Dejudicialisation of International Law and Future Trajectories

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Abstract

Recent developments at the international level reveal that there is an increasing number of political resistances against international courts and tribunals as part of wide criticism of the basic principles of international law such as the rule of law, global governance, multilateralism and democratic liberalism. In this respect, the future and impact of the judicialisation of international law, which refers to the uneven increase in the jurisdiction and judicial activity of international courts, are questioned. Similarly, whether dejudicialisation which expresses the removal of the international courts' power as a reverse movement, constitutes a new trend and will continue increasingly in the future has become relevant. There are certain assertions to defend the existence of international courts and the continuation of judicialisation –albeit at a slower pace– in the future despite the increasing incidence of dejudicialisation. Examples of extraordinary resistance which can trigger the dejudicialisation process are still exceptional and cannot completely eliminate judicialisation in current conditions. This argument has been reached by examining three recent backlash examples, including the withdrawals from the International Criminal Court (ICC), the paralysis of the World Trade Organization (WTO) Appellate Body, and the limitation of the jurisdiction of the South African Development Community Tribunal (SADC) Tribunal. Clearly, the displacement of international courts, which have become inseparable actors of international law, cannot be achieved by a few examples of extraordinary resistance, both in the present and in the near future.

I. Introduction

International courts and tribunals (ICs) have been facing criticisms about their legitimacy, rulings or designs following the period of noticeable expansion of international courts with the effect of judicialisation which has taken place in an uncoordinated and unplanned manner. These criticisms emerge for various reasons or driving factors such as normative discontent, the structural relationship of international courts with states, rising domestic regime costs, and the rise of populist-nationalist governments.[1] Similarly, they can take

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1 For detailed explanations on the reasons for backlash: Wayne Sandholtz, Yining Bei and Kayla Caldwell, 'Backlash and International Human Rights Courts' in Alison Brysk and Michael Stohl (eds*), Contracting Human Rights: Crisis, Accountability, and Opportunity* (Edward Elgar Publishing, 2018); Henry Lovat, 'International Criminal Tribunal Backlash' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020); Karen J Alter and Michael Zürn, 'Conceptualising Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison' (2020) 22(4) The British Journal of Politics and International Relations 563-584; C Hillebrecht, *Saving the International Justice Regime: Beyond Backlash against International Courts* (Cambridge University Press, 2021).

different forms of resistance that are uneven and do not follow a pattern of linear escalation. Sometimes, it is limited to non-compliance to the decisions of the ICs, and sometimes it shows itself as an extraordinary reaction like withdrawing from the jurisdiction or restraining functions of ICs such as the recent impasse in the Appellate Body of the WTO. Recent instances of resistance have led to the question of whether the expansion of the judicial power of international courts has stopped and dejudicialisation has escalated, which is a reverse movement for the development of international justice. While every new dispute resolution mechanism brings with it some criticisms, such as the fragmentation of international law, the idea of having functional peaceful settlement mechanisms is preferable for the development of international justice to non-functioning or destroyed courts. This is because judicialisation is a development that is in line with fundamental principles of international law such as the rule of law, global governance, and multilateralism. In this respect, future expectations of judicialisation in international law also form some sort of follow-up questions. In the following pages, it will be claimed, with a relatively optimistic approach, that there are certain substantial grounds to support the continued existence of international courts and the persistence of the impact of judicialisation, albeit at a slowing pace, despite the increasing instance of dejudicialisation.

For this purpose, this article is organised into three main sections. In the first part, which is a definitive part of the article, the concepts of judicialisation and dejudicialisation will be explained and their differences will be revealed with similar terms. The framework of these two concepts will be depicted to evaluate recent developments and make comparisons in the following sections. While addressing the theory of dejudicialisation, it will be briefly explained how it gained momentum when serious failures occur in the expected benefits of dispute settlement systems. The second section is about the selected backlash examples and which of these examples led to the entire dejudicialisation of the mechanism in question. The final section of the paper will include explanations of specific justifications to support anticipations for the future of judicialisation to answer the main research questions of this study.

This study focuses on specific extraordinary resistance examples and thus, incidences of ordinary resistance or pushback against ICs are excluded. In addition, in this paper, the concepts of dejudicialisation and backlash are differentiated and used to express the different phenomena. Backlash is a part or key factor of dejudicialisation and refers to the extraordinary resistance of any international law actor to any international court that seeks to reduce the authority or jurisdiction of the court. However, dejudicialisation refers to the process which is mostly generated by extraordinary resistance and its cumulative effect is relatively destructive against the judicial power of international justice regimes.[2] In some cases, it can be a cumulative result of different backlashes of different states. In other limited instances, a single backlash could lead an international court to dejudicialisation.

A. Judicialisation – dejudicialisation

1. Definitions

As describing one of the major developments in international law, judicialisation refers to the proliferation of judicial activity and the continued empowerment of courts as

[2] Karen J Alter, Emilie M Hafner-Burton and Laurence R Helfer, 'Theorizing the Judicialization of International Relations' (2019) 63(3) International Studies Quarterly 449, 454.

institutions on the national and international scale.[3] In other words, this term covers a process in which courts and judges gradually take over policymaking and politics previously dominated by legislators and executives. As a result, judicialisation includes activities that might diminish the sovereignty and authority of states.[4] It represents a significant transfer of authority from leaders and legislatures to international dispute settlement systems.[5]

In the post-Cold War era, a spreading legality culture and an international trend in legal activism and right-claiming emerged with increased judicial activity in international politics and the growth of constitutional courts on the domestic level.[6] In particular, there appears to be an increase in the willingness of national judges to rule on human rights violations, restrain foreign sovereign immunity, and file claims for extraterritorial jurisdiction. Similarly, the overall number of international judicial institutions, as well as the total number of cases in international courts have increased worldwide.[7]

Under certain situations, judicialisation can reduce the control of states over political processes and outcomes, and the desirability of this impact is controversial for states. This is because there is an assumption that a high level of judicialisation limits the regulatory spaces of states and conversely states protect their regulatory space in areas with low judicialisation.[8] However, judges can promote impartial decision-making, assist states in sending credible signals, and resolve collective issues. Expanding space for non-state actors and increasing their influence in international politics, can foster a sense of inclusion, fairness, and transparency. However, judicialised international relations have some potential drawbacks as well. Judicialisation can also lead to politics in other ways, giving an advantage to well-resourced and law-savvy individuals. When judges are not accountable for their decisions, they might thwart policies that hold popular support and cause legitimacy challenges. As a result, judicialisation may limit government authority and national politics and parallelly may result in reactions or criticism against the international justice regime.[9]

Conversely, the concept of dejudicialisation, defined as the process of reduction or elimination of judicial power[10] is the opposite course of judicialisation. It refers to the

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3 Daniel Abebe and Tom Ginsburg, 'The Dejudicialization of International Politics?' (2019) 63(3) International Studies Quarterly 521, 522.

4 Torbjorn Vallinder, 'When the Courts Go Marching In' in C Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995) 11, 13; C Neal Tate, 'Why the Expansion of Judicial Power' in C Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995) 27, 28.

