

BEYOND BACKLASH: THE CONSEQUENCES OF ADJUDICATING MEGA-POLITICS

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I

INTRODUCTION

This Article examines the implications of adjudicating mega-politics for the case at hand, for the larger mega-political issue, for the normative order of international law, for domestic politics, and for the international courts (ICs) that adjudicate these types of cases. While it offers a different angle on the question of ICs' involvement in mega-political disputes than the other articles in this issue, it also provides a conclusion to this special issue: *The International Adjudication of Mega-Politics*. As such, its goal is to offer a more general account of the consequences of ICs' embroilment in mega-political issues and disputes.

The adjudication of mega-politics is the phenomenon of courts becoming involved in issues of outright and utmost political significance that divide countries or societies.¹ Unlike the situation of high politics, which involves existential topics that lie at the heart of sovereignty and deeply concern executive branches (for example, security and sovereign prerogatives), an issue is mega-political because it is both divisive and engages society and often, although not always, governments. When ICs are called upon to adjudicate hotly-contested and socially or politically divisive issues, they know well that no matter how they rule, powerful actors and segments of society are likely to be frustrated or disappointed.² They are also well aware that resistance, contestation, and forms of actual or symbolic backlash from disappointed parties might follow from such involvement.

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1. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. OF POL. SCI. 93, 94 (2008). The framing article for this special issue adapts Hirschl's definition for the purposes of this study. See Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 1–2.

2. A recent paper argues that in highly contested issue-areas—what are termed here as mega-political conflicts—the concern with the outcome of the cases becomes paramount. See Mikael Rask Madsen, Juan A. Mayoral, Anton Strezhnev & Erik Voeten, *Sovereignty, Substance, and Public Support for European Courts' Human Rights Rulings*, AM. POL. SCI. REV. (2021).

The introductory article of this special issue argues that mega-political disputes are the cases where ICs are least likely to be able to resolve the dispute, and perhaps most likely to engender political backlash.³ For many reasons, ICs cannot avoid being embroiled in mega-political disputes, but their involvement comes with political and institutional risks. ICs can end up in critics' crosshairs because they perform their role as counter-majoritarian institutions by interpreting and enforcing norms that put a brake on actors who violate individual rights, create civilian casualties as a war tactic, or abrogate international agreements they no longer like. While ICs' involvement in mega-political disputes is not new, it may be increasing because of international judicialization trends, which have led to establishing a growing number of ICs that have compulsory jurisdiction and offer access for non-state actors to initiate litigation.⁴ In recent years, this trend has particularly clashed with the rise of populism and nationalism, resulting in certain parties contesting the liberal international script reflected in large swaths of international law.⁵ Hence, it may be both inevitable and unavoidable that ICs will be seized by those who prefer that international law be followed, much to the consternation of those who understand sovereignty as conferring an international legal right to defend a country's national interests—however the government defines it—by whatever means those parties deem necessary. All of this portends that the international adjudication of mega-politics is a phenomenon that is likely to grow in prevalence, perhaps provoking increased resistance to ICs.

This Article is focused on generalizing this special issue's findings on the consequences of IC involvement in mega-political issues. Generally, the special issue's collective findings challenge Ran Hirschl's concerns about juristocracy, which spurred his original interest in mega-politics. Hirschl was worried that judicial intervention would instantiate elite hegemony in antidemocratic ways.⁶ This Article does not question his findings based on a comparative analysis of constitutional courts. Yet, as it pertains to our specific focus on IC intervention in mega-politics, this Article will argue that IC involvement, on balance, tends to be democracy-enhancing. More specifically, the international adjudication of mega-politics tends to engender or reinforce the rule of law, due process, and human rights because of the ways in which ICs provide legal processes that translate political opposition into legal categories and rights. This Article also argues, contrary to the 'most likely' claims presented in the introductory article

3. Alter & Madsen, *supra* note 1.

4. See KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 81-5 (2014) [hereinafter *THE NEW TERRAIN*]; Karen J. Alter, Emilie M. Hafner-Burton & Laurence R. Helfer, *Theorizing the Judicialization of International Relations*, 63 *INT'L STUD. Q.* 449, 450 (2019) [hereinafter *Theorizing Judicialization*].

5. See, e.g., David A. Lake, Lisa L. Martin & Thomas Risse, *Challenges to the Liberal Order: Reflections on International Organization*, 75 *INT'L ORG.* 225, 236-41 (2021).

6. See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (particularly chapters 1 & 6).

of this special issue,⁷ that an IC's involvement is not per se contributory to backlash politics that target the IC. This is because ICs have many strategies that can diffuse conflict, some of which are directly part of the core processes of adjudication. By carefully employing legal strategies that convert a larger dispute into a more tractable legal controversy, adjudication can, for example, transform what for partisans is a larger conflict into a more limited and specific battle that—at least to an extent—can be resolved. Resolving a piece of the underlying conflict can reinforce specific international legal norms and the idea that adjudication can helpfully resolve disputes, and it can contribute positively to the resolution of the larger controversy.

Underlying differences between ICs and national constitutional courts may help explain why IC involvement in mega-politics may mitigate Hirschl's concerns with juristocracy. To be sure, domestic judges can employ the very same legal strategies that ICs use to convert a conflict into something that is legally and politically tractable. Yet, in most cases, ICs' rulings are not directly applicable in national legal orders; instead, they have to go through a process of national adaptation. This means that in practice, IC rulings may inevitably be filtered by national institutions such as ministries of justice, attorneys general, and national judges and courts, as well as international officials. This filtering process, where international and domestic actors determine what compliance with an IC ruling requires, can nudge the parties towards finding a middle ground that arguably respects the IC ruling while satisfying (in part, if not in whole) opposing claims. In other words, some (but not all) IC rulings provide an additional and external element in the longer dispute resolution process that may help diffuse some of the contestation surrounding the core conflict that triggered the lawsuit. The Article returns to the effects of IC rulings on conflict resolution in Parts III and IV.

Interestingly, backlash might also be mitigated by the same possibility of working around or filtering an IC's intervention. One reason that the international adjudication of mega-politics seldom generates a broader political backlash is because the filtering process may generate a compromise that is more easily achieved than mobilizing support for changing international law or an IC's mandate. Backlash may also not be a likely outcome since international adjudication reinforces a normative order that many stakeholders support. Instead, these stakeholders will counter efforts to dejudicialize or weaken the laws in question.⁸ So while IC involvement may in the short term provoke an uproar that at first blush appears to exacerbate a conflict, in the long run IC involvement may also provide a path out of conflict. These cautiously salutary

7. Alter & Madsen, *supra* note 1.

8. See Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 318–26 (2016); Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. OF L. IN CONTEXT 197, 204 (2018).

findings do not mean that the adjudication of mega-political disputes is necessarily always the best way forward. It is usually better if stakeholders resolve their disputes themselves as long as, in the process, they do not sacrifice minority groups, vulnerable individuals, or the will of the people. The findings do, however, mean that the international adjudication of mega-politics, while deeply frustrating for political leaders and certain segments of society that would prefer to ignore international law, is perhaps not something that should be avoided wherever possible.

