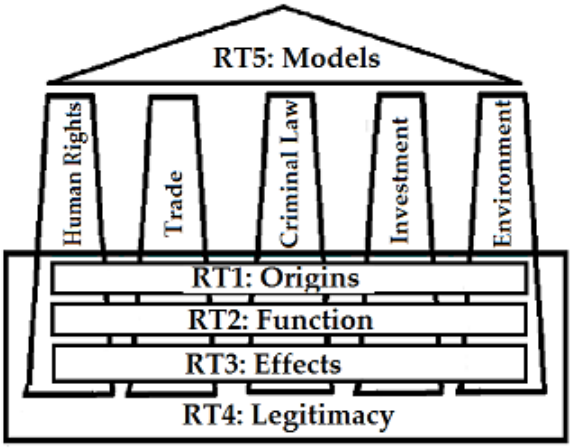
PluriCourts: The Legitimate Roles of the Judiciary in the Global Order
Research Plan as of 20121119



Background: why worry?

Since the end of the Cold War, states have established a cascade of international courts and tribunals (ICTs) with functions far beyond the early aims of reducing the risk of war. The European Court of Human Rights (ECtHR) protects 800 million people. The International Criminal Court (ICC) brings hope of justice after atrocities. ICTs form the backbone in international regimes like the WTO, resolving disagreements among participating states. Still too weak and dependent on states, new ICTs are called for to solve problems from climate change to corporate wrongdoing.

The *primary research objective* of PluriCourts is to analyze and assess the legitimate present and future roles of this *plurality* of international *courts* (thus: *PluriCourts*) and tribunals - an emerging global judiciary - in the international and domestic order.

Why worry about the legitimacy of the ICTs? Many hail ICTs as constitutional constraints on an anarchic system of states, as islands of effective world governance. Kant's utopian hope that states would agree to peaceful dispute resolution may have come true, in abundance. States have agreed to curtail their sovereignty to address a wide range of common objectives.

But skeptics challenge the legitimacy of the global judiciary. A growing number of critics claim that

- ICTs seldom achieve their intended effects.
- ICTs circumvent national legislatures and ignore cultural differences.
- ICTs are central culprits of 'judicialization' with little accountability or checks and balances.
- Some ICTs promote unbridled free market values and avoid transparency.
- Turf wars among the mushrooming ICTs replace the anarchy among states.
- ICTs fall victims to their own success: the ECtHR is overburdened and in danger of collapse.

The question of the *normative legitimacy* of ICTs thus grows in urgency. Why should ICTs enjoy such authority as they currently do, or claim? That is, for which sound reasons should domestic or international authorities, or private individuals and bodies, defer to ICTs? Indeed the very effectiveness of the ICTs –and thus the international rule of law –seems to depend on them being *perceived* as legitimate, since the international order has but weak means of enforcement. Our working hypothesis is that ICTs should be subject to legitimacy standards known from domestic constitutional debates, such as democratic control, rule of law values, subsidiarity in relation to national organs, and achievement of their objectives. But these standards must be critically assessed, realigned, specified and adapted to the international context, to ICTs' interaction with national constitutional orders, and to differences among ICTs, *e.g.* for world trade or human rights.

Strategy: primary and secondary research objectives

This normative assessment of ICTs - the primary research objective of PluriCourts - depends on empirical and legal analyses of three issues, pursued as *secondary research objectives*. Research

Topic (RT) 1 concerns the *Origins* of the ICTs: what did states want to achieve with the ICTs, how have they been established and why do we have ICTs for some international challenges - but not others? RT2 explores how ICTs *Function,* operate and are structured. RT3 addresses the *Effects* of ICTs, especially how well they promote their founders' objectives – possibly adjusted over time.

To address these questions, PluriCourts focuses on *five* sectors of international law: *human rights, trade, criminal law, investment, and environment* – where the latter *lacks* a judiciary.

RT4 will assess the criticisms against ICTs, using theories and principles of *Legitimacy* well known from domestic constitutional theory, duly developed for ICTs. RT5 builds on the other RTs to develop and assess plausible, sustainable *Models* for each ICT and for their interaction with national/ international bodies, such as more or less centralized and independent ICTs. PluriCourts thus also contributes to legitimacy debates on global governance, and how ICTs reshape conceptions of legitimate sovereignty and state interests.

PluriCourts restructures this area of research by three new contributions: first, *in-depth studies of each sector;* second, *comparative* research on the ICTs, and third to *connecting* these findings to broader explanatory and justificatory frameworks.

PluriCourts asks new questions about the legitimate role of each ICT, and of their combination. We assess them *as an emerging global judiciary* that should *aid* resolution of international needs. PluriCourts answers these questions by means of a long-term multidisciplinary study of the ICTs during a time of rapid development; including individual ICTs, their interactions and relations to other international institutions and with domestic courts, legislatures and executives.

