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ARTICLE

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Activists in international courts: Backlash, funding, and strategy in international legal mobilization

Freek van der Vet[1] | **Lisa McIntosh Sundstrom**[2]

[1]University of Helsinki, Helsinki, Finland

[2]University of British Columbia, Vancouver, British Columbia, Canada

Correspondence
Freek van der Vet, University of Helsinki, Helsinki, Finland.
Email: freek.vandervet@helsinki.fi

Lisa McIntosh Sundstrom, University of British Columbia, Vancouver, British Columbia, Canada.
Email: lisa.sundstrom@ubc.ca,

Regional human rights courts like the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court of Human and People's Rights (ACtHPR) have become popular sites of mobilization for victims and activists who seek justice when justice fails at home. Besides being platforms for individual remedy, human rights courts increasingly shape social norms and state policy within countries, making them attractive avenues for rights advocates to develop new norms or to push domestic authorities to reform legislation. The judges of these courts can decide, for example, whether same-sex couples have a right to be married, if prisoners have the right to vote or receive HIV/AIDS treatment, or when a state can deport illegal immigrants to a country where they will likely be tortured. As these courts pass their judgments, they often find themselves in conflict with states that are violating human rights of marginalized groups on a large scale and are unwilling to implement international rulings.

Although international human rights courts have become increasingly popular venues among victims and activists who seek justice when justice fails at home, we are only beginning to understand how activists play roles in shaping the development of regional human rights courts' case law—the body of judgments that shapes how judges will make their decisions in the future. We now have plenty of international relations and international legal research on the interactions between states and international courts: how judges in these courts wrestle between deferring to the interests of member state governments whose actions are on trial and sticking closely to the conventions' fundamental yet evolving principles (Alter et al., 2019; Helfer & Voeten, 2014). As some states begin to resist international courts' authority, scholars have begun to examine the dynamics of this backlash (Hillebrecht, 2022; Madsen et al., 2018; Sandholtz et al., 2018). Recent studies have also demonstrated that human rights advocates—whether NGOs or individual lawyers—have a significant impact on shaping the jurisprudence of international courts and the impact judgments have in concrete locations (Kahraman, 2018; Sundstrom, 2014; van der Vet, 2012; Kurban, 2020; Conant, 2018; Harms, 2021; Cichowski, 2016; Hodson, 2011; Haddad, 2018). Meanwhile, these advocates themselves have been subject to repression and stigmatization by governments as part of the backlash

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phenomenon. Without an adequate understanding of the factors shaping activists' engagement with international courts, we risk undervaluing their strategic impact on the expansion of case law, the human rights protection of marginalized groups who cannot find remedies at home, and the domestic implementation of these judgments in an age of state backlash.

In this special symposium, the authors examine how activists navigate two opposing trends: first, facing a growing backlash against international courts alongside dwindling resources and targeted repression of human rights defenders, and second, having access to a growing number of international courts and quasi-judicial institutions and with that, a growing pool of knowledge on how to strategically select suitable institutions and strategic cases. By examining how rights advocates navigate this space, we wish to go beyond successful cases, or what Helen Duffy (2018) has called the "champagne moment" in strategic litigation, which focuses on judgments alone and presumes a linear pathway from litigant to judgment to successful policy reform. Studies of international litigation have shown that rights advocates are active far before and after these judgments: they select strategic cases to forward to international courts, persuade judges of the soundness of the claims (sometimes after numerous unsuccessful attempts), engage in follow-up advocacy for the domestic implementation of final judgments, and often proliferate their best practices by training other activists (Duffy, 2018; Haddad, 2018; Kahraman, 2018; Kurban, 2020; Sundstrom, 2012; van der Vet, 2012). Our collection of articles in this symposium explores the following themes:

1. *Backlash against NGOs*: Scholars have demonstrated a widespread trend of increasing government restrictions on NGOs in recent years. In many hybrid and authoritarian regimes, these measures have severely restricted human rights NGOs' capacity to operate. How do the mounting repressive measures by governments against civil society and NGOs affect how these rights advocates litigate at international human rights courts? Does this "shrinking space" for civil society change the character and quantity of applications going to an international court?
2. *Backlash against funders*: NGOs and donors who fund them are in dynamic relationships with one another, exploring which kinds of human rights strategies, including litigation, are most fruitful. Funders have varied over time in their degree of support for strategic litigation. Certain states have begun to restrict funders' ability to support human rights NGOs and NGOs' ability to accept funds. How have funding and state restrictions affected NGO engagement in litigation and donors' strategies?
3. *Strategic venue choices*: NGOs and lawyers strategically use international courts to shape case-law, human rights law, or domestic legislation. At the same time, activists litigate at international courts to find remedies for individual victims. Some courts have greater de jure power to compel member states to comply, while others present more opportunity for creative precedents in judgments. How do public interest lawyers balance interests in achieving material remedies for the specific rights violation victims they represent, versus winning strategic innovations in courts' jurisprudence?