5 John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65(3) Law and Contemporary Problems 41.

6 Tom Ginsburg, 'The Global Spread of Constitutional Review', in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 81, 87; Javier Couso, Alexandra Huneeus and Rachel Sieder, 'Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America' in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press, 2010) 3-4.

7 Alter, Hafner-Burton and Helfer (n 2) 450.

8 Johann R Basedow, 'Why De-Judicialize? Explaining State Preferences on Judicialization in World Trade Organization Dispute Settlement Body and Investor-to-State Dispute Settlement Reforms' (2021) 16(4) Regulation & Governance 1362.

9 Alter, Hafner-Burton and Helfer (n 2) 450.

10 Trischa Mann, 'Judicialisation' in Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2018).

return of power from international justice regimes to legislators and executives while judicialisation defines the transfer of power from these actors to courts. The latter refers to an increase in judicial participation in international governance, and the former refers to a reduction in that participation. Dejudicialisation can only occur after an area of international law has become judicialised and extraordinary resistance to the authority of ICs has increased. Another aspect of dejudicialisation is that it is generally prone to occur when there is a significant difference between the anticipated advantages from the existence of a court and the costs incurred by major states subject to the court's authority.[11]

The judicialisation of international law, which began in the 1990s, is frequently explained as a spontaneous, uncontrolled, and disorganised process that advances slowly but steadily.[12] Despite the fact that judicialisation is a global phenomenon,[13] it is neither a uniform nor static process. There are several challenging areas of international law where judicialisation initiatives have failed or have never been attempted[14] such as environmental protection or international security. This is also more prevalent in regions where international adjudication is limited, such as Asia.[15] Furthermore, there is a growing backlash against the judicialisation process. While criticism against claims of legal authority is not new,[16] and it almost simultaneously occurred with international courts, the current nationalist-populist backlash is more powerful than prior reactions[17] as populism drives hostile campaigns against the authority of international courts and tribunals rather than challenging or criticising individual rulings.[18] These backlashes could end up with the removal of the power of ICs, repoliticise international law and make some international courts unfunctional. As a consequence, judicialisation is not an irreversible advancement, and dejudicialisation is no longer just a theoretical possibility.[19]

Although dejudicialisation appears to reflect the same situation with backlash, in some cases it begins with the emergence of extraordinary large-scale or multiple backlashes, but sometimes a single strong backlash can lead to an entire dejudicialisation. Additionally, resistance against international courts has several types and a distinction must be made according to the degree of the resistance. Resistance to international courts takes the form of a process that may escalate from ordinary resistance to backlash, and they are extremely uneven and do not follow a pattern of linear escalation. As an ordinary type of resistance, pushback takes place within the workspace of the international court and accepts the authority of the body while reacting to particular rulings or general legal developments. On the other hand, backlash or extraordinary resistance refers to the

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11 Abebe and Ginsburg (n 3) 521-529.

12 Cesare PR Romano, 'Trial and Error in International Judicialization' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 111, 111-112.

13 Miles Kahler, 'Legalization as Strategy: The Asia-Pacific Case' (2000) 54(3) International Organization 549.

14 Suzanne Katzenstein, 'In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century' (2014) 55(1) Harvard International Law Journal 151, 158-159.

15 Cesare PR Romano, 'Mirage in the Desert: Regional Judicialization in the Arab World' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press, 2019) 169, 170-171.

16 Karen J Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54(3) International Organization 489.

17 Alter, Hafner-Burton and Helfer (n 2) 451.

18 Erik Voeten, 'Populism and Backlashes against International Courts' (2020) 18(2) Perspectives on Politics 407.

19 Abebe and Ginsburg (n 3) 529.

challenge of states operating within the judicialised framework of international law against the authority and existence of international courts. This may lead to substantial institutional reform or even the demolishing of courts, alongside other occurrences including pressure placed on serving judges, the withdrawal of financial assistance, withdrawal from the jurisdiction, suspending or dissolving the court, etc. Backlash emerges when particular legal advancements collide with broader societal issues and the kind of social, political, and legal mobilisation that these issues might start.[20] Even though a judicial ruling could cause a backlash, in the end, an extraordinary resistance targets the authority or institution of the court rather than merely a decision.[21] Hence, backlash could contribute to the escalation of dejudicialisation, whereas pushback is not generally sufficient to be part of the dejudicialisation process, because it could be beneficial for the development of international law and judicial institutions. As a result, it is reasonable to see dejudicialisation as a compilation created by extraordinary resistances to weaken the authority of ICs.

2. Framework of concepts

According to Alter, Hafner-Burton and Helfer, judicialisation theory consists of four stages of judicialised politics that include *"Shadow politics" "Adjudication politics" "Compliance politics"* and *"Feedback politics"*.[22] These phases are also helpful to clarify the framework of dejudicialisation, which is covered by the feedback politics category, the last stage of the theory. Hence, it is deemed that dejudicialisation could only take place after an area of international law is judicialised[23] and it is necessary to explain the emergence of judicialisation to build on further explanations concerning dejudicialisation.

Judicialisation begins when states take into account whether to form a judicial body to handle certain policy issues, along with the predicting cost-benefit balance of the proposed international court based on various assumptions. The litigants present their lawsuits before the court during the shadow politics and adjudication politics stages, and the court issues judgements on these cases. Followingly, the compliance politics stage becomes relevant, revealing important indications about the dejudicialisation process. The decision of the court may be favourable or unfavourable to states, but in either case, states must comply. However, in case the decision is unfavourable, political resistance might arise against it.[24] In some international judicial regimes where additional steps and cooperation with domestic courts are required for compliance, national courts may refuse to ensure compliance and thus can prevent the enforcement of specific cases. The feedback politics phase begins when states react to the rulings of international courts as a result of their payoff assessment.[25] If the cost-benefit analysis exhibits that payoffs are considerably lower than anticipated in the first place, states might try to limit the jurisdiction of the international court through some type of backlash.[26] This is because, if international

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20 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) International Journal of Law in Context 197, 198-202; Hillebrecht (n 1) 5-9.

