

PluriCourts Research Plan 2018-2023

The research on the legitimacy of ICs conducted by PluriCourts in the first 5 year period was based on empirical and legal analysis of three *secondary research objectives*: RT1: the *Origins* of ICs: what did states want to achieve, how were ICs established, and why for some international challenges - but not others? RT2 explored how ICs *Function*, operate and are structured. RT3 addressed the *Effects* of ICs, especially how well they promote their founders' objectives. To answer these questions, PluriCourts focused on *five* sectors of international law: *human rights, trade, criminal law, investment, and environment*. RT4 assessed the criticisms against ICs. RT5 built on the other RTs to develop plausible, sustainable *Models* for ICs and their interaction with national/ international bodies.

PluriCourts 2.0 builds on insights from the first period and expands as elaborated below under 'Methodology.'

a) Research plan PluriCourts 2.0

Objectives

States have established manifold regional and international courts and tribunals (ICs) to resolve disputes, interpret treaties, and deter illegal behavior. These ICs cover a range of issues including: human rights, trade, investment and international crimes. But we now observe that African states are leaving the International Criminal Court (ICC). The UK Brexit from the EU, including the Court of Justice of the European Union (CJEU). Several countries discuss exit from the European Court of Human Rights (ECtHR). Why these protests and exits?

One possible cause may be a general shift by many states away from multilateralism in general, toward nationalist protectionism – political, economic and cultural (Hooghe & Marks 2016). But the critiques may also relate to the design of ICs, their practice and effects. PluriCourts' overriding research objective remains to analyze and assess the legitimate present and future roles of this international judiciary in the global legal order: Why and when are these international courts and tribunals legitimate authorities, whose decisions should enjoy deference by 'compliance communities': international, regional and domestic authorities, individuals, companies and other non-state actors?

ICs' increase in number and influence has spawned controversy and complaints, often phrased as charges that they are *illegitimate* (Ralph 2016; Copling & Trommer 2017). PluriCourts was established in 2013 to explain and assess such accusations. The charges of illegitimacy have become more rampant in recent years. The protests are frequently accompanied by non-appearance, non-compliance and even exit, and threats thereof, may test the resilience of ICs, and their adaptability. PluriCourts 2.0 explores the normative, legal and empirical soundness of such charges of illegitimacy, to understand and assess how ICs do, could and should respond.

Our analysis hitherto has led PluriCourts 2.0 to renewed critical reflection about the most salient concepts and standards of legitimacy, and a focus on the three main clusters of charges of illegitimacy against ICs. Criticisms concern the multi-level separation of authority to and among ICs; the proper checks and balances on ICs' functioning; and how well they perform. These conclusions inform two final research themes: When are ICs more suitable than alternatives? What are best practices and models for improvements for each IC, duly cognizant of their differences?

Some notes on methodology are followed by a presentation of each of these research themes (RT), indicating more specific *research topics*, to be further specified in due course. PluriCourts authors are in **Bold**. Full reference list at <http://www.follesdal.net/pluricourts-2-0-ref/>

Methodology

PluriCourts 2.0 shifts its research focus in several ways, addressing legitimacy critiques *across* more ICs, allowing more systematic and cautious *comparisons* across a *broader* range of ICs. Attention to their many differences is crucial to understand and assess the charges of illegitimacy each ICs faces from various critics, and to identify feasible and constructive reforms. PluriCourts 2.0 expands our focus beyond ICs in human rights, international criminal law, trade and investment to include a) the International Court of Justice (ICJ) - the only IC with jurisdiction in any dispute of international law; b) dispute settlement under the United Nations Convention on the Law of the Sea (UNCLOS), including the International Tribunal for the Law of the Sea (ITLOS); and c) the Court of Justice of the European Union (CJEU), often regarded as the most

powerful IC in relation to its member states. PluriCourts 2.0 also goes beyond the currently covered environmental issues to consider how ICs can and should deal with ‘global public goods’ generally.

PluriCourts 2.0 continues to exploit its multidisciplinary collaboration among political philosophers, legal scholars and political scientists. Philosophical research assesses the charges of illegitimacy voiced against ICs, critically scrutinizing their premises and implications. Legal research contributes with studies on the origins, methods of interpretation and the jurisprudence of ICs, as well as on empirical and normative issues. Political science research studies the legitimation strategies used by ICs, and explains how governments, NGOs and other actors justify political action with claims about the legitimacy or illegitimacy of ICs.