THEMES: THE IMPACTS OF RESOURCES, BACKLASH, AND MULTIPLE VENUES ON ACTIVISTS IN INTERNATIONAL COURTS

In this section, we summarize the three papers contained in this symposium and their original contributions to these themes.

HADDAD AND SUNDSTROM

Over the last decade, dozens of countries have erected legal barriers or started vilifying campaigns to stymie the work of NGOs (Buyse, 2018; Chaudhry, 2022). One tactic in this toolkit is the enactment of burdensome regulation on NGOs that receive funds from foreign donors as they allegedly promote

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foreign agendas (Christensen & Weinstein, 2013; Dupuy et al., 2021). States that frequently abuse human rights are especially prone to target NGOs that engage in strategic litigation (Hillebrecht, 2019).

Most NGOs depend on foreign funding, and NGOs that litigate international cases fall disproportionately in this category, but do funders affect the selection of cases? In "Foreign Agents or Agents of Justice? Private Foundations, NGO Backlash, and International Human Rights Litigation," Heidi Haddad and Lisa Sundstrom examine the extent to which Western donors, particularly private foundations, have encouraged NGOs in Europe to litigate at the ECtHR as a human rights advocacy strategy. They examine overall patterns of donor funding and NGO litigation records, and look in more detail at the case of Russian NGOs' foreign funding and litigation records. The analysis is extremely timely, as the Russian government's criminalization of independent civil society actors, especially in the human rights field, and their accusation that foreign funding turns NGOs into "foreign agents" have been crucial elements of the Russian regime's autocratization. This claim has also provided fuel for Russia's disenchantment with the ECtHR in recent years, contributing to the assessment of many observers that Russia's full-scale attack on Ukraine was the last straw in an inevitable collision course leading to its exit from the Council of Europe.

Haddad and Sundstrom debunk the idea that foreign donors are pushing NGOs toward strategies of human rights litigation. Instead, they argue, there is more evidence that NGOs themselves promoted the mechanism of international litigation as a strategy that donors later adopted. This article is a poignant reminder of the advocacy tools that Russian human rights activists and citizens have lost as a result of their government's departure from the Council of Europe, including ECtHR jurisdiction. Yet it also provides insight into the likely roles of foreign donors in other country cases where NGOs are using international court litigation as a human rights advocacy strategy, which is often a target of the ire of national governments, as explored in the next article in the symposium.

DE SILVA AND PLAGIS

When states attack human rights NGOs within their borders and/or international human rights courts themselves, how does this affect the willingness of those NGOs to take cases to international courts, and the ways in which they do so? De Silva and Plagis ask this question in their article about state backlash against NGOs in the case of Tanzania and the African Court on Human and Peoples' Rights.

A fascinating empirical question they pose is: does state backlash against NGOs increase NGO litigation at international courts (to contest state repression at those courts and use international mechanisms when domestic ones are not available), roughly in line with Keck and Sikkink's famous "boomerang pattern" (Keck & Sikkink, 1998), or decrease it due to heightened fear and restricted NGO capabilities that state repression creates? Employing a process-tracing analysis of NGOs' involvement in three cases before the African Court at different stages of the Tanzanian government's backlash against the Court, De Silva and Plagis find that "two-level backlash" by states can result in both phenomena, either promoting or deterring NGO legal mobilization at international human rights courts, depending on certain conditions. The three selected cases concerning the death penalty, the rights of persons with albinism, and the rights of pregnant schoolgirls and mothers, which took place at different time periods, demonstrate a number of patterns of state backlash interacting with NGO strategies.

The authors find that domestic-level state backlash deterred domestic NGOs from partnering with international NGOs in litigation, but that such backlash, when it repressed domestic political and legal mobilization opportunities, actually encouraged both Tanzanian and international NGOs to turn to the African Court more frequently to seek remedies. International-level backlash in turn only deterred NGOs from international litigation when such backlash consisted of state efforts to restrict NGOs' ability to engage in litigation, and not when the international backlash was in the form of routine noncompliance with African Court rulings. Importantly, the authors find that NGO

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responses to state backlash were significantly shaped by their degree of legal consciousness and expertise with the rules, proceedings, and workings of the African Court. Those NGOs with less knowledge and experience were more likely to back away from engaging with the Court under the pressure of state backlash. De Silva and Plagis conclude that "NGOs' persistent human rights advocacy in the face of state backlash is a double-edged sword," in the sense that they may not be deterred by state backlash initially, but there is a danger that their continued determination to engage in international litigation could prompt governments to engage in even more severe forms of backlash, with critical impacts on international courts and already vulnerable human rights defenders.