This Article proceeds as follows. Part II draws on the conflict literature to set reasonable expectations for an investigation of how IC intervention may impact a mega-political issue. Part III draws on the contributions to the special issue to show how and why international judicial intervention has varying impacts. Part IV focuses on how ICs themselves are impacted by becoming embroiled in mega-politics disputes, connecting this analysis to discussions about backlash against ICs and studies of IC authority. Part V provides a brief conclusion.

II

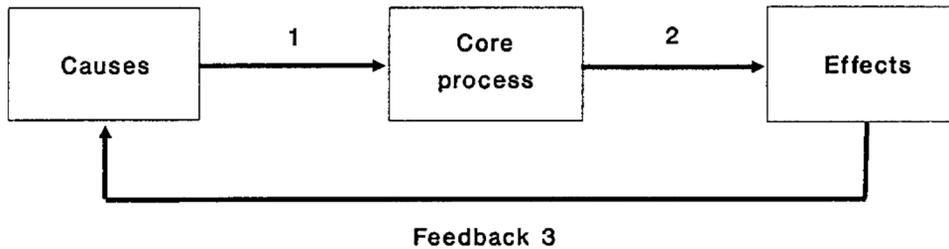
INTERNATIONAL COURTS AND CONFLICT RESOLUTION IN MEGA-POLITICAL CASES

By definition, a mega-political dispute involves societal and political conflict. Any adjudicatory intervention is invariably part of this conflict, and adjudication might contribute to conflict resolution, conflict exacerbation, or have little to no impact whatsoever. This Article will suggest that a focus on the particular conflict may be too limited, but given the interest in how international adjudication impacts specific conflicts and controversies, this Part briefly turns to the vast and varied literature on conflict resolution as a framework for thinking about how international adjudication of mega-politics might influence the resolution of either the case-specific conflict or the larger, mega-political conflict.

The conflict literature examines interpersonal, societal, and inter-state conflicts. Thus, it includes conflicts ranging from managerial concerns up to militarized civil wars. The central finding is that conflicts are only resolved when conflict participants agree to a mutually satisfactory solution. This may seem obvious, but its implications are profound. James Wall and Ronda Callister undertook a meta-analysis of this literature, distilling its insights and constructing a conflict map that situates any dispute resolution process (in their words, the “core process” of conflict resolution) into the larger process of conflict resolution.⁹ Figure 1 below identifies three linkages, each of which are separate cause-and-effect pieces of the conflict cycle.

9. See generally James A. Wall, Jr. & Ronda Roberts Callister, *Conflict and Its Management*, 21 J. MGMT. 515 (1995) (reviewing conflicts and the conflict management literature).

Figure 1: Wall and Callister's Conflict Cycle Framework¹⁰



This special issue applies this framework and asks how the core process of international adjudication impacts the dispute at hand (linkage 2) and the megapolitical issue more generally (linkage 3). Wall and Callister's larger point is that these linkages are interrelated. To focus only on the effects of the core process (linkage 2) without considering how the resultant effects are or are not related to the conflict's root cause (linkage 1) may generate faulty expectations. One may think that a beneficial direct effect will impact the parties to the conflict, but the core process may actually do very little to resolve the underlying conflict.¹¹ In the best-case scenario, the core process generates a positive feedback effect that mutates and dampens the larger conflict. In the worst-case scenario, the core process exacerbates the conflict by satisfying one group while angering another. Yet the more likely outcome is that there is no appreciable feedback effect (linkage 3), either because the root cause remains unaddressed or because the partisans are not ready to put aside their differences.

In sum, the conflict cycle framework indicates that two separate steps must be considered when exploring how international adjudication impacts megapolitical conflicts. The first step is whether adjudication contributes to the resolution of the concrete and delineated dispute that generated the legal suit. Resolution of the particular conflict could in itself be beneficial insofar as mobilized stakeholders find satisfaction, and perhaps especially egregious problems will then be addressed. The second step (which may or may not follow) is adjudication generating a positive feedback effect at the domestic or international level. This feedback beneficially mutates the conflict to engender positive changes, if only by jarring participants out of their position of repose.

Case specific facts are going to matter for these linkages. For example, when a territorial dispute is truly only about the land in question, it might be resolved by adjudication. When larger political issues are at stake, however, adjudication may not be enough to resolve a dispute. Contrasting the Bahrain-Qatar and South China Sea territorial disputes helps to elucidate this point. The facts in both disputes are roughly similar in that the land in question was uninhabited, and its monetary value laid in its divisible fishing and mineral rights. For over a hundred years, the Bahrain and Qatar dispute was mostly about loyalties and promises the

10. *Id.* at 516.

11. *Id.* at 526–30.

British Empire had made to local leaders. After oil was discovered in 1934, the British government in 1939 and the Gulf Cooperation Council in 1986 tried and failed to resolve the dispute.¹² In 1991, the conflict was transferred (controversially) to the International Court of Justice (ICJ). Adjudication was protracted, yet it “had its own rhythm. Where mediators sought compromises that both sides could endorse, judges simply proceeded through each step of the litigation process.”¹³ With specific disagreements resolved by judicial fiat, and with the entrenched rulers having died, the ICJ’s ruling (which split the difference and did not greatly upset the status quo created by Britain) established a border.¹⁴ It helped that sentiments in society more broadly were not inflamed, and that the new leaders wanted to move on from the older generations’ fights.

By contrast, the South China Sea case was dormant for many years because neither side could nor wanted to enforce their conflicting claims. This territorial dispute is now mega-political because China moved on to occupy and transform the contested islands into military bases, thus linking its land claim to historical Chinese visions of its dynastic past. The issue has also become mega-political because all parties involved see the dispute as a harbinger of China’s geopolitical intentions in the larger region. As was also the case in the Bahrain-Qatar dispute, one of the parties insisted that they had not consented to adjudication. It is hard to say whether the Philippines-China arbitration made the dispute worse, or if it simply had no impact. But the difference between the two cases comes down to the perspectives of the parties in each case: the Bahrain-Qatar parties wanted their dispute resolved, while the parties to the South China Sea dispute refuse to compromise.

Given that a specific controversy may have root causes that are far larger than the case at hand, all parties involved have choices to make. Litigants can choose to pursue the case legally, perhaps with the goal of mobilizing supporters, scoring a symbolic win in a larger battle, or because they simply believe that the law is on their side. Judges can choose to avoid a substantive ruling through the avoidance techniques discussed in the first article of this special issue,¹⁵ or they can engage the merits of the case.¹⁶ The conflict cycle framework identifies different ways that ICs may engage. Should they engage the merits, one option is for judges to formalistically focus on interpreting the relevant law without directly considering the impact of their legal interpretation on the case at hand or on the larger issue

12. The details of this controversy, and why the controversy was resolved through adjudication, are discussed in *THE NEW TERRAIN*, *supra* note 4, at 172–78.

13. *Id.* at 176.

14. *See id.* at 172–78; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112, ¶ 41 (July 1); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1995 I.C.J. 6, ¶ 50 (Feb. 15); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶ 252 (Mar. 16).

15. Given this special issue’s collective goal of exploring what happens when ICs engage in highly controversial issues, it is unsurprising that for each of this special issue’s contributions, the IC chose to engage. However, the possibility of not engaging is still a highly relevant consideration.

