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When Should International Courts Intervene? How Populism, Democratic Decay and Crisis of Liberal Internationalism Complicate Things

Jan Petrov*

Shai Dothan. ***International Judicial Review: When Should International Courts Intervene?*** Cambridge: CUP, 2020. Pp. 170. £85.00. ISBN: 9781108488761.

Abstract

Shai Dothan's book International Judicial Review *aims to refute criticism which stresses international courts' (ICs) lack of legitimacy, epistemic inferiority, suffocation of public deliberation, susceptibility to capture and production of bad outcomes. This essay argues, however, that there is an important line of criticism of ICs stemming from a profounder disagreement with the post-Cold War international legal system – the critique related to ethno-national and/or authoritarian populism – which poses novel challenges to justifying ICs. Engaging with Dothan's arguments through the prism of the populist backlash, this essay contributes to recent scholarship on populism and international law by explaining how populism challenges the justification of IC interventions. Populists treat majority will and national/regional identity as the exclusive sources of the common good, and this casts doubts on arguments favouring multilateralism, such as the Condorcet Jury Theorem used by Dothan. It also allows populists to re-frame IC interventions as threats to people's well-being and disseminate 'counter-myths' delegitimizing ICs, which may impair ICs' ability to produce good outcomes. Altogether, populism has the capacity to increase the costs of international judicial intervention for ICs and reduce the costs of non-compliance and exit for the populists, which confronts IC scholars and judges with new challenges.*

* The Queen's College and The Bonavero Institute of Human Rights, University of Oxford, Oxford, United Kingdom; Judicial Studies Institute, Masaryk University, Brno, Czechia. Email: jan.petrov@law.ox.ac.uk.

1 Introduction

Several years ago, Nico Krisch stated that international courts (ICs) 'seem to be living in hard times'.[1] Recent events attest that their living conditions have not eased much since then. National representatives regularly criticize ICs' interventions in domestic affairs and their rhetoric tends to harshen over time. Former US President Donald Trump labelled the World Trade Organization (WTO) and its dispute settlement body 'a catastrophe'.[2] The International Criminal Court (ICC) was not spared the Trump administration's criticism either. Then US National Security Advisor John Bolton threatened that '[i]f the court comes after us, Israel, or other US allies we will not sit quietly'.[3] A harsh stance towards ICs, however, is by no means limited to the United States. After withdrawing the Philippines from the ICC, President Duterte threatened to arrest the ICC's Prosecutor if she conducted any investigations in the Philippines.[4] Regarding other ICs, Italian politician Matteo Salvini characterized the European Court of Human Rights (ECtHR) as a useless 'European circus',[5] while the Speaker of the Hungarian Parliament labelled the ECtHR judges 'some idiots in Strasbourg'.[6] Reacting to a judgment of the Southern African Development Community (SADC) Tribunal, then-Zimbabwean president Mugabe said the ruling was 'nonsense, absolute nonsense, no one will follow that'.[7] More recently, the Polish government adopted the 'muzzle law' which censured domestic judges for implementing selected rulings of the Court of Justice of the European Union (CJEU).[8]

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1 Nico Krisch, 'The Backlash against International Courts', *Verfassungsblog*, 16 December 2014, available at https://verfassungsblog.de/backlash-international-courts-2.

2 'WTO Chief Reacts Coolly to Trump's Criticism of Trade Judges', *Reuters*, 27 February 2018, available at https://reut.rs/3xUVkkH.

3 'John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack', *The Guardian*, 10 September 2018, available at www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech.

4 'Philippines: Duterte Threatens to Arrest International Criminal Court Prosecutor', *The Guardian*, 13 April 2018, available at www.theguardian.com/world/2018/apr/13/philippines-duterte-threatens-to-arrest-international-criminal-court-prosecutor.

5 'Strasbourg Court "Useless" Says Salvini', *ANSA.it*, 9 April 2015, available at www.ansa.it/english/news/politics/2015/04/09/strasbourg-court-useless-says-salvini_07b1abed-c340-443f-b073-776d80562b81.html.

6 See Polgári, 'Hungary: "Gains and Losses": Changing the Relationship with the European Court of Human Rights', in P. Popelier, S. Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights* (2016) 295, at 308.

7 Alter, Gathii and Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', 27 *European Journal of International Law* (*EJIL*) (2016) 293, at 309.

8 Venice Commission, Opinion 977/2020, *Urgent Opinion on Amendments to the Law on the Common Courts, the Law on the Supreme Court, and Some Other Laws*, Doc. CDL-PI(2020)002, 16 January 2020, available at www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e.

In this atmosphere, Shai Dothan's new book, *International Judicial Review: When Should International Courts Intervene?*, is a welcome and timely contribution to the debate on ICs' legitimacy, authority and effectiveness. This accessibly written monograph explores several strands of criticism of ICs and, although not uncritically supportive of ICs, is conceived as a rejoinder to opponents of international judicial review. Dothan's central argument is that international judicial interventions can be legitimate (chapter 2), identify good legal solutions (chapter 3), enhance democratic deliberation (chapter 4) and promote good outcomes (chapters 5 and 6). The book can also be read as a set of principled recommendations IC judges should consider when making decisions and thinking about their implications. Employing tools of social choice theory, game theoretical models, social network analysis and democratic theory, Dothan refutes several lines of criticism of ICs in an original and thought-provoking way. Specifically, the book responds to critics who stress ICs' alleged lack of legitimacy, epistemic inferiority, suffocation of public deliberation, susceptibility to capture by interest groups and production of bad outcomes.[9]

The quotes at the beginning of this essay, however, indicate that some actors' discontent with ICs stems from a profounder disagreement with the post-Cold War international legal system and its values represented by 'new-style' ICs.[10] The rise of authoritarian populism, advancing democratic decay and shifts in previously widespread beliefs in international law all change the context in which ICs operate and challenge the legal and political imaginary that surrounds them. For sure, the international legal order has always been criticized, ICs included, and often rightly so. Any resistance against ICs cannot be automatically treated as an authoritarian populist step. Some scholars even argue that international law is a discipline of crises and that the current state may be merely a temporary slump that will be easily overcome.[11] Yet, there is also a possibility that we are witnessing a systemically relevant crisis requiring a re-assessment of the state and role of international law. Even if the truth is somewhere in the middle and the current trends will only have mid-term significance, they still require theoretical (re-)consideration.[12]

For these reasons, this essay focuses on developments related to the rise of populism and democratic decay, understood as 'incremental degradation of the structures and substance of liberal constitutional democracy',[13] which have contributed to the current tensions in the international legal system. My intention is not to criticize Dothan for not dedicating the book specifically to the populist resistance against ICs. His take

[9] S. Dothan, *International Judicial Review: When Should International Courts Intervene?* (2020). Dothan defines bad outcomes of ICs broadly as instances when results free of ICs' involvement would have been better than those following ICs' interventions (at 7).

[10] See K. Alter, *New Terrain of International Law* (2014), at 5–6 (defining new-style ICs).

[11] See Krieger and Nolte, 'The International Rule of Law – Rise or Decline? Approaching Current Foundational Challenges', in H. Krieger, G. Nolte and A. Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (2019) 3, at 17.

[12] *Ibid.*, at 4–8.

[13] Daly, 'Democratic Decay: Conceptualising an Emerging Research Field', 11 *Hague Journal on the Rule of Law* (2019) 9, at 17.

is more general, yet not a mere 'fair weather' account as it addresses important and challenging strands of criticism of ICs. Rather, this review essay has two main goals. First, it aims to expand Dothan's arguments by zeroing in on the populist critique and to explain how the named socio-political developments matter for Dothan's account of justifying international judicial review. After all, populists are not the first to criticize ICs. However, I argue that due to specific features of the populist ideology and political style, populism adds extra layers across the existing lines of resistance to ICs. While there is a continuity with earlier nationalist and counter-majoritarian critique of ICs, authoritarian populists' combination of anti-elitism, anti-liberalism and identity concerns allows them to devise an accessible and resonating narrative blaming ICs as a part of the globalist elite and criticize them on behalf of the 'real' people seeking freedom from external domination by the elites (see Section 3). Second, analysing the populist critique of ICs through the prism of Dothan's arguments provides a good opportunity to decipher how specifically populism and democratic decay challenge ICs and justifications of their performance. Thereby, this essay also aims to contribute to the growing but still incipient debate on the populist challenge to international legal institutions. This debate often views populism as a general threat to the status quo. This essay aims to look more closely at *how exactly* these trends challenge ICs and their scholarly justification.

