participate effectively in a multilateral negotiation, one needs not only to be able to read and figure out the extent to which one can accommodate the interest of other states but one needs also to be able to read the personalities of the other participants and understand what levers and methods will be effective in influencing them. In any event, it is clear that if one wants to gather sufficient votes for plenary adoption of legal texts, it is necessary to negotiate an outcome that a large majority of the delegations can support.

Negotiating Civil War provides useful background on the development of legal regimes regulating civil wars, both historically and in the three case studies. Lovat makes insightful observations about the roles of various players in the negotiations. His main objective, to develop hypotheses that explain the negotiation of civil war regimes, will be of more interest to international relations theorists than to international law practitioners, particularly lawyers who negotiate multilateral agreements.

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International Judicial Review: When Should International Courts Intervene? By Shai Dothan. Cambridge, UK: Cambridge University Press, 2020. Pp. vii, 161. Index. doi:10.1017/ajil.2021.5

Do international courts (ICs) shape a better world? And, assuming that they do, under which conditions are they the most effective in pushing states to adopt good policies? In addition, can the plethora of recently established ICs constitute a diffuse system of international judicial review that protects the rule of law, democracy, and human rights in the contemporary global arena? These and other important related questions are dealt with in the latest book from Shai Dothan, an associate professor at the Faculty of Law of the University of Copenhagen, entitled *International Judicial Review: When Should International Courts Intervene?* Issues of this sort are of crucial importance in today's world, especially in light of the growing backlash against ICs, which underscores the latest, and perhaps most existential, crisis of the international liberal order.[1] Recent years have seen global ICs like the International Criminal Court (ICC) and the Appellate Body of the World Trade Organization be severely criticized. A few Latin American and Caribbean states have withdrawn from the jurisdiction of the Inter-American Court of Human Rights (IACtHR) and attempts at restraining the authority of the European Court of Human Rights (ECtHR), the Central American Court of Justice (CACJ), the Court of Justice of the Economic Community of West African States, the East African Court of Justice (EACJ), and the South African Development Community Tribunal have taken place with varied success.[2]

While expressly not a policy-oriented book, Dothan offers a number of recipes for ICs to respond to such challenges. In particular, the book provides its readers with concrete tools to assess the quality of judicial decision making of ICs through an accurate portrayal of what good judicial practices look like. In so doing, *International Judicial Review* helps us understand why ICs behave the way they do, especially when their rulings intuitively clash with our sense of justice.

For instance, backed up by theoretical arguments and empirical evidence, Dothan explains why the ECtHR sometimes grants states a margin of appreciation, regardless of the existence of clear violations of the European Convention on Human Rights (Convention). Furthermore, *International Judicial Review* does not explore ICs from a mere legalistic perspective, although its analysis of the case law of ICs is extremely precise and compelling. As Dothan unfolds his valuable narrative, he always assesses the practices

[1] John G. Ikenberry, *The End of Liberal International Order?*, 94 INT'L AFF. 7 (2018).

[2] For an overview of these forms of resistance and backlash, see Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 197 (2018).

of ICs with regard to the impact that they have on their broader sociopolitical contexts.

Finally, Dothan's book challenges the conventional wisdom that ICs are welfare-improving solutions to problems of incomplete information and high transaction costs between states. For Dothan, contemporary ICs cannot be fully understood through the classic Westphalian and hierarchical paradigms, according to which states are the sole protagonists of the international legal arenas and international law imposes binding rules on them from above (p. 139). ICs instead are increasingly focal points of a complicated network with many centers of power and are tasked with maintaining global governance (p. 140). For all these reasons, Dothan's book is a valuable piece of scholarship, which originally contributes to the theoretical discussion on ICs, while providing theoretical and practical tools to those lawyers, activists, and judges involved in the world of international adjudication.

The book is divided in five substantive chapters, which tackle different issues related to international judicial review, and a final chapter containing the author's conclusions.