16. Alter & Madsen, *supra* note 1.

at stake. Especially if a substantive ruling might generate an adverse feedback effect (linkage 3), intentionally ruling in a way that has no significant impact on the case or the larger controversy may make sense. Another option is to focus only on the specific case itself, narrowly resolving the legal dispute (linkage 2). Both are plausible ways for courts to proceed, yet courts might also consider the feedback effect of the ruling (linkage 3). ICs may also decide that the imperative of justice or the rule of law requires them to issue a ruling that probably will generate a feedback contestation. The existence of these different possibilities means that the “legal” choice of focusing only on the law as applied to the facts of the particular case will, in any event, be a choice, and the core process of adjudication will have an effect, assuming judges are reflexive about the broader conflict. Yet it might also be the case that no matter what choice the judges make, the ruling will be contested, and the underlying dispute will persist. This will likely be the case if the litigants are at an impasse regarding a disputed issue.

Our interest includes ICs’ and litigants’ strategic engagement with the specific case at hand as well as the empirical consequences of adjudication for the larger conflict. In light of the conflict cycle framework, it is possible to distill a set of potential adjudicatory impacts. The greatest impact would be to mutate the underlying dispute so as to address some if not all of the root causes by instigating positive feedback (linkage 3). The next greatest impact would be to help contribute to resolving the specific controversy involved in the lawsuit (linkage 2). A third and different outcome might be the strengthening of the international normative order. In this scenario, the ruling neither affects the case at hand nor the larger issue (so no linkage 2 or 3 impact), but it might still make a positive systemic contribution in upholding specific international law and reinforcing the larger normative order. A fourth possible outcome is non-compliance followed by backlash whereby not only is the conflict not resolved, but the IC’s authority is also damaged through the process. While it is possible to identify these different strategic options and outcomes in the abstract as theoretical possibilities, how courts and litigants in practice have engaged in mega-political issues and with what consequences is another matter. The next Part addresses this issue.

III

INTERVENING IN MEGA-POLITICAL DISPUTES: JUDICIAL STRATEGIES AND POLITICAL CONSEQUENCES

This Part considers how international judges engage and manage the challenge of offering a ruling on the merits. The discussion brings out some of ways that ICs engage and soften the impact of an adverse ruling, most of which involve introducing some distance between the ruling and the root cause of the conflict. The techniques include: 1) letting time and legal processes create a space for the actors to themselves find a resolution, which the IC ruling then reinforces; 2) acknowledging the voice of impacted individuals while repatriating or recognizing the principle of subsidiarity rights and, thus, states’ relative policy-

making latitude; 3) converting a large structural issue into resolvable individual issues; and 4) requiring state attention to the issue, guidelines, and procedures, but without indicating a specific remedy. These strategies allow ICs to pick their battles to a certain extent. They also allow those actors who will implement IC rulings time and space to use political means to find a solution.¹⁷

Given that the larger goal of an IC is to instantiate respect for the normative order it oversees, and given the system's goal of building respect for the rule of law, an appeal to these strategies should not be seen as a political act, as opposed to a legal one. Rather, these are resilience techniques employed to maintain institutional authority. The discussion that follows will identify various IC strategies, but it will primarily focus on the implications of entering the conflict for the dispute at hand and for the larger controversy. Using the conflict literature's framing, the discussion is structured around different forms of effects on the conflicts, starting with the presumably greatest effects on mega-political conflicts of international adjudication. Yet a number of the contributors to this special issue reject a narrow focus on the relationship between states and ICs, or the specific conflict, discussing instead the impact of adjudication on private litigants and the larger normative order of the international adjudication of mega-politics. The final discussion in this Part therefore departs from the conflict cycle framework to consider this broader issue.

A. Greatest Conflict Resolution Impacting: Generating a Mutating Feedback Effect

To impact both the specific dispute and the larger mega-political controversy, an IC must issue a substantive ruling that upsets the status quo. Usually this requires that the IC rule in favor of the plaintiff, in whole or in part, which will likely upset the defendant and its supporters. Two of the special issue's articles discuss occasions of ICs entering ongoing debates and triggering feedback that manages to resolve a meaningful aspect of the larger controversy.

Political scientists Dorte Sindbjerg Martinsen and Michael Blauberger examine the effects of the judgments of the Court of Justice of the European Union (CJEU) with regard to conflicts over posted workers in European Union (EU) member states.¹⁸ At bottom, this was a larger controversy over workers' and employers' rights that pitted social welfare-protecting older EU member states against newer EU members. At first, the CJEU's "*Laval* quartet" rulings, which sought to strike a balance between free movement and collective action, generated a storm of controversy because the rulings seemingly took the side of the posted workers, upsetting the domestic-political bargain of the social welfare

17. See generally Laurence R. Helfer, *Populism and International Human Rights Law Institutions: A Survival Guide*, in HUMAN RIGHTS IN A TIME OF POPULISM: CHALLENGES AND RESPONSES 218 (Gerald L. Neuman ed., 2020) (reviewing a range of legal and political tools that might be deployed to address the challenges that populism poses to international human rights law institutions).

18. See generally 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.

protecting member states. Yet Martinsen and Blauburger argue that the controversy regarding the issue and the directive preceded the CJEU's rulings. The rulings impacted this preexisting issue by upsetting the status quo, triggering new discussions, and opening up space for different political solutions to the underlying issue. The authors are focused on the larger controversy of free movement versus collective action, rather than the specific claims that precipitated the legal rulings. In fact, there were many cases that challenged in different ways whether the free movement of services could undercut national social protections. For the larger mega-political issue, political actors crafted a compromise that involved maintaining some of the posted worker rules while also introducing subsidiary rights over other aspects of the posted worker rules. Labor-receiving EU countries did have to compromise and change laws and practices, but they were also able to force labor-exporting countries to adopt practices that helped to equalize the price of foreign and local labor.

The political compromise involved "EU legislators not only codify[ing] but often seek[ing] to modify or override case law."¹⁹ The CJEU then approved this agreement, applying the compromise. The larger mega-political controversy about whether European integration should be allowed to undermine social protections for workers, however, continues. Most recently, Poland and Hungary challenged the legislated political compromise, and the CJEU "confirmed . . . the amendment of the directive strengthening the rights of posted workers . . . In other words, the Court sided with the political majorities of the EU legislatures."²⁰

Legal scholars Laurence R. Helfer and Clare Ryan examine the European Court of Human Rights (ECtHR) engagement with LGBT issues over time. Their discussion identifies a number of ways that the ECtHR entered the debate while minimizing political controversy. For example, the ECtHR ruled against the criminalization of homosexual sex only after state and social attitudes had changed in most member states, and they later extended homosexual rights after "[a] growing number of jurisdictions adopted anti-discrimination statutes including sexual orientation and outlawed incitement to hatred against homosexuals."²¹ Later, to avoid a predictable conflict with new accession states, the Council of Europe required that new members first repeal anti-sodomy laws. The ECtHR also allowed governments "broad discretion to regulate other areas of LGBT life."²² Over time, however, the ECtHR got ahead of political developments in some member states which were no longer progressively advancing LGBT rights. While each ECtHR ruling in principle only applied to the government and the litigants at hand, another paper by Helfer and Erik Voeten find that these rulings had *erga omnes* effects of pulling lagging European

19. *Id.* at 53.

20. *Id.* at 55–56.

