "cheap" politically, which is important on both the supportive and critical ends of the spectrum. Actions, in contrast, whether supportive or critical of ICC behaviour or the Court generally, are likely to involve more substantial political risks and to present governments with potentially significant political costs. Distinguishing these two elements of government positions in respect of the ICC, in turn, enables us to obtain more

[28] Krebs and Jackson, "Twisting Tongues and Twisting Arms: The Power of Political Rhetoric," 35.
[29] Humphreys, "Another Waltz? Methodological Rhetoric and Practice in Theory of International Politics."
[30] Bolsen, "A Light Bulb Goes On," 4. Note that Bolsen uses this term to refer to "verbal or textual communications *targeting attitude change*" (emphasis added). In this sense, our current usage is broader. Our use of this term in this context should also be distinguished from other meanings given to this term in e.g. legal philosophy (see e.g. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*; Perelman et al., *The New Rhetoric*.)
[31] In the present context, this category may be understood as approximating Austinian "performatives". See: Austin, *How to Do Things with Words*, 6–7.

granular understanding of the extent to which these strategies – that is rhetoric and action, respectively – are driven or shaped by similar or dissimilar factors.

This distinction may be broadly understood as reflecting the two aspects of each of the different positions set out in the typology above – that is, the extent of (stated) government approval or disapproval of ICC conduct or the Court generally ("rhetoric"), and the extent of any steps taken to resist or support Court conduct or the ICC more broadly ("action"). Reflecting this distinction, Table 2, which is a revised version of Table 1, looks as follows:

Table 2: State Positions Towards Tribunals - Action and Rhetoric

Position	Unqualified support	Qualified support	Neutral	Pushback	Backlash
Rhetoric	Strong, unqualified government approval of international tribunal conduct.	Mild or qualified government approval of international tribunal conduct.	Neither approval nor disapproval of international tribunal conduct.	Mild or qualified government disapproval of international tribunal conduct.	Intense government disapproval of international tribunal conduct.
Action	Extensive, potentially costly steps to support tribunal conduct or a tribunal more broadly	Some limited steps to support tribunal conduct or a tribunal more broadly	Absence of any steps to resist or support tribunal conduct or tribunal more broadly.	Non-aggressive steps to resist tribunal conduct or against such tribunal more broadly	Aggressive steps to resist tribunal conduct or against such tribunal more broadly

Distinguishing rhetoric and action analytically in this fashion permits us to analyse separately the factors potentially driving and shaping state attitudes and behaviour towards the ICC. It also, moreover, enables us to break down backlash and the accompanying positions on this spectrum into a set of discrete conceptual elements, recognising that we may expect to see (a) (relatively cheap) rhetoric from governments across the spectrum, but relatively less accompanying costly "action", and (b) also anticipating that backlash – i.e. comprising both "rhetoric" and "action" components - and its mirror, supportive opposite on the other side of the spectrum, are each less likely to manifest than both positions nearer the centre of the spectrum, again reflecting the relatively higher costs we may expect to be associated with action in these two categories.

Before moving on, a few words on the operationalisation of this analytic schema. First, in terms of identifying state positions on this spectrum at any given time, we focus on rhetoric and actions of governments and high-ranking government officials, rather than seeking to directly examine the behaviour and statements of other sub-state (or transnational) constituencies. This decision reflects not only methodological exigencies, but more fundamentally the formal and substantive primacy of states in international law: while non-state bodies may be bound by international legal strictures, only states may sign, ratify, or withdraw from treaties.[32] The conduct and views of non-state domestic or transnational constituencies may of course drive or contribute to these decisions:[33] we leave this, however, as an empirical question for future research, rather than attempt to incorporate such constituencies into our conceptual schema, definitions, or measurements.

Second, we do not limit our analysis to states that have formally agreed to subject themselves to the ICC's jurisdiction. Again, this decision recognises the reality of international law and politics: governments may disapprove of tribunal conduct and resist court conduct and measures, without necessarily being party to relevant treaties, or even capable themselves of withdrawing from tribunal jurisdiction.

A case could be made that backlash – and other positions on the spectrum - should only be recognised as relevant where originating from governments formally subject to a tribunal's jurisdiction. The analytic value of this restriction, however, seems limited, particularly as states

[32] See: Boyle and Chinkin, *The Making of International Law*, 41. ("Although states enter into binding agreements with non-state entities, treaties are defined as legal agreements between states, or between states and international organisations or international organisations inter se.") Custom is a little different, but even here states remain the principal authors. See also Madsen et al.: "The first and most obvious observation is that terminating an [international court] requires Member State action, and most often collective action involving a group of Member States or all Member States. This follows from the legal set-up of [international courts] under international law that they both are established and terminated by Member States." ("Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," 204.)