21 Voeten (n 18) 408.

22 Alter, Hafner-Burton and Helfer (n 2) 454-457.

23 Abebe and Ginsburg (n 3) 529.

24 Alter, Hafner-Burton and Helfer (n 2) 455-456.

25 Abebe and Ginsburg (n 3) 524-525.

26 Laurence R Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102(7) Columbia Law Review 1832, 1887-1888.

judicial institutions do not match the interests of states, especially major powers, then they may either be dissolved or rendered obsolete.[27]

State resistance against international courts varies depending on the severity of damage in their interests caused by the relevant international justice regime. For example, if the payoff of a particular state from a decision is extremely low, that state may express its dissatisfaction by applying extraordinary resistance against the court. Backlash can occur in the form of bilateral cooperation or unilateral actions. Hence, the state may decide to withdraw from the IC's jurisdiction entirely or even try to weaken it through unilateral action.[28] Moreover, states may also seek cooperation to modify the court's jurisdiction, either by abolishing the judicial body, or by eliminating the relevant aspect believed to cause undesired outcomes for the interests of the state. This is difficult to do unilaterally unless the uncomfortable state is particularly a powerful state, thus necessitating cooperation with other states. The dejudicialisation process requires a great deal of political effort, which is ultimately costly for states. Despite this expense, states continue to consider dejudicialisation as an option when the costs of compliance with court rulings are greater than the political costs of targeting the court, as well as collateral costs and benefits. Briefly, in case remaining in the relevant judicial system is unsustainable, states venture to bear these costs.[29]

Thereby, the dejudicialisation framework can be outlined with five presumptions. First, the court must be involved in highly significant issues for dejudicialisation to be worth the cost of the political efforts of states. Second, it is related to the structural aspects of the court; for example, ICs that are not part of a broad organisation or work as separate institutions are more vulnerable to dejudicialisation. Third, it is more prone to occur when there is a more negative relationship between expectations and actual benefits from the court. Fourth, it is important whether the state that will undertake the dejudicialisation campaign will be able to tolerate its high judicial costs in the long run. Finally, four types of actors, namely governments, national courts and public, and litigants, might express their dissatisfaction against ICs, through various forms and boosting the dejudicialisation process.[30] Having outlined the framework of both concepts and clarified the relationship between them in this section, it is necessary to discuss current examples of dejudicialisation before providing a basis for future trajectories.

B. Some criticism examples

Currently, ICs are subject to a wide range of criticism concerning their designs, procedures, legal interpretations, and acceptability of their decisions. Furthermore, some core features of ICs as laid down in the Judicial Trilemma Theory such as judicial independence, accountability and transparency are often questioned and criticised. Furthermore, the Theory states that one of these three features will always remain weaker in international courts for various reasons, which in turn, becomes the focal point of criticism.[31] In addition, some critiques prioritise the reasons for circumventing the will of national democratic legislators and neglecting cultural differences in the international community before the

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27 Richard H Steinberg, 'The Impending Dejudicialization of the WTO Dispute Settlement System?' (2018) 112 *Proceedings of the Annual Meeting (American Society of International Law)* 317.

28 Madsen, Cebulak and Wiebusch (n 20) 215-216.

29 Abebe and Ginsburg (n 3) 525.

30 ibid 525-526.

31 Jeffrey L Dunoff and Mark A Pollack, 'The Judicial Trilemma' (2017) 111(2) American Journal of International Law 225, 226.

court.[32] As pointed out earlier, the judicialisation of international law does not reflect a linear advancement. At the international level, there is no unlimited and constantly increasing empowerment of the jurisdiction. In this context, the metaphor of the ebb and flow[33] seems appropriate to describe the expansion of judicialisation, wherein increased backlash and dejudicialisation may lead to an ebb which implies a retreat from the high level of judicialisation. Judicialisation may rise again and expand the judicial powers of international courts and tribunals, albeit not always to the same level, thus mitigating the effect of dejudicialisation. Hence, explaining the relationship between these two concepts in a static and fixed way does not reflect the truth.

Recently, there are a growing number of backlash instances including the dismantling of the SADC Tribunal, withdrawal threats of the African Union (AU) from the International Criminal Court, congestion in the WTO dispute settlement system and the resistance of Russia and different states against judgements of international and regional human rights courts. The trend of populist governments in countries such as Russia, the United States, Hungary, Poland, Ecuador, Venezuela and many more also causes an increase in populist attacks or backlash on international institutions and authorities of international courts.[34] While there are increasing examples of extraordinary resistance, most of these reactions do not result in an entire dejudicialisation in international justice regimes. Some ICs are more defenceless and helpless in the face of extraordinary resistance than others, thereby prompting dejudicialisation. Nonetheless, from a positive standpoint, it is stated in the literature that ICs can adapt themselves to changing situations.[35] In the limited scope of this article, only three particular instances of extraordinary resistance have been examined, out of the different levels of resistance to ICs, to explain future trajectories in terms of judicialisation.

1. WTO dispute settlement system

The congestion in the appointment of new members to the Appellate Body of WTO was caused by pressure from the US and it has stopped the functioning of the court. As of December 2019, the Appellate Body has become unable to form a quorum to examine the appeals[36] and on 30 November 2020, the last member's term of office expired, therefore, as a body without members, it has become a paralysed court and unable to continue its judicial activities.[37] The current crisis in the Appellate Body is one of the most concrete examples of backlash against international courts. At the same time, it has created the appropriate circumstances for the dejudicialisation of the regime for states willing to reduce the role of the WTO Dispute Settlement System in international trade.[38] However, the dispute settlement mechanism continues its mission with the Panel stage even though it is not possible to appeal the decisions at this stage due to the bottleneck in the appointment

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[32] Andreas Follesdal and Geir Ulfstein, 'International Courts and Tribunals: Rise and Reactions' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press, 2018) 1, 6.

[33] Abebe and Ginsburg (n 3) 524.

[34] Voeten (n 18) 414.

[35] Follesdal and Ulfstein (n 32).

[36] Steinberg (n 27) 316.

[37] World Trade Organization, Appellate Body Annual Report for 2019-2020 (31 July 2020) WT/AB/30 13-14 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/AB/30.pdf&Open=True> accessed 22 March 2021.

[38] Abebe and Ginsburg (n 3) 526.

of members.[39] For this reason, it will not be possible to talk about a complete dejudicialisation, as the dispute settlement system continues the possibility of resolving the dispute between states at the Panel stage. However, the absence of an active Appellate Body leaves WTO members unable to have confidence in the finality or enforceability of Panel decisions. Hence, a fundamental pillar of legal commitments under WTO agreements is undermined.[40]

The impasse in the Dispute Settlement Body (DSB) is a symptom of the cooperation crisis in the WTO and, generally, in international trade. The main reason for the Appellate Body's paralysis was the US' denial to join the consensus to initiate the appointment procedure, with three motivations for doing so. The first reason is that the Trump administration was openly sceptical of the rules-based international order. Additionally, US trade policy adopted a new direction towards not being bound by the limits of international trade obligations. Thus, the Trump administration acted hostile to the multilateral trading system. President Trump has repeatedly criticised the WTO and its dispute settlement system for alleged unfair treatment against the US. An international system that is compulsory and binding, such as the WTO dispute settlement system, can be seen as a threat to keeping political interests under control, as in the Trump administration. Because of this, the US administration aimed to render the system non-functional, despite expressing support for the WTO and even initiating several new disputes.[41]

The second reason that causes more effective and escalated actions against the international trade system is the growing political and commercial competition between the major powers, such as the US and China. The US and to a lesser degree, the European Union (EU) share several concerns about China's state-backed industrial plan and some of China's actions are not covered by current international trade rules. In addition, the US considers that the existing international trade rules are causing unfair consequences in its continued competition with China.[42] Lastly, the US has expressed concerns and criticism about the functioning and structure of the Appellate Body, and the WTO dispute settlement mechanism in general, long before the Trump administration took office.[43] The US has long suggested reforms to the WTO dispute settlement mechanism that would provide more checks and balances and in particular more flexibility and member control. Thus, the impasse in the DSB has structural as well as political reasons. Ending this deadlock and getting the Appellate Body working again requires a much broader solution than a revision in the procedure for Appellate Body members.[44]

For almost three years, uncertainty about the destiny of the Appellate Body continues due to the reasons briefly listed above. The inauguration of the Biden administration, succeeding the Trump administration, also did not make a swift difference

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39 Marianne Schneider-Petsinger, 'Reforming the World Trade Organization: Prospects for Transatlantic Cooperation and the Global Trade System' [2020] Chatham House: The Royal Institute of International Affairs Research Paper 13.