21. Laurence R. Helfer & Clare Ryan, *LGBT Rights as Mega-Politics: Litigating before the ECtHR*, 84 LAW & CONTEMP. PROBS., no. 4, 2021, at 66.

22. *Id.* at 67.

states' LGBT rights policies up to a higher rights-protecting level.²³ So long as social mores favored the ECtHR's jurisprudence, the litigation avoided the mega-politics label. The ECtHR could reference an emerging consensus in European societies, treating the European Convention on Human Rights as a living instrument. Following the same logic, the ECtHR also combined its rulings in some cases with deferring to local governments in other cases where public sentiment was deeply divided. Employing the established doctrine on the margin of appreciation, the ECtHR, for example, let governments determine whether or not to recognize gay marriage while still insisting on its anti-discrimination jurisprudence.²⁴

The situation has changed, however. Helfer and Ryan suggest that the strategy of upholding uniform anti-discrimination jurisprudence, while allowing a margin of appreciation for some gay rights issues, has increasingly been at odds in recent years with nationalist and populist leaders who have begun rolling back earlier legislative advances, as well as challenging bedrock principles like gay activists' right to expression and association (for example, in gay pride parades). Helfer and Ryan suggest that anti-gay state actions over the last twenty years are putting the ECtHR on a mega-politics collision course with existing case law and the divergent social mores of West and Central European countries. Part of the political challenge is that gay rights litigants are associating gay rights with the "European project" and the "idea of Europe," while, on the other side, anti-gay rights politicians are touting such rights as "threats to the family" and "threats to the nation." Given this politicization, these cases involving core European human rights, and populist leaders actually valuing being seen as challenging Europe, the ECtHR is unlikely to be able to rely on deference or social mores as protection against the wrath of the spokespersons of sacred family values.

Together these two articles show that IC engagement can generate a feedback effect that helpfully addresses some of the core issues in contention. Overall, the CJEU stuck to its freedom of services commitments, and the ECtHR stuck to its anti-discrimination doctrine. This does not imply that the underlying mega-political conflicts were thereby resolved once and for all. New and more challenging legal suits may arise, inspired by the gains of previous cases, which might even reopen some of the original issues. Changing sociopolitical conditions might also lead to backlash against international legal developments. As shown by Helfer and Ryan, the rise of nationalist and populist leaders in some European countries has also directly contributed to the re-politicization of some of the original conflicts.

23. Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 80–84 (2014).

24. *Id.* at 86–88.

B. Engagement That Resolves Disputes While Sidestepping the Mega-Politics

To generate a feedback effect, ICs need to engage the larger mega-political controversy in their merits rulings. In the two articles just discussed, ICs did this. Those authors suggest that the ICs' actions helped to resolve specific litigant demands and some of the larger core issues at stake. Moreover, if an IC provides a remedy that ameliorates truly egregious behavior, a specific IC intervention can dampen an already-inflamed conflict.

An IC can, however, also sidestep the larger conflict and focus only on the dispute at hand. The conflict cycle framework would in this scenario suggest that this type of intervention might perhaps improve the conflict that is being litigated, while leaving larger mega-political concerns largely unimpacted. In the articles discussed below, the ICs' rulings did not directly address the broader mega-political conflict from which the concrete lawsuit stemmed, yet by providing legal remedies, upholding the law, and thereby contributing to the normative order, the intervention arguably was nonetheless impactful.

Legal scholars Salvatore Caserta and Pola Cebulak focus on territorial disputes by proxy (TDbP), which they define as litigants raising individualized claims that implicitly ask the IC to intervene in larger territorial disputes: "regional ICs deal with TDbP when they do not directly decide on who should lawfully exercise sovereignty over a particular territory or whether a people have the right to independence. Instead, they are called to address specific legal questions only indirectly related to the territorial dispute[.]"²⁵ These disputes provide both risks and opportunities. Traditional territorial disputes are interstate cases where international borders are at the core of the dispute. In TDbP cases, by contrast, the boundary is not at the core of the dispute, and the IC arguably lacks the jurisdiction to directly address the broader territorial conflict. For this reason, the IC may be justified in—and perhaps even legally compelled to—sidestepping larger territorial controversy. For TDbP cases, a private litigant will only have standing to raise the case if they can demonstrate a personal or group impact. The IC can therefore focus exclusively on the impact on the plaintiff(s). Caserta and Cebulak argue that TDbP cases generally involve the commercial rights of stakeholders, the human rights of impacted individuals, or the institutional responsibilities of regional or state entities.

Their empirical analysis includes the relatively weak and fragile Central American Court of Justice (CACJ) and two of the most powerful and authoritative ICs—the CJEU and the ECtHR. They discuss cases where ICs ruled in favor of the claimants, and, in doing so, put individual rights above the underlying state interests in the territorial disputes. The CACJ's intervention triggered adverse political responses but nevertheless helped develop the law of the Organization of Central American States and generated symbolic victories in support of the litigants. There was, however, no resolution of the broader mega-

25. 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.

political controversies. The CJEU's TDbP cases have included both intra-European territorial disputes and European policies that speak to territorial disputes in Israel and Palestine. In these cases, the CJEU eschewed the opportunity to draw on relevant UN Security Council resolutions, treating the issues as self-contained questions of EU law. Caserta and Cebulak suggest that this formal legal strategy implicitly means that the CJEU stayed loyal to the policy of European governments.²⁶ In theory, IC engagement could have exacerbated the larger mega-political conflicts, but the authors find that the CJEU's ruling had little political impact since the rulings mainly reiterated the position of the EU with regard to the larger conflict while also addressing delineated and somewhat isolated issues pertaining to EU law.

Whereas the CJEU's cases have been commercial in nature, the ECtHR's TDbP inter-state and individual cases, by definition, concerned human rights, and, for jurisdictional reasons, steered clear of the topic of territorial delineation. A particularly contested issue concerns protracted proceedings related to land rights after the de facto division of Cyprus in 1974. These highly divisive cases only began to be resolved by the ECtHR some two decades after Cyprus's division. By engaging only the human rights dimensions of the underpinning mega-political dispute, the ECtHR's interventions have generally validated the rights of individuals and the larger human rights normative order. As a result, the ECtHR has converted larger disputes into questions of economic compensation, which in these cases have amounted to significant amounts. The authors suggest that this type of intervention can help to reframe the issue as one of human security, one that impacts the survival, livelihood, and dignity of people. If the IC can then help to address the needs of affected peoples, judicial intervention may keep the conflict from becoming even more heated.²⁷

The rulings have not, however, changed the underlying mega-political dispute. Caserta and Cebulak's discussion of the central *Loizidou* case demonstrates how the after-the-ruling proceedings have been deeply politicized.²⁸ Turkey initially opposed paying damages "as a matter of principle."²⁹ After seven years, Turkey accepted that compensation was owed for denying access to the property, but the government never restored the property to the claimant. The Council of Europe's Committee of Ministers remains unsatisfied, and the issue remains unresolved.

A second case involving the same mega-politics issue was Cyprus' inter-state case against Turkey, which concerned both Turkey's treatment of Greek-Cypriots during its invasion of Cyprus and its dealings with Turkish Cypriots and the Gypsy community in Northern Cyprus. The inter-state case was politically explosive. Turkey refused to participate, and its government eventually ignored

26. *Id.*

27. *Id.*

28. *Loizidou v. Turkey*, App. No. 1531/89, (Dec. 18, 1996), <http://hudoc.echr.coe.int/eng?i=001-58007>.