My argument is that the ideological underpinnings of populism and the populist style of political communication create a specific constitutional vision or legal-political imaginary,[14] which challenge many assumptions and arguments justifying IC interventions, including sophisticated arguments such as those provided by Dothan. Populists treat majority will and national (or regional) identity as the exclusive sources of the common good, which cast doubts on arguments favouring multilateralism and on ICs' ability to identify good legal solutions (see Section 3.A). As Section 3.B explains, the populist imaginary also allows the portrayal of ICs and their allies as threats to the people, which is detrimental to ICs' social legitimacy and capacity to incite beneficial social processes and produce good outcomes (such as deterring war crimes). Altogether, authoritarian populism has the capacity to increase the costs of international judicial intervention for ICs and reduce the costs of resisting ICs for the populists (see Section 3.C). Such re-shuffling of the cost–benefit analysis of an IC intervention exacerbates ICs' dilemma of how to navigate between normative legitimacy of an intervention and its strategic aptness (see Section 3.D). Due to these challenges, international judicial interventions can lead to very different consequences than Dothan envisages, which presents both IC judges and scholars with a whole new set of considerations to make.

A terminological remark is necessary here since populism has become a widely debated but also highly contested term. Mudde defined populism as 'an ideology that

[14] Petrov, 'The Populist Challenge to the European Court of Human Rights', 18 *International Journal of Constitutional Law* (*ICON*) (2020) 476, at 486 (pointing to a populist constitutional vision); Blokker, 'Populist Governments and International Law: A Reply to Heike Krieger', 30 *EJIL* (2019) 1009, at 1013 (pointing to the capacity of populism to shift the imaginary of the law).

considers society to be ultimately separated into two homogeneous and antagonistic groups, "the pure people" versus "the corrupt elite", and which argues that politics should be an expression of the volonté générale (general will) of the people'.[15] Many authors add anti-pluralism as a typical feature of populism and view the populist ideology as antithetical to liberal democracy and to liberal internationalism.[16] Other authors, however, argue that anti-pluralism is not necessarily a feature of all varieties of populism.[17] Similarly, not all varieties of populism necessarily seek nationalist or isolationist approaches to foreign policy.[18] Nonetheless, this essay focuses on the currently dominant type of populism: authoritarian populism that is tied to significant anti-pluralist, illiberal and ethno-national elements.[19] Before I zero in on the populist challenge to ICs (Section 3), I situate Dothan's book within the scholarship on ICs' legitimacy, authority and effectiveness (Section 2).

2 Situating International Judicial Review

Echoing Rousseau's famous line, Føllesdal recently wrote that 'states are free, yet everywhere live under international courts'.[20] This statement reflects the transformation of the international order in recent decades. The end of the Cold War led to the establishment of new ICs. Scholars started referring to the phenomenon of the proliferation of an international judiciary.[21] Besides their increase in quantity, ICs have strengthened due to a shift towards compulsory jurisdiction, gains of greater de facto independence, wider access channels and further domestic embeddedness.[22] In addition, ICs have acquired a number of novel roles besides their traditional task of dispute settlement.[23] Consequently, litigation rates skyrocketed: over 90% of ICs' binding rulings were delivered after 1989.[24] Altogether, these factors have led to 'a paradigm change in

[15] Mudde, 'The Populist Zeitgeist', 39 *Government and Opposition* (2004) 542, at 543.

[16] See, e.g., J.-W. Müller, *What Is Populism?* (2016), at 21.

[17] See Bugarič, 'Could Populism Be Good for Constitutional Democracy?',15 *Annual Review of Law and Social Science* (2019) 41.

[18] Blokker, 'Varieties of Populist Constitutionalism: The Transnational Dimension', 20 *German Law Journal* (*Ger. L.J.*) (2019) 332; Wehner and Thies, 'The Nexus of Populism and Foreign Policy', 35 *International Relations* (2021) 320.

[19] P. Norris and R. Inglehart, *Cultural Backlash and the Rise of Populism: Trump, Brexit, and Authoritarian Populism* (2019); Bugarič, 'Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism', 17 *ICON* (2019) 597; Halmai, 'Populism, Authoritarianism and Constitutionalism', 20 *Ger. L.J.* (2019) 296.

[20] Føllesdal, 'Survey Article: The Legitimacy of International Courts', 28 *Journal of Political Philosophy* (2020) 476, at 476.

[21] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003).

[22] Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent', 39 *NYU Journal of International Law and Politics* (2007) 791; Keohane, Moravcsik and Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', 54 *International Organization* (2000) 457, at 469.

[23] Alter, 'Delegating to International Courts: Self-Binding vs. Other-Binding Delegation', 71 *Law and Contemporary Problems* (2008) 37, at 37.

[24] Alter, *supra* note 10, at 4.

creating and using' ICs,[25] causing a dense, although unevenly spread,[26] judicialization of international relations as a crucial component of the international order.[27]

Given their socio-political and legal significance, ICs have been analysed as a field of study for quite some time. Various common topics and approaches emerged, despite the great variation among ICs.[28] A lot of the recent literature reflects the abovementioned paradigm change and responds to the corresponding need to examine ICs' legitimacy and authority, asking crucial questions about what justifies ICs' intervention. As the literature is too voluminous to be reviewed here in full, I briefly present four major approaches: approaches focusing on normative legitimacy, social legitimacy, performance-based approaches and practice-based approaches.

One important strand of scholarship focuses on the normative questions surrounding ICs' legitimacy. Many scholars acknowledge that the traditional justifications based on state consent are insufficient these days. Grossman, for example, reimagines ICs' normative legitimacy, puts emphasis on extending participation and procedural fairness in IC proceedings and lays down a set of universal standards of justice that ICs must adhere to.[29] Von Bogdandy and Venzke argue that because ICs exercise public authority they require democratic legitimacy. Accordingly, they make a case for a greater politicization of ICs and for increasing other actors' possibilities of involvement in IC proceedings, and stress the publicness and transparency of ICs' operation.[30] Føllesdal, building on Raz's work, argues that ICs are legitimated by the service they provide, such as overcoming co-ordination problems. ICs' interventions are thus legitimate as long as they enable 'states or other compliance constituencies to better act on the reasons they have'.[31] Generally, the debate about the normative legitimacy of ICs has attracted a lot of attention.[32] Yet, another strand emerges within the scholarship on ICs' legitimacy as some authors, instead, analyse ICs' social legitimacy, which changes focus from ICs' institutional features to various actors' beliefs about why ICs' interventions are justified and perceived as legitimate.[33]

[25] *Ibid.*, at 3.

[26] B. Kingsbury, 'International Courts: Uneven Judicialization in Global Order', in J. Crawford and M. Koskenniemi (eds), *Cambridge Companion to International Law* (2012) 203.

[27] Alter, Hafner-Burton and Helfer, 'Theorizing the Judicialization of International Relations', 63 *International Studies Quarterly* (2019) 449.

[28] See C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2014).

[29] Grossman, 'The Normative Legitimacy of International Courts', 86 *Temple Law Review* (2013) 61.

[30] A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014).

[31] Føllesdal, 'The Legitimate Authority of International Courts and Its Limits', in P. Capps and H. Palmer Olsen (eds), *Legal Authority Beyond the State* (2018) 188, building on J. Raz, *The Authority of Law: Essays on Law and Morality* (2009).

[32] N. Grossman, H. G. Cohen, A. Føllesdal and G. Ulfstein, *Legitimacy and International Courts* (2018); R. Howse, H. Ruiz-Fabri, G. Ulfstein and M. Q. Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (2018); A. Føllesdal, J. K. Schaffer and G. Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (2013); Bodansky, 'Legitimacy in International Law and International Relations', in J. Dunoff and M. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (2013) 321; Besson, 'The Authority of International Law: Lifting the State Veil', 31 *Sydney Law Review* (2009) 343.

[33] Cali, Koch and Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights', 35 *Human Rights Quarterly* (*HRQ*) (2013) 955; Voeten, 'Public Opinion and the Legitimacy of International Courts', 14 *Theoretical Inquiries in Law* (*Theor. Inq. L.*) (2013) 411.