[33] Per Madsen at al. "… although only very few actors can in principle eliminate an [international court], it is likely to be the interaction between different [international court] audiences that causes processes of resistance" ("Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," 205.)

may find themselves subject to the jurisdiction of a court even absent direct consent, as might be the case, for example, with a UN Security Council referral to the ICC: given that any state may notionally find itself in the dock owing to such a referral, it would seem short-sighted to impose such a restriction in respect of the ICC. Moreover, in general governments may be dissatisfied with the conduct of international courts even in cases where they are expressly *not* subject to such body's jurisdiction: see e.g. the reaction of Israeli and (to a lesser degree) UK governments to the ICJ's *Wall* and recent *Chagos* advisory opinions.[34] In similar vein, the US clearly remains capable of weakening the ICC, for example, without being a member.[35] Likewise, having formally withdrawn from the jurisdiction of the ICC, the government of Burundi may still engage in "backlash" and otherwise react to the Court. In short, this approach recognises that states may support or oppose tribunals, regardless of formal standing or membership of the regime in question.

Measuring Government Reactions in Africa

Based on the above conceptualisations and schema, we code African government reactions to the ICC yearly over an approximately 10-year time-period. One of the challenges that we face in doing so is that governments and tribunals interact in ways that are both public and private. We focus on public interactions that were sufficiently significant to receive media attention: there are three reasons for this. The first is pragmatic in that this information is publicly available and available for all the countries in our analysis, allowing us to capture a broad range of interactions from member and non-member states alike. In contrast, private

[34] See: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Rep 136, 9th July 2004, United Nations [UN]; International Court of Justice [ICJ]; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ GL No 169, 25th February 2019, United Nations [UN]; International Court of Justice [ICJ].

[35] Not only have prominent American politicians spoken out against the court, but the United States has also worked to secure treaties with parties to the ICC to prevent the extradition of its citizens to the Court. (See e.g. Kelley, "Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements.", and more recently: Bolton, "Remarks to the Federalist Society.").

information is of course private, and some of these interactions may already be lost to time or remain classified. The second reason is that we expect there to be a significant amount of consistency between public and private. That is, we expect it is unlikely that governments will present one position to the public and an entirely different position to the institution in ways that would not be picked up by our coding scheme. Third, the public narrative itself is important, even if it is only part of the story, because it shapes public perceptions about the institution.

To understand what the public positions were, we used the Factiva search engine. For each country, we searched "Country & ICC" or "Country and 'International Criminal Court'". For countries with more than one name in common usage we had searches for all common variations of that name. We scanned the resulting stories to understand the context and determine if there was a relevant interaction. In a handful of cases there were numerous articles on the same story filed on the same day, such as when a major development was made in the case. For those cases we picked one article to build off as subsequent articles did not reveal further information relevant for our purposes as they tended to use the same quotes from government officials. We also found that some articles repeated historical statements of leaders towards the ICC and we disregarded these statements as they were already captured in the years in which they happened.

We evaluate state interactions in terms of rhetoric and actual actions towards the tribunal. Both dimensions are coded on scales that range from -2 to 2 (reflecting the typology set out in Table 2) and are based on the totality of evidence accumulated over each year, where negative scores indicate support for the tribunal and positive numbers indicate antagonism. In most years there were either no or only one relevant article in a year. Where there was more than one article, these often presented the same picture in terms of coding and when they did not the case was coded based on the most extreme statements or actions. Where there was

ambiguity about how the case would be coded, the same evidence was provided to another coder. The most significant discussion between the coders was how "speech acts" should be coded. As shown here, and consistent with the preceding section of this article, the coding developed here treats speech acts as both action and rhetoric. Although we did not put a time constraint on how early the searches began, the earliest records began in 2008 and we looked at cases through the end of 2019.

Negative coding for rhetoric indicates support for the Court. Rhetoric is coded as -2 when states are highly supportive of the course, oppose calls for withdrawal, or argue that violators should be tried by the ICC. More general supportive statements but featuring some inconsistency or qualification is coded as -1. Positive numbers, in contrast, indicate opposition to the ICC. A coding of 1 indicates equivocal criticism of the Court, including claims that the Court had created a dangerous precedent, general expressions of concern, or concerns about Head of State immunity. Strongly negative rhetoric is coded as 2. This rhetoric includes endorsing, supporting or threatening withdrawal from the Rome Statute. It also includes claims of ICC bias against Africa ("targeting" or "hunting" Africans or creating "double standards"). It also includes statements asserting refusal to comply with ICC measures, including in respect of arrests or extradition. Cases where there is no evidence of rhetoric due to a lack of relevant articles or lack of evidence of rhetoric in the article are coded as 0.