29. Caserta & Cebulak, *supra* note 25, at 143.

the ECtHR's ruling. In 2010, Cyprus made another attempt at the same issues and sought compensation for affected individuals, but the court's ruling was once again largely ignored by Turkey. Seen together with the other cases related to the mega-political issues surrounding Cyprus, it is unclear how the court's ruling will impact the resolution of the underlying political conflicts. While non-compliance or partial compliance has hampered these cases, the ECtHR's rulings have clarified the rights of individuals and supported the relevance of the Council of Europe's normative order. In other words, these cases may matter more for future litigation even if the individual claims and the larger mega-political conflict remain unresolved.

C. When the Dispute Itself May be Beside the Point

This special issue embraced the conflict cycle framing to generate realistic expectations for the impact of IC engagement in particular mega-political controversies. A number of articles in this special issue, however, suggest that such a framing is too narrow. This Part outlines findings from three contributions where the authors focus on how adjudication affects the larger normative order that ICs are engaged in developing and upholding.

Legal scholars James Thuo Gathii and Olabisi D. Akinkugbe analyze the international adjudication of election disputes by African ICs and African Supreme Courts. Their article challenges the conflict cycle framing's focus on whether IC intervention has an impact on the conflict or case at hand. In some cases, IC intervention did generate substantive wins for litigants. For example, the Economic Community of West African States Court issued two provisional orders barring Benin from excluding the plaintiffs from the elections.³⁰ In other cases, African ICs sided with the plaintiffs and ordered remedies, such as the payment of fines.³¹ Compliance on the part of the government (which did not always occur) is, in Gathii and Akinkugbe's view, not the measure of success or impact. Instead, they offer a litigant-centric perspective, valuing what plaintiffs hoped and were able to achieve through their international legal appeals. The article achieves this perspective by including many quotes indicating how litigants and opposition parties viewed these judicial rulings. As a whole, it is clear that both legal stakeholders and judges are demanding their democratic rights, making democracy work, defending national constitutions, and upholding the rule of law. Especially in the context of emerging African democracies, these actions and outcomes are important and new. Even if the defendant government then ignored the international legal ruling, exposing electoral malpractice and galvanizing supporters remains both the intended and a highly valued impact.

Gathii and Akinkugbe also stress that the context of adjudication really matters. Multi-party elections and judicial checks are relatively new arrivals in Africa, entering African politics in the 1990s as part of the third wave of

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

31. *Id.* at tbl.1.

democratization. While the judicialization of some issues has generated scholarly controversy in some Western countries, with scholars questioning whether judicialization helps and who it helps, Gathii and Akinkugbe explain that some African governments' hegemonic political power extends to controlling the electoral apparatus, including the judiciary. In such a context, that litigants can appeal to ICs and in so doing "publicize their grievances and galvanize their supporters, in addition to creating an opportunity for the government to have to answer for its conduct in a forum that it does not control."³²

The article also discusses specific examples of election litigation and provides an in-depth analysis of the complex context of electoral improprieties in Africa, including the many failed efforts to have those issues addressed at the national legal and political level, as well as at the international political level. The final cases Gathii and Akinkugbe discuss involve recent national supreme court decisions, from 2017 and 2020, where the Malawi and Kenyan Supreme Courts overturned election results. The Malawi and Kenyan rulings applied 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 that their article addresses. Not only are transformations of norms and interpretations in neighboring countries poorly captured by the conflict cycle framework, but a purely domestic focus also misses how adjudication of election disputes in African ICs contributed to these new important Supreme Court rulings.

Political scientists Silvia Steininger and Nicole Deitelhoff consider the role of criminal law enforcement and human rights jurisprudence in violent conflicts. They are not per se interested in the heated controversy over whether IC intervention in conflict zones deters violence or if it may actually prolong war by encouraging combatants to fight to the bitter end in order to avoid prosecution.³³ Even if one could measure a court's impact on violence, they argue that counterfactual thinking about if it

would . . . have been better (for the court, for the norm, for the society) if the issue had never been adjudicated – does not hold much promise for international courts in situations of violent conflicts. The establishment of specific courts and their handling of particular cases is historically contingent, which means the inclusion or exclusion of international courts in situations of violent conflict is not predetermined and a different fate of specific courts and conflicts is possible.³⁴

Instead, they discuss different ways that IC intervention may impact the specific

32. *Id.* at 190.

33. There is an extensive debate on this topic, with complicated and nuanced findings. *See generally* DANIEL KRUMARCIC, *THE JUSTICE DILEMMA: LEADERS AND EXILE IN AN ERA OF ACCOUNTABILITY* (2021) (discussing how accountability can both deter atrocities and contribute to ongoing atrocities); Hyeran Jo, Beth A. Simmons & Mitchell Radtke, *Conflict Actors and the International Criminal Court in Colombia*, *J. OF INT'L CRIM. JUST.*, Dec. 4, 2020, at 1 (analyzing Columbian conflict as a case study for conflict actors in the International Criminal Court).

34. 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 121.

conflict.

They see IC intervention as transforming violent conflicts into legal disputes that can actually be addressed in ways that help victims have their day in court and builds a historical record of what happened. The larger dispute is in this way disaggregated into pieces, some of which can be legally redressed. Relatedly, international adjudication provides a particular forum for the parties to engage with each other that is quite different and removed from what happens on the killing fields. Another function, according to the authors, is that IC intervention might well help shore up the international normative order and thus have future effects on international criminal law and future conflicts. In sum, Steininger and Deitelhoff suggest that to understand the functions and effects of international law and its subfields of human rights and international criminal law, one needs to look beyond the conventional focus on whether litigation is contributing to ending the specific conflict. Focusing on the broader normative developments of international criminal law might also contribute to less violence and a peaceful resolution of entirely different conflicts.

Legal scholars H el ene Ruiz Fabri and Edoardo Stoppioni consider how controversies over the *jus cogens* category of international law are illustrative of how international legal suits can be proxies for underlying mega-political struggles.³⁵ While many issues related to *jus cogens* controversies are pitched as questions of sovereignty pertaining to both international legal sovereignty and Westphalian sovereignty concerns,³⁶ the mega-political nature of these conflicts typically derives from larger, more fundamental disagreements. These disagreements typically center around the direction of international law and inherent tensions in international law pertaining to its post-colonial transformation. For example, the authors quote a French diplomat who stated that when people bring up *jus cogens*, he “pulls out his gun.”³⁷ They further explain: “reverting to France’s stance, it is quite clear, even if not explicitly stated, that their reluctance towards *jus cogens* is based on the fear that *jus cogens* would develop in the direction of criminalizing colonization or declaring nuclear weapons unlawful.”³⁸ *Jus cogens*, from this perspective, is a tool to further certain agendas, replacing traditional international lawmaking by transforming natural law principles into norms of customary international law. The use of *jus cogens* in this way collides, fundamentally, with the idea of a state’s sovereign right to choose which international obligations they are willing to accept. The authors note: “The mega-political nature of *jus cogens* is evident from the fact that it revolutionizes the traditional paradigms of the international legal order. *Jus cogens* embodies in international law a claim for profound structural

35. H el ene 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.

36. See Stephen Krasner, *The Persistence of State Sovereignty*, in *INTERNATIONAL POLITICS AND INSTITUTIONS IN TIME* 39, 41–42 (Orfeo Fioretos ed., 2017) (discussed in Alter & Madsen, *supra* note 1).