Chapter 2 targets the normative legitimacy of international judicial intervention in national policies. The chapter exports to the realm of ICs what Alexander Bickel has termed the judicial review's counter-majoritarian difficulty; that is, when the actions of an accountable parliament are frustrated by unaccountable judges.[3] In Dothan's view, the counter-majoritarian difficulty is even more palpable for ICs. This is because ICs do not overrule parliaments as national supreme courts often do; rather, they are empowered to gainsay decisions of sovereign states as a whole, even after their national courts have reviewed the issues and all the domestic processes are exhausted (p. 14). The counter-majoritarian difficulty also emerges with respect to the fact that ICs are constrained by the will of their member states, which Dothan seems to consider as the best possible representatives of all individuals affected by their actions (p. 19). This implies that, when interpreting treaties, international judges are bound to follow the intention of the states and not impose upon them obligations they did not willingly assume (p.17). Despite these constraints, Dothan argues that ICs can use expansive interpretation when there are good reasons to believe that a restrictive or textual interpretation of a given treaty would not represent the will of the states, or of the people residing in those states. According to Dothan this can happen: (1) when treaties themselves do not represent the will of states because of imbalance of power during the negotiations; and (2) when there is good reason to believe that states do not represent the interests of the individuals under their jurisdiction. The latter situation may occur in the case of foreigners who live as aliens in countries that are not their own, prisoners, as well as discrete and insular minorities.

Chapter 3 deals with outcomes of judicial intervention, arguing that ICs' institutional position allows them to learn from the collective wisdom of national decisions. Inspired by the work of Cass Sunstein and Eric Posner,[4] the chapter relies on the Condorcet jury theorem. This theorem argues that when a group of decisionmakers has to choose between two options—one right and one wrong—and each of them has an equal probability greater than 50 percent of making the right choice, the majority's decision is more likely to be correct that that of any decisionmaker (p. 38). For Dothan, this means that, under the assumption that states choose their laws rationally, ICs would reach good policies by following the laws adopted by the majority of states in the world or in a region (pp. 38–39). To corroborate his analysis, Dothan discusses the emerging consensus doctrine used by the ECtHR to interpret the Convention; a tool of interpretation which prioritizes a particular solution to a complex human rights issue if this solution is supported by the majority of the forty-seven contracting parties to the Convention. Dothan, however, acknowledges that the advantage of ICs does not only depend on their behavior, but it is linked

[3] Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1986).

[4] Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 Stanford L. Rev. 131 (2006).

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to the conduct of the states under their jurisdiction. Accordingly, ICs must strategically give states the right incentives by, for instance, a strategic use of the margin of appreciation doctrine (p. 135).

Chapter 4 assesses the impact of ICs' judgments on their sociopolitical context, arguing that these often improve public deliberation by shifting the public discourse from the language of interests to the language of rights. According to Dothan, through their reasoned judgments, courts can guide the public toward a method of argumentation that is not based on raw power, but on principles, values, and norms (p. 70). Importantly, the impact on public deliberation of ICs is strengthened by the fact that these are not standalone institutions, but are often part of a large network of actors, which can be activated and informed by the rulings, even when they cannot enforce the judgments directly (p. 74). This feature is of central importance to assess the effectiveness of international judicial review, especially when ICs are likely to face political backlash. According to Dothan, contestation among actors generates information, which then spreads to the public. In this regard, friction between institutions does not always lead to negative results, as it can prevent the capture of power by interest groups (p. 136).[5]

Chapter 5 uses empirical research to explore how ICs can improve the accuracy of information about state noncompliance with international law, thus becoming a focal point of shaming efforts of networks of actors populating the field surrounding them. The chapter also discusses the pros and cons of the intervention of NGOs in IC proceedings. For Dothan, NGOs' participation is valuable when it: (1) provides ICs with cases that would have not reached an IC otherwise; (2) offers an effective channel for publicity; and (3) assists ICs in the enforcement of their rulings (p. 89–91). Yet, not all that glitters is gold. Dothan also provides a number of reasons for why NGOs' intervention may harm an IC. NGOs may in fact expose the court to cases it would rather not decide (p. 92). NGOs may also jeopardize the court's impartiality, as these organizations often have explicit political agendas to carry forth (p. 93). Finally, some NGOs (the so-called GONGOs, or government-organized nongovernmental organizations) can be manipulated by the rich and powerful, who can use their resources to create or buy out NGOs, with the result that an IC would compromise its institutional integrity. With these considerations, the chapter reviews procedures for the intervention of NGOs in IC proceedings, arguing that these should match the type of issues dealt with by different ICs (p. 95).

Chapter 6 explores the implications of the principle of complementarity applied to the ICC in an effort to explain under which conditions the principle can deter international crimes within the jurisdiction of the Court. The analysis is inspired by game theory and uses backward induction to calculate whether a state is more likely to prosecute its soldiers if there is a probability that the ICC would prosecute them and whether this possibility deters soldiers from committing crimes altogether. More specifically, Dothan asks the compelling question: "which rule leads to better deterrence, complementarity or primacy?" (p. 115). The chapter shows that a fear of harmful intervention by an IC may actually push states to prosecute their own soldiers.