40 Robert Howse, 'Appointment with Destiny: Selecting WTO Judges in the Future' (2021) 12(3) Global Policy 71; James Bacchus, 'Might Unmakes Right: The American Assault on the Rule of Law in World Trade' (2018) 173 Centre for International Governance Innovation 17.

41 Robert McDougall, 'Crisis in the WTO: Restoring the Dispute Settlement Function' (2018) 194 Centre for International Governance Innovation 1; Basedow (n 8) 1370.

42 Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57(2) Harvard International Law Journal 261, 265; McDougall (n 41) 1.

43 Basedow (n 8) 1369-1370.

44 McDougall (n 41) 1.

in the policy towards the WTO and especially the Appellate Body. Since, as expressed, the US had long-standing criticism and concerns against the WTO even before the Trump administration. Although in the beginning, it is expected that the new administration will have a more optimistic point of view to introduce reform proposals for the WTO, the Biden administration also shares the same anxieties of former US administrations regarding the WTO Dispute Settlement Mechanism. While the US has not offered any specific reform proposals so far, the US backlash can be seen as a unilateral dejudicialisation attempt or de facto reform of the WTO dispute settlement mechanism, because it forces WTO members to use less judicially based dispute resolution procedures in the absence of a working Appellate Body.[45]

However, there are some reform efforts carried out by the EU. In this context, the EU has published reform proposals and cooperates with other WTO members such as China, India and Canada to deal with the stalemate in the appointment of members and to reactivate the Appellate Body.[46] The EU responded to the WTO problem in a reactive manner and acted in line with the perception of international law as a governance system, and not just an instrument for the benefit of states, and its legitimacy comes from wide social consent, satisfaction, accountable and transparent institutions.[47] Hence, the EU focuses on enhancing accountability and transparency of the Appellate Body which can lead to expanding the judicial power of the dispute settlement mechanism, instead of entire dejudicialisation. While acknowledging some US complaints, the EU rejects unilateral US dejudicialisation measures and leads multilateral initiatives to temporarily replace and ultimately restore the Appellate Body.[48] Therefore, in March 2020, 16 Member nations established the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) which serves as an interim mechanism for resolving WTO disputes that are appealed by Members in the absence of a fully operational WTO Appellate Body.[49] During the establishment of the MPIA, it was emphasised that in addition to the temporary nature of the arrangement, the resumption of the function of the Appellate Body is a priority.[50]

The EU's emphasis on the existence of a functional Appellate Body by supporting the values of multilateralism and the rule of law, together with the reform scenarios put

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45 Basedow (n 8) 1370.

46 Schneider-Petsinger (n 39) 18-19; European Commission, 'Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System' (Publications Office of the European Union, 2021) <https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159544.1329_EN_02.pdf> accessed 22 April 2022.

47 Basedow (n 8) 1373.

48 Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22(3) Journal of International Economic Law 297, 313.

49 European Commission, 'EU and 15 World Trade Organization Members Establish Contingency Appeal Arrangement for Trade Disputes' (*European Commission,* 27 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_538> accessed 22 April 2022.

50 ibid. '*We wish to underscore the interim nature of this arrangement. We remain firmly and actively committed to resolving the impasse of the Appellate Body appointments as a matter of priority and urgency, including through necessary reforms. The arrangement therefore will remain in effect only until the Appellate Body is again fully functional*.'

forward for the re-functioning of the Appellate Body,[51] raise the expectations that the attacks against the WTO will not result in an entire dejudicialisation. Because, although the reform proposals include scenarios for downgrading the WTO system from a judicial dispute resolution system to a quasi-judicial or diplomatic resolution mechanism, and the WTO dispute settlement mechanism is unlikely to survive unchanged from its current shape,[52] the binding nature of the mechanism is expected to continue. As a result, resistance against the WTO dispute settlement mechanism, while undermining the highly judicialised character of the court and causing some degree of re-politicization of the regime, will likely not lead to complete dejudicialisation.

2. South African Development Community Tribunal

Another example is the Southern African Development Community Tribunal, which was established in 1992 on paper by the SADC, a regional organisation with 16 member states in Africa.[53] However, the tribunal officially started its activities with the appointment of its judges in late 2005. In accordance with its purpose which is ensuring the provisions of the SADC Treaty and subsidiary instruments, the SADC Tribunal adjudicated disputes referred to it by member states, community bodies and also individuals.[54] However, in the Tribunal's second case, prominently known as the *Campbell v. Zimbabwe* case, which was referred to by individuals namely Mike Campbell (Pvt) Limited and William Michael Campbell, the Tribunal's decision encountered noncompliance and backlash. In this case, it is alleged that Zimbabwe's land reform violated the prohibition of racial discrimination, hindering access to justice and failing to provide fair compensation to the applicants and the 77 other white farmers allowed to participate in the proceedings.[55] The SADC Tribunal found that the Zimbabwean government violated the SADC Treaty by expropriating lands owned by white Zimbabweans.[56] Hereupon, the government challenged the legality of the SADC Tribunal's existence and resisted its rulings.[57] Zimbabwe's campaign against the SADC Tribunal has a fundamental reason, in that, governments do not like to lose their political control over disputes before international courts, and the inability to exert political influence on the court's outcomes causes discomfort. In a similar vein, the government considered the Tribunal's decision to stop the seizure of the lands, which it made with the

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51 Pauwelyn (n 48) 300. It listed four 'likely scenarios' for the settlement of future trade disputes in the WTO DSM: *'i) the default risk of appeals 'into the void' followed by a block on panel Reports, (ii) no appeal ex post or ex ante no appeal pacts (NAPs) followed by regular adoption of panel reports by the Dispute Settlement Body (DSB) under the negative consensus rule, (iii) Article 25 arbitration appeals making panel and appeal reports automatically binding without DSB adoption, and (iv) 'floating' panel reports (or interim panel reports) that are neither adopted nor appealed/blocked'.*

52 McDougall (n 41) 19.

53 'Institutions' (*Southern African Development Community*, 2022) <https://www.sadc.int/institutions> accessed 14 February 2023.

54 Romano, 'Trial and Error in International Judicialization' (n 12) 122-123.

55 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADCT 2 6, 53-54.