37. Fabri & Stoppioni, *supra* note 35, at 153.

38. *Id.* at 172.

transformation, which this article has called the tectonics of mega-politics.”³⁹ *Jus cogens*, thereby, becomes in itself mega-political with regard to how to define what international law is binding on sovereign states.

As shown by Ruiz Fabri and Stoppioni, even if ICs are rarely in a position to actually solve the underlying geopolitical and mega-political disagreement underpinning *jus cogens* cases, they can participate in the ongoing process of settling and developing the normative order of international law by articulating *jus cogens*. Like in the situation of African election disputes where, according to Gathii and Akinkugbe, the larger litigation goal was to support bottom-up efforts aimed at future reforms, *jus cogens* disputes are in many cases better understood as aiming for future changes in the structure of international law. Ruiz Fabri and Stoppioni consider this point in detail, arguing that *jus cogens* could be a tool for countering Western hegemony in international law and its institutionalized order. More precisely, they argue that *jus cogens* is potentially an emancipatory mechanism for third world countries in the post-Cold War era. However, so far legal practices vary greatly “between the homeostatic conservatism of courts unwilling to accept its iconoclastic potential, and the activism of courts that see it as the promise of a new paradigm in international law.”⁴⁰ The key point they are making is that the procedural avenue of *jus cogens* is underexplored, yet it offers counter-hegemonic actors a pathway for rethinking the international system by furthering *actio popularis*, *erga omnes*, and inter-systemic linkages between different international legal regimes and courts.

IV

MEGA-POLITICS INDUCED BACKLASH AGAINST INTERNATIONAL COURTS

The preceding Parts have outlined ways in which IC involvement in mega-political cases impacts the substantive controversy or the specific dispute. A related question is whether engaging highly-contested issues might adversely impact an IC. The central concern is that an adverse ruling might provoke a backlash against ICs or lead to a loss of IC authority. This Part first briefly reiterates what earlier studies of backlash against ICs have already found, notably that backlash efforts against ICs rarely succeed.⁴¹ This Part further develops this point, analyzing the work of scholars that increasingly looks at political attacks on ICs as evidence of a growing backlash against international courts, international judicialization, international institutions and the liberal international order, more generally.

Most backlash studies focus on government-led efforts to dejudicialize or otherwise clip a court’s wings (for example, by firing judges, cutting budgets, and limiting litigant access). This Part reframes this idea as “backlash as

39. *Id.* at 172.

40. *Id.* at 174.

41. See, e.g., Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Special Issue – Resistance to International Courts Introduction and Conclusion*, 14 INT’L J. L. CONTEXT 193, 195–196 (2018).

dejudicialization.” This type of backlash is especially interesting for scholars who see ICs as agents or functional servants of the states that create them. Yet scholars writing about backlash as dejudicialization find dejudicialization to be extremely rare. This Part reframes this backlash in terms of the more likely outcome: “backlash as contestations over authority.” This type of backlash matters if ICs are thought of as trustees of the international legal order in which they participate. The special issue’s introduction drew on Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen’s authority framework,⁴² noting that international judges need to worry about how a broader set of audiences, which includes national judges, bar associations, and the public, might react to IC authority. Contestations over IC authority are not, however, only (or even mostly) an artifact of ICs issuing rulings that key audiences dislike. Instead, most scholars see authority contestations as an indication of and natural response to the growing authority of international institutions.⁴³ In essence, the reason that litigants want to adjudicate mega-politics is precisely because ICs have authority and influence, and this authority and influence is in turn why the losing parties are likely to adopt vocal and public de-legitimation campaigns. Even if dejudicialization is not politically achievable, these contestation campaigns can also harm ICs.

A. Backlash as Dejudicialization

Most studies of backlash against ICs focus on state-orchestrated backlash responses, where member state governments actively sought to reverse or eradicate an IC ruling, to eliminate an IC, or to substantially alter its jurisdiction or structure in order to avoid future adverse rulings or render the IC more politically subservient. These measures exemplify a degree of backlash as dejudicialization caused by IC intervention in mega-politics. But to demonstrate the validity of the backlash causal claim, the political response must itself be a reaction to specific IC rulings.

Backlash as dejudicialization should be seen as an extraordinary response that does not typically result from a specific IC ruling. The previous Part considered that IC rulings might upset the status quo, generating compromises that perhaps reverse in whole or in part the IC’s ruling. This is exactly what happened with respect to the Posted Worker Directive discussed by Martinsen and Blauberger, who see the CJEU’s intervention as having contributed to resolving the larger controversy regarding the Directive. We agree that to the extent that states want disputes to be resolved, provoking a response wherein

42. See generally *Theorizing Judicialization*, *supra* note 4.

43. See, e.g., Jonas Tallberg & Michael Zürn, *The Legitimacy and Legitimation of International Organizations: Introduction and Framework*, 14 REV. INT’L ORGS. 581, 588–89, 594–95 (2019) (exploring how global governments are legitimized and delegitimized); Michael Zürn, Martin Binder & Mathias Ecker-Ehrhardt, *International Authority and Its Politicization*, 4 INT’L THEORY 69, 71, 73 (2012) (explaining that there is increasing politicization in international courts, which is often met by public contestation). See also MICHAEL ZÜRN, A THEORY OF GLOBAL GOVERNANCE (2018) (suggesting that today, world politics naturally create resistance and contestation due to structural power imbalances).

stakeholders reach a new agreement is not something that ICs should either do or actively avoid. Backlash as dejudicialization is, however, fundamentally different because rather than make agreements to circumvent an IC ruling, states are attempting to permanently remove an issue from the IC's legal purview by circumscribing litigant access or changing an IC's mandate.⁴⁴

In practice, dejudicialization in its various forms (eliminating an IC, stripping jurisdiction for whole classes of cases, defunding, changing standing or access rules, exiting treaties, et cetera) is hard to achieve because of the unanimity required to change a court's basic mandate.⁴⁵ Many scholars therefore view dejudicialization as extreme and unlikely because other tools, including ignoring a ruling, working out a political settlement, or narrowly interpreting a legal ruling, are more easily used by states.⁴⁶ Not on this list is the possibility that states might use appointment politics to create a more politically pliable international judiciary. IC judicial appointments are often, although not always, politically contested decisions.⁴⁷ Yet because of countries getting to select their home-state nominee and the difficulty (and often impossible task) of coordinating like-minded states in a way that fundamentally reshapes the composition of judges on an IC, appointments rarely lead to politically stacked ICs. In this sense, the

44. Abebe and Ginsburg define dejudicialization as “the complete removal from judicial cognizance of a policy issue that had previously been subject to judicialization.” Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 INT'L STUD. Q. 521, 521 (2019). Given that when ICs serve as inter-state dispute settlement bodies they generally have jurisdiction over any legally presented dispute, removing a mega political issue entirely from an ICs' cognizance may be procedurally impossible. Accordingly, a softer definition may be necessary. *See also* Wayne Sandholtz, Yining Bei & Kayla Caldwell, *Backlash and International Human Rights Courts*, in CONTRACTING HUMAN RIGHTS 159, 160 (Alison Brysk & Michael Stohl eds., 2018).