Another approach examines ICs' performance and effects. The very fact that ICs help to secure certain objectives justifies, according to some scholars, ICs' claim to deference from states and other actors.[34] As Shany put it, ICs 'will enjoy support and be accepted as authoritative only if states and other key stakeholders perceive them as beneficial, at least in the long run'.[35] As regards performance, a vast amount of literature has focused on compliance with ICs' rulings.[36] An overreliance on compliance by scholars, however, has been subject to serious criticism.[37] Consequently, some authors have moved beyond the binary concept of compliance towards broader accounts of ICs' effectiveness and performance. Shany evaluates ICs' effectiveness by comparing their goals set by the mandate providers with the outcomes actually achieved by ICs.[38] Squatrito *et al.* devise the concept of ICs' performance, distinguishing between two dimensions – process and outcome performance – and three levels of performance – micro (single case), meso (issue area) and macro (legal system).[39]

An alternative practice-based approach, recently developed by Alter, Helfer and Madsen, redirects our attention to the behaviour of ICs' audiences (state authorities, litigants, non-governmental organizations (NGOs), etc.) as the key factor of ICs' de facto authority, and sets the question of legitimacy aside. The authors examine audiences' recognition of an obligation to comply with IC rulings and their engagement in meaningful action pushing towards giving effect to those rulings. A heavy emphasis is placed on the role of varying legal, political and institutional contexts for the operation of ICs.[40]

In recent years, the debate on ICs' legitimacy and authority has been closely tied to the study of the criticism of and resistance to ICs. Although criticism of ICs is not new, it has intensified in the past decade and shifted from opposition to particular decisions and doctrines towards more intensive resistance denunciating the rationale, authority and sometimes the very existence of ICs. Several studies have traced the resistance practices and their effects,[41] while Madsen, Cebulak and Wiebusch provided a systematic theoretical framework for understanding resistance to ICs. They distinguish between pushback as a limited form of resistance and backlash as extraordinary

[34] See Føllesdal, *supra* note 20, at 486.

[35] Shany, 'Assessing the Effectiveness of International Courts: A Goal-based Approach', 106 *American Journal of International Law* (*AJIL*) (2012) 225, at 267.

[36] For the review of literature on compliance see Huneeus, 'Compliance with International Court Judgments and Decisions', in Romano, Alter and Shany (eds), *supra* note 28, at 437.

[37] See, e.g., Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010) 127.

[38] Y. Shany, *Assessing the Effectiveness of International Courts* (2014).

[39] T. Squatrito, O. Young, A. Føllesdal and G. Ulfstein (eds), *The Performance of International Courts and Tribunals* (2018).

[40] K. Alter, L. Helfer and M. Madsen (eds), *International Court Authority* (2018).

[41] See, e.g., Contesse, 'Resisting the Inter-American Human Rights System', 44 *Yale Journal of International Law* (2019) 179; Sandholtz, Bei and Caldwell, 'Backlash and International Human Rights Courts', in A. Brysk and M. Stohl (eds), *Contracting Human Rights* (2018) 159; Alter, Gathii and Helfer, *supra* note 7; P. Popelier, S. Lambrecht, and K. Lemmens (eds), *Criticism of the European Court of Human Rights* (2016).

resistance triggering structural changes to an IC.[42] A related issue is how ICs should react to rising resistance and increase their resilience.[43]

In sum, the existing literature provides a considerable amount of knowledge about ICs and their interventions into domestic affairs. However, one of the major questions remains: Why and when are ICs justified in claiming that others should defer to their judgments and interpretations?[44] Given the on-going dialectical processes of advancing judicialization and backlash against ICs, the question is likely to remain with us. It is also likely that we will not be able to provide a definitive answer anytime soon. To approximate the answers at least, the challenge rather is to consider the question from various angles and theoretical and methodological vantage points.

And this is clearly the strongest point of Shai Dothan's *International Judicial Review*. Trying to answer the question posed in the subtitle of the book, *When Should International Courts Intervene?*, he employs a variety of sophisticated theoretical and methodological approaches beyond doctrinal legal theorizing. Dothan's account relies on instruments of social choice theory, game theoretical models, social network analysis and insights from democratic theory on democratic failures and courts as deliberative institutions.

Employing these approaches, the book provides deeper insights into some of the mentioned crucial questions of the study of ICs. My brief and necessarily selective review of various strands of literature on ICs was intentionally broad since *International Judicial Review* contributes to a number of these debates. Dothan's arguments are recounted in greater detail in Section 3, but generally the book touches upon the normative legitimacy of IC intervention, the processes before ICs, effectiveness and outcome performance and the question of how audiences interact with ICs. It shows that the normative legitimacy of ICs' interventions is linked to contextual factors at the international (such as the history of the treaty negotiations) and domestic levels (such as the quality of democratic procedures) (chapter 2). The book then re-conceptualizes ICs' interventions in ways that emphasize their epistemic (chapter 3) and democratic qualities (chapter 4). Finally, Dothan theorizes how ICs' institutional design can affect their outcome performance (chapter 6 on access rules) and their relation to particular audiences (chapter 5 on co-operation between ICs and NGOs).

International Judicial Review is conceived as a rejoinder to the critics of ICs. The book addresses criticism stressing ICs' lack of legitimacy, epistemic inferiority, suffocation of public deliberation, susceptibility to capture by interest groups and production of bad outcomes. All these critical threads represent, without a doubt, important challenges voiced against ICs. Nevertheless, the current wave of criticism levelled against international legal institutions seems to go further than the lines of criticism considered

[42] Madsen, Cebulak and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) 197.

[43] *Ibid.*; Squatrito, 'Judicial Diplomacy: International Courts and Legitimation', 47 *Review of International Studies* (2021) 64; Squatrito, 'International Courts and the Politics of Legitimation and De-Legitimation', 33 *Temple International and Comparative Law Journal* (2018) 298.

[44] See Føllesdal, *supra* note 20, at 477.

by Dothan as some actors have been contesting the very basis of the 'liberal script'.[45] Particularly the rise of authoritarian populism, often accompanied by advancing democratic decay and shifts in previously widespread beliefs in international law, changes the context in which ICs operate.

The rest of this essay therefore examines Dothan's arguments from the standpoint of arguably the most pressing strand of current IC criticism: the populist challenge. This standpoint is a very specific take on the book, yet one that is justified, I believe, by the following reasons. First, authoritarian populism is a widespread phenomenon spanning across continents and challenging even democracies that were thought to be consolidated.[46] Second, although it shares some subjects with earlier sovereigntist critique of international institutions, the populist challenge to ICs is novel and distinctive in several aspects, as part 3 argues in detail.[47]

3 Authoritarian Populism and New Challenges to Justifying International Judicial Intervention

As Heike Krieger explained, 'there exists no specific populist doctrine of international law that would forge a coherent systematic concept'.[48] Populism is often described as a thin ideology that in practice complements a thick political ideology (such as socialism or conservatism). While the thick ideology provides for a comprehensive worldview, i.e. 'interpretations and configurations of all the major political concepts attached to a general plan of public policy',[49] populism as a thin ideology is narrower in its scope and limits itself to providing the imaginary of how democracy should work.[50] Thus, it offers a distinct interpretive framework or imaginary rather than a particular policy content.[51] Accordingly, we can see quite a wide variety of populist foreign policies in the real world.[52] Whether, how and when the populist critique of international institutions is employed, however, depends on the various domestic or regional socio-political contexts and the thick ideologies attached to populism in the given case.

45 Börzel and Zürn, 'Contestations of the Liberal Script' (SCRIPTS Working Paper No. 1 2020).

46 Levitsky and Way, 'The New Competitive Authoritarianism', 31 *Journal of Democracy* (2020) 51.

47 See also Voeten, 'Populism and Backlashes against International Courts', 18 *Perspectives on Politics* (2020) 407; Helfer, 'Populism and International Human Rights Institutions: A Survival Guide', in G. Neuman (ed.), *Human Rights in a Time of Populism* (2020) 218, at 222; Petrov, *supra* note 14, at 505, who all single out the populist criticism of ICs as distinctive.

48 Krieger, 'Populist Governments and International Law', 30 *EJIL* (2019) 971, at 973.

49 Freeden, 'Is Nationalism a Distinct Ideology?', 46 *Political Studies* (1998) 748, at 750.

50 Huq, 'The People Against the Constitution', 116 *Michigan Law Review* (2018) 1123, at 1132; Hawkins and Rovira Kaltwasser, 'The Ideational Approach to Populism', 52 *Latin American Research Review* (2017) 531, at 515.

51 Stanley, 'The Thin Ideology of Populism', 13 *Journal of Political Ideologies* (*J. Pol. Ideol.*) (2008) 95, at 108.

52 Prieto Rudolphy, 'Populist Governments and International Law: A Reply to Heike Krieger', 30 *EJIL* (2019) 997, at 999; Verbeek and Zaslove, 'Populism and Foreign Policy', in C. Rovira Kaltwasser et al. (eds), *The Oxford Handbook of Populism* (2017) 385; Wehner and Thies, *supra* note 18.