PluriCourts is a leading international centre for the study of ICTs. It engages outstanding international legal scholars, political scientists and political theorists and institutions, as Senior Research Fellows and in an Advisory Committee (all **Boldfaced**). An eminent multi-disciplinary research team is based in Oslo, supplemented by new and strengthened cooperation with international researchers and other institutions engaged in related research. PluriCourts generates international publications, research training and teaching curricula. The ten year period also allows PluriCourts to contribute to train government officials and national and international judges, participate in public debate, and offer policy suggestions and scenarios to improve ICTs individually and as a whole.

In order to gain traction on the comparative, multi-level and multi-disciplinary primary objective concerning the legitimacy of the ICTs, PluriCourts must combine legal, empirical and normative elements. The project will draws on and contributes to the interdisciplinary exchange in international law, political science/international relations and political philosophy – and international political economy, international political history and the sociology of law where relevant – (**Helfer** &Slaughter 1997, Keohane & al. 2000). PluriCourts seeks to uphold methodological standards *within* each discipline by a critical mass of scholars in each.

The five sectors are chosen because their ICTs have very different origins, designs and effects (Kingsbury 2012). This focus allows PluriCourts to both respect the specificities of different ICTs and compare them, to explore their respective bases of legitimacy, and any similarities relevant for developing models for their future development in each sector – and to consider whether there is or should be movement toward a single international court.

A starting assumption to be explored is whether central actors – politicians, judges and NGOs – assess ICTs according to several aspects of legitimacy known from domestic constitutional debates: *Consent and democratic and representative influence; Rule of law, including independence of the judiciary, due process, transparency and finality; Subsidiarity*; *Compliance and effectiveness; Global justice and respect for human rights values.* Such standards will be critically assessed both descriptively and normatively and brought to bear on the ICTs individually and as a whole.

5 Sectors

PluriCourts considers ICTs in a wide sense, encompassing international institutions whose formal function is *dispute settlement,* even if not called a 'court' (as in the WTO) or if only able to make

non-legally binding decisions (such as the UN human rights treaty bodies). We compare ICTs in five substantive sectors, at various territorial levels, and study their interplay. The structure can accommodate further sectors at a later time if appropriate, such as the International Tribunal for the Law of the Sea. The sectors vary on salient aspects given our research objectives: a) number of *levels* – national, regional and/or global and how they interact; b) the *subjects* regulated or affected: states, individuals, international organizations, and/or corporations; c) the legal *authority* of ICTs, from the 'strong' dispute settlement systems which pass binding judgments and decisions to 'weak' non-binding settlement; d) their relationship to legislative and executive bodies at international, regional and national levels; e) the use of ICTs as 'enforcement' mechanisms, such as non-compliance procedures under environmental agreements; and f) their claim to hierarchical supremacy, with human rights often touted as central to the 'constitutionalization' of international law.

Many perceive the International Court of Justice (ICJ), the principal judicial organ of the UN, as the most authoritative judicial organ (Guillaume 1995). One reason for this is the general jurisdiction of the ICJ, which distinguishes it, though the disputes before the ICJ involve only states. PluriCourts compares the ICJ to other courts, and studies its interaction with specialized ICTs and how it deals with new issue areas, such as international environmental law and human rights.

The Court of Justice of the European Union (CJEU), integral to EU's ambition of 'an ever closer Union', is not a focus of PluriCourts. It is nevertheless studied both from a comparative perspective and as a multi-level case: how this advanced international court interacts with other EU organs and with member states, the relation to the ECtHR once the EU accedes to the European Convention on Human Rights, and how the CJEU engages in issues beyond the European context (**Alter** 2009).

International human rights

The many human rights ICTs assume several social functions, especially by giving standing to individuals at the international level and by their judicial review of domestic decisions. Regional human rights courts are prominent examples. PluriCourts here draws on the findings of the MultiRights project, which scrutinizes some of these issues, but goes far beyond that project - for instance by comparing the European regime with that of the Inter-American human rights regime (**Alter, Helfer**). When new optional protocols are adopted or negotiated that contain individual complaints procedures for various international human rights conventions, questions of legitimacy have become imperative – especially the balance of power between the legislator and the judiciary. The impact of these ICTs depends to a large extent on their perceived legitimacy, especially so for those that lack formal powers to issue binding decisions, such as the UN Human Rights Committee. States have started to question the legitimacy of the overall set up of the individual complaint procedures, for example, the professionalism of the members of those treaty bodies (Grossman 2009). PluriCourts also studies the efforts to overcome the fragmented institutionalization of international human rights (**Helfer** 2008), such as the High Commissioner for Human Rights' proposal for a 'unified treaty body'; proposals for a World Court of Human Rights; the EU's accession to the European Convention on Human Rights, and the reform process of its Court.