56 E Tendayi Achiume, 'The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts' in Karen J Alter, Laurence R Helfer and Mikael R Madsen (eds), *International Court Authority* (Oxford University Press, 2018) 124, 127-128.

57 'Mugabe Vows to Seize More Farms' (*BBC*, 28 February 2009) <http://news.bbc.co.uk/2/hi/africa/7916312.stm> accessed 28 December 2021. *'Some farmers went to the SADC... but that's nonsense, absolute nonsense, no-one will follow that. We have courts here in this country, that can determine the rights of people. Our land issues are not subject to the SADC tribunal'.*

view of correcting the unfair land sharing of the colonial period,[58] as an intervention in its domestic policy and loss of control.

While the SADC Tribunal wanted to discuss whether sanctions should be imposed for Zimbabwe's non-compliance, Zimbabwe argued that the court was not properly constituted because the 2000 Protocol establishing the Tribunal was not ratified by a sufficient number of member states and that the Tribunal's decisions were invalid and null.[59] Zimbabwe's activities to suppress the court went beyond just verbal expressions and continued with the block of the reappointment of five judges whose terms of office had expired,[60] as the US did in the Appellate Body. In this context, the SADC Summit postponed both the sanctions against Zimbabwe and the appointment of a judge to the Tribunal in order to review the Tribunal's role, functions, and mandate within six months. Hence, the Tribunal, which has only four members left, has become unable to provide enough numbers to accept new complaints. In addition, Zimbabwe persuaded other member states to reassess the function and particularly judicial power of the SADC Tribunal.[61] This is because sovereign member states of international courts play a significant role in international judicial governance institutions, but their influence is also limited. Since international judicial governance institutions are collective structures operating under predetermined rules and settled practice, states generally cannot act individually within these bodies.[62] As in this case, lobbying work must be carried out to bring about a collective movement to influence or start a backlash. Therefore, the hostile attitude of Zimbabwe towards the Tribunal resulted in the jurisdiction of the tribunal being narrowed and authorised only in inter-state disputes in 2014.[63] Even though the Protocol regarding this jurisdictional change was adopted at the SADC Summit and was signed by some member states, it has not yet entered into force at the time of writing. This successful backlash to the SADC Tribunal, which resulted in the confines of the jurisdiction, re-politicisation of the court, and its closure in practice for years, is a clear example of dejudicialisation.[64]

3. International Criminal Court

In Africa, the SADC Tribunal is not the only dispute settlement system which has been the subject of resistance, the International Criminal Court (ICC) also experienced criticism and campaign against its jurisdiction. Initially, African states and the AU provided significant support to the ICC and anti-impunity norm after the Rome Statute entered into force in

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58 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 Journal of International Law 293, 307-308.

59 Henok B Asmelash, 'Southern African Development Community Tribunal' [2016] *Max Planck Encyclopedias of International Law* para 44.

60 Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35(4) Human Rights Quarterly 870, 878-879.

61 Abebe and Ginsburg (n 3) 527; Asmelash (n 59) para 65.

62 Niels Blokker 'The Governance of International Courts and Tribunals: Organizing and Guaranteeing Independence and Accountability' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press, 2018) 26, 37.

63 Romano, 'Trial and Error in International Judicialization' (n 12) 123.

64 Alter, Gathii and Helfer (n 58) 306; Abebe and Ginsburg (n 3) 526.

2002, except for some authoritarian African countries that felt threatened.[65] However, the arrest warrant of Sudanese President Omar al-Bashir and the prosecutions of President Uhuru Kenyatta and Deputy President William Ruto caused African states to move away from their progressive position for the ICC. Consequently, many AU member states began to criticise the legitimacy of the ICC. The AU stated its criticisms by emphasising two main reasons. Firstly, it is expressed that the ICC Prosecutor constantly targets only African states and leaders, it exhibited an abuse of the indictments while simultaneously acting as a Western tool. As for the second reason, it has been argued that the indictments of the Sudanese President could weaken peace progress in Darfur.[66] During that period, African states did not implement Al-Bashir's arrest warrant and resorted to non-cooperation as a resistance tactic. Hence Al-Bashir travelled around to some African member states of the ICC without being arrested. In addition, African states repeatedly advocated the opinion that international courts should not have any jurisdiction over incumbent African leaders and demanded some reforms in the 2009 Assembly of State Parties such as the Prosecutor should take into account the interests of peace before starting an investigation and UN General Assembly should be authorised to postpone ICC indictments in case the UN Security Council is unable to make a decision.[67] After the reform demands of the AU were largely ignored and rejected, the resistance against the ICC has become more strenuous and in January 2016, the AU Assembly passed the 'ICC Withdrawal Strategy'[68] to determine the roadmap for the mass withdrawal of African states from the Rome Statute.[69]

In this period, three members of the AU, namely South Africa, Burundi, and the Gambia, notified or announced their withdrawal from the ICC.[70] Officially, on 26 October 2016, Burundi submitted its withdrawal notification from the Rome Statute to the UN Secretary-General. This decision came after ICC Prosecutor Fatou Bensouda launched a preliminary investigation in April 2016 into possible crimes against humanity allegedly committed in Burundi since April 2015.[71] Although the Burundi government emphasised that the Court is a tool used by powerful states to punish leaders of weaker countries who do not conform to the West, avoiding potential investigations against senior government officials for escalating violence and serious international crimes after the 2015 election seems to be the main reason.[72] As the withdrawal from the Court would take place one

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65 Kurt Mills and Alan Bloomfield, 'African Resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm' (2018) 44(1) Review of International Studies 101, 109.

66 African Union Peace and Security Council, 'Communiqué of the 142nd Meeting of the Peace and Security Council' (21 July 2008) AU Doc. PSC/MIN/Comm(CXLII)Rev.1 paras 3, 9; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 189.

67 Mills and Bloomfield (n 65) 112-113.

68 African Union, 'Withdrawal Strategy Document' (12 January 2017) <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 29 November 2021.

69 Kurt Mills, '"Bashir Is Dividing Us": Africa and the International Criminal Court' (2012) 34(2) Human Rights Quarterly 404, 428.

70 Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' (2018) 29 Criminal Law Forum 63, 64.

71 'ICC Judges Authorise Opening of an Investigation Regarding Burundi Situation' (*International Criminal Court,* 9 November 2017) <https://www.icc-cpi.int/pages/item.aspx?name=pr1342> accessed 30 December 2021.

72 'Burundi: ICC Withdrawal Major Loss to Victims' (*Human Rights Watch*, 27 October 2016) <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims> accessed 30 November 2021.

year after the notification, Burundi's withdrawal did not prevent the ICC Prosecutor from continuing the investigation. Concurrently, South Africa announced on 21 October 2016 that it will withdraw from the ICC, which came with the ICC's statement that it would rule on whether it was unlawful not to arrest al-Bashir during his visit to South Africa.[73] The High Court of South Africa decided that the government could not withdraw from the Rome Statute without the approval of parliament.[74] For this reason, South Africa had to revoke its withdrawal from the Court.[75] Similarly, Gambia also announced its intention to exit the ICC system in October 2016, claiming that the ICC targets only Africans, but after the government that took the decision to withdraw lost the elections, the newly elected president waived this decision.[76] For this reason, although South Africa and the Gambia entered the backlash campaign against the ICC, they could not withdraw from the Rome Statute. These examples have reduced the likelihood of dejudicialisation occurring in Africa, except in Burundi.