Still, this essay claims that (authoritarian) populism adds an extra layer to the criticism of ICs which spans across the various foreign policies of states: rhetorical ammunition allowing portrayal of ICs' authority as a bulwark allowing elitist foreign judges to deform the genuine will of the 'real' people. Clearly, there is a good dose of ideational continuity with earlier nationalist criticism of ICs. Indeed, authoritarian populism is often intertwined with nationalist principles as it rejects universalist values and tends to be protective of state sovereignty. The line between nationalist and populist critique is therefore quite fuzzy in practice. However, unlike pure nationalism, populism primarily builds on the notions of the people and popular sovereignty, which adds the lens of the 'real' people versus elite antagonism. The anti-elitist element can encompass both domestic and international elite.[53] Accordingly, the populist critique is not merely about the preference of national sovereignty. Populists denouncing liberal-democratic elites make ICs a part of what seems to be a more coherent, accessible and resonating narrative – a narrative blaming ICs as a part of the globalist elite and criticizing them on behalf of the people seeking freedom from external domination by the elites.[54] Simply conflating the populist critique with earlier nationalist criticism of ICs would therefore 'miss the importance of preserving the pure people as the point of departure for any policy, including foreign policy'.[55] Additionally to its anti-elitism, authoritarian populism is also anti-liberal[56] and stresses the theme of an endangered identity using notions of a struggle against a common threat or enemy, potentially including ICs.[57]

The combined effect of the named extra layers can be amplified by populists' appealing and resonant style of political communication leading to greater mobilization of the public. While questions concerning the legitimacy of ICs have traditionally been formulated by the legal and political elites,[58] the populist narrative centred around the popular will and socioeconomic and identity concerns seems to have a higher potential to mobilize and unite people – possibly even across borders – than the sovereigntist or counter-majoritarian critique of ICs alone.[59] That threatens ICs since it challenges the construction of their legitimate authority.[60] Populists are well equipped to frame

[53] Copelovitch and Pevehouse, 'International Organizations in a New Era of Populist Nationalism', 14 *Review of International Organizations* (2019) 169, at 175.

[54] See *infra* text accompanying notes 102 and 105 for the examples of Kenya's and Burundi's criticism of the ICC; see *infra* text accompanying note 89 for Venezuela's critique of the IACtHR.

[55] Verbeek and Zaslove, *supra* note 52, at 387.

[56] See the examples below, including Orbán's illiberal democracy rejecting the pluralist values promoted by European supranational courts, Duterte's rejection of a universalist human rights agenda in the Philippines and Chavismo in Venezuela.

[57] F. Söderbaum, K. Spandler and A. Pacciardi, *Contestation of the Liberal International Order* (2021) at 46. See below the example of Orbán's pledge to guard the authentic Hungarian identity against the CJEU's interventions (see *infra* text accompanying note 82), and Duda's defence of Polish policy choices against the CJEU and the Venice Commission (see *infra* text accompanying note 79).

[58] See Çalı *et al.*, 'The Legitimacy of Human Rights Courts', 35 *HRQ* (2013) 955, at 962.

[59] See Petrov, *supra* note 14.

[60] More generally Schmidt, 'Discursive Institutionalism', in F. Fischer et al. (eds), *Handbook of Critical Policy Studies* (2015) 171.

resistance to ICs as necessary for achieving true democracy and popular sovereignty. Presenting ICs as morally corrupt enemies of the people may result in a particularly high ability of populism to decrease the social legitimacy of ICs and the popular demand for respecting ICs' independence, which may impair ICs' effective functioning.[61] After all, frames and narratives not only represent reality, but they also enable moral judgments, define problems, prescribe solutions and motivate action.[62]

Compared to fully authoritarian actors, however, populists build their criticism of ICs on specific understandings of fundamental concepts of constitutional democracy. Constituent power, popular will and popular sovereignty are all crucial concepts for populists' political claims. As Barber put it, '[p]opulists subvert constitutional government, but do so in a manner that brings much of the people along with them, and which allows – and requires – the basic structures of a democratic state to remain in place'.[63]

An additional challenge is that part of the populist rhetoric overlaps with important earlier criticisms of ICs and the global legal order as such. Populists raise major questions about tensions inherent in the post-Cold War international legal order, particularly between universalism and particularism, and between the rule of law and democratic self-rule.[64] As Blokker claims, '[i]n the contemporary age of intensified internationalization and globalization, the linkage between a democratic imaginary and a practical commitment to (collective) autonomy appears to many as less and less self-evident'.[65] It is fair to admit that international judicialization 'comes with a price'[66] as ICs probably contribute to people's dissatisfaction stemming from the lack of control over important socio-political and moral issues. Yet, many scholars argue and many examples – some mentioned below – demonstrate that the legitimate criticism can be hijacked by populists to seek unchecked power and avoid politically costly compliance with international rulings, fend off critique of human rights violations or even avoid prosecution for war crimes.[67] Even critics of the liberal order point out that in practice authoritarian populists exacerbate many of the issues they criticise, including the democratic disconnect.[68] Distinguishing the legitimate critique from hijacking is clearly not easy. The line between the two categories is blurred and ultimately comes down to discerning good faith and bad faith intentions, which is, however,

[61] Voeten, 'Public Opinion and the Legitimacy of International Courts', 14 *Theor. Inq. L.* (2013) 411, at 415.

[62] See Benford and Snow, 'Framing Processes and Social Movements: An Overview and Assessment', 26 *Annual Review of Sociology* (2000) 611.

[63] Barber, 'Populist Leaders and Political Parties', 20 *Ger. L.J.* (2019) 129, at 130.

[64] Walker, 'Populism and Constitutional Tension', 17 *ICON* (2019) 515.

[65] Blokker, *supra* note 14, at 1014.

[66] Pin, 'The Transnational Drivers of Populist Backlash in Europe: The Role of Courts', 20 *Ger. L.J.* (2019) 225, at 236.

[67] See, e.g., Krieger, *supra* note 48, at 978 ('there is also a perception that populists are "hijacking" arguments of globalization critique because it provides them with some additional legitimacy'); Halmai, *supra* note 19; Norris and Inglehart, *supra* note 19, at 14 ('behind the populist façade, a darker and more disturbing set of authoritarian values can be identified').

[68] Wilkinson, 'The Rise and Fall of World Constitutionalism', *Verfassungsblog*, 7 October 2021, available at https://verfassungsblog.de/the-rise-and-fall-of-world-constitutionalism/.

extremely difficult to decipher and requires a careful monitoring of actual policies that follow the populist rhetoric.[69]

In sum, the populist surge arguably represents a critical juncture in ICs' evolution, and 'during critical junctures, old understandings get called into question'.[70] Engaging with Dothan's arguments, the following sections explain how exactly the populist features challenge even sophisticated justifications of ICs' interventions.

A *Eroding Consensus on the Common Good*

As noted in Section 2, an important strand of the existing scholarship focuses on the outcomes produced by ICs. Some critics point out that ICs cause more harm than good, generating incoherent case law, legal uncertainty and bad policy outcomes.[71] The likelihood of poor performance is quite high, as international judges lack familiarity with the domestic situations and national laws and have to find solutions that would work across different countries. Dothan engages with this criticism and refutes it. He argues that thanks to their position ICs are well placed to identify good solutions. Dothan shows that, under some conditions, ICs are uniquely positioned to profit from comparative law by aggregating independent solutions of numerous countries and produce good policies (at 37). Dothan presents this argument in an original way, using tools of social choice theory. Particularly, he employs the Condorcet Jury Theorem – a mathematical model justifying the wisdom of a crowd as opposed to an individual decision-maker.

More specifically, the Jury Theorem applies to situations where one of two alternatives is right for the collective. It holds that if 'each individual in a group has a probability of being correct that is higher than 0.5, then the probability that the majority of the group is correct will be larger yet; further, the majority will approach perfect accuracy in judgment as the size of the group increases'.[72] In the context of law and courts, the Jury Theorem suggests that states can benefit from comparative legal analysis. For instance, if a national court struggles to identify a good legal solution, it might do well to follow a policy adopted by the majority of nations in a region. Yet, there is an important pre-condition to profit from the Jury Theorem – the individual countries must have adopted their policies independently of each other: 'If all the states in a region make their policies independently, the Jury Theorem implies that the law adopted by the majority of the states is probably good' (at 41). However, if states just mimic one another's policies without making their own assessments, a mere information

[69] Krieger, *supra* note 48, at 995 (suggesting that international 'institutions have to carefully scrape out where a per se legitimate aim is only used as a pretext'). See, more generally, Pozen, 'Constitutional Bad Faith', 129 *Harvard Law Review* (2015) 885.

[70] Alter, 'Critical Junctures and The Future International Courts in a Post-Liberal World Order', in A. Kent, N. Skoutaris and J. Trinidad (eds), *The Future of International Courts and Tribunals* (2019).

[71] See Dothan, supra note 9, at 37 (referring to S. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (2018)).

