may properly rely for their more detached assessments. Moreover, in the experience of this reader, Ramcharan's rendition of UN realities rings true.

His final chapter takes a step back from the intricacies of the UN human rights program to survey the current panorama of human rights challenges (pp. 260–61). He sees them as structural ("lack of democratic and accountable governance in numerous countries"), strategic (no major power can assure stability against extremist movements which have "no compunctions" about human rights), political (lack of adequate political strategies), institutional (governments run the UN Human Rights Council), and normative and policy-oriented (it is "far from clear" that leading powers give "full backing" to the UN Charter, the Universal Declaration, and the two Covenants) (p. 260). In addition, there are global challenges of "poverty, inequality, and widespread lack of human dignity," climate change and the environment, terrorism, and massive displacements (p. 261).

In the face of all this, Ramcharan argues that strengthening national protection systems is "one of the most strategic for the universal realization of human rights." This includes six "key dimensions": "constitutional, legislative, judicial, institutional, educational, and preventive" (p. 168). While the UN has a catalytic and monitoring role to play, "The protection of human rights should take place in one's country, where one lives and comes face to face with authority or power" (p. 113).

To strengthen both national and international systems, and quoting B. R. Ambedkar, a champion of the Indian Dalits, Ramcharan counsels that we must engage civil society and the young in a strategy of "educate, organize, and agitate" (pp. 261–62). Ramcharan recognizes that exposure of human rights violations is important. "But, at the end of the day, this is fire-brigade work." He looks to the long run: "Information, education, and advisory services are seed-planting work. In the long-term they will be more decisive. Much more remains to be done in these areas" (p. 247).

At the UN, this should be done with diplomatic skill and sensitivity. Long experience as an insider has taught Ramcharan to attend to matters of style and presentation. "Where deep issues of principle are involved, one should be ready to raise them. But the manner of wording them should be wise, not foolhardy" (p. 235). Recently "many NGOs have taken on a stridency . . . that sometimes results in an adversarial and accusatory posture" (p. 249). Striking the right balance can be difficult. This challenge calls for "reflection as we move into a potentially treacherous future" (p. 235).

In the end, Ramcharan—who has seen firsthand both the highs and the lows of UN human rights performance over decades, and who is acutely aware of the range of current challenges—has not lost hope: "We must continue to strive . . . for the universal protection of human rights" (p. 262).

Doug Cassel
Notre Dame Law School

Negotiating Civil War: The Politics of International Regime Design. By Henry Lovat. Cambridge, UK: Cambridge University Press, 2020. Pp. xv, 368. Index.
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Why have states in the post-1945 period agreed to treaty regimes that limit their freedom of action to deal with civil war? This is the question addressed by Henry Lovat, a lecturer in international law and politics at the University of Glasgow School of Law, in *Negotiating Civil War: The Politics of International Regime Design*.

Lovat's approach is to decide on the theoretical analytic lenses that should be used in considering the negotiation of the three civil war regimes that the book covers: Common Article 3 of the 1949 Geneva Conventions; Article 1(4) of the 1977 Addition Protocol I and of Protocol II to those Conventions; and Article 8(2)(c)–(f) of the Rome Statute establishing the International Criminal Court. *Negotiating Civil War* focuses more on political science theory than on legal

analysis. More than half of the book is devoted to theoretical discussion, rather than to the details of the legal regimes considered in Lovat's three case studies. The theoretic discussion is often laden with jargon that will be familiar only to those steeped in the field of "IR theory" (Lovat's acronym for "international relations theory"), and even the accessible material is often written in ponderous, complex prose, which is not easy to read.[1]

Chapter 1 is an in-depth discussion of various traditional international relations theoretical approaches to the development of international regimes, with extensive citations to their proponents. Lovat believes there are shortcomings in each of the existing approaches and that international relations theory is turning toward a growing recognition of the usefulness of a "multi-paradigmatic" approach. He calls the desired approach pluralistic "analytic eclecticism," which draws on multiple research traditions and involves reasoning from an "'intermediate level' between induction from facts and deduction from theory" (p. 17).