While the resistance of African states proceeded, some non-African states such as Malaysia and the Philippines exited the ICC.[77] Malaysia withdrew from ICC jurisdiction due to internal opposition to the Rome Statute's ratification, as well as political pressure from the risk of undermining the sovereignty and authority of the country by allowing the ICC to investigate members of the Royal Family.[78] The reasons for the withdrawal of the Philippines include the intention of the ICC Prosecutor to initiate an investigation into the drug war in the country and the perception that the ICC is acting biased as a political tool.[79] The withdrawal of Burundi, Malaysia and the Philippines from the Rome Statute forms a crucial indicator that dejudicialisation is gaining strength and increasing its impact on international criminal law.

In addition to withdrawals, another recent striking resistance against the ICC was that the US imposed sanctions on some members of the Court which are the ICC Prosecutor, Fatou Bensouda, and another senior prosecution official, Phakiso

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73 'Withdrawal Depository Notifications (South Africa)' (25 October 2016) C.N.786.2016.TREATIES-XVIII.10 <https://treaties.un.org/doc/publication/cn/2016/cn.786.2016-eng.pdf> accessed 29 November 2021.

74 *Democratic Alliance v Minister of International Relations and Cooperation and Others* (2017) Case No 83145/2016 (High Court of South Africa) para 6.

75 'South Africa: Withdrawal of Notification of Withdrawal' (7 March 2017) C.N.121.2017.TREATIES-XVIII.10 <https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf> accessed 29 November 2021.

76 Merrit Kennedy, 'Under New Leader, Gambia Cancels Withdrawal From International Criminal Court' (*NPR*, 14 February 2017) <https://www.npr.org/sections/thetwo_way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court> accessed 30 November 2021.

77 Konstantinos D Magliveras, 'The Withdrawal of African States from the ICC: Good, Bad or Irrelevant?' (2019) 66(1) Netherlands International Law Review 419, 436.

78 Andreas Zimmermann and Nora Jauer, 'To Be a Party or Not to Be a Party: Malaysia's Envisaged "Withdrawal" from Its (Pending) Accession to the Rome Statute' (*EJIL:Talk!*, 14 May 2019) <https://www.ejiltalk.org/to-be-a-party-or-not-to-be-a-party-malaysias-envisaged-withdrawal-from-its-pending-accession-to-the-rome-statute/> accessed 11 April 2021.

79 'ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law' (*International Criminal Court,* 20 March 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> accessed 28 March 2021; Jason Gutierrez, 'Philippines Officially Leaves the International Criminal Court' (*The New York Times*, 17 March 2019) <https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html> accessed 11 April 2021.

Mochochoko, due to involvement *"in the ICC's efforts to investigate US personnel."*[80] These sanctions included visa restrictions and blocking their assets, referring to a form of resistance by putting serving members of the court under pressure. However, these sanctions, brought by the Trump government in September 2020, were lifted approximately seven months later by the decision of the Biden administration.[81] Accordingly, this constitutes an example of a failed backlash.

As a result, the withdrawal of three states from the Rome Statute and ICC jurisdiction has somewhat narrowed the judicial activity of the Court. Nevertheless, the expected massive withdrawal in which the AU determined the roadmap, could not take place and backlash instances emerged as withdrawals did not seriously damage the legitimacy and authority of the court. In the meantime, ICC has started to expand its field of work to different states outside Africa in response to the criticism of overly focusing on African states. Investigations have been initiated against violations in other countries such as Georgia,[82] Venezuela,[83] and Ukraine.[84] In addition, new states such as the State of Palestine, El Salvador and Kiribati became parties to the Rome Statute.[85] Bearing in mind that there are serious backlash instances against the ICC and that its judicial activity narrowed down, recent developments are also signs that judicialisation can continue, given the ICC's current trend of expansion.

C. Future trajectories

Taking these examples listed in the previous section, which only constitute a limited group among the courts that encountered backlash such as the Inter-American Court of Human Rights, European Court of Human Rights, East African Court of Justice, and International Court of Justice, it is clear that dejudicialisation is now a factual phenomenon. It is not just a theoretical possibility anymore while it has been completed in some extraordinarily targeted ICs, such as in the SADC Tribunal. However, the relationship between judicialisation and dejudicialisation does not fit into a pattern and both concepts have an ambiguous and unexpected movement. While there are examples where extraordinary resistance has affected ICs but has not removed their judicial power, there are several

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[80] 'US Sanctions on the International Criminal Court' (*Human Rights Watch*, 14 December 2020) <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court> accessed 31 December 2021.

[81] 'Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court' (*United States Department of State,* 2 April 2021) <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/> accessed 11 April 2021.

[82] 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following Judicial Authorisation to Commence an Investigation into the Situation in Georgia' (*International Criminal Court*, *International Criminal Court,*27 January 2016) <http://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-following-judicial> accessed 21 July 2022.

[83] 'ICC Prosecutor, Mr Karim A.A. Khan QC, Opens an Investigation into the Situation in Venezuela and Concludes Memorandum of Understanding with the Government' (*International Criminal Court,* 5 November 2021) <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-opens-investigation-situation-venezuela-and-concludes> accessed 21 July 2022.

[84] 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I Have Decided to Proceed with Opening an Investigation."' (*International Criminal Court,* 28 February 2022) <http://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> accessed 21 July 2022.

[85] 'Rome Statute of the International Criminal Court' (*United Nations Treaty Collection*, 14 February 2023) < https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII10&chapter=18&clang=_en> accessed 14 February 2023.

grounds and indicators to be optimistic that judicialisation will continue, or at least, that there will not be a drastic reduction. The trend of judicialisation could continue in the form of the creation of new international judicial bodies and changes in the policies of powerful states.[86] Additionally, even though there is a certain level of dejudicialisation in some highly judicialised areas of international law, these systems generally continue to exist in less judicialised forms. In this context, four main core propositions have been explained that judicialisation still has the potential to expand and dejudicialisation will not become the more dominant trend.