Chapter 7 concludes the book by arguing that contemporary ICs can be best understood through a network paradigm rather than through classic public international law Westphalian and hierarchical paradigms. This is because ICs have increasingly become focal points of an informal network of global governance, which, through its check and balances, prevents excessive concentration of power. For Dothan, this has however one big problem; namely, the impossibility of central planning, which eventually translates to no one being truly accountable for policy decisions that shape the global arena (p. 141). In

[5] Similar conclusions have been reached by scholars of resistance to ICs and by a number of sociologists focusing on conflict. See, e.g., Madsen, Cebulak & Wiebusch, *supra* note 2; Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).; YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

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this regard, Dothan maintains that ICs can still play a central role in that "[b]y forcing states to openly defend their policies in legal terms, international courts expose policy-making to public scrutiny. This is the best tool to ensure transparency and accountability and to prevent abuses of power" (p. 142).

Dothan's *International Judicial Review* constitutes an important and novel contribution. Perhaps the most relevant aspect for the readers of this *Journal* is that the book provides a number of conceptual frameworks to grasp how ICs can effectively protect the underlying values of the international liberal order, namely, the rule of law, democracy, and human rights. Some critical remarks are, however, necessary. To better conceptualize them, I will organize them around three keywords that, in my view, constitute the most salient issues to discuss in relation to Dothan's approach to ICs. These are normativity, state consent, and judicial strategies.

Normativity. The book has a strong normative component. For Dothan, ICs are set up to make the world a better place and to lead states to form good policies. In today's academia, where scholars often tends to portray an—at times not entirely genuine—facade of scientific objectivity, Dothan's idealism is refreshing. However, Dothan's conceptualization of how ICs "do good" is too formalistic, almost procedural. This is indeed reflected in the subtitle of the book, which refers to "when" ICs should intervene and refrains from exploring "how" they should intervene. This formal normativity is prominent in Chapter 2, where in summarizing the main tenets of his argument, Dothan argues that "international courts must strive to issue decisions that are normatively legitimate. Before the judges ask themselves if they are positioned to give a good decision, they should ask themselves if they should be the ones to decide" (p. 35).

To begin with, Dothan is not entirely clear about when the decisions of an IC are normatively legitimate, and, throughout the chapter, he seems to imply that normative legitimacy parallels the interests of an IC's member state. This, however, as I will explain in more depth below, is a classic public international law reading that does not entirely reflect the empirical reality of many ICs. Moreover, recent studies demonstrate that the authority and legitimacy of ICs is rather marginally determined by normative elements, but rather depends on social acceptance;[6] that is, the capacity to embed their practices in their own sociopolitical contexts.[7] In other words, it is sociological legitimacy that matters the most, not the normative legitimacy. This is because international society is not merely a diplomatic and legal interface of states and international organizations, but is an arena of contestation between a variety of national and transnational elites, each with their own agendas, political preferences, ideologies, and professional interests.[8] In this light, ICs can effectively "do good" not only by carefully respecting the boundaries of their formally delegated competences, but also by seeking to have their practices accepted by the actors in their sociopolitical fields.

State Consent. While Dothan acknowledges that ICs are not merely interstate institutions, the book often refers to the idea of state consent as a central factor influencing the authority and legitimacy of ICs. For instance, in Chapter 2, Dothan argues that international judges' main constraint is the intention of states parties. This reading is not entirely in sync with the empirical reality of many ICs. Again, recent studies have shown that the interests of governments are only one of many factors that ICs must weight when providing a ruling.[9] Dothan's view fits

[6] Mikael Rask Madsen, *Explaining the Power of International Courts in Their Context: From Legitimacy to Legitimization*, 7 RSCAS POLICY PAPER (COURTS, SOCIAL CHANGE AND JUDICIAL INDEPENDENCE) 23 (2012); INTERNATIONAL COURT AUTHORITY (Karen J. Alter, Laurence Helfer & Mikael Madsen eds., 2018).

[7] SALVATORE CASERTA, INTERNATIONAL COURTS IN LATIN AMERICA AND THE CARIBBEAN: FOUNDATIONS AND AUTHORITY (2020).

[8] David M. Trubek, Yves Dezalay, Ruth Buchanan & John R. Davis, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE WESTERN RESERVE L. REV. 407 (1994).