Table 3: Frequency of Rhetoric Towards the ICC, 2008-2019

Category	Frequency
Strongly supportive: -2	48 (7.41%)
Weakly supportive: -1	51 (7.87%)
No evidence of support or antagonism: 0	425 (65.59%)
Weakly critical: 1	68 (10.59%)
Strongly critical: 2	56 (8.64%)
Total	648 (100%)

Table 3 demonstrates the breakdown of cases in each of these categories. Three aspects of this measure are noteworthy. First is the number of cases where there is no rhetoric towards the ICC, which is by far the modal category. Rhetorically there is relative silence towards the ICC more than anything else. Second is the extent to which the critical rhetoric is relatively balanced with supportive rhetoric. In 15.28% of the cases there are indications of supportive rhetoric towards the ICC. Critical rhetoric is slightly more prevalent and occurs in 20.14% of the cases. Combined these data do not demonstrate overwhelming evidence of an "African backlash" but rather a more nuanced picture of support, critique, and silence. Finally, it is interesting that the second largest category is weakly critical statements towards the ICC. These were especially notable earlier in the dataset as 22% of the observations of cases coded as a 1 occurred in 2008 and 2009. Looking qualitatively at the articles that were coded these criticisms were based around the al-Bashir indictment and arrest warrants. Moreover, the year when there were the most instances of this type of rhetoric was in 2013 when several states expressed concern about and sought to delay the trial of Kenya's Uhuru Kenyatta and William Ruto.

While there is often a focus on extremely negative rhetoric towards the court, this rhetoric is relatively infrequent.

Actions similarly are coded between -2 to 2. Actions that are fully supportive of the Court are coded as -2. These actions include measures such as domesticating or ratifying the Rome Statute, pushing for investigations, opposing withdrawal efforts, and high-level cooperation with the Court. Actions that were still supportive but less strong were coded as -1. These include cooperative action with the Court, working-level workshops, discussions, and incomplete efforts to domesticate the Rome Statute. Positive values again suggest antagonistic actions towards the Court. More minor actions, such as offering or hosting visits by those wanted by the Court, going into financial arrears, pushing for a stronger African regional criminal court in preference to the ICC,[36] pushing to defer ICC action, pushing to amend the Rome Statute to weaken regime, were coded as 1. The strongest actions, coded as 2, involve attempting to withdraw or withdrawing from the Rome Statute, actively pushing for the withdrawal of others from the Statute, and non-cooperation or aiding others' non-cooperation with ICC measures. Again, actions are coded as zero when there are no articles for a state for a given year or when the articles do not describe an action (i.e., only describe rhetoric), and as with rhetoric zeros are the modal value.

[36] The issue here is not preferring another court to the ICC as indeed the ICC is designed to be a "court of last resort" as ideally domestic courts should address these issues. Rather the issue is that the proposed African court would have exemptions for heads of state and as such would provide leaders with legal immunity.

Table 4: Frequency of Actions Towards the ICC, 2008-2019

Category	**Frequency**
Strongly supportive: -2	45 (6.94%)
Weakly supportive: -1	73 (11.27%)
No evidence of support or antagonism: 0	384 (59.26%)
Weakly critical: 1	115 (17.75%)
Strongly critical: 2	31 (4.78%)
Total	648 (100%)

Table 4 provides the frequencies of actions towards the ICC. As with Table 3, the largest category is no actions towards the ICC but there are relatively fewer cases in this category for action. Similarly, the positive and negative actions towards the ICC are relatively balanced with 18.2% of the cases being supportive of the ICC and 22.5% of cases being antagonistic towards the ICC. The smallest category of action is the extremely negative category with less than 5% of cases occurring within this category. Moreover, the largest non-zero category is the weakly negative category.

Combined these data reveal insights into the nature of "African" interactions with the ICC. Most significantly, the relationships reveal a significant heterogeneity in rhetoric and action towards the Court. Strongly negative actions towards the ICC are relatively rare and while strongly negative rhetoric is slightly more frequent this is not the predominant tendency. Thus, the focus on "backlash" misses less severe negative signals sent by governments in terms of weakly negative action and rhetoric. Critically, moreover, this focus overlooks both strongly and weakly supportive actions from many African states. By taking a broader view of behaviour that looks at more states, a wider timeframe, and the variety of reactions that states

have towards the ICC we get a picture that is more detailed and nuanced. Indeed, looking at this broader picture we can see that the 2016/17 African backlash is not as atypical as the existing narrative portrays, despite the calls for and actual withdrawals, and it was characterised by actions and rhetoric in both directions. This broader picture highlights that these events were less of an "African backlash" than a "backlash" among a handful of African states and a "counter backlash" among others.