RT1 Legitimacy standards

The wide variety of charges that ICs are illegitimate firstly requires some conceptual clarification. For this purpose PluriCourts 2.0 relies on a mixed or multidimensional conception of IC legitimacy (**Langvatn & Squatrito** 2017). The overarching concern is why and when an IC merits criticism and deference of various kinds. A full assessment of an IC’s legitimacy involves three aspects: its *origins*, *function* or procedural operation, and its *performance* or outcome and effects. For each of these three aspects, for each IC, there are complex relations between *legality*, *moral justification*, *social acceptance* and *compliance*. This multidimensional approach to IC legitimacy allows for systematic analyses, and requires multidisciplinary contributions. PluriCourts 2.0 addresses four currently contested aspects of this conception.

Conceptions of Legitimacy: normative justification, social support, legality and compliance. How do and should audiences’ perceptions of the legitimacy of an IC affect their normative legitimacy, and when does the normative justifiability of an IC depend on actual compliance and performance – and public assurance thereof? The content and justification of the appropriate normative standards of legitimacy are not explored in PluriCourts 2.0 from abstract normative standards alone, but also depends on the existing structure and functioning of the various ICs – a version of a *practice dependent* approach (Sangiovanni 2007).

State consent serves important and normatively puzzling roles in how states create and commit to international law and ICs (Krisch 2014). Whence the relevance of non-democratic states’ consent, who hardly act ‘on behalf of’ their populations? What is the role of acceptance by non-state actors? Which other legitimacy sources do ICs have, given their considerable discretion to interpret and apply international law?

Constitutional and public law standards familiar from domestic theories of constitutionalism, public law and the judiciary may secure values that are also relevant for ICs (Global Constitutionalism - Peters 2014; Kumm 2009; Constitutional Pluralism - Walker 2002, Loughlin 2014, Avbelj & Komarek 2012). Often discussed standards to be critically assessed include *democratic self-governance* (International Public Authority - IPA, Bogdandy & Venzke 2014), and other modes of *accountability* e.g. by the *separation of powers*.

The following Research Themes address three distinct yet intertwined clusters of legitimacy challenges. **RT2** explores the proper allocation of powers between *different international and national* law-making, executive and judicial organs including the principle of *subsidiarity* (Shany 2005; **Follesdal** 2013; Carozza 2016; Besson 2016). *Procedural standards* are often brought to bear on ICs: *rule of law* standards, *due process*, and *transparency* (Global Administrative Law - GAL, Kingsbury & Krisch 2006).

RT3 explores the *checks and balances* on ICs. All these preliminary standards, revised for the multi-level legal and political order, help explain and assess the *constrained independence* of different ICs (Helfer 2006, Shany 2012b).

Performance standards are central to the final cluster of charges of illegitimacy, critically assessed in **RT4**. ICs’ claims to authority suffer if they fail to accomplish the tasks for which states established them: *dispute settlement* and *review*, *specification* of treaty norms, and to bolster state *compliance* (the Goals-Based Approach to ICs, Shany 2013). Further illegitimacy charges concern ‘macro-level’ impacts of ICs (**Squatrito, Follesdal, Ulfstein & Young** 2017): how they *develop law*, their impact on domestic and international *rule of law*, on *state sovereignty*, and *global governance and distributive and restorative justice* (Caney 2006; Ratner 2015; Anghie & Chimni 2003; **Follesdal & Pogge** 2005). **RT5** asks whether ICs’ functions are or would be better served by other institutions. Finally, **RT6** discusses best practices and models of ICs based on the findings in the previous RTs.

RT2 Multilevel separation of authority

The vertical allocation of authority. Brexit, African exits from ICC and other recent challenges against ICs urge renationalization of authority now placed at a regional or international level. States have delegated or pooled some sovereign rights to an IC in an issue area for various objectives: to enhance the state’s

commitments, to coordinate better, or to manage cross border concerns (Alter 2014; Kumm 2016). When are critics correct that an IC fails to serve a good purpose, and when are ICs scapegoats in two level games? When do ICs defer to states (Bailliet 2013; Follesdal 2017)?

PluriCourts 2.0 explores whether and how a defensible principle of subsidiarity guides such allocation of authority between ICs and the national level. (Ulfstein 2016; Saul 2015a; Follesdal 2013) Should subsidiarity be person-centered, only justifying ICs which provide a service to *individuals* (Raz 2006)?