[9] INTERNATIONAL COURT AUTHORITY, *supra* note 6; LIESBET HOOGE, GARY MARKS, TOBIAS LENZ, JEANINE BEZUIJEN, BESIR CEKA & SVET DERDERYAN, MEASURING INTERNATIONAL AUTHORITY – A

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well with the so-called "old-style" ICs (i.e., the International Court of Justice), which rule upon interstate cases and are indeed influenced by state consent. This state-centric reading, however, does not entirely apply to "new-style" ICs like the ECtHR, the Court of Justice of the European Union (CJEU), and the many other regional and subregional human rights and economic courts that have been recently established around the globe.[10] These newer ICs are not residual to national society, and their role is not limited to providing functional responses to the needs of states. Rather, new-style ICs are part of a broader structuring of global (or regional) societies and politics that are produced not only by governments and states but also, and perhaps, above all, by a host of other actors like national judges, other regional organs, NGOs, and even individuals.[11] This becomes obvious when looking at the practices of these courts, which have all pushed the boundaries of state consent through teleological interpretation, at times even expanding their competences or the ultimate goals of their founding treaties. Exemplary in this regard is the CJEU, which through the doctrines of direct effect and supremacy, transformed the European Union from an intergovernmental system to a supranational constitutional community based on the rule of law.[12] Beyond Europe, the EACJ has declared itself a human rights court, despite its entrenchment in an economic community;[13] the IACtHR has declared an international legal obligation that all states parties shall interpret domestic law in accordance to its jurisprudence;[14] the Caribbean Court of Justice has strikingly limited the effects of dualism in the Caribbean region, and even ventured into protecting indigenous and LGBTQI rights;[15] while the CACJ has often intervened in national politically sensitive issues, ranging from territorial disputes, environmental law, and constitutional crises.[16] In short, state consent, at least intended in the classic public international law view that Dothan seems to endorse at times, is hardly a constraint on these ICs.

The importance that Dothan attributes to state consent also emerges in Chapter 3, where he argues that ICs' good policies are most likely determined when these institutions learn from the collective wisdom of the majority of states. The idea behind this view is praiseworthy, as it aims at exposing the virtues of comparative law. However, in the present historical juncture, in which many states are departing from the liberal rule-of-law inspired model of governance, such an optimistic reliance on states' collective wisdom may lead to an authoritarian international law.[17] In other words, when a significant number of states erodes constitutional checks and balances and the rule of law at the national level, should ICs abide by these practices in the name of state consent, or should they instead resist in the name of those values—human rights, fairness, equality, due process, etc.—that justified

POSTFUNCTIONALIST THEORY OF GOVERNANCE, VOL. III (2017); Birgit Peters & Johan Karlsson Schaffer, *The Turn to Authority Beyond States*, 4 TRANSNAT'L LEGAL THEORY 315 (2013).

[10] KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2013).

[11] Mikael Rask Madsen, *Sociological Approaches to International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2013).

[12] Antoine Vauchez, *The Making of the European Union's Constitutional Foundations: The Brokering Role of Legal Enterpreneurs and Networks*, *in* TRANSNATIONAL NETWORKS IN REGIONAL INTEGRATION – GOVERNING EUROPE 1945–83 (Wolfram Kaiser, B. Leucht & M. Gehler eds., 2010).

[13] James T. Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249 (2013).

[14] PABLO GONZÁLEZ-DOMÍNGUEZ, THE DOCTRINE OF CONVENTIONALITY CONTROL – BETWEEN UNIFORMITY AND LEGAL PLURALISM IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (2018).

[15] Salvatore Caserta, *The Contribution of the Caribbean Court of Justice to the Development of Human and Fundamental Rights*, 18 HUM. RTS. L. REV. 170 (2018).

[16] Salvatore Caserta, *Regional International Courts in Search of Relevance: Adjudicating Politically Sensitive Disputes in Central America and the Caribbean*, 28 DUKE J. COMP. & INT'L L. 59 (2017).

[17] Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221 (2020).

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their establishment? The answer to this question is by no means straightforward. Surely, it cannot be answered solely through the lens of state consent and instead must be found in the underlining politics of international law. This, in turn, exhibits the flaw of a procedural understanding of what is "good" in the first place.