45. Exit may be a unilateral decision. Whether exit is actually or perceived to be a sanction is an open question. In any event, there are many reasons that states exit agreements and IC jurisdiction. *See generally* Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005) (explaining why treaty exit occurs); Emilie Hafner-Burton & Laurence Helfer, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673 (2011) (arguing that derogations are rational in the face of political uncertainty).

46. Abebe & Ginsburg, *supra* note 44, at 525–26 (discussing other strategies short of dejudicialization that may not lead to backlash, such as rewriting the legal rules or adding new provisions that make future adjudication far less likely; for example, requiring human rights claims to be filed within months of the alleged violation).

47. *See generally* Cosette Creamer & Zuzanna Godzimirska, *The Job Market for Justice: Screening and Selecting Candidates for the International Court of Justice*, 30 LEIDEN J. INT'L L. 947 (2017) (discussing how governments use their power to appoint IC judges and how they are influenced by interstate politics and other candidate-specific factors); Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L RELS. 391 (2012) (examining the deeply politicized process for Appellate Body appointments); Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007) (examining dissents in the ECtHR that show activism tendencies of IC judges); Erik Voeten, *The Politics of International Judicial Appointments*, 2 CHI. J. INT'L L. 387 (2009) (evaluating the politics of IC judicial appointments); Karen J. Alter, *Delegation to International Courts and the Limits of Re-contracting Political Power*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 312 (Darren Hawkins et al., eds., 2006) (considering why appointment politics and other sanctioning mechanisms are rarely used in practice) [hereinafter *Delegation to International Courts*].

domestic strategies employed to diminish judicial autonomy (for example, forced retirements, shorter term limits, or firing sitting judges) may not be transferable to the international level.⁴⁸

None of the articles examined in this special issue find a direct link between litigating specific mega-political issues and a dejudicialization effort directed at the IC adjudicating the case, but this could be because they examined mega-political controversies rather than rulings that generated a political backlash. When Erik Voeten focused on dejudicialization efforts, he however also found that these backlash efforts seldom succeed.⁴⁹

Because dejudicialization in practice is difficult to achieve, Daniel Abebe and Tom Ginsburg suggest that a more likely state response will be a feedback reaction where the court continues to exist, but participants vote with their feet by not bringing new cases, participating in legal processes, and paying attention to IC legal rulings.⁵⁰ Given that mega-politics cases can reach ICs in many different ways, a state decision to stop engaging with it will, however, not stop an IC from entering into a mega-politics issue, as shown in some of this special issue's contributions. These other forms of reactions are not seeking to formally dejudicialize an IC, but they might still contribute to a diminution of its power and authority. The next Part addresses these strategies.⁵¹

B. Backlash as Contestations Over Authority

Drawing on Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen's analytical framework for understanding ICs' de facto authority, this special issue's first article defined IC authority as "a court's ability to project its ideas and values about the law and to have these projects reflected by, or even internalized in, the actions of individuals, groups and organizations in society."⁵² For mega-political issues, this would mean that the IC is able to instill respect for international law, the international rule of law, and the IC's particular interpretation of the law into the implicated state or among a set of similarly situated legal, political and social actors in the highly-contested issue area. Conversely, backlash as contestation over authority, by building a consensus amongst constituent states against the IC, would seek to lessen transnational support for the ruling, the law, the institution associated with the IC, and the IC.

48. *Delegation to International Courts*, *supra* note 47, at 319.

49. See Erik Voeten, *Populism and Backlashes Against International Courts*, 18 *PERSP. ON POL.* 407, 409–11 (2020) (noting that out of twenty-seven instances of attempted backlash between 1990 and 2020, only one effort was successful, but also finding that unilateral exit was among the more successful strategies).

50. Abebe & Ginsburg, *supra* note 44, at 523–26.

51. There is surprisingly little scholarship focused on the efforts of states to delegitimize an IC. One exception is a study that examines how states discussed WTO appellate body rulings in the Dispute Settlement Body. See generally Cosette D. Creamer & Zuzanna Godzimirska, *(De)Legitimation at the WTO Dispute Settlement Mechanism*, 49 *VAND. J. TRANSNAT'L L.* 275 (2016).

52. KAREN J. ALTER, LAURENCE HELFER & MIKAEL RASK MADSEN, *INTERNATIONAL COURT AUTHORITY* 13 (2018).

States would contest IC authority in this way to build support for that state's decision to ignore an IC ruling or to encourage domestic and foreign audiences to see the behavior that gave rise to the adjudication as an issue of national choice.

Unlike backlash as dejudicialization, where governments are driving the process, for backlash as an authority contestation, upset actors are appealing to the IC's broader constituency, including legal advisors in other countries, national judges around the world, the broader legal and scholarly community, and especially the public.⁵³ Well-informed international judges will be attuned to these larger audiences, especially since they may be impacted by the judges' rulings and indispensable allies for sustaining IC authority. In other words, even if there is agreement among all the member states to change the IC's mandate—an exceedingly rare occurrence in practice—backlash-inspired contestation will play out in a broader field of actors, many of whom will seek to counter the hostilities against the IC.⁵⁴ Because ICs' different audiences are independent and not organically linked, ICs may find that they lack the ability to influence specific litigants (what Alter, Helfer and Madsen call narrow authority) at the same time that they maintain support in the legal field (what Alter, Helfer and Madsen call extensive authority), public support (aka popular authority), and the support of similarly-situated potential state and substate litigants (what Alter, Helfer and Madsen call intermediate authority).⁵⁵ The political influence and power of ICs grows both as the jurisdictional reach of ICs grow and as audiences within and outside of the litigating state embrace an IC's legal rulings and its authority. The converse is also true, however. An IC's de facto authority can be diminished or undermined if fewer audiences accept the binding nature of IC rulings in general or for certain issues. The key point made by Alter, Helfer and Madsen is that to understand ICs' de facto authority and reach, it is necessary to explore these different audiences' engagement with the rulings of ICs.⁵⁶

Anti-IC politics can spiral into a larger assault on international law, the international institution associated with the contested law, and the international liberal order more generally. Insofar as an IC's intervention can be framed as a violation of sovereignty or an existential threat to a valued and deeply held principle, it may not matter if the IC's ruling actually impacts the case or issue at hand.⁵⁷ Should mobilized partisans have a larger goal of absolute national sovereignty, then a broader and more encompassing backlash politics will not stay within the rational realm of political leaders conducting cost-benefit analysis of whether dejudicialization is feasible or if they can lessen the impact of an IC

53. *Id.* at 31–36.

54. See Alter et al., *supra* note 8, at 318–326 (discussing the varied backlash outcomes and the role of major stakeholders).