The horizontal allocation of authority. Several critics question the authority relations between ICs and other international bodies. With what right should ICs *review* other bodies: such as Security Council decisions by the ICJ (*Lockerbie*), the CJEU (*Kadi*) or the ECtHR (*Al-Dulimi*). Other charges of illegitimacy concern ICs' *law-making*, since this may challenge the standard separation of powers doctrine (Waldron 2013). ICs' complex contributions to international *enforcement* systems merit scrutiny: the WTO authorization of members' counter-measures, the ECtHR' 'pilot judgments' interacting with the Committee of Ministers (Tsereteli 2015).

Beyond fragmentation. ICs deal with international law in judicially fragmented, sometimes conflicting ways. Worries of 'forum shopping' appear overdrawn (Behn & Fauchald 2015), and some praise the resulting non-domination, creativity and flexibility of contemporary ICs (Krisch 2010, Pauwelyn 2014). PluriCourts 2.0 develops and builds on such claims to assess two new challenges: how *states* now create 'competing' regional ICs (Morse & Keohane 2014), and *ICs* resistance and resilience against formal harmonization – as between the ECtHR and the CJEU.

RT3 Independence and accountability

Several critics lament *juristocracy*: the arbitrary rule of autocratic judges rather than the rule of law (Hirschl 2004).

Independence from whom with regards to what. ICs must enjoy considerable independence to settle disputes and develop the law by legal means (Posner & Yoo 2005, Helfer & Slaughter 2005; Alter 2008; Follesdal 2015). PluriCourts 2.0 explores several aspects of ICs' checks and balances and the delegation problems involved:

Composition. Institutional rules for selecting judges affect the possibilities for the desired forms of independence. PluriCourts 2.0 studies when and how appointment processes affect the composition of ICs and judicial behavior in various ICs (Elsig & Pollack 2012, Voeten 2008). The causes and effects of the dearth of women judges in the ICs, and the implications for their legitimacy, remains an important research topic (Grossman 2016; Bailliet 2016).

Procedural Guarantees. Impartial and trustworthy dispute resolution, review and law making by the ICs require that their discretion is constrained by *procedures* for access by parties to the dispute, - and possibly others affected by the ICs' judgment and its law making. Further legitimacy concerns arise regarding transparency (including *amicus curiae* by NGOs), use of witness and expert evidence, and victim participation in international criminal cases.

Methods of interpretation. ICs have discretion to interpret and apply relevant legal sources. Internationally accepted principles of legal interpretation empower ICs to resolve international disputes, and provide general guidance on how to interpret and develop the law (Saul 2015b) – restricting ICs' discretion. PluriCourts 2.0 studies how ICs 'balance' these concerns, also in anticipation of reactions of compliance constituencies.

Internal practices and secretariats. Internal working practices vary between different ICs, such as who prepares draft decisions, the internal deliberations, and use of dissenting opinions (Tallberg, Sommerer, Squatrito & Jonsson 2013). PluriCourts 2.0 continues to scrutinize such practices and the important roles of IC secretariats (St. John 2017).

International, regional and domestic checks. ICs operate in *complex international and regional* structures. PluriCourts 2.0 compares and assesses how this occurs, e.g. by the UN General Assembly, the Security Council, or meetings of state parties (e.g. ITLOS and Paris Agreement COP). States' and IOs' different nomination practices for various ICs merit further comparative assessment as regards their legitimacy and legitimating effects (Ginsburg 2013, 488; Helfer 2006; MacKenzie & al. 2010). The impact of states' and IOs' budgetary control over ICs allows accountability, and carries risks (St. John 2017). Further checks are wrought by states' responses to IC judgments: (threats) of exit, vocal objections, legislative override or (partial) compliance (Ginsburg 2005; Larsson & Naurin 2016; Langford, Behn & Fauchald 2017)

Professional standards. The IC adjudicators are constrained by concerns both to maintain the reputation of their IC in the eyes of their colleagues in the 'global judiciary' (Seibert-Fohr 2014) and to anticipate the

reactions of other audiences, including states and public opinion. Professional standards may constrain how they exercise their discretion, to be studied comparatively among ICs.