[72] K. Ladha and G. Miller, 'Political Discourse, Factions and the General Will: Correlated Voting and Condorcet's Jury Theorem', in N. Schofield (ed.), *Collective Decision-Making: Social Choice and Political Economy* (1996) 393, at 393.

cascade emerges, which does not profit from the Jury Theorem. Accordingly, domestic courts that simply follow each other do not gain the Jury Theorem benefits from comparative law.

ICs, however, are in a position that allows them to aggregate previous independently taken domestic decisions and profit from the Jury Theorem: 'An international court that uses comparative law allows all the states to make an initial independent decision and provides them, at a later stage, with a decision that perfectly aggregates the policies of all states' (at 41). Dothan illustrates the argument on the ECtHR's emerging consensus doctrine. Echoing the Jury Theorem logic, he shows that the ECtHR uses the consensus doctrine to interpret ECHR rights in a way that safeguards rights protected by the majority of states in Europe (at 41).

According to Dothan, 'there is no justification for intervention that leads to worse outcomes than states can reach on their own' (at 37). Using the Jury Theorem argument and pointing to several examples from the ECtHR system, he shows that IC intervention can lead to better outcomes. Populism, however, challenges this approach. The populist ideology has a different conception of what constitutes a good legal solution, which makes the populist-governed states less likely to be persuaded by the Jury Theorem argument. Since populists may not believe in the liberal states' capacity to adopt good legal solutions in certain areas, the Jury Theorem may even lead them towards non-compliance with IC judgments.

The Jury Theorem is concerned with the collective outcome; it does not model the choices of individual actors.[73] Still, Dothan's argument assumes that states seek good legal solutions. That in turn presupposes the existence of exogenously defined right answers to the given legal questions.[74] Dothan defines these as those that are 'efficient and useful, or simply morally superior' (at 38). Thus, the use of the Jury Theorem presumes a minimal consensus on the agreed-upon goal, i.e. on what constitutes an efficient, useful and morally superior policy. Here comes the complication stemming from the populist imaginary of law and politics: judging from the ideological basis of populism, political speeches and manifestos of populist leaders, their conception of good policies is likely to be different from those of the liberal countries, at least in some areas.

Populism often manifests as a local resentment against the policies imposed from above by an international elite. Rather than looking for good policies in other states' laws, populists proclaim to seek the right solutions in the unique local identity and common sense of the (real) people.[75] The alleged uniqueness of the people casts doubt on the exogenous solutions, especially since populists often shape their policies in contraposition to globalist tendencies and liberal constitutionalism.[76] All this affects

[73] Schofield, 'Introduction', in N. Schofield (ed.), *supra* note 72, at 1, 4.

[74] A. Vermeule, *Law and the Limits of Reason* (2009), at 67–68; Edelman, 'On Legal Interpretations of the Condorcet Jury Theorem', 31 *Journal of Legal Studies* (2002) 327.

[75] Hirschl, 'Opting Out of "Global Constitutionalism"', 12 *Law and Ethics of Human Rights* (2018) 1, at 30.

[76] See Tóth, 'Full Text of Viktor Orbán's Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014', *Budapest Beacon*, 29 July 2014, available at https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/. See, more generally, T. Pappas, *Populism and Liberal Democracy* (2019).

how populists (and possibly their voters) perceive the countries whose policies ICs aggregate in Dothan's model. Especially in controversial areas such as migration, security and minority rights, populists' ideas of good policies and their sources can be different from those of liberal states that form the emerging consensus in Dothan's example.

This, in turn, influences the persuasiveness of the Jury Theorem argument from the populists' viewpoint. Expressed in the language of social choice theory, if actors 'disagree on the content of the common good, they are also likely to disagree on decision makers' ability to find out what the common good requires'.[77] Consequently, if the populists do not believe that the liberal countries will make correct policies (with a probability higher than 0.5), the Jury Theorem argument cannot persuade them. In fact, if populists believe that the other states are more likely to be wrong, the Jury Theorem logic actually makes things worse as it would imply a high probability of producing a wrong solution.[78] Thus, populists' take on the Jury Theorem argument may lead them to a conclusion that their own policy is more efficient and morally superior than the one created by ICs through aggregating policies of liberal states. Echoing arguments from popular sovereignty, unique local identity and anti-elitism, Polish President Duda's reaction to the CJEU's and the Venice Commission's interventions regarding Polish judicial reforms exemplifies that:

> We will not let others decide for us. We Poles have the right to decide about our own country, our own laws – that is why we fought for democracy. They will not come here and impose on us in foreign languages the political system we are supposed to have in Poland, or tell us how Polish matters are to be handled.[79]

In practice, such views can lead to attempts to preclude the enforcement of international policies with a reference to domestic uniqueness. In this way Hungary (and other Visegrád countries) resisted the EU emergency relocation mechanism based on migration quotas. The Orbán government apparently did not see the European co-operative and responsibility-sharing approach as a good policy. The government organized a referendum on the relocation scheme and challenged the scheme at the CJEU. When the referendum turned out to be invalid, Orbán nevertheless presented the 98% vote against relocation as a clear message sent by the Hungarian people to the EU. Simultaneously, the government proposed a constitutional amendment stating that a foreign population shall not be settled in the territory of Hungary. Importantly, the Hungarian Constitutional Court issued a decision that could serve as the government's shield against EU law. The Hungarian Court stated that the protection of Hungarian constitutional identity justifies the government's refusal of the relocation scheme.[80] When the CJEU subsequently confirmed the validity of the relocation scheme,[81] Orbán

[77] E. Lagerspetz, *Social Choice and Democratic Values* (2016), at 308.

[78] See Vermeule, 'Many-Minds Arguments in Legal Theory', 1 *Journal of Legal Analysis* (2009) 1, at 26.

[79] Flis, 'Duda Shocks with Hate Speech Attack on Polish Judges', *Rule of Law in Poland* (2020), available at https://ruleoflaw.pl/duda-shocks-with-hate-speech-attack-on-polish-judges/.

[80] Halmai, 'Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law', 43 *Review of Central and East European Law* (2018) 23.

[81] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the EU*, ECLI:EU:C:2017:631.

replied employing the identity and popular sovereignty arguments: 'I will never contribute to making Hungary an immigrant country', adding that 'the decision on whom to live with should be for Hungarians alone'. He also insisted on having been 'given authorisation from Hungarian voters to guard Hungary's culture and identity', and promised to fight on.[82] To look beyond Hungary, Russia even introduced a formal mechanism that allows the Russian Constitutional Court to reject the ECtHR's judgments as non-executable.[83] The uses of this mechanisms hitherto suggest it is seen as a tool for opting out of inconvenient commitments.[84] Such mechanisms represent a problem for ICs' authority and for multilateralism as such, as they open the door for bad-faith cherry-picking of international obligations.

B *Alternative Portrayals of International Courts*

The different conception of what constitutes good legal solutions is one element of the populist imaginary. It is important per se but it also allows populists to construe alternative narratives about ICs (and their allies such as NGOs), which seem to resonate well with certain audiences. As Section 2 suggests, the ways other actors perceive ICs and react to their rulings are critical for ICs' social legitimacy and authority respectively. Accordingly, the populist portrayals of ICs and their allies may affect the perceptions of ICs and the social processes their rulings initiate.

International Judicial Review zeroes in on a particular social process in chapter 4: public deliberation. Critics of ICs sometimes claim that international judicial decisions tend to suffocate discussion about important political and social issues.[85] Dothan argues that, in fact, ICs can strengthen and improve public deliberation. Their decisions do not mark the end of a discussion. They can be seen as focal points that ignite a broader public debate. ICs can direct attention to a certain issue and provide the public with information and legal arguments about that matter. Having such information can mobilize the public and start a broader dialogue between the general public, the branches of state power and other actors, such as foreign courts (at 67). Dothan notes that ICs surrounded by a 'myth' can be particularly successful in mobilizing the public. The ICC, for instance, has cultivated a myth as a site where war criminals are brought to justice. Even if the ICs' actual effectiveness in providing these goods is limited,[86] the myth itself can stir the public and initiate beneficial social processes.

[82] Székely, 'PM Orbán: Hungary Acknowledges ECJ Ruling but Won't Change Its Migrant Policies', *Hungary Today* (2017), available at https://hungarytoday.hu/pm-orban-hungary-acknowledges-ecj-ruling-wont-change-migrant-policies-94567/.

[83] Aksenova and Marchuk, 'Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights', 16 *ICON* (2018) 1322.

[84] Kahn, 'The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg', 30 *EJIL* (2019) 933.

[85] Dothan, supra note 9, at 67, referring to Lord Sumption's speech 'The Limits of Law' (2013), available at www.supremecourt.uk/docs/speech-131120.pdf.