Table 5 illustrates the overall relationship between action and rhetoric in the dataset. The dataset clearly indicates that the measurements are related in ways that we would expect, in that when action is supportive towards the ICC, that tends to also be seen alongside supportive rhetoric. Similarly antagonistic action is often seen alongside antagonistic rhetoric. Interestingly in many cases there are only records of rhetoric or action. In the subsequent section we will explore the factors that may explain this variation in the data.

Table 5: Tabulation between Action and Rhetoric

			Rhetoric			
Actions	**Strong support (-2)**	**Weak support (-1)**	**No rhetoric (0)**	**Weak aggression (1)**	**Strong aggression (2)**	**Total**
Strong support (-2)	27	1	15	2	0	45
Weak support (-1)	8	32	25	8	0	73
No actions 0	9	13	330	18	14	384
Weak aggression (1)	3	5	52	38	17	115
Strong aggression (2)	1	0	3	2	25	31
Total	48	51	425	68	56	648

Support or Critique: Explaining Government Reactions

There is no consensus on the potential determinants of backlash and supportive reactions towards tribunals remain woefully under-theorised. The most developed typology available to date is, again, provided by Madsen et al, who identify a number of "factors influencing resistance" to international courts, highlighting "institutional factors, the constellation of actors involved in resisting or counter-resisting ICs, and the broader social and political contexts of the processes". However, this research neither specifies causal mechanisms linking factors to outcomes as a means of explaining backlash, nor identifies relationships amongst these factors and the presence, absence, or severity of backlash.[37] In contrast, where researchers have sought to identify and explain instances of backlash, the focus has primarily been on distinct drivers of specific cases.[38]

Building on these studies, including Madsen et al.'s consideration of "institutional" factors in backlash, we argue that state reactions towards tribunals in part reflect the conduct and nature of that state's relationship with international tribunals. More specifically, states will experience the tribunal differently where the Court is challenging their behaviour than they will in instances when they are not challenged or threatened by Court action. In particular, governments may adopt a negative or critical position towards the Court where they are concerned about significant, costly adverse measure by a tribunal.[39]

There are numerous potential sources of such costs, including economic domestic political/economic considerations and/or harm to international status/reputation, etc.. Challenging a tribunal may in turn mitigate some or all of these costs and spur a rally-round-

[37] "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," 215.
[38] See e.g. Sandholtz, Bei, and Caldwell, "Backlash and International Human Rights Courts"; Mills and Bloomfield, "African Resistance to the International Criminal Court."
[39] Robert Keohane ("The Demand for International Regimes.") provides a canonical example of how cost-benefit analysis can be used to explain the creation of international regimes: we argue that the critique and even destruction of such regimes too can follow such a framework.

the-flag effect, securing domestic support against what is portrayed as undesired foreign intervention.[40]

In other words, governments will be more likely to challenge Court conduct when clearly on the "losing" side of a potentially costly measure, and to "backlash" against an institution where such measures are potentially highly costly to the government concerned and where backlash is likely to be relatively less costly. This tendency may, moreover, be particularly common in respect of international criminal tribunals with the potential to hold state leaders criminally liable for historic conduct - with the domestic and/or international opprobrium this may attract - and even to impose custodial sentences for behaviour which would not be triable (or would have little prospect of trial) in domestic or foreign national courts.

At the ICC this is manifest in two ways. The first is rather direct in that the ICC prosecutor can open investigations and cases on specific countries. Although in some instances states have referred matters to the ICC directly, in others cases have been opened by the prosecutor *proprio motu*, or on the recommendation of the UNSC. Because these states experience their countries being subject to the ICC rules and at times government officials or leaders may appear directly in the crosshairs of the tribunal, we argue that these states will be more likely to engage antagonistically towards the tribunal.

[40] See in similar vein: Schlipphak and Treib, "Playing the Blame Game on Brussels: The Domestic Political Effects of EU Interventions against Democratic Backsliding."

Hypothesis 1: States with current cases at the ICC will be more likely to engage antagonistically.

In other cases, states have cases heard before the ICC due to government policies that run counter to their obligations under the Rome Statute. This issue was most obvious with the failure of states to arrest or detain Omar al-Bashir despite an arrest warrant being issued against him from the ICC. These instances of non-cooperation subject the state to ICC criticism and could spark more antagonistic behaviour in the future as states react negatively to the Court's decision. This argument leads to the following hypothesis:

Hypothesis 2: States found to be non-cooperative by the ICC will be more likely to engage antagonistically towards the ICC subsequently.

