

FOREWORD

THE INTERNATIONAL ADJUDICATION OF MEGA-POLITICS

KAREN J. ALTER* & MIKAEL RASK MADSEN**

I

INTRODUCTION

International Courts (ICs) are increasingly called upon to rule on social and political issues that divide and polarize politics or pitch significant groups within societies against one another. Adjudicating such highly divisive issues puts ICs and their authority to the test. Yet, we have little systematic knowledge on the consequences of ICs' involvement in such cases. What happens to the courts themselves in the aftermath of such cases? What happens to the legal issues involved? What are the consequences for the dispute itself and the polity more generally?

Because of the proliferation of ICs over the past decades and the overall expansion of international legal norms, ICs are today faced with a multitude of questions that are deeply politicized both nationally and internationally, ranging from migrants' rights to territorial disputes. We borrow the notion of “mega-politics” from Ran Hirschl, who developed it for his critique of the increased turn to courts—national and international—for the resolution of “issues of outright and utmost political significance that often divide whole polities.”¹ However, as we detail in the first article included in this special issue, “The International Adjudication of Mega-Politics” by Karen J. Alter and Mikael Rask Madsen,² the notion must be broadened to fully capture the wealth of deeply politicized cases that ICs face today. Moreover, as both this article and other contributions to this special issue suggest, IC involvement in mega-political disputes might not lead to a diminishing of democracy but instead help democratic deliberation.

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* Karen J. Alter is a Norman Dwight Harris Professor of International Relations and Professor of Political Science and Law at Northwestern University. She is also a permanent visiting professor at the iCourts Center for Excellence and a University of Copenhagen Faculty of Law.

** Mikael Rask Madsen is a Professor of Law at the University of Copenhagen and the Director of iCourts Center for Excellence for International Courts at the Danish National Research Foundation.

1. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. OF POL. SCI. 93, 94 (2008) [Hereafter Hirschl, JUDICIALIZATION OF MEGA-POLITICS].

2. Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 1.

This preface briefly previews the studies included in this special issue, focusing in particular on how they engage the concept of mega-politics as reframed in the first article included in the special issue. Although all articles engage the general framework developed by the editors, this is a collective project. We asked each set of contributors to this special issue to select a mega-political topic to consider, explain why the issue was mega-political, and choose a specific focus. The scope of the inquiry is national, transnational, and international, and the case-studies are written by an interdisciplinary group of experts of ICs and generally involve both junior and senior scholars.

The original plan was to discuss papers at a first workshop, undertake revisions, and reconvene again for a second workshop. The COVID-19 pandemic however forced us to cancel the workshop just one day before it was scheduled at iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts at the University of Copenhagen. A second planned workshop was held as an abridged Zoom seminar. It is important to acknowledge that the COVID-19 pandemic has impacted scholarly research and this project, not as an excuse, but rather to better take stock of where we individually and collectively find ourselves in the beginning of 2022.

II

OUTLINE OF THE SPECIAL ISSUE

Karen J. Alter and Mikael Rask Madsen's article "The International Adjudication of Mega-Politics" provides the overall framework for the special issue.³ Expanding on Ran Hirschl's definition, the authors explain that the mega-politics descriptor applies to the issue in dispute, not a court ruling itself or the politicization of a legal controversy. Alter and Madsen identify three structural contexts that give rise to mega-politics litigation: 1) inter-state disputes; 2) social cleavage disputes; and 3) sovereignty-based disputes. These categories suggest that IC embroilment in mega-politics is neither new nor likely to end, and it may in fact be increasing in prevalence. The authors identify strategies international judges may use to avoid engaging, alongside reasons why ICs may decide not to avoid the controversy. They then discuss the particularities and consequences of embroiling international adjudicators in these highly contentious legal-political issues. While there are always risks when courts intervene in issues of high salience and political significance, the fragile authority of ICs and the rise of nationalism and populism exacerbates the risk for ICs. The article discusses the variable and fragile authority of ICs in general, explaining that the risk is not so much a backlash that leads to dejudicialization, but rather that key actors will stop bringing cases or adhering to IC rulings. The framework sets up the special issue contributions that investigate how ICs navigate, contribute to, and survive their engagement in mega-politics.