[86] Dothan points out that the ICC actually convicted only eight people in more than 16 years: *ibid.*, at 68.

Dothan's account is an important reminder that an IC's decision is not the end of the game. In fact, it marks the beginning of a complicated process of compliance politics, post-litigation bargaining and public amplification strategies.[87] In this process, the IC's social legitimacy and authority are crucial for the actual effects on public deliberation. I will try to show that populism has a great capacity to delegitimize ICs and their rulings. Not only can it impair the ICs' contribution to targeting problematic practices and policies, but populism can even change the discursive frame and turn the public debate *against* ICs and their allies. Although there is no coherent populist international legal doctrine, it is possible to discern certain common elements in the structural features of populist ideology and in populist actors' practices and statements.[88]

Dothan argues that the friction between ICs and domestic governments invigorates public deliberation (at 67). Yet, a look at recent portrayals of ICs by populist leaders suggests that if the friction reaches a certain level, they may deform public deliberation. While Dothan speaks about ICs' myths (and argues that they require the people to know about the ICs' existence, but not to know too many details) (at 68), populists are very active in construing and disseminating ICs' 'counter-myths'. These counter-myths aim to present ICs as threats to the people and as elite actors to be blamed for the people's problems. The lack of detailed knowledge about ICs then makes courts susceptible to these counter-myths. ICs, of course, cannot be immune from criticism. They can be legitimately criticized for many reasons. Populist counter-myths, however, reach a different level of criticism and aim to delegitimize the IC as such, its rationale, performance and functioning.

A few examples illustrate the point. When Hugo Chávez reacted to an Inter-American Court of Human Rights (IACtHR) ruling, he stressed the elitist element, referring to the court as '[t]he corrupt, dictators, fugitive bankers, they are all protected by the US and by that international system that obeys both imperial power and the bourgeoisie that is part of that power'.[89] When the ECtHR sided with a representative of a pro-Kurdish party, Turkish President Erdoğan stated: 'This isn't seeking justice, it's simply terror-loving'.[90] Donald Trump portrayed the WTO adjudicatory bodies as biased against the US. He said that although the WTO was set up 'to benefit everybody…, we lose the lawsuits, almost all of the lawsuits in the WTO'.[91] Even the ICC – an institution protecting the people from genocide, crimes against humanity and war crimes – was portrayed as a threat to the people by the US administration: 'The United

87 Alter, Hafner-Burton and Helfer, *supra* note 27, at 454.

88 Krieger, *supra* note 48, at 973.

89 Soley and Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', 14 *International Journal of Law in Context* (2018) 237, at 252.

90 'Turkey's Erdogan Says ECHR Ruling on Jailed Politician Supports Terrorism', *Reuters*, 21 November 2018, available at https://reut.rs/3IxgYjU.

91 'Trump Threatens to Pull US Out of World Trade Organization', *BBC*, 31 August 2018, available at www.bbc.com/news/world-us-canada-45364150.

States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court.'[92]

If such counter-myths are successful and resonate well with the public, the ICs' social legitimacy can suffer substantially and erode incrementally. After all, even liberal thinkers argue that the populist narratives resonate with the public as they address some points that bother people yet have long been overlooked or unsatisfactorily addressed by the liberal actors.[93] Returning to Dothan's argument, this implies that ICs' contribution to public deliberation can be significantly impaired. If the public is persuaded by the counter-myth and views an IC as an external threat to their identity and well-being, the IC's judgments are not likely to produce beneficial social processes. This effect may be augmented by populist leaders' skill in (mis)using social media, including the use of fake accounts, bots, fake news, manipulation of algorithms, etc.[94] Moreover, individual delegitimizing statements sometimes represent a mere prelude to more severe measures. Chávez's aforementioned criticism was just a prequel to Venezuela's later exit from IACtHR. Kenyan critique of the ICC nearly led to a collective withdrawal of African states from the Rome Statute (see Section 3.C).

Part of the problem may be *how* ICs influence public deliberation. Dothan explains that ICs initiate further deliberation and change the debate about power to a discussion about rights and values (at 68). Populism is well equipped to portray this shift as a threat too. Populism has been labelled as politics of impatience and immediacy.[95] It sees politics as a polarized friend v. foe conflict. Refusing 'the endless litigiousness' of liberal institutions,[96] it seeks action and fast enforcement of the alleged will of the people. As Blokker put it, populists stress popular sovereignty and claim 'to bring the law closer to the people and to engage in the only legitimate way of making law – that is, through political majorities'.[97]

The populist counter-myths significantly complicate ICs' stature and contribution to public deliberation. They translate a number of ICs' advantages to threats and aim to turn the people against ICs. If ICs want to maintain their authority, they have to care not only about the legitimacy and consequences of their rulings and the quality of their arguments, but also about cultivating their own myth.[98] Yet, IC judges are not public relations specialists, and they face powerful adversaries – charismatic populist leaders with communication training and virtually unlimited access to the media.

[92] See 'John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack', *supra* note 3. In June 2020, Trump's administration announced actual sanctions against any ICC officials involved in investigation of US forces' behaviour in Afghanistan.

[93] J. Zielonka, *Counter-Revolution: Liberal Europe in Retreat* (2018).

[94] See Helfer, *supra* note 47, at 226.

[95] Waldron, 'Rule-of-Law Rights and Populist Impatience', in G. Neuman (ed.), *Human Rights in a Time of Populism* (2020) 43.

[96] Urbinati, 'The Populist Phenomenon', 51 *Raisons politiques* (2013) 137, at 147.

[97] Blokker, *supra* note 14, at 1011.

[98] See *supra* note 43.

C *Decreasing the Costs of Resistance against ICs*

The counter-portrayals of ICs may affect the outcomes of ICs not only at the micro level of a particular case. They can reach across borders and mobilize transnational alliances, which may influence also the meso- and macro-level outcomes concerning the international regime surrounding the given IC or even the international order as such. Most importantly, they may shift the costs and benefits of (non-)compliance with international commitments. The decreasing social legitimacy of an IC, coupled with a transnational campaign against an IC, can reduce the costs of resisting ICs and make non-compliance, exit and other resistance techniques more likely. Engaging with Dothan's argument about admissibility rules at international criminal tribunals, this section illustrates the described risk in the case of Kenya's backlash against the ICC.

Beside all the aforementioned strands of ICs' criticism, the reviewed book also considers the critique that ICs produce bad results and that outcomes free of ICs' involvement are better than those following ICs' interventions.[99] To refute these claims, Dothan presents a detailed strategic analysis of admissibility rules at international criminal tribunals. While the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda adopted the rule of primacy, the ICC is based on complementarity. Under primacy, ICs have priority over national courts' jurisdiction. Under complementarity, ICs exercise jurisdiction if national legal systems fail to do so, including where they are unwilling or unable to genuinely carry out proceedings. Dothan argues that the chosen admissibility rule crucially affects the ICC's main goal: deterring genocide, crimes against humanity and war crimes. In a game theory-inspired analysis, he shows that the effects depend on the type of state in question and on the probability of prosecution by the ICC:

> [W]hen the probability of prosecution is low, complementarity is clearly superior to primacy regardless of the types of states under the ICC's jurisdiction. Complementarity leads to more deterrence than primacy in rule of law states, while in corrupt states both rules of admissibility will not deter soldiers.... [W]ith a high probability of prosecution, primacy is clearly superior regardless of the type of states under the ICC's jurisdiction. In rule of law states, soldiers will be equally deterred under both admissibility rules. But in corrupt states, primacy can deter soldiers where complementarity would fail. (at 118–19)

Dothan then moves the debate a step backwards and analyses how the chosen admissibility doctrine affects states' willingness to join (or exit) the ICC. The conclusion is that complementarity is a better doctrine for an incipient court with a low likelihood of prosecution. Primacy, however, is superior under the condition of high probability of prosecution (at 129). Although the chapter is tied to the ICC, Dothan extends it to other courts elsewhere in the book and claims that ICs can affect the states' willingness to join their jurisdiction or increase its scope through doctrines they develop (at 8).

However, even this particular example of ICC admissibility rules – perhaps too specific to generalize on ICs as such – shows how populism challenges IC justifications.

[99] For Dothan's definition of good and bad outcomes, see *supra* note 9.

Dothan's claim rests on the states' balancing political and reputational costs and the benefits of being subject to an IC's jurisdiction and having to comply with its rulings (at 117). The argument I advance here is that populism mixed with nationalism and the crisis of liberal internationalism shifts the cost–benefit analysis of being subject to ICs' jurisdiction by reducing the costs of exit and non-compliance: not only by re-framing the exit through developing the ICs' counter-myths as discussed above, but also by transnational coalitions of like-minded states.