In addition to these more direct measures from the ICC, the extent to which governments could face consequences from the ICC also depends on their internal policies. States that have good human rights policies towards their citizens are unlikely to face ICC jurisdiction. For these states supportive rhetoric could be beneficial especially if there are forces within civil society that support the broad aims of the ICC and because it is unlikely that the state would face scrutiny given its existing policies. In contrast, governments that use repressive measures against their own populations are more likely to be subject to potential ICC measures, even if they are not the subject of current cases before the ICC. Even if a state does not feature in current cases before the ICC, moreover, engaging more negatively towards the ICC could be beneficial to the government of that state, as it would help to delegitimise and

damage the Court, rendering any subsequent adverse measures less damaging to the government. This logic leads to the following hypothesis.

Hypothesis 3: Governments that have worse human rights practices are more likely to engage antagonistically towards the ICC.

In contrast to these antagonistic factors, we argue that other aspects of the state-tribunal relationship have an ameliorative effect, namely the extent to which states are embedded within the institutional framework. States become embedded within institutions for specific reasons. As such, they are more likely to be supportive of the institution and its larger goals and as such are more likely to remain supportive than states that are not embedded within the institution. Moreover, embeddedness in an organisation provides a venue to express concerns and influence decisions.

The principal means by which states can become embedded in the ICC institutional regime is via ratification of the Rome Statute. In turn, as parties to the Rome Statute have formally "bought into" the ICC framework, these states may be expected to be more supportive of the ICC. In contrast, non-states parties may anticipate less costly repercussions from expressing negative attitudes towards or behaving negatively towards the Court.

Hypothesis 4: States that are members of the Rome Statute are less likely to engage antagonistically towards the ICC than states that are not members.

Additionally, one of the critiques of the ICC is that outsiders are holding leaders to account. States that have symbolic representation on the Court through their co-nationals may

be less likely to experience this concern. In contrast, states that lack representation on the Court from co-nationals may be more likely to experience this concern:

Hypothesis 5: States that have nationals on the bench are less likely to engage antagonistically towards the ICC than states that do not.

Government responses to the ICC are likely also to be affected by a range of additional factors, rendering some governments more likely than others to engage in tribunal backlash. State responses to international tribunal conduct are likely to be determined at least in part, for example, by the relative material power of the state in question, the nature of domestic institutions and political culture, and the presence or absence and strength of transnational social pressure. These factors are therefore included as control variables in the analysis.

Explaining Reactions to the ICC

Using the original dataset described above for our dependent variable, we evaluate each of the five hypotheses developed in the theoretical section. Due to the five-point scale and the relatively small dataset, we use a pooled linear regression to assess the factors related with responses towards the ICC. We treat rhetoric and action as different dependent variables to allow for the possibility that rhetoric and actions are driven by different process. Specifically, rhetoric is easier for states to do and is more easily dismissed as "cheap talk". Actions, in contrast, are potentially more costly. We also cluster standard errors by country to account for the repeated observations. We also include a model with different intercepts for each year to account for correlations within years when government are reacting to major developments at the ICC.

To account for ICC actions, we use two different independent variables. To evaluate Hypothesis 1, we include a measure of investigation which has two separate indicator variables, one to indicate that the ICC has opened a preliminary investigation into a country and another to indicate that the ICC has formally opened a case in a country. To evaluate Hypothesis 2, we use an indicator variable that measures if a state has had a cooperation request from the ICC: these requests largely refer to requests for cooperation to arrest Omar al-Bashir. This variable is lagged by one year to avoid the possibility of having the dependent variable on both sides of the equation.

To evaluate Hypothesis 3 that argues that states with worse human rights practices will be more antagonistic towards the ICC we use the Political Terror Scale based on the US State Department reports to avoid missing data. The Political Terror Scale is a 5-point index.[41] One indicates countries are under a secure rule of law. Two indicates a limited amount of imprisonment for nonviolent political activity. Three indicates extensive political imprisonment or a recent history thereof, where execution and political are common. Four indicates that civil and political violations are expanded to a large proportion of the population, but where this is limited to those interested in politics/ideas. Five, indicates that terror affects the entire population. We expect that this variable is positively related with antagonism towards the ICC. To evaluate Hypothesis 4 that stipulates that member states are less likely to engage in antagonistic behaviour, we include an indicator variable for states that have ratified the Rome Statute. Finally, to assess Hypothesis 5 we include an indicator variable for states that have nationals sitting on the ICC.