After extensive review of traditional approaches in academic literature and further analysis, Lovat arrives at five hypotheses for analyzing the development of civil war treaty regulatory regimes:

(1) The Realist hypothesis: that great power preferences are likely to be especially significant;
(2) The Rationalist hypothesis: the more restrictive the treaty provisions, the less likely governments are to support them, particularly if engaged in or expecting a civil war, whereas the end of a civil war might make governments more likely to support restrictive provisions;
(3) The Agent Characteristics hypothesis: moral authority and expertise help governments and nonstate actors—Lovat calls them "norm entrepreneurs"—to elicit support for restrictive provisions;
(4) The Logic of Argument hypothesis: strong, coherent arguments premised on widely shared values and principles are likely to garner government support; and
(5) The Regime Type hypothesis: democracies are more likely to support restrictive provisions than nondemocracies.

Lovat uses these hypotheses in assessing the factual situations and the government and nonstate actors involved in the negotiation of the regimes addressed. His goal is to consider how these factors influenced outcomes. He describes his research methodology as "process tracing" and searching for the "empirical fingerprints" of the hypotheses (pp. 53–54).

To a U.S.-lawyer reader, it may seem backward to develop hypotheses and then work to fit the facts into them, rather than drawing conclusions from a factual and legal analysis. Lovat explains that the book began life as a doctoral thesis. It is extensively researched, heavily footnoted, and contains a large bibliography. Indeed, the book still has the traits of a European doctoral thesis, in that it reaches back in history, develops a thesis, and then leaves no research stone unturned in addressing it.

Lovat's second chapter provides historical background, beginning with the concept of civil war in archaic Greek societies and the description of Roman wars in the late first century and running to 1949. Along the way, he reviews the contributions of Grotius, Gentili, and Vattel to the law of war. Lovat cites the 1863 Lieber Code (General Orders No. 100 for the U.S. armies in the field) as setting out national rules applicable to a civil war and notes that Oppenheim said at the beginning of the twentieth century that international law was not applicable to civil wars unless the parties recognized one another as belligerents. He points to the Martens clause in the preambles of the 1899 and 1907 Hague Conventions, which declared

[1] For example: "Typological theorising, for example, provides a structured means of identifying and organising theoretical traditions and insights to combine in analysis, by reference to the 'property space' of insights derived from multiple IR theoretical approaches" (p. 23).

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that, in cases not covered by those conventions, populations and belligerents remained under the protection of the principles of international law resulting from the laws of humanity and the requirements of the public conscience.

Chapter 3 addresses the negotiation of Common Article 3 of the 1949 Geneva Conventions,[2] the first of Lovat's three case studies. Lovat reviews how the International Committee of the Red Cross's (ICRC) initiative to update the 1929 Geneva Conventions led to a 1947 experts meeting, an ICRC draft text, and the Swiss-convened diplomatic conference in 1949, where it was initially proposed that in non-international armed conflicts (NIACs) each party be bound on the basis of reciprocity to the provisions of the conventions. Lovat reviews the controversy this engendered, eventually leading to a French proposal for the text of Common Article 3 that was adopted by secret vote in the plenary.

Rather than a traditional legal analysis, Lovat focuses on the motivation of key countries that participated in the negotiations as seen primarily through the lens of his theoretical hypotheses, basing this part of his discussion primarily on secondary sources. For example, Lovat says that the United States had been ready to cover classic civil wars, but ended up balancing "regional material hegemony" with "rhetorical and discursive flexibility" (p. 111) and that the Soviets adopted a humanitarian, anti-colonialist approach to force the West to "defend morally problematic" positions (p. 116). Lovat concludes that the wording of Common Article 3, adopted in the international humanitarian context of the post-war period, bridges the gap between humanitarian aspirations and the actual preferences of the states that participated in the negotiations.

Chapter 4 deals with the 1977 Additional Protocols to the 1949 Geneva Conventions. The ICRC convened meetings of government experts in 1971 and 1972[3] to prepare the groundwork for the diplomatic conference that met in four sessions from 1974 to 1977 to prepare and adopt two additional protocols—Protocol I, concerning international armed conflicts, and Protocol II, concerning NIACs.[4]

Lovat reviews the insistence of developing countries at the 1974 session of the diplomatic conference on treating wars of national liberation as international armed conflicts. "Conservative" Western countries (Lovat distinguishes these from "liberal" Western countries) were concerned that classifying conflicts based on the motives of the belligerents rather than objective criteria favored a "just war" approach and was not in keeping with humanitarian traditions; their concerns made no headway. What would end up as Article 1(4) of Protocol I, providing that wars of national liberation be treated as international armed conflicts, was adopted.[5] Both a relatively high threshold and relatively rigorous provisions for Protocol II were adopted in 1975.[6]

[2] Common Article 3 of each of the four 1949 Geneva Conventions can be found at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp.