The very example of the ICC's admissibility rules shows how a mix of ethno-national, populist and sovereigntist rhetoric can problematize ICs' outcomes and reduce their authority. The violence in Kenya following the 2007 election led to a thousand people being killed and hundreds of thousands displaced.[100] In 2010, the ICC opened the investigation of six persons including Kenyan ministers Uhuru Kenyatta and William Ruto, who later became the President and Deputy President of Kenya respectively. Kenyan representatives pursued a complex backlash strategy against the ICC. Hijacking the complementarity rule was an important part of it.

After the ICC started investigations, Kenya's initial plan was to avoid, or at least postpone, them with reference to complementarity. Kenya demanded domestic investigations, claiming that domestic and regional prosecutions are more legitimate than the ICC's actions. Accordingly, the domestic authorities proposed a number of domestic mechanisms for investigating the post-electoral violence, none of which came into being though. Yet, the ICC Pre-Trial Chamber rejected the defendants' admissibility challenge. Nevertheless, the African Union supported Kenya's efforts to try Kenyatta and Ruto domestically. Later, the Union proposed trying them in regional courts rather than the ICC and attempted to establish an African regional tribunal for prosecuting international crimes. By that time, Kenya had proposed to amend the complementarity rule so that it included regional investigation and prosecution mechanisms.

While none of these techniques were successful, Kenya incrementally intensified its rhetoric criticizing the trial. Politicizing the complementarity rule, together with employing a campaign full of nationalistic, populist[101] and anti-colonialist elements, was a crucial part of this. The ICC's unwillingness to transfer the cases to the domestic level was portrayed as a lack of respect for the sovereignty of the Kenyan people and as evidence that the ICC had been captured by the Western elite's colonial interests. Kenyatta said that the ICC 'stopped being the home of justice the day it became the toy of declining imperial powers', adding that the ICC's interventions 'constitute a

[100] The following account of Kenya's backlash against the ICC draws from Helfer and Showalter, 'Opposing International Justice: Kenya's Integrated Backlash Strategy against the ICC', 17 *International Criminal Law Review* (2017) 1; Sandholtz, Bei and Caldwell, *supra* note 41; Ochs, 'Propaganda Warfare on the International Criminal Court', 42 *Michigan Journal of International Law* (2021) 581.

[101] According to Voeten, secondary literature is split on qualifying Kenyatta as a populist. For my purposes, however, it is not necessary to classify each leader into a single box; populism is a scale rather than a binary notion. What is crucial here is that Kenyatta's political style (at least towards the ICC) includes ethno-national, sovereigntist and populist elements. Voeten, *supra* note 47, at 414.

fetid insult to Kenya and Africa. African sovereignty means nothing to the ICC and its patrons'.[102] Public support for ICC prosecutions decreased significantly.

This counter-myth proved to resonate well, even across borders. As Helfer and Showalter put it:

> Cumulatively, the appeals to complementarity fueled the narrative that the ICC prosecutions represented the West's stubborn refusal to respect Kenya's sovereignty by facilitating domestic investigation and prosecution of the defendants. This narrative served bolstered [sic] the defendants' domestic popularity, increased public hostility to the ICC, and framed the cases against Kenyatta and Ruto as exemplars of a broader regional concern rather than a Kenya-specific problem.[103]

Kenya managed to regionalize the conflict and turn it into a pan-African concern. The African Union got involved and adopted or proposed several measures supporting Kenya's position. The peak was a vote on the *en masse* withdrawal of African countries from the Rome Statute. Although the proposal was unsuccessful in the end, it helped to disseminate the counter-myth about the ICC. The African Union, as well as some African states individually, continued supporting Kenya. Kenya itself obstructed the ICC process, especially in terms of providing evidence. As a result, the ICC Prosecutor was forced to drop charges against Kenyatta and Ruto in 2014 and 2016 respectively.

This case shows that the sovereigntist and populist rhetoric denouncing the ICC cloaked in a specific interpretation of complementarity can reshuffle the cost–benefit analysis of the intervention by ICs. The ICC refused to defer to Kenya's domestic mechanisms as it saw them as shams. According to Dothan, 'if the state would conduct sham trials, the ICC would declare that the state is unwilling to prosecute its soldiers. This declaration itself would be very damaging to the state's reputation' (at 121). The Kenyan situation, however, demonstrates that the nationalist and populist rhetoric allowed the state to reduce the reputational costs by striking back against the ICC. Building on important pre-existing debates about accusations of the ICC's anti-African bias,[104] the Kenyan leaders developed a counter-myth reframing the whole issue, regionalizing the conflict and ultimately avoiding the prosecutions.

In addition, the regionalization of the conflict represented a bigger challenge to the ICC. Kenya's counter-myth of the ICC spread and incited a threat of a withdrawal cascade. After the ICC started investigating grave rights violations in Burundi, the country's Vice-President denounced it as a 'plot aiming to hurt Burundi' and labelled the ICC as a 'political tool used by the international community to oppress African countries'.[105] Burundi subsequently exited the ICC. Gambia and the South African Republic notified their withdrawal from the Rome Statute too, but later withdrew their notifications of withdrawal. Beyond Africa, the Philippines left the ICC in 2019 after the ICC Prosecutor announced the preliminary examination of extra-judicial killings as part

[102] Quoted in Helfer and Showalter, *supra* note 100, at 19.
[103] *Ibid.*, at 41.
[104] See K. Clarke, A. Knottnerus and E. Volder (eds), *Africa and the ICC* (2016).
[105] Sandholtz, Bei and Caldwell, *supra* note 41.

of Duterte's war on drugs. In the official note, the Philippines framed the withdrawal as a 'principled stand against those who politicize and weaponize human rights'.[106]

Examples from other international regimes support the argument that regionally strong states can be influential among like-minded countries and spread the resistance to an IC. In the Inter-American system, Venezuela's backlash had an important transnational dimension. Venezuela established several parallel international institutions serving as alternatives to the Organization of American States (OAS, the IACtHR's umbrella organization), often gathering like-minded populist governments.[107] These governments have also criticized the IACtHR[108] and contributed much to the so-called strengthening process – a reform aimed at weakening the role of human rights actors of the OAS, particularly the Inter-American Commission.[109] These additional examples support the thesis that populist critique of ICs can have a transnational appeal uniting and mobilizing like-minded states and, thereby, reduce the reputational costs of non-compliance or even exit.

D *Exacerbating the ICs' Dilemma between Legitimacy and Strategic Concerns*

Considering all the previous challenges together, populism has the capacity to increase the costs of international judicial intervention for ICs and reduce the costs of resisting ICs by the populist actors. Such a situation is highly problematic for ICs on many fronts. One of them is that it further exacerbates the ICs' dilemma between the normative legitimacy of their intervention and its strategic aptness.

Dothan lists normative legitimacy as the first condition of a justifiable international judicial intervention (at 35). A traditional argument for ICs' legitimacy relies on state consent – states themselves agreed to the international commitments and the ICs' jurisdiction. Following from the state consent logic, Dothan argues, ICs should mostly follow states' intentions and not impose new obligations on them. Thus, restrictive interpretation should become a standard (at 15–19). He adds, however, that in some situations the expansive approach of an IC can be legitimate: (i) if there are reasons to believe that the treaty's text fails to reflect all the parties' will, for example due to political pressure during the treaty negotiation or due to complicated amendment rules; (ii) if the states misrepresent the will of individuals affected by their actions (democratic failure) (at 19). As the book deals in greater detail with the latter, I also focus on the democratic failure scenario.

Dothan claims that the principle of state consent is justified by the assumption that states usually represent all individuals affected by their actions. However, expansive

[106] Casis and Benosa, 'Current International Legal Issues: Philippines', 23 *Asian Yearbook of International Law* (2017) 41, at 53–55.

[107] Soley and Steininger, *supra* note 89, at 251; Krieger, *supra* note 48, at 981.

[108] Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights', in J. Couso, A. Huneeus and R. Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (2010) 112, at 132.

[109] Contesse, *supra* note 41, at 209–210.

interpretations may be legitimate when 'there is good reason to believe that states do not represent the interests of these individuals' (at 28). These situations of democratic failure typically include the disenfranchised (foreigners and prisoners), discrete minorities not fully represented in the democratic process and cases of interest groups' disproportional influence on the democratic process (at 29–32). Consequently, ICs facing 'states with potential democratic failures should not defer to their policies' (at 34). Yet, an exception to this principle exists. Dothan argues that ICs can defer to the states even in cases of democratic failure if their interventions would have harmful effects. Aggressive IC intervention can lead states to seek restrictions of the IC's mandate, not joining additional commitments or even exiting the regime (at 35 and 130). Elsewhere in the book, Dothan puts this bluntly, 'backlash should be considered by the court as it makes its decisions. The court cannot go on suicide missions' (at 48).