3. *Id.*

Dorte Sindbjerg Martinsen and Michael Blauberger's article "The Court of Justice of the European Union and the Mega-Politics of Posted Workers" examines the hotly contested issue of the labor rights of workers from one European country who are temporarily employed in another European country.⁴ The authors explain that this issue has generated problems due to the differential labor and social regulations of the member states, putting rules on the freedom of services in a collision course with labor regulations, which many member states see as falling within their sovereign prerogative. Through a provocative analysis of newspaper coverage of the political debates about rulings of the Court of Justice of the European Union (CJEU) in five countries from 2000-2020, the authors find that the issue was already politicized before the CJEU ruled, in large part because European enlargement disrupted a careful political balance achieved among pre-enlargement member states. The authors argue that the CJEU first tried to rebalance the diverse interests, issuing rulings that proved highly controversial. It then stepped back, parsing the responsibility for determining the relevant rights to implicated states. The authors process-trace the interaction of CJEU rulings with different political attempts to resolve the conflict legislatively. The judicial-legislative interaction, although controversial, ultimately helped to quiet tempers, and the authors see the CJEU as crucial in helping to craft a workable solution. The overall finding is that while the CJEU's "Laval quartet" rulings became a lightning rod of contestation, the heart of the problem came from conflicts of law, not the CJEU per se. By trying to help craft solutions, and later deferring to member state solutions, the CJEU both weathered the storm and helped to right the ship.

Silvia Steininger and Nicole Deitelhoff's article "Against the Masters of War: The Overlooked Functions of Conflict Litigation by International Courts" examines adjudication of violent conflict in various guises and legal venues.⁵ Focused on the mega-politics involved in adjudicating these cases, the authors argue that one cannot assume that international judicial intervention is harmful to the goals of democracy, the peaceful resolution of disputes, or the legal norms in question. Even if the parties ignore the ruling or use it to rally their forces, the authors argue that judicial involvement has writ-large been helpful for instantiating what Karen Alter and Mikael Rask Madsen refer to as the intermediate and extensive authority of ICs and of the law in question. Moreover, when litigation is embraced by both sides, judicialization buys time, interjects legal concerns, and creates a space and process for partisans to work out their differences. Even in cases where the various sides reject and capitalize on litigation for their own purposes, the authors reject the validity of a counterfactual analysis of what might have been had the IC not become involved. History cannot be rewritten, they argue, especially when the subject is war. Litigation will neither win nor end the war,

4. Dorte Sindbjerg Martinsen & Michael Blauberger, *The Court of Justice of the European Union and the Mega-Politics of Posted Workers*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 29.

5. Silvia Steininger & Nicole Deitelhoff, *Against the Masters of War: The Overlooked Functions of Conflict Litigation by International Courts*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 95.

but the development of law and legal processes can contribute to less violence and the peaceful resolution of disputes.

Laurence Helfer and Clare Ryan's contribution "LGBT Rights as Mega-Politics: Litigating Before the ECtHR" examines the evolution of LGBT rights litigation before the ECtHR.⁶ Using new empirical data, they show that the rights of sexual minorities have increasingly been politicized in recent years, and that this politicization is likely to be a feature of future ECtHR cases. Although most of the early controversies involving LGBT rights have become settled in many European countries and are thus no longer mega-political, Helfer and Ryan show how both old and new LGBT right controversies have (re)emerged as mega-political issues in other European countries and before the ECtHR. The authors suggest that recent expansions of ECtHR case law, in particular in the area of same-sex families and asylum, are likely to further politicize LGBT rights litigation before the Strasbourg Court. They provide concrete examples of how the combination of deep social cleavages over LGBT rights in some member states and sovereignty driven politics have fueled the re-politicization of LGBT rights as a mega-political issue—yet only for some countries and with respect to some issues. The mega-politics of LGBT rights is, in other words, highly variable across Europe and with respect to the specific issue involved, so that one increasingly finds different states pitched against each other on these issues.

Salvatore Caserta and Pola Cebulak in "Territorial Disputes by Proxy: The Indirect Involvement of International Courts in the Mega-Politics of Territory" examines an obvious candidate for mega-political disputes: contested delineations of territory between states.⁷ The authors focus on how these territorial disputes sometimes reach ICs indirectly. More specifically, the article focuses on how regional courts, set up to mainly adjudicate economic and/or human rights matters, have increasingly been faced with such indirect territorial disputes. Since these regional courts have compulsory jurisdiction and allow private litigants access, they have created the pathway that different segments of litigants can use to contest territorial claims. Focusing on territorial cases before the Central American Court of Justice, CJEU, and the ECtHR, the authors explore how these cases, and the discussion of these cases, is different from the literature on the ICJ's inter-state adjudication of territorial disputes. ICJ cases are generally consensual, and studies find that judicial intervention can help find peaceful resolution to conflicts. The lack of state consent for regional territorial dispute resolution by proxy contributes to more mixed results. In some instances, the intervention of regional judges has exacerbated the underlying inter-state conflict, while in others, regional courts have contributed to stabilizing the conflict and reframing public discourse from being centered on national interest to focusing on individual rights.