In addition to these factors, we include three additional control variables that focus on state-level variables that may make states more prone to engage supportively or

[41] Gibney, M., Cornett et al., "The Political Terror Scale 1976-2019."via Teorell, Jan et al., "The Quality of Government Standard Dataset, Version Jan21."

antagonistically towards the ICC. The first is the role of liberal democratic institutions within a state, such as rule of law and a strong civil society. Governments that are accustomed to these forces may be less willing to engage antagonistically towards the ICC and more likely to be generally supportive of the ICCs aims. We measure this using the V-Dem measurement of liberal democracy.[42] We expect this variable will be negatively related with the dependent variables. Second, governments may anticipate negative reactions to critiquing the ICC. Weaker countries may have a more cautious approach than states with stronger militaries. We account for this by including the Global Militarization Index as a control variable. This index has three components: military expenditure, personnel, and heavy weapons.[43] The values are normalised at the global level in this index. Finally, states may vary in the extent to which they experience pressure from other states and non-governmental organisations to support the ICC. To account for the possibility that this factor explains antagonism to the ICC, we include a measure of political globalisation which is based on the number of embassies and international non-governmental organisations in a state, along with membership in international organisations and treaties.

The results of the analysis of rhetoric are found in Table 6, which presents three different models. Model 1 just includes the main variables that test the five hypotheses laid out in the theoretical section. Model 2 includes the control variables. Finally, Model 3 includes dummy variables for years to account for the fact that states are reacting to major events and as such years when rhetoric is more supportive or antagonistic.[44] These findings indicate weak support for the theoretical argument presented here. States with open cases against them are

[42]Coppedge, Michael et al., ""V-Dem [Country–Year/Country–Date] Dataset V10"; Pemstein, Daniel et al., "The V-Dem Measurement Model: Latent Variable Analysis for Cross-National and Cross-Temporal Expert-Coded Data."via Teorell, Jan et al., "The Quality of Government Standard Dataset, Version Jan21."
[43]Mutschler, Max M. and Bales, Marius, "Global Militarization Index 2020.") via Teorell, Jan et al., "The Quality of Government Standard Dataset, Version Jan21."
[44] Using 2008 as a baseline, 2011 and 2017 had more supportive rhetoric whereas 2013 had more negative rhetoric. The other year dummy variables were not statistically significant. This result is not consistent with the argument that there was a wave of backlash in 2016/17 among African states.

more likely to use antagonistic rhetoric than states that are not under investigation in any manner, but this finding is not statistically significant at conventional levels. The year after states have had a request for cooperation from the ICC, it is expected that there will be more antagonistic rhetoric, supporting Hypothesis 2. This finding is statistically significant in all three models and does indicate that states are more likely to engage in negative rhetoric when they have been criticised by the court. Hypothesis 3 is also supported with member states being more supportive of the ICC rhetorically than non-member states. The other hypotheses are not statistically significant nor are any of the control variables. The coefficient for political globalisation narrowly misses statistical significance but the coefficient size is relatively small and thus not noteworthy.

Table 6: Analysis of Rhetoric Towards ICC

	Model 1	**Model 2**	**Model 3**
Preliminary Investigation	0.08	-0.15	-0.09
	(0.23)	(0.24)	(0.24)
Open case	0.39	0.37	0.41†
	(0.26)	(0.25)	(0.24)
Request cooperation	0.51*	0.57*	0.71*
	(0.21)	(0.23)	(0.28)
Political Terror Scale	0.04	-0.03	-0.04
	(0.07)	(0.09)	(0.08)
Member	-0.41**	-0.30*	-0.31*
	(0.12)	(0.14)	(0.14)
Judge co-national	-0.47	-0.41	-0.43
	(0.36)	(0.36)	(0.34)
V-Dem Liberal democracy index		-0.55	-0.55
		(0.43)	(0.43)
Global Militarization Index		0.00	0.00
		(0.00)	(0.00)
Political Globalization		0.01†	0.01†
		(0.00)	(0.00)
Years Dummy	No	No	Yes
Constant	0.13	-0.13	0.09
	(0.21)	(0.37)	(0.39)
Observations	588	513	513
Countries	55	50	50
R2	.10	.12	.14
AIC	1549	1378.4	1383.2

† $p < 0.1$, * $p < 0.05$, ** $p < 0.01$

The analysis of actions towards the ICC is found in Table 7. Interestingly, the findings for actions differ from rhetoric in several important respects. Primarily, neither preliminary nor open investigations are statistically significant and indeed in most cases they are negatively signed which would run contrary to Hypothesis 1. Moreover Hypothesis 2 is not supported statistically. States that had cooperation requested of them similarly, membership and the having a conational as a judge are also not statistically significant, although it comes closer to statistical significance in Model 6 when year is controlled for.[45] That said, there is support for Hypothesis 3 in that states that are higher on the Political Terror Scale are more likely to engage in antagonistic actions towards the ICC. There is also support for Hypothesis 4 as member states are more likely to engage in supportive actions towards the ICC than non-member states. Beyond these factors there is little noteworthy.