RT4: Performance

The final kinds of charges of illegitimacy concern ICs' *performance and effectiveness*. These include the ICs' several functions: dispute settlement on the basis of legal reasoning, review and law making; the 'meso-level' fulfilment of objectives of treaties of which they are part; and their 'macro-level' impact on domestic and international rule of law, and global governance and justice (**Squatrino** & al 2017).

Judicial behavior and politics. PluriCourts 2.0 studies the opportunity space created by ICs' constrained independence specified in RT2-RT3. How and why do different ICs select, decide and justify cases strategically in order to secure societal outcomes in line with judges' preferences (Larsson & **Naurin** 2016; Larsson, **Naurin**, & al 2016)? How successfully do they anticipate reactions of important compliance constituencies, and how does that impact their status as legal, independent institutions? What is the role of 'diffuse' and 'specific' support of ICs for their social legitimacy (Easton 1965, Lupu 2013)?

Compliance. PluriCourts 2.0 continues to study conditions affecting states' compliance, such as the role of civil society (**Squatrino** 2016). We explore whether and how the *social legitimacy* of the IC and its judgments affects compliance due to the quality of procedures, reasoning, judgments or specification of remedies (Tyler & Jost 2007; Alter 2014, 60).

Meso-level Treaty objectives. Several charges of illegitimacy question the *effectiveness* of ICs concerning the treaty objectives – e.g. to reduce human rights violations or international crimes (Jo & Simmons 2014), or foster domestic parliamentary democracy and rule of law (**Saul** 2017), or global trade. Ambiguous, contested or conflicting objectives challenge the 'goal based' approach to *effectiveness* (Shany 2012a) and may affect the legitimacy and compliance with ICs (**Hayashi & Bailliet** 2017, **Langvatn & Squatrino** 2017).

Meta-level effects. Further charges of illegitimacy concern broader outcomes that ICs contribute to (**Squatrino** & al 2017). Do ICs perpetrate domination by certain states, multinationals or investors over historically underprivileged groups including women, or the Global South (Anghie & Chimni 2003; Haskell 2014; **Behn, Berge & Langford** 2016, Pogge 2010, **Behn** 2015)? Do ICs– and should they - contribute to global justice, and if so, should judges draw on such norms in their interpretations?

PluriCourts 2.0 also explores and assesses ICs' meta-level effects upon *the international and national system*. Do they effectively 'hollow out' national sovereignty (Ruggie 1982), or fuel a shift from diplomacy to 'an international rule of law' with more legalization, judicialization and possibly 'constitutionalization'? Governments' perception of such trends may explain calls to renationalize ICs. Why this occurs, and ICs' resilience and responses merit study.

PluriCourts studies how and when ICs and non-state actors empower each other - including individuals, corporations, civil society and NGOs; thereby transforming the state-centered *nature of international law* (Kuyper & **Squatrino** 2017, Alter 2014).

RT5: Comparative advantages

PluriCourts extends its comparative research agenda to identify for which functions, and under which conditions, ICs can be expected to perform better than alternative international and nation institutions and practices, especially given some states' calls for renationalization of dispute settlements. Alternatives for *dispute resolution* include political deliberations, conciliation, non-compliance procedures, and different forms of hybrids (**Voigt** 2016; Alter 2008; Beckman & al 2016; Koh 2011). Such alternatives are compared for their possible benefits in fact-finding, development of the law and roles in enforcement.

Global Public Goods? Among problem types, PluriCourts addresses the advantages and weaknesses of ICs for multi-party disputes and contestations about global public goods such as the environment, refugee protection and peace (**Voigt** 2014; **Bailliet & Larsen** 2015; **Bailliet** 2015).

RT6: Best practices and models

RT 6 draws conclusions about paths and standards to establish, improve, or abolish ICs in their institutional contexts on the basis of the legitimacy standards scrutinized and brought to bear in other RTs.

Several factors affect the opportunities and speed of such changes: their historical origins and path dependencies (for investor-state tribunals, **St. John** 2017); and some governments' preferences for political, bilateral action, or for regional alternatives (Morse & Keohane 2014).

PluriCourts 2.0 studies how changes – for better and worse - come about, by whom. When do ICs modify their interpretations or modes of deference in light of legitimacy concerns or to preempt state action?

The present preference among some states to renationalize authority underscores the need to understand how states may coordinate - or block - changes which affect the normative and social legitimacy of ICs' authority to adjudicate disputes, review, or make law.