6. Laurence R. Helfer & Clare Ryan, *LGBT Rights as Mega-Politics: Litigating Before the ECtHR*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 59.

7. Salvatore Caserta & Pola Cebulak, *Territorial Disputes by Proxy: The Indirect Involvement of International Courts in the Mega-Politics of Territory*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 123.

Hélène Ruiz Fabri and Edoardo Stoppioni's article "*Jus Cogens* before International Courts: The Mega-Political Side of the Story" considers how the legal category of *jus cogens* generates inter-state conflicts.⁸ While *jus cogens* is generally understood as a set of fundamental and overriding principles of international law that provide peremptory norms for the international system, the substantive contents of *jus cogens* norms and their precise value as legal sources are deeply contested. This contest over *jus cogens* is largely driven by sovereignty claims. This contested category of international law was originally framed as a dispute over Western conceptions of international law against non-aligned and socialist states at the advent of decolonization. More recently, however, Third World Approaches to International Law (TWAIL) have invested in *jus cogens* as an emancipatory legal tool against the continuous Western dominance of international law. The authors show how this conflict remains unresolved in international law and that international judges continue to oscillate between a conservative and a progressive stance on *jus cogens*. Using a more normative TWAIL perspective, the authors argue that *jus cogens* offers an overlooked procedural potential, and particularly for those who have been reduced to subalterns of the international system.

James Thuo Gathii and Olabisi Akinkugbe's article "Judicialization of Election Disputes in Africa's International Courts" explores the practice of candidates disputing electoral outcomes in front of regional ICs, even when the ICs' jurisdiction for doing so is questionable or non-existent.⁹ Litigants turn to ICs because domestic courts tend to ratify the election of incumbents, contributing to the "hegemonic preservation of incumbents."¹⁰ The cases they examine were sometimes adjudicated domestically, sometimes internationally, and sometimes in both venues. The authors are mostly interested in why litigants chose to judicialize the dispute. While the plaintiffs sometimes win legal victories that validate some of their arguments, they typically do not manage to reverse the electoral outcome. Litigants pursue cases, knowing they will lose, because doing so draws domestic and international attention to their complaints. Given that elections will reoccur, the goal is to draw greater scrutiny for the next election. Given that the elections are nationally validated, and IC rulings in these cases are generally ignored, the legal reviews are not politically disruptive. The authors then review recent national level judicial decisions that reversed problematic elections. The Malawi and Kenyan rulings they analyze apply new understandings of election laws and of the role of supreme courts in interpreting these laws. The authors' point is that the boundaries of election laws, the role of African ICs, and the role of African Supreme Courts are being redefined by the litigation their article addresses.

8. Hélène Ruiz Fabri & Edoardo Stoppioni, *Jus Cogens before International Courts: The Mega-Political Side of the Story*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 153.

9. James Thuo Gathii & Olabisi D. Akinkugbe, *Judicialization of Election Disputes in Africa's International Courts*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 181.

10. *Id.*

Karen J. Alter and Mikael Rask Madsen's article "Beyond Backlash: The Consequences of Adjudicating Mega-Politics" concludes this special issue.¹¹ It examines the implications of adjudicating mega-politics for politics, for society, for the case at hand, and for the ICs involved. The authors draw on the findings of the special issue contributions, identifying the many strategies that ICs use to rule on the issue without inciting a political backlash. The conclusion also further develops the claim that adjudicating mega-political disputes need not be democracy undermining. The analysis ends up questioning whether we should worry about ICs adjudicating mega-political disputes. The cautiously salutary findings do not mean that all involved should welcome more adjudication of mega-political disputes. It is always better for stakeholders to resolve their disputes themselves, so long as minority and vulnerable individuals and groups are not thrown under the bus in the process. The findings of this special issue do, however, mean that the international adjudication of mega-politics, while deeply frustrating for political leaders that would prefer to ignore international law, is perhaps not something that should be avoided wherever possible. Circling back to Ran Hirschl's concern about juristocracy, the overall finding is that international judicial review of mega-political issues does not necessarily lead to juristocracy. Instead, international legal review of mega-political cases may be a limited but nonetheless consequential fail-safe against the alternative of unfettered and unquestioned actions and interpretations of international law, rendering international law a rule-by-law tool of heads of state.

11. Karen J. Alter & Mikael Rask Madsen, *Beyond Backlash: The Consequences of Adjudicating Mega-Politics*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 219.