The first claim is about the role and position of ICs in international relations. International courts became acknowledged as an integral aspect of international order after extensive judicialisation and they cannot be displaced uncomplicatedly.[87] Extraordinary resistances against international courts are fairly unusual occurrences, notwithstanding that they have recently intensified. ICs have faced a lot of criticism, but their authority has only been significantly challenged and changed a few times.[88] In current international law, judicialisation has not been the subject of a powerful fundamental critique and current global politics still remains reformist rather than rejectionist.[89] Furthermore, ICs play an active role in the face of backlash rather than simply being passive observers and could respond to state resistance to protect their authority and jurisdiction. They are able to use a variety of methods, referred to as resilience techniques or judicial and extrajudicial methods, to either avoid or minimize the impacts of resistance. For example, the practice of legal diplomacy can be used by ICs to ensure a low risk of non-compliance. Judges could also rely on external expertise to support their claims and prevent resistance by diverting criticism to different actors.[90] Additionally, international courts can seek to develop support by interacting directly with the audience, such as by seeking the support of constituencies and engaging international actors and lawyers in debates over the meaning of their decisions, press statements, conferences, thematic debates, seminars, and other forms of information sharing. Hence, complete dejudicialisation can occur far less frequently, and there is no significant decline in the number of cases submitted to ICs. Whether this will change as global power balances shift is a high-stakes question. Nevertheless, the existence of ICs is not in jeopardy, nor are they on the verge of extinction. In the current circumstance of ICs, there is a trend toward repulsion and stagnation, and the expansion in the number of ICs has at least paused.[91] Therefore, because of their legal

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86 Abebe and Ginsburg (n 3) 528-529.

87 Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014) 44-45. Shany claims that it is possible that the reason for creating international courts and attributing them with these capabilities is symbolic and international courts, like their national counterparts, are anticipated to confer legitimacy on the activity of the social institutions or political systems that established them. This can create an explanation for why states need international courts and why international judicial systems will continue to exist.; Gleider I Hernández, 'The Judicialization of International Law: Reflections on the Empirical Turn' (2014) 25(3) European Journal of International Law 919, 920; Philippe Sands, 'Judicialization and Its Challenges' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press, 2018) 245, 249.

88 Madsen, Cebulak and Wiebusch (n 20) 217.

89 Benedict Kingsbury, 'International Courts: Uneven Judicialization in Global Order' in James Crawford and Martti Koskenniemi (eds), *Cambridge Companion to International Law* (Cambridge University Press, 2012) 203, 224.

90 Salvatore Caserta and Pola Cebulak 'Resilience Techniques of International Courts in Times of Resistance to International Law' (2021) 70(3) The International and Comparative Law Quarterly 745-746.

91 Madsen, Cebulak and Wiebusch (n 20) 212,217.

framework and a large number of supporters, ICs can change their directions but they do not fade away easily, even though they are vulnerable and delicate institutions.[92]

Second, rejudicialisation may occur as a result of dejudicialisation movements. In some cases, backlash to ICs may also benefit the international justice regime and can be classified as progressive. Given that ICs frequently operate outside political oversight, backlash from governments or non-governmental actors can be useful because they provide them with legal or political knowledge of which they might otherwise be unaware.[93] Moreover, in regimes where the functioning of the system has come to a standstill due to the dejudicialisation, state parties that wish the system to continue in accordance with the fundamental principles of international law may initiate rejudicialisation of the relevant area or region of international law by proposing new dispute settlement mechanisms. As detailed above, in the absence of the paralysed Appellate Body, 16 WTO members ensured the establishment of the interim MPIA is an example that supports this view. Furthermore, some developing countries have recently backed out of agreements that allow foreign firms to seek international arbitration to challenge national policies that violate international investment law. This trend contributed to the new judicialisation proposals. The Chinese Belt and Road Initiative, for example, includes internationalizing the Supreme People's Court and establishing the China International Commercial Court (CICC) as a new judicial system for international commercial conflicts. In this direction, on 29 June 2018, two CICCs were formed in two Chinese cities.[94] Furthermore, the EU has been working since 2015 to build the Multilateral Investment Court (MIC), which will substitute the current system of investment arbitration.[95] In a similar vein, withdrawal threats of the AU from the Rome Statute prompted the Malabo Protocol which calls for the creation of a criminal law chamber for the proposed African Court of Justice and Human Rights, which might inspire state courts to hold their own war crimes prosecutions.[96] As a result, even in cases of backlash targeting the institution of the court, it is not possible to speak of a complete return of judicial power to states in the subject matter of international law within the jurisdiction of the targeted court. Although the new formations, which are narrower in jurisdiction than the previous court, cannot be seen as a positive development in terms of international justice, the fact that there has not been a complete transfer of judicial power is important for the conclusions of this article.

The third reason is concerning patterns of backlash. Extraordinary resistance rarely occurs even though there is a plethora of criticism against ICs, a minor part of these seriously challenged and caused changes in the authority of ICs. Additionally, backlash that could give effect to dejudicialisation needs collective acts against the institutional

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92 Sands (n 87) 249.

93 Madsen, Cebulak and Wiebusch (n 20) 217.

94 Sheng Zhang, 'China's International Commercial Court: Background, Obstacles and the Road Ahead' (2020) 11(1) Journal of International Dispute Settlement 150, 151-155; Guodong Du and Meng Yu, 'What's China's Supreme Court's Next Big Move for the Belt and Road Initiative?' (*China Justice Observer*, 23 May 2020) <https://www.chinajusticeobserver.com/a/whats-chinas-supreme-courts-next-big-move-for-the-belt-and-road-initiative%C2%A0> accessed 26 March 2021.

95 Marc Bungenberg, *Draft Statute of the Multilateral Investment Court* (Nomos Verlagsgesellschaft mbH & Co KG 2021); Council of the European Union 'Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiation' (*Council of the European Union*, 20 March 2018) <https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/> accessed 31 March 2021.

96 Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of "Regional Complementarity"' (2019) 17(5) Journal of International Criminal Justice 1005.

structure or authority of international courts, but current backlash examples are mostly carried out by individual states and only a limited number of them gained momentum in their regions in which the issue of backlash interested other regional states.[97] Although international courts mostly have so far overcome these extraordinary political criticisms to fulfil the goals of justice and accountability, there is still a strong likelihood of an increased backlash against international courts and tribunals. Because the criticism against international law –particularly against international human rights and criminal courts– is part of a broader rejection of the rule of law, global governance, multilateralism and democratic liberalism. The end of the Cold War ushered in a sense of optimism about the future of democracy and human rights, but the global war on terror and the subsequent rise of populism have jeopardised these achievements.[98]

Recent developments at the international level show that rising populist leaders around the world tend to abandon global governance and liberal democratic order. A wave of populist governments has increased attacks on democratic liberal institutions and fundamental principles of international law.[99] The V-Dem 2022 Democracy Report shows that the level of democracy enjoyed by the average global citizen had fallen behind 1989 and the post-Cold War gains had vanished. For years, scholars had predicted that the global wave of autocratisation[100] would lead to more wars, both interstate and civil. In particular, Russia's invasion of Ukraine indicates the correctness of this prediction. Therefore, the 2022 Democracy Report points to this change in the nature of autocratisation. Various pieces of evidence point to populist leaders becoming bolder and taking tougher action, leading to more autocratisation.[101] For this reason, the expectation that backlash examples will increase in number also expands the possibility of seeing more dejudicialisation examples in the future. Hence, these events and predictions put forward a pessimistic counter-argument to the optimistic justification of this article based on the small number of examples of backlash.