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Implementation Plan

Research within the 21 sub-themes identified in the Research Plan will be pursued by several means: by the resident staff in their own publications, by invited visitors, and by targeted publication-oriented workshops on the various themes. Several such concrete activities are under way.

The workshop based publications generally follow a procedure we have fine-tuned during the first four year of PluriCourts: Several coordinators across the disciplines and different ICs, possibly together with an external expert, identify and elaborate a narrow research question within one of the 21 sub-themes. Scholars from one or more disciplines are invited to present think pieces or draft papers once or twice, as part of other professional conferences or as free standing PluriCourts-workshops. Publications are as anthologies or special issues.

We will organize workshops aimed at publications for each of the 21 sub-themes listed. Our experiences with the coordinators, and the team as a whole, leave no doubt that we will complete research within each of the sub-themes. But the nature of these cross-cutting themes makes it difficult to plan their specific contents, sequence and starting dates exactly. We therefore choose not to specify this in a detailed specification plan.

Our annual events are also used to conduct and disseminate research: Our annual conference, our Concepts and methods workshops, our PhD courses in Oslo and abroad, and the annual summer school with iCourts

Applications to the ERC /Horizon 2020

PluriCourts has submitted several applications to the Norwegian Research Council and to Horizon 2020/the European Research Council. While we have not succeeded in securing large grants, Postdoctoral Fellow Matthew Saul made it to the ERC final rounds in 2016 and has received funding to reapply in 2018.

In the coming years, PluriCourts will increase efforts to secure large research grants, matching our budget of 3 grants. We routinely organize workshops on application writing, drawing on the experiences of Føllesdal and Ulfstein in winning grants and on panels for the Research Council of Norway and the ERC.

During the spring of 2017 we run a series of four workshops focused on ERC grants, due to the comparative benefits of such grants regarding application costs, quality of assessment and success rate. Professors Christina Voigt and Freya Baetens apply to the ERC in 2017 and other will apply later. Researchers in the Investment Pillar applied for H2020 in 2015, and might consider applying again.

b) Organization

PluriCourts will continue to be led by a Director and Co-Director, exchanging positions about every two years. Two professors were appointed in 2016, one permanent and one until 2025. This means that we have coordinators at professor level in all three disciplines and in all relevant sectors covered by PluriCourts, and no further permanent hiring is planned. All coordinators continue to meet regularly with the two Directors, as a strategic advisory organ to implement the research plan across the different disciplines and thematic areas.

The Scientific Advisory Committee will continue to provide guidance, meeting annually. PluriCourts continues to employ excellent postdoctoral researchers who carry out extensive research on their own and organize related workshops. Two postdoctoral fellows in political science join the team in 2017. Further hiring is planned for the last five years; the number is contingent on external financing.

PluriCourts has an acceptable gender balance both among senior researchers – where three out of seven coordinators are women, and among the postdoctoral research fellows - with five women and five men.

c) The Centre / research after the CoE-funding ends

One of the co-directors (professor Føllesdal) and the coordinators will maintain the competence and research activity on ICs once PluriCourts 2.0 comes to an end in 2023. Co-director professor Ulfstein plans to retire in 2021. The funding for professor of political science (Naurin) will be continued by the Faculty of Law until 2025, the other coordinators have permanent positions at the Faculty of Law.

PluriCourts 2.0 will continue the collaboration with relevant researchers and research groups at the Faculty of Law, and at the Departments of Political Science and of Philosophy, with an eye to efforts which will continue after 2023, including assistance in future application processes and appointments on international courts.

In dialogue with the Faculty of Law, PluriCourts 2.0 has developed strategies to secure continued excellence in research and teaching concerning international courts after 2023. The Faculty has expressed interest in a research school. Possible contributions from PluriCourts include

- * PhD courses (2018-) on legal theory, political science and law on international courts and tribunals,
- * Annual "Concepts and Methods" workshops focusing of different topics
- * "Publish and Flourish" workshops, on how to pursue and combine a research career and other goals, including workshops on how to write a good ERC application

As a frontrunner in internationalization at the Faculty, PluriCourts will help develop more elective courses in English, and revise the curriculum in Master courses to include more on international courts.

The Faculty of Law plans to establish a Centre for Excellent Education where PluriCourts will contribute with dialogue-based teaching: 1) moot courts, where students argue cases before senior judges and academics, and 2) legal clinics where student submit arguments before real international courts.