[45] With 2008 as a baseline, the only years that were statistically significant were 2014, 2016 and 2017, which had more supportive actions recorded in these years. The findings run counter to the narrative of an "African backlash" occurring in 2016/17.

Table 7: Analysis of Actions Towards ICC

	Model 4	Model 5	Model 6
Preliminary Investigation	-0.30	-0.30	-0.26
	(0.20)	(0.24)	(0.24)
Open Case	0.05	-0.03	-0.01
	(0.23)	(0.23)	(0.23)
Request cooperation	0.46	0.42	0.59†
	(0.31)	(0.33)	(0.35)
Political Terror Scale	0.12*	0.15*	0.15*
	(0.05)	(0.07)	(0.07)
Member	-0.36**	-0.24†	-0.26*
	(0.10)	(0.12)	(0.12)
Judge co-national	-0.37	-0.38	-0.40
	(0.29)	(0.32)	(0.31)
V-Dem Liberal democracy index		-0.12	-0.11
		(0.36)	(0.35)
Global Militarization Index		0.00†	0.00
		(0.00)	(0.00)
Political Globalization		0.00	0.00
		(0.00)	(0.00)
Years Dummy	No	No	Yes
Constant	-0.12	-0.81*	-0.66†
	(0.17)	(0.34)	(0.36)
Observations	589	514	514
Countries	55	50	50
R2	.10	.14	.20
AIC	1490.0	1314.8	1297.7

Comparing across these tables reveals some striking similarities and differences between the relationship with the ICC and the different explanations posed in this paper. Specifically, the relationship between membership and engagement with the ICC is statistically significant and consistent across models. Namely, member states compared to non-member states engage in more supportive ways towards the ICC. This finding is perhaps unsurprising, but it highlights the importance of membership in driving support for the tribunal. Moreover, it also highlights that a fair amount of antagonism towards the ICC is driven by non-member states. Looking at the articles analysed for this study, non-parties to the Rome Statute such as Rwanda and Sudan were key in driving antagonism towards the ICC in Africa, not only in their

own reactions to the ICC but also in encouraging others to have more critical reactions through diplomatic outreach. This finding reminds us to not underestimate the role of non-members in fostering discontent with an institution and it challenges conceptualisations of backlash that focus on withdrawal or substantial reform to an institution which are actions that only members to an institution can undertake.

The differences between the models are also interesting and they suggest that rhetoric and actions might be driven by different processes, likely because there are different costs and benefits for each. Requests for cooperation were met with rhetorical criticism from states. Yet in terms of actions, the findings were inconclusive. These differences are interesting and warrant further investigation to understand better. Interestingly, the Political Terror Scale was statistically insignificant when it came to rhetoric, but it was statistically significant for action. This finding suggests that state actions are related to their own human rights practices, but the same cannot be said of rhetoric. These findings are a first cut but they suggest that by taking a broader view of state-tribunal interactions we are better able to understand which factors can lead to more antagonism and which can lead to more support for the ICC as an institution. Importantly, the model fit across all six models is relatively weak and suggests that further theorisation of the causal process is warranted. Qualitative investigation using the concepts developed in this article may also shed further light on nuances in attitudes and behaviours towards the ICC, particularly as little is known about what leads states to support tribunals, especially in times of crisis.

Discussion and Conclusion

Relationships between African states and the ICC form one locus of examination amidst broader concerns about international dissatisfaction – including from powerful governments – with the ICC and other international tribunals. For example, while many may view the ICC's Afghanistan investigation as a positive and significant non-African initiative for the Court, this situation also harbours significant institutional risk.[46] In particular, the US under Donald Trump enacted sanctions against the ICC Prosecutor and her deputies and visa restrictions on ICC personnel, although these decisions were reversed under the Biden administration.[47] Broader international discomfort with the ICC also remains evident: in particular, granting authorisation to the Prosecutor to investigate Israeli and Palestinian conduct in the OPT will likely form another locus of tension between governments – notably, but potentially not only, Israel – and the Court. Indeed, the political challenges facing the ICC must also be set in the context of apparently increasing government, popular and other stakeholder discomfort – and in some cases, open hostility – to international tribunals.