[3] The ICRC reports on the government experts conferences are available at https://www.loc.gov/rr/frd/Military_Law/RC-confer_govern_experts.html and https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1972_V-1.pdf.

[4] The records of the diplomatic conference are available at https://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html. More generally, Geneva Conventions materials are available at https://www.loc.gov/rr/frd/Military_Law/Geneva-Conventions_materials.html.

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 1, June 8, 1977, 1125 UNTS 3, *at* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6C86520-D7EFAD527C12563CD0051D63C.

[6] The U.S. delegation report says Western countries like the United States and Canada wanted a low threshold and basic humanitarian provisions while countries like Norway and Finland wanted provisions paralleling Protocol I, and that developing countries consistently feared a protocol on NIACs would lessen their ability to suppress rebellion. "Perhaps the worst combination of results was achieved"—relatively rigorous provisions and a high threshold, dealing the goal of strengthening the law applicable to NIACs "a serious blow." Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Second Session, submitted to the Secretary of State on July 18, 1975, by George H. Aldrich, prepared by Ronald J. Bettauer, at 30–31. Lovat refers to the 1975 and 1976 reports of the U.S. Delegation, but not to the delegation reports

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The chapter then reviews the important developments concerning NIACs that occurred during the1977 final session of the diplomatic conference. To moderate the impact of Article 1(4) of Protocol I, what became Article 96(3) was agreed among various delegations, providing that the Protocol would become applicable to a national liberation movement only if it submitted a declaration to the depositary assuming the same rights and obligations as a party to the Geneva Conventions and the Protocol.[7] In addition, in view of growing concern about the rigor of the substantive provisions that would be applicable in NIACs, particularly among developing country delegations, Canada and Pakistan crafted an abbreviated version of Protocol II. Despite varying positions of states, "with the USA leading the Western block in 'consensus-seeking', the Pakistani draft (with minor amendments) was adopted by consensus" (p. 158).[8]

The remainder of chapter 4 considers the various delegations' motivations and assesses their behavior through the lens of the hypotheses put forward in chapter 1. For example, Lovat submits that the approach of the United States to the negotiations[9] was overshadowed by Vietnam, influenced by a conservative Pentagon. As explained below, this inaccurately describes how U.S. positions were developed. He also mentions several times that the United States exhibited a degree of cooperation with the Soviets on ensuring the nonapplicability of the Protocols to nuclear weapons (e.g., pp. 159, 180). However, the U.S. delegation report says that during the course of the conference there was "no consideration of the issues raised by the use of nuclear weapons."[10]

Lovat thinks the U.S.-led Western group exhibited Rationalist characteristics, that conservative Western states exhibited Agent Characteristics, and that Egypt and Pakistan exhibited Logic of Argument characteristics. He posits that the Regime Type hypothesis was problematic here since authoritarian states favored the most demanding Protocol II provisions, likely because they did not expect to have to apply them.

Chapter 5 deals with the negotiation of Article 8(2)(c)–(f) of the Rome Statute,[11] which

concerning the other two sessions of the diplomatic conference or concerning the two the government experts meetings. Excerpts from the U.S. delegation reports are also at 1974 DIG. U.S. PRAC. INT'L L. 701 (1974); 1975 DIG. U.S. PRAC. INT'L L. 803 (1975); 1976 DIG. U.S. PRAC. INT'L L. 681 (1976); and 1977 DIG. U.S. PRAC. INT'L L. 918 (1977). Lovat cites one U.S. delegation reporting cable; the practice was to send a reporting cable at least once a week during diplomatic conference, each session of which lasted months. There are a few relatively minor factual inconsistencies between the Lovat narrative and the U.S. delegation reports, e.g., on the number of states that participated in some of the conferences.

[7] Protocol I, *supra* note 5, Art. 96.