Finally, some aspects of the judicialisation of international law and relations provide a basis for optimism about the future of this process. The reason is that it is characteristically an uneven process and is much more widespread in some regions, even to the extent that there are courts operating on the same subject in these regions, while in others, a regional court has yet to be established. Similarly, judicialisation is much greater in particular subjects of international law while there are no special courts for other fields. Furthermore, some international actors resort to international judicial mechanisms more frequently than others, in other words, while some states bring more cases before certain international courts, other international actors prefer not to bring cases.[102] These

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97 Madsen, Cebulak and Wiebusch (n 20) 216.

98 Hillebrecht (n 1) 6-7.

99 ibid 6.

100 Anna Lührmann and Staffan I Lindberg, 'A Third Wave of Autocratization Is Here: What Is New about It?' (2019) 26(7) Democratization 1095, 1099. *'Autocratization.. signals that.. the opposite of democratization, thus describing "any move away from [full] democracy". As an overarching concept autocratization covers both sudden breakdowns of democracy á la Linz and gradual processes within and outside of democratic regimes where democratic traits decline – resulting in less democratic, or more autocratic, situations'.*

101 Vanessa A Boese and others, 'Autocratization Changing Nature? Democracy Report 2022' (*Varieties of Democracy Institute,* 2022) 6-12 <https://v-dem.net/media/publications/dr_2022.pdf> accessed 22 July 2022.

102 Cesare PR Romano, 'The Shadow Zones of International Judicialization' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 90.

characteristics support the idea that international law has the potential to open up new avenues for judicialisation.

The most popular anticipation is that judicialisation will expand across the Asia-Pacific region. This region, which accommodates two-thirds of the world's population, is not judicialised. The Economic Court of the Commonwealth of Independent States and the Court of the Eurasian Economic Community are the only operational sub-regional courts in this region with limited jurisdiction for former Soviet republics. As a result, the lack of judicial entities in this vast territory gives researchers optimism for the future of international courts. However, there are several crucial factors that limit international courts in the region, including China's reluctance against international adjudication and aspects of power distribution and disparities, and intense rivalries among the region's powerful states. While judicialisation has occurred in other parts of the world as a result of the leadership of one or more integrated powerful states, none of the major Asian powers has taken a similar lead because of political, cultural, and historical disputes. The influence of judicialisation was restrained by the absence of states willing to submit to strong regional or global judicial scrutiny. On the other hand, there are organisations such as the Association of Southeast Asian Nations (ASEAN), although they have limited competences and membership, which are states that aim to increase cooperation and relations in the region. This leads to some positive expectations for the future like the establishment of regional tribunals with the lead of regional agencies other than states, such as ASEAN countries.[103]

Some fields of international law have been considerably judicialised, while other areas have not seen a significant and effective expansion in this respect. According to Krisch, judicialisation is limited, particularly in three subject areas: economic regulation, human rights, and international crimes, which he describes as *"islands of judicialisation in a broader sea*."[104] Despite the fact that these issues have been substantially judicialised, there has been no such impact on global and regional financial governance, environmental challenges, or most military and intelligence actions. In the future, judicialisation may have a substantially greater impact on these issues of international law than it does now.[105]

The final aspect of judicialisation, which concerns the effectiveness of the ICs, is not directly related to the creation of new judicial space which is the usual way of the expansion of judicial power. With a few exceptions, most judicial institutions have spare capacity that is not being used, and some potential users have not chosen to decide to be part of the system of international courts.[106] As a result, judicialisation can theoretically survive by recruiting new users rather than opening new courts. For example, China may accept the International Tribunal of the Law of the Sea's jurisdiction over its maritime conflicts with Southeast Asian countries.[107]

These arguments, taken together, led to the conclusion that the dejudicialisation of international relations could not entirely extinguish judicialisation in current circumstances, but it can reduce its speed and influence. It is obvious that the arguments for the existence of international courts are compelling, and that the displacement of

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[103] ibid 101-102.

[104] Nico Krisch, 'The Path of Judicialization: A Comment on Karen Alter's The New Terrain of International Law' (*EJIL:Talk!*, 23 April 2014) <https://www.ejiltalk.org/the-path-of-judicialization-a-comment-on-karen-alters-the-new-terrain-of-international-law/> accessed 29 March 2021.

[105] Romano, 'The Shadow Zones of International Judicialization' (n 102) 105-106.

[106] ibid 108.

[107] Abebe and Ginsburg (n 3) 529.

international courts which became integral actors of international law, will not be achievable with the present instances of extraordinary resistance. The ebb and flow metaphor of judicialisation could mirror the current state of international courts. Over international judicial institutions, the last several years may have been a flow term for dejudicialisation and an ebb term for judicialisation. Naturally, it would not be wrong to expect a reverse direction change in the future.

II. Conclusion

Over the last three decades, international law has become progressively judicialised in a variety of fields. The number and significance of international courts and tribunals have expanded. The judicialisation of international law is considered significant for the development of more effective and legitimate global governance that supports human rights, international justice and peace.[108] However, criticism of international courts has intensified in recent years for several reasons, including, in general, the fact that payoffs from international courts are lower than initial expectations of states from courts. In addition, only a minor fraction of the backlash cases destroyed international courts and have led to dejudicialisation, the harshest form of criticism of the courts, which occurs when international actors target judicial power to render ICs non-functional.[109]

Even while there has been an increase in examples of backlash recently, as this article has indicated in earlier parts, these examples are insufficient to assert that judicialisation has ended or a complete reversal of the trend is proceeding. For example, there are reform efforts in the WTO Appellate Body's impasse, and it is expected that the WTO system's compulsory jurisdiction will not be abolished during this reform process. Moreover, while the ICC's judicial activities have been narrowed by withdrawals, it is also increasing the court's authority with the new state parties. Current examples are insufficient to speak of total dejudicialisation. As previously stated, most criticism and opposition to international judicial institutions are reformist in origin and this situation can stay within the scope of judicialisation unless the jurisdiction of the IC is limited.

International courts and tribunals, as some scholars have claimed, have become entrenched in international relations. It is difficult to dislocate and eliminate them. The rise of populist-nationalist governments in a few states produces some congestion in the system, but not to the extent of causing a widespread reaction. There are various fields and regions where judicialisation is still in its early stages. In the future, improvements will be witnessed in these regions because there are findings regarding that new international courts and tribunals will arise at the regional level rather than at the global level.[110] In Asia, regional courts have yet to be established, like in the African system, and respective governments may agree to construct regional courts in the future.[111] Judicialisation that is not a straight, linear, consistent, nor planned project, appears to be continuing unevenly, but at a slower pace compared to as it was in the 1990s. As a result, the recent rising populist attacks, and criticisms against fundamental principles of international law indicate that dejudicialisation might become widespread, but there are still solid reasons to expect that international courts mostly protect their authorities.

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[108] Follesdal and Ulfstein (n 32) 1.

[109] Abebe and Ginsburg (n 3) 527-528.

[110] Romano, 'The Shadow Zones of International Judicialization' (n 102) 108.

[111] Abebe and Ginsburg (n 3) 529.

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