Although the general framework created by Dothan is persuasive, balancing the general principle (no deference in democratic failure cases) with the exception (deference if reprisals are likely) could prove tricky in the era of democratic decay. Authoritarian populism tends towards democratic failures, but also increases the probability of backlashes against ICs.

The effects of populism on the democratic process remain contested.[110] Recent accounts, however, explain that populists in government can have some democratizing effects on countries in early phases of transition from autocracy to democracy. Yet, once the country reaches the stage of a liberal constitutional democracy, populist governments' steps often lead to democratic decay.[111] Since populism is based on a bifurcation in society – us versus them, the morally right real people versus corrupt elites[112] – the goal of populist politics is authentic enforcement of the real people's will.[113] This leads to anti-pluralism and excludes some members of society from the people in the populist sense.[114] Authoritarian populism in practice thus often leads to deformation of the democratic process in many ways. Besides the restrictions imposed on civil society actors,[115] populist governments often regulate the media in such a way so as to suppress critical voices.[116] In the legislative process, they were reported to be bypassing the regular procedures, restricting the rights of opposition MPs and suffocating parliamentary debate.[117] In some countries we even witness changes to

[110] See, e.g., Howse, 'In Defense of Disruptive Democracy: A Critique of Anti-populism', 17 *ICON* (2019) 641.

[111] C. Mudde and C. Rovira Kaltwasser, *Populism: A Very Short Introduction* (2017), at 87.

[112] Mudde, *supra* note 15, at 542–543.

[113] Stanley, 'The Thin Ideology of Populism', 13 *J. Pol. Ideol.* (2008) 95, at 104–105.

[114] Müller, *supra* note 16, at 21. But see also Bugarič, *supra* note 17.

[115] Buyse, 'Squeezing Civic Space: Restrictions on Civil Society Organizations and the Linkages with Human Rights', 22 *International Journal of Human Rights* (*IJHR*) (2018) 965, at 970–973.

[116] T. Ginsburg and A. Huq, *How to Save a Constitutional Democracy* (2019), at 108.

[117] Kazai, 'The Misuse of the Legislative Process as Part of the Illiberal Toolkit. The Case of Hungary', *Theory and Practice of Legislation* (*Theory & Prac. Legis.*) (forthcoming); Szente, 'The Twilight of Parliament – Parliamentary Law and Practice in Hungary in Populist Times', 1 *International Journal of Parliamentary Studies* (2021) 127; Bień-Kacała, 'Legislation in Illiberal Poland', *Theory & Prac. Legis.* (forthcoming); Scotti, 'With a Different Name, the Rose Is Not a Rose Anymore: Legislative Quality and Gender Equality in the AKP's Turkey', *Theory & Prac. Legis.* (forthcoming).

electoral rules in order to rig elections.[118] Domestic courts are often unable to counter these policies since they are themselves targeted – paralysed and/or captured – by populists.[119] These measures critically increase the chance that a state does not represent the will of all affected individuals, which according to Dothan justifies expansive IC intervention.

However, as the previous sections argued, populists are also well equipped to resist the intervening IC – delegitimize it, seek restrictive changes in its institutional design, exit it or otherwise challenge its authority. Additionally, the incremental nature of democratic decay makes things even trickier since it is difficult to ascertain a clear point when democracy is damaged. Individual elements of the populist reforms might seem justifiable, but their joint effect deteriorates democracy.[120] These features make the ICs' dilemma as to when to intervene even more problematic.

An example from the Inter-American system illustrates these difficulties. Once Hugo Chávez took power, the democratic regime in Venezuela started gradually deteriorating.[121] After initial reluctance and deference towards Chávez, both the Inter-American Commission and the Inter-American Court of Human Rights started countering Chávez's policies. The IACtHR stood against a number of these policies, including prosecuting and assaulting journalists, dismissals of domestic judges and later even extrajudicial killings of political opponents. These interventions, however, failed to put Venezuela back on the democratic track as they have not been enforced. Moreover, using the populist and nationalist rhetoric, Chávez managed to portray the IACtHR as a foreign evil and mobilized the people against it.[122] That increased domestic support for the Chavista regime and allowed Chávez to denounce the American Convention on Human Rights in 2012.[123] The IACtHR's interventions against Venezuela thus ultimately led to a severe backlash against the IC. Nevertheless, a contrary, deferential approach by ICs to decaying countries does not seem to be advisable either. European ICs have often been criticized for adopting a too lenient approach that failed to counter democratic decay in Hungary.[124]

To summarize, countries governed by authoritarian populists are more likely to cause democratic failures but are also more likely to attack ICs' authority in response to their intervention. As a result, the intervening ICs finds themselves between a rock and a hard place. On the one hand, the legitimate thing to do is to intervene

[118] N. Cheeseman and B. Klaas, *How to Rig an Election* (2019).

[119] Petrov, '(De-)judicialization of Politics in the Era of Populism: Lessons from Central and Eastern Europe', *IJHR* (forthcoming); W. Sadurski, *Poland's Constitutional Breakdown* (2019); Halmai, 'Dismantling Constitutional Review in Hungary', *Diritti Comparati* (2019) 31; Urribarri, 'Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court', 63 *Law and Social Inquiry* (2011) 854.

[120] Ginsburg and Huq, 'How to Lose a Constitutional Democracy', 65 *UCLA Law Review* (2018) 78, at 94; Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making?', 13 *ICON* (2015) 279.

[121] A. Brewer-Carías, *Dismantling Democracy in Venezuela* (2010).

[122] Candia, 'Regional Human Rights Institutions Struggling against Populism: The Case of Venezuela', 20 *Ger. L.J.* (2019) 141.

[123] Soley and Steininger, *supra* note 89, at 250.

[124] Ginsburg and Huq, *supra* note 116, at 192.

expansively as populist governments often tend to deform the democratic process. On the other hand, it might be strategically reasonable to defer since populist actors are well equipped to harm the ICs' authority. As a result, Dothan's framework for assessing the legitimacy of ICs' intervention may not guide ICs sufficiently in the particular context of populist-governed decaying democracies.

4 Conclusion

Reflecting upon the state of the international order, Cesare Romano recently stated that we need scholarship 'that can help find ways to entrench ICs in the international landscape'.[125] *International Judicial Review* makes an important step in this direction. It provides innovative arguments justifying ICs' interventions, based on a rich theoretical and methodological toolkit, contributing to discussions about ICs' legitimacy, authority and performance. The book is a powerful response to various strands of IC criticism. This review essay, however, assesses Dothan's account from a viewpoint of the pressing populist challenge to ICs, which arguably represents a critical juncture in the evolution of ICs.

Reading *International Judicial Review* through the lens of the populist critique allows one to identify some of the specificities of the populist backlash against ICs and contribute to the growing debate on the populist challenge to international law. This review essay has aimed to show how exactly authoritarian populism challenges justifications of IC interventions and our thinking about ICs' legitimacy, authority and performance. It argues that the populist ideology provides ammunition for targeting ICs. It is a powerful ammunition based on specific interpretations of popular sovereignty, self-government and national (or regional) identity. This allows populists to re-frame the debate about ICs, problematize what has regularly been viewed as advantages of multilateralism and create counter-myths portraying ICs and their allies as threats to the people. Whether and when these counter-myths will be employed, however, seems to depend on the pre-existing domestic or regional cleavages and narratives. Overall, the domestic and transnational appeal of the populist reframing can shift the costs and benefits of (not) being subject to an IC's jurisdiction and (not) having to comply with its judgments. Accordingly, the populist attacks on ICs' social legitimacy and creation of alternative international institutions may facilitate non-compliance and even exit. This further exacerbates IC judges' dilemma of how to navigate between the legitimacy and strategic aptness of an international judicial intervention.

In sum, this essay has tried to show that the recent populist surge represents a severe challenge to our thinking about ICs and their justification. Populist countermyths and reframing efforts bring a whole new set of issues and considerations that IC judges will face and scholars have to re-think. While I have focused only on a handful

[125] Romano, 'Legitimacy, Authority, and Performance: Contemporary Anxieties of International Courts and Tribunals', 114 *AJIL* (2020) 149, at 162.

of examples, other authors argue that we might be heading towards far-reaching structural changes of international law.[126] Be that as it may, as Alter put it, 'we are surely in for a bumpy ride, and we cannot take for granted that the institutions under strain – including international courts – will endure this ride'.[127]

[126] Ginsburg, 'Authoritarian International Law?', 114 *AJIL* (2020) 221.
[127] Alter, *supra* note 70, at 8.