[8] The U.S. delegation report calls the redraft of Protocol II the "most dramatic development in the Final Plenary Sessions," noting that while it was likely that the two-thirds vote requirement would result in some reduction of the draft as reported by the conference committees, the "drastic surgery . . . was not foreseen." Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Fourth Session, submitted to the Secretary of State on September 8, 1977, by George H. Aldrich, at 27 [hereinafter 1977 U.S. Delegation Report]. In his closing statement, Aldrich said the United States was "disappointed" at the relatively high threshold, which could be a "convenient excuse" to refuse to admit applicability." *Id.*, Appendix D, at 6.

[9] By quoting a New Zealand comment, Lovat implies he agrees that the U.S. delegation chair for the negotiation of the Additional Protocols "though alert and articulate, had little experience of, or feeling for, multilateral diplomacy" (p. 158). In fact, the U.S. delegation chair had deep experience. It seems gratuitous to pass on a second-hand subjective criticism of this type. The U.S. delegation chair's feeling for multilateral diplomacy can be seen in his observation that "a perhaps vital" "element of our [U.S.] success was our constant concern to identify and meet, insofar as possible, the real needs of other Conference participants. Given sufficient time and effort, it was usually possible to arrive at a solution to any particular problem that met at least the minimum requirements of virtually all delegations." 1977 U.S. Delegation Report, *supra* note 8, at 30.

[10] *Id.* at 32; Appendix D, at 4–5.

[11] Rome Statute of the International Criminal Court, Art. 8, July 17, 1998, *at* https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#article8.

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established the jurisdiction of the International Criminal Court over war crimes in NIACs. Lovat first notes that the creation by UN Security Council resolution in 1993 of the International Criminal Tribunal for the former Yugoslavia (ICTY) and in 1994 of the International Criminal Tribunal for Rwanda (ICTR) provided the context for further work on the establishment of the International Criminal Court (ICC). The former provided jurisdiction over grave breaches of the 1949 Geneva Conventions as well as violations of the laws and customs of war, but did not deal with war crimes in NIACs. However, the ICTY Appeals Chamber held that the laws and customs of war included acts committed during internal armed conflict.[12] The ICTR explicitly provided jurisdiction over violations of Common Article 3 and Additional Protocol II. [13]

Lovat describes a vigorous debate on whether war crimes during NIACs should be within the jurisdiction of the court that continued until late in the 1998 Rome Diplomatic Conference that adopted the ICC's statute. The jockeying led to a final proposal by the Rome Conference Bureau that was adopted. The adopted version of threshold provided broader NIAC coverage than Additional Protocol II.

The key focus of the chapter again is on assessing the roles of the key participants in the negotiations. Lovat argued that the "like-minded group" (which included Australia, Canada, Netherlands, Belgium, and others) took a principled, humanitarian stance, arguing that most conflicts were NIACs and that there needed to be broad coverage. He cites the U.S. delegation chair as saying that the U.S. position was most heavily influenced by the U.S. Department of Defense (p. 230, n. 95), but notes that the United States served as a constructive broker on the threshold. Lovat characterizes Russia as obdurate on coverage of NIACs.

Viewed through the lens of his hypotheses, Lovat says the like-minded group recognized the need for some great power support (the Realist hypothesis). The Rationalist hypothesis was reflected in countries that considered themselves at low risk of internal conflict, or had recently emerged from such a conflict. In terms of the Agent Characteristics hypothesis, he notes the ability of Canada and other like-minded states to leverage moral authority and subject matter expertise. And the Logic of Argument hypothesis was seen in the strong, coherent arguments advanced by delegations and NGOs in favor of robust NIAC provisions. Lovat suggests a possible correlation between Regime Type and positions. On the whole, Lovat says the result was driven by "middle-ranking" Western powers with the support principally of the Western P-3 (pp. 254–55).

All in all, the case studies in Chapters 3–5 often describe the evolution of positions without providing the relevant texts, sometimes making them hard to follow. They focus extensively on the threshold for coverage of NIACs but largely ignore analysis of the substantive provisions negotiated for each regime. Secondary sources are extensively referred to as authority for various propositions.