Finally, even if we accept the underlying rationality of Dothan's reasoning and concede that ICs are indeed in a favorable position to learn from the collective wisdom of states, this claim is applicable only to those ICs equipped with the necessary resources to perform the complex research needed to collect all the data required to reconstruct such a communal wisdom. As explained by one ECtHR judge interviewed by Dothan for his research, (pp. 41–42), this task is not a trivial one, as it requires research divisions, clerks, and perhaps computer programs able to collect and systematize large amount of data. And this without even mentioning that this process, ultimately, presupposes a widespread accessibility of national judgments, most likely in a digital form; a fact that is not a given in many countries and regions of the world. While exploring the potential of comparative law may be possible—and, with some caveats, advantageous—for well-organized ICs like the ECtHR and the CJEU, less well-resourced courts may encounter structural difficulties in collecting the data necessary to provide a comprehensive comparative analysis of national judicial decisions in the states subject to their jurisdictions. Many ICs, especially those with jurisdiction over developing countries, may have limited (or challenging) access to the internet, inadequate libraries, and, ultimately, lack the personnel necessary to assist the judges in this task. Therefore, the argument that ICs are in a unique institutional position to gain from the insights of comparative law is more of an abstract nature, and sounds a bit like wishful thinking rather than a concrete possibility for many ICs.

Judicial Strategies. Another theme that cuts across the whole book is that in order to play an important role in national and international societies, ICs must deploy a number of judicial strategies. This is a valuable point, especially because Dothan provides many examples of ICs successfully deploying strategies to trigger social and political acceptance. For instance, Dothan demonstrates how the ECtHR carefully applied the margin of appreciation doctrine to avoid political backlash in *Ireland v. The United Kingdom*.[18] In this case, while finding that some interrogation techniques used by the United Kingdom to fight terrorism in Ireland in the 1970s violated Article 3 of the Convention, the court acknowledged that the general measure of administrative detentions were in line with the margin of appreciation doctrine (p. 49). Dothan also shows that ICs can delay decisions and await for more favorable political conditions to decide upon sensitive cases. This strategy was deployed by the ECtHR in the *Banković* case,[19] where the court decided that it did not have jurisdiction to hear the case because the facts took place outside the territory of the members of the Convention (p. 50). Interestingly, ten years later, in the *Al-Skeini*[20] and *Al-Jedda*[21] judgments, the court found the United Kingdom responsible for violations in occupied Iraq, thus asserting extraterritorial jurisdiction (p. 51). Generally, Dothan argues that ICs should engage in a dialogue with other political bodies like executives, legislators, and national judiciaries (pp. 74–81) and carefully rely on nonstate actors (i.e., NGOs) to carry out blaming strategies on reluctant governments (pp. 88–92).

Yet, the successful deployment of judicial strategies presupposes that both ICs and the recipients of their judgments share common rationalities and values. This is, however, hard to expect in situations in which actors increasingly move away from rational politics and from the underlying values of international adjudication. In other words, what judicial tactics

[18] Ireland v. United Kingdom, App. No. 5310/71, 1978 Eur. Ct. H.R. 1 (Jan. 18, 1978).

[19] Banković and Others v. Belgium and Others, 2001-XII Eur. Ct. H.R. 333 (Dec. 12, 2001).

[20] Al-Skeini and Others v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 18 (July 7, 2011).

[21] Al-Jedda v. United Kingdom, App. No. 27021/08 (Eur. Ct. H.R. July 7. 2011), 50 ILM 950 (2011).

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should ICs deploy when seeking to limit authoritarian and populist governments that seek to shy away from liberal governance and values? Similar questions arise in situations in which ICs are called to address issues of megapolitics;[22] that is, polarizing issues, such as the rights of migrants, minorities, or religious groups, conflicts over territory, over the legal use of military or economic coercion, or disagreements about the terms of access to a national market. In these cases, Dothan's answer would perhaps be that ICs should strategically refuse to get involved in such issues not to compromise their authority; or, at best, they should provide rulings that are extremely deferential to the states involved in the dispute. Yet, the real question is, at what cost? It is true that, as argued by Karen Alter some time ago, judges have longer time horizons then politicians, who are often concerned with short(er) term policies that may allow them to win the next election.[23] Following this view, ICs should rationally defer their intervention, waiting for better times. Yet, what if these better times will not come any time soon? What to do in cases in which national leaders seize power systematically, thus establishing autocracies of any kind? In these cases, which doctrinal tools and other strategies, if any, remain in the hands of international judges to protect the basic values of the international liberal order?

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[22] Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

[23] Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998).

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