International adjudication has been described as a "lynchpin" of the post-Cold War international order, within which the ICC stands out as a particularly critical element in the landscape. As a potentially universal court with jurisdiction over core crimes in domestic and international settings it creates the prospect of finding military and political leaders criminally liable. This ability is a significant intrusion into an arena where states have traditionally guarded sovereign prerogatives. Additionally, due to the scope for UN Security Council

[46] See: Kersten, "Monkey Cage Analysis The International Criminal Court Is Set to Investigate Alleged U.S. War Crimes in Afghanistan"; Alex Whiting, "An ICC Investigation of the U.S. in Afghanistan." In respect of other international criminal courts, the experience of the ICTY in investigating NATO conduct in Serbia during the Kosovo intervention (arguably), and (more starkly) the absence of RPF cases from the ICTR's docket also illustrate the implications of political constraints for court conduct. (See e.g. discussions variously in: Haskell and Waldorf, "The Impunity Gap of the International Criminal Tribunal for Rwanda"; Waldorf, "A Mere Pretense of Justice"; Colangelo, "Manipulating International Criminal Procedure"; Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia.")

[47] See Kyle Rapp and Zelebogile Zvobgo, "Biden Reversed Trump's Sanctions on the International Criminal Court Officials. What Happens Now?"

referral, the ICC's jurisdictional reach may extend beyond Rome Statute states parties. As such, while the ICC remains only one of many international tribunals, it arguably sits at the "sharp-end" of the practice of international adjudication, forming a particularly clear target for disgruntled governments. The typology developed in this article permits us to take a broader view of tribunal-state interactions and posits that it is insufficient to focus on states that challenge institutions but that, rather, we need to consider the broader range of state-tribunal interactions to understand the factors that make for a healthy, well-functioning tribunal.

This typology and analysis also allow us to consider how court conduct might contribute to state attitudes and behaviour towards institutions. We have found here that there is a relationship between Court conduct and government rhetoric. Although these findings are tenuous, they suggest that those responsible for instigating or authoring unwelcome international judicial interventions should carefully consider the risk of their conduct giving rise to criticism – and potentially backlash - and how such risks may be managed or mitigated, prior to the adoption of such measures. Interestingly, our findings did not support the conclusion that ICC actions in respect of a state will generally lead to negative reactions: one reason for this inconclusive finding may be the role of self-referrals in the ICC system and states in some cases seeing the ICC as a tool rather than as an antagonist. Interestingly, the stronger findings statistically in terms of reactions to Court decisions, in respect of rhetoric, also related more to non-cooperation with the ICC than to states being made the subject of an investigation of government conduct per se.

Our argument is not that court decisions should be determined by their potential consequences: rather, it suggests that to the extent that potentially unwelcome institutional consequences are foreseeable, tribunals may be advised to reduce the possibility of such risks materialising in their most extreme form by proactively seeking to mitigate these. The pursuit of justice may necessarily risk the heavens falling – "*fīat jūstitia ruat cælum*". Equally, though,

the unwavering pursuit of justice need not preclude international tribunals from taking steps to avoid unwelcome outcomes and foster the cooperation necessary for the ICC to function more effectively.[48] Indeed, the capacity of international tribunals to generate negative reactions may be understood from a certain vantage point as an indicator of institutional power: a tribunal that does not challenge governments is unlikely to inspire antagonistic reactions.

When the Rome Statute was completed in 1998 there was a pervasive sense that it would usher in an era where impunity was no longer an option for the most serious international crimes. Indeed, many African governments were amongst the strongest early supporters of this initiative, and as this study has highlighted many African states remain supportive of the ICC even when it has been challenged by other regional governments. Yet as the potential implications of the Rome Statute regime have become evident, some African (and non-African) governments have balked at the Court's actions, failing to abide by or enforce – and in some cases seeking to frustrate – Court measures. These reactions challenge the sustainability and effectiveness of the Court: indeed, while the ICC continues to conduct investigations in Africa and elsewhere, it is evident that the era of impunity is far from over – as this article highlights, political leaders may seek to hinder the Court variously via rhetoric, action and, as is often the case, inaction.

The ICC is not alone in facing these pressures: negative government reactions to international tribunals have been highlighted in a range of contexts, posing potentially significant challenges to these "lynchpins" of the rules-based international order. These pressures in turn make it critical to better understand state-tribunal interaction. As researchers and observers of international tribunals we need to examine the broader picture of state

[48] In a cognate argument, Shai Dothan makes the case that international courts, lacking extensive enforcement tools, "actively seek to build reputation capital and to use it in ways that increase the costs to states of failing to comply with their judgments." (*Reputation and Judicial Tactics: A Theory of National and International Courts*, 1.)

interactions with tribunals to better understand the full range of such interactions, with a view – ultimately – to enabling more effective international adjudication.

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