KAHRAMAN

Rights advocates have a growing menu of institutions and courts available to them. How do activists choose at which institution to lodge their cases in a world where legal remedies have diversified, or as some have argued, fragmented (Koskenniemi & Leino, 2002)? In "What Makes an International Institution Work for Labor Activists? Shaping International Law through Strategic Litigation," Filiz Kahraman goes beyond the tendency of legal mobilization studies to only examine how activists interact with a single court or institution. Instead, Kahraman opens up how rights advocates imagine which institution is most receptive to their claims.

Drawing on a comparative interview study of British and Turkish trade union activists and their legal mobilization campaigns at international courts and quasi-judicial institutions like the International Labor Organization (ILO), Kahraman examines how activists first probe and then strategically identify which court or international institution is most susceptible to their primary goals of influencing structural reforms and setting new norms. Through this probing process—or dynamic signaling game between courts and litigants—activists push a court's jurisprudence and case law into new issue areas.

For instance, at the ECtHR, Turkish trade unionists challenged domestic courts' ruling that public sector workers did not have the right to establish unions, even though the ECtHR had no established case law on labor rights in 1990s. They won the case, with the ECtHR finding that Turkey violated the right of public sector workers to unionize. These cases not only had an impact within Turkey, but over the next decades, similar cases brought by British unionists would spin off the early precedent set by the Turkish legal mobilization efforts. Kahraman argues that they ultimately pushed the ECtHR to recognize the basic trade union rights as fundamental human rights. Kahraman sheds light on the often hidden strategies behind international litigation. Activists litigate not just for the immediate impact on the current case they work on, but how they envision that all the cases they work on may shape norms and domestic structural reforms further in the future. Whether an institution is perceptive of claims lies in the eye of the beholder. Kahraman finds that besides targeting institutions with high compliance rates, they also take cases to institutions with low rates of compliance, especially "if these institutions have extensive judicial authority to create new international norms." So, it is not the *de jure* protection set by an international courts, but rather how activists perceive the juridical responsiveness and judicial authority of courts—or, how judges adopt either an activist approach or restraint in response to incoming cases and how willing states are to implement cases of a court, respectively—that determines why activists select certain courts or quasi-judicial institutions (like the ILO).

Kahraman gives us new tools to interpret how activists perceive authority and receptiveness and respond to opportunities. Rather than static external legal remedies, courts and quasi-judicial institutions are opportunity structures that are malleable to the strategic vision of the activist or litigant.

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CONCLUSION

The articles in this symposium together reveal a number of key overlapping insights. At the broadest level, they demonstrate that activists' behaviors and strategies influence international courts' jurisprudence, politics within states, and the human rights outcomes of everyday citizens—and these influences have often been hidden in our existing canon of research on international courts. In addition, all of these articles show that, while activists may face challenges in their efforts, often including significant backlash from their home state governments, they also continue to retain significant agency through their creative efforts to develop legal strategies and circumvent state repression. Activists perennially innovate: sparking the ideas that inspire donors who fund them; calculating how to continue their litigation work when government actors threaten them; and taking risks in litigation to push courts to expand how they define human rights.

However, along with these uplifting conclusions, there are worrying patterns that demand future research. States are increasingly pushing back against the powers of international courts to bind them to costly measures, and as this symposium has shown, national governments often point to activists as contributors to this "problem" of invasive international human rights standards. A growing body of research has tracked how human rights defenders of all kinds globally are under threat from actors like governments and corporations who disagree with their contentious actions. We need more studies that gather comprehensive data and systematically track these threats, specifically with regard to activists who engage in international human rights litigation. We suspect that such activists are likely disproportionately targeted due to the international visibility of their complaints. We also desperately need research into possible innovative responses to these threats to activists—responses from activists, funders, governments of countries that support human rights, and international courts themselves.

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AUTHOR BIOGRAPHIES

Freek van der Vet is a University Researcher at the Erik Castrén Institute of International Law and Human Rights, Faculty of Law, University of Helsinki and the principal investigator of the Toxic Crimes Project.

Lisa McIntosh Sundstrom is Professor of Political Science at the University of British Columbia. She is the director of the ActinCourts network at UBC and conducts research on legal mobilization by Russian activists.

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