In Chapter 6, Lovat returns to a discussion keyed to his theoretical hypotheses. He argues that his case studies show that at least some great power support is needed for establishing an internal armed conflict regime (the Realist hypothesis). He further argues that, for the most part, governments can be expected to prefer a regulatory regime that does not require costly changes in behavior, often preferring regimes with minimum restrictiveness that can nevertheless be characterized as humanitarian progress (the Rationalist hypothesis). Lovat suggests that moral authority plus technical expertise are effective, particularly when "nested within broader normative narratives" (p. 270) (the Agent Characteristics hypothesis). He also notes that "cognitive consensus" based on strong, coherent arguments can develop over time (p. 274) (the

[12] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. former Yugoslavia Oct. 2, 1995), *at* https://www.icty.org/x/cases/tadic/acdec/en/51002.htm (cited by Lovat at p. 211).

[13] ICTR Statute, adopted by S/RES/955, Art. 4 (1994), *at* https://undocs.org/S/RES/955(1994) (cited by Lovat at pp. 210–11).

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Logic of Argument hypothesis). Lovat believes the Regime Type hypothesis may be a less salient factor.

On the whole, Lovat believes he has made a strong case for the relevance of his hypotheses. And while saying that further research would be useful, he says his "conservatively eclectic" theoretical approach should generate a "balanced, nuanced—and ultimately persuasive—account of the design of civil war regimes" (p. 289). He believes *Negotiating Civil War* provides "a wider set of lessons . . . for government policymakers and officials designing and implementing multilateral negotiating strategies" and concludes that his findings "constitute a valuable contribution" (pp. 301–02).

To this reviewer, however, the salience and novelty of Lovat's hypotheses are questionable. To some extent they seem obvious. Governments and experienced multilateral negotiators already likely consider the factors that Lovat's hypotheses describe, although not using the same terminology. It is natural that governments engage in cost-benefit analyses when developing negotiating positions. And in any multilateral negotiation, major powers will usually have larger delegations, more expertise, and more negotiating influence than less powerful states. Not only do major powers provide aid and support to smaller countries, they have a greater capacity for their capitals to instruct their embassies to approach other governments to lobby for support both before and during the negotiations.

Moreover, Lovat's hypotheses do not seem to fit the actual process for developing negotiating positions. For example, the Regime Type hypothesis does not square with how the U.S. positions were developed for the 1971–1977 conferences on the Additional Protocols.[14] U.S. positions were drafted within the U.S. State Department Office of the Legal Adviser, vetted with State's International Organization Bureau, and then there were multiple meetings, primarily with the lawyers for each of the Armed Services and for the Joint Chiefs of Staff, and representatives of the Office of the Secretary of Defense, the Defense Department's General Counsel's Office, and the Arms Control and Disarmament Agency's General Counsel's Office. The effort was to achieve the maximum humanitarian progress consistent with military requirements. While the U.S. positions were developed in the shadow of the Vietnam War, it is inaccurate to say the Pentagon was the driver of U.S. positions. Moreover, while senior level State Department authority was obtained for participation in the negotiations, there was no real political oversight except on matters such as conference participation (for example, the successful U.S. effort to deny accreditation to the PRG, the purported South Vietnamese liberation movement). Since all the major offices concerned were represented on the delegation, it was normally not necessary to seek or receive instructions during the three-month conference sessions.

Lovat's Agent Characteristics and Logic of Argument hypotheses overlap in that they both relate to putting forth strong, expert arguments in a coherent manner and having those arguments seen as based in moral authority or shared values. More problematic, Lovat attributes his hypotheses as drivers of government participation in negotiations. What he ignores for the most part is the importance of the personalities of individual participants in negotiations. Where he cites an individual as having expertise and prestige, e.g., George Abi Saab (p. 175), he tends to attribute this to the state, i.e., Egypt in this case. Lovat is looking for empirical fingerprints of his hypotheses primarily at the "state/-government" level (p. 56). However, in multilateral negotiations it is possible that the delegation of a major power may not have activist participants who exhibit great expertise and moral authority, while a small state may have such a person on its delegation. And the personality of the delegation member may well have more of an influence on the negotiations than the size or standing of his or her state. To

[14] This reviewer, at that time an attorney in the State Department Office of the Legal Adviser, coordinated the position papers for the 1971–1976 conferences and was a member of the U.S. delegation to those conferences, representing the United States on one of the conference main committees.

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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.

RONALD BETTAUER
George Washington University Law School

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).

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