55. This is discussed at length in Madsen et al., *supra* note 41, at 193.

56. See Alter et al., *supra* note 52, 33–36.

57. For more on how backlash politics foments resentment through framing an action as a threat to deeply held values, see Roger Petersen, *Emotions and Backlash in US Society and Politics*, 22 BRIT. J. POL. & INT'L RELS. 609, 611, 616 (2020).

ruling through other means. Even if such options are on the table, partisans are likely to vociferously advocate for a full-throttled return to majoritarian politics with fewer international legal checks and balances. Supporters of populist backlash politics may also be willing to destroy crucial norms, like the idea that international law or democratic norms are a standard of legitimate behavior. This type of politicization may impact an ICs' authority, even if it does not lead to dejudicialization. Given the volatility of backlash politics where specific goals and objectives can morph and change so that a compromise that addresses one demand may simply generate another demand, the intersection of mega-politics and backlash politics is obviously risky for ICs.⁵⁸ Should partisans have these larger goals, IC resilience strategies may be insufficient insofar as the mere possibility of international judicial involvement in the future may be seen as objectionable in some quarters.

Thinking about backlash politics through the broader lens of ICs' de facto authority allows us to better comprehend how the international adjudication of mega-politics entails judicial risks other than formal dejudicialization. ICs engaging in mega-political cases enter a conflict cycle where, as discussed above, they can chip into the process of resolving mega-political disputes in various ways. At the same time, they also risk becoming associated with certain positions of the preexisting conflict. In conflicts fueled by nationalist and populist sentiments, ICs might even be viewed as part of an issue over which the parties are at an impasse.⁵⁹ Whatever the impact on the specific mega-political issue, a full-throttled backlash politics might adversely impact an IC's de facto authority in some segments of society, and these actors may in turn disengage or sideline the IC in different ways. The reverse outcome, however, is also possible. Counter-mobilization can mobilize support and reinforce support for the law and the IC.⁶⁰

V

CONCLUSION

Building on the contributions to this special issue, this Article has sought to address the implications of adjudicating mega-politics for the cases being litigated, the larger conflicts from which the cases stem, and the ICs involved. Contrary to perhaps reasonable expectation, the studies included in this special issue show ICs successfully navigating the fraught terrain that is the adjudication of mega-politics. In some cases, the ICs were able to constructively contribute to

58. This type of backlash politics is discussed in Karen J. Alter & Michael Zürn, *Conceptualizing Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison*, 22 BRIT. J. POL. & INT'L RELS. 563, 565–77 (2020) and Karen J. Alter & Michael Zürn, *Theorising Backlash Politics: Conclusion to a Special Issue on Backlash Politics in Comparison*, 22 BRIT. J. POL. & INT'L RELS. 739, 740–51 (2020).

59. Helfer and Ryan's contribution to this special issue suggests this, insofar as they argue that gay rights have become associated with the European project. See Helfer & Ryan, *supra* note 21.

60. Lisbeth Zimmermann, Nicole Deitelhoff & Max Lesch, *Unlocking the Agency of the Governed: Contestation and Norm Dynamics*, 2 THIRD WORLD THEMATIC: A TWQ J. 691, 699–701 (2017).

resolving the dispute (for example, contestation over European law regarding posted workers, discussed by Martinsen and Blauburger). In other cases, such as those discussed in articles by Caserta and Cebulak and by Gathii and Akinkugbe, international adjudication did not resolve the underlying conflicts, but nonetheless, it arguably made a number of positive contributions to future cases or the normative order that ICs are trying to reinforce. Other contributions, notably the articles by Steininger and Deitelhoff and by Ruiz Fabri and Stoppioni, show how bringing mega-political issues before ICs can be part of long-term strategies of building support for the normative order in ways that empower previously overlooked actors and interests. Helfer and Ryan's contribution, however, shows that even when an IC seemingly has contributed to resolve a conflict in the short and medium term, sociopolitical conditions can change in the member states. Previous victories may lead to reopening the contestation and putting ICs in increasingly challenging situations vis-à-vis their prior stance, with the risk of adverse reactions.

The international adjudication of mega-politics did not result in dejudicialization or a direct attack on an IC in any of the cases examined in this special issue. This suggests that the strategies discussed in Part II of this Article can work to navigate mega-political disputes. Equally important is the relationship with the key audiences of ICs, as discussed in the parts on mega-politics-induced backlash against ICs. As suggested, backlash against ICs is both a broader phenomenon than dejudicialization and one that needs to be understood in the context of both the forces seeking to limit ICs' formal authority and those countering such attempts. Differing from the dominant states-centric focus on dejudicialization in most research, our reconceptualization opens for assessment of the complex constellations of actors who contribute to either reinforcing or reducing IC authority across different audiences.

A final note pertains to Ran Hirschl's concern that the adjudication of mega-politics could contribute to an antidemocratic juristocracy.⁶¹ On the one hand, this special issue's findings challenge Hirschl's original concerns. With the caveat that the special issue only focuses on ICs—and not comparative analysis of constitutional courts—our findings generally suggest that the turn to ICs in the context of mega-political questions tends to reinforce basic tenets of the rule of law, including due process and human rights. The translation of political issues into legal issues also, at least in some instances, helps transform an open-ended and larger conflict into a delineated set of questions which are more resolvable. Arguably, an IC's more limited and indirect role in adjudicating mega-political issues can contribute to also solving the larger conflict in the longer term. IC intervention may, counterintuitively, also be more manageable politically since international judgments for the most part need to be implemented. ICs, then, set in motion a particular legal-political process that involves many actors and seeks to strike a balance between the need to implement a ruling and a desire to find

61. See Hirschl, *supra* note 6, 169–210.

politically acceptable solutions. IC rulings are, in other words, somewhat more flexible than those of domestic courts and function as external contributions to resolving internal conflicts. That said, Hirschl could well argue that insofar as the current international law reflects a preference for liberal values—human rights, market openness, checks and balances and limited national sovereignty—IC intervention in mega-politics also serves to reinforce the hegemony of those who support the international liberal order. This would be a twist on Hirschl’s original concern, and not really a concern shared by supporters of democracy and human rights.

Overall, and much to our own surprise, this special issue’s findings seemingly run counter to the conventional depiction of backlash against ICs when adjudicating mega-political questions, where IC rulings risk provoking adverse reactions and even exacerbating conflicts. This typical media depiction of the international adjudication of mega-politics has inspired some research, but it may not adequately examine how IC intervention in mega-politics might generate a search for new ways to resolve conflicts and new counter-mobilizations that build political support for the existing international order. This by no means implies that ICs are the best institutions for resolving mega-political disputes or fragments of such disputes. The conflict resolution literature makes the key claim that to solve a conflict, the conflict participants need to agree on a mutually satisfactory solution. ICs rarely provide such solutions, but they can in some instances help directly-impacted individuals and provide some important contributions to the larger goal of finding mutually agreeable solutions.

The growing judicialization of international relations, or its reversal, is an ongoing and still unfolding history. If partisans respond to growing authoritarianism by raising more international judicial appeals, and ICs maintain the support of significant audiences, IC authority may remain strong, and support for judicialization may even grow, precisely because delegation to ICs can reinforce the influence of international law. The current climate of ICs is, however, particularly fraught and marked by a growing pushback against multilateralism coming from many fronts. At least in the short term, then, an increase in mega-political issues being brought before ICs may be expected, driven by the disjuncture between national politics and international law. Ultimately, this special issue suggests that ICs can be resilient actors in pushing back against these political headwinds.