International trade law

Dispute settlement under WTO is of a traditional bilateral character. It is not served by a formal court but rather with ad-hoc panels, an Appellate Body and the Dispute Settlement Body (DSB). The country prevailing in a dispute may be authorized to demand compensation or to counter with limited trade sanctions (*e.g.* suspension of concessions) to enforce a binding recommendation or ruling of the DSB. The organisational, procedural and substantive aspects all merit scrutiny, especially the involvement of third countries through formal intervention and use of *amicus curiae* briefs by other stakeholders; and the system's interaction with other legal sectors, such as environmental law and human rights law. WTO's relationship to the national level is of particular interest, e.g. due to popular charges of "illegitimate" decisions such as prohibitions of trade measures for health reasons (Lang 2008) or subsidies, and protection of patents in medicine (Médecins Sans Frontières 2005).

International criminal law

International criminal law shall serve the same human values as international human rights, but is in a sense their 'inverse' by subjecting individuals to international *responsibility*. Special features to be scrutinized include the relationship between the permanent International Criminal Court (ICC) and the *ad hoc* tribunals, charges of selective geographical engagement; due process; interaction with the UN Security Council, and the relationship to national courts - the principle of complementarity.

One issue of interest is the emergence of 'Gender Crime' in the 1998 Rome Statute of the ICC recognizing rape as a war crime and a crime against humanity, based on prior jurisprudence of the International Criminal Tribunals for former Yugoslavia and for Rwanda (Ocampo 2010 ENREF 65).

International investment law

In this area non-state actors, *i.e.* multinational corporations, enjoy both substantive and procedural rights under international law. There is concern that this severely curtails legitimate national needs for regulation *e.g.* concerning welfare, use of natural resources and environmental protection. This area of law has mainly developed through bilateral treaties supported by some multilateral frameworks set up to manage disputes, such as the International Centre for Settlement of Investment Disputes (ICSID). The future design of this area of law remains uncertain; such multilateral institutions may proliferate. The number of investment arbitrations has increased, including under the auspices of ICSID. The allegedly inconsistent awards is said to create a legitimacy crisis and may call for a standing appellate body (Frank 2005, Ratner 2005, challenged by **Fauchald** 2007); further spurred insofar as arbitration decisions are not made public , raising transparency concerns. Should international law recognize international obligations for international corporations (CSR) and subject them to international control by ICTs (Jackson 1998; Ruggie 2007, Ruggie 2009)?

International environmental law

The legitimacy of international environmental governance has received increased attention (**Bodansky** 1999). There are no specialized courts in international environmental law. Non-compliance procedures have been established to deal with multilateral issues that require preventive rather than reparative approaches, and to provide assistance and capacity-building rather than sanctions, for example the Compliance Committee with its Facilitative Branch and Enforcement Branch under the Kyoto Protocol. But environmental problems are increasingly addressed in existing ICTs. Thus sectors without ICTs may suffer from 'externalities' from other sectors equipped with ICTs. PluriCourts asks *e.g.* whether a judicial body would be necessary, effective, and realizable in international environmental law or whether existing multilateral mechanisms should include more court-like elements (**Ulfstein** 2009a, Hockman 2008), and how to address interaction with other sectors.

5 Research Topics

The ICTs in these five sectors will be examined within five *Research Topics* (RTs), each subdivided into 2 or 3 subtopics pursued by several scholars including one designated PhD or PostDoc. *RT 1-3* explore legal and empirical aspects of ICTs' *Origins, Structures and Effects,* respectively, for their normative assessment. PluriCourts will *combine* legal and political science scholarship to an unprecedented extent. *RT4* feeds into and draws on these analyses to critically assess the actual charges levied against the legitimacy of ICTs, drawing on different normative theories of legitimacy. *RT5* builds on these findings to develop and assess several plausible and sustainable models or scenarios for the respective ICTs, as well as their mutual interaction and relationship with international and national legislative, executive and judicial organs, including domestic courts.

RT 1: The Origins of ICTs

One central requirement of legitimate authorities is that they have come about in appropriate ways. The origins of ICTs are also essential in determining their intended and changing objectives, which

should be juxtaposed with their effectiveness when addressing the legitimacy of ICTs. RT1 combines legal research and political science to determine why and how states established ICTs with certain powers in certain sectors – while not in others; what was the reasoning behind the design, composition and procedures of the specific institutions; how did states and non-state actors plan for the multiplicity of ICTs; and what roles did non-state actors play? ICTs signal the legalization and judicialization of international politics. Why do states increasingly resort to legal procedures in their cooperation and in the design of international institutions (Goldstein & al. 2000)?

1.1 Why ICTs? Legal aspects

The legal research on the ICTs' origins explores, first, states' and other stakeholders' ambitions in defining ICTs' substantive scope; who should have standing; whether they should have compulsory jurisdiction and powers to enact binding judgments; and their composition and procedures.

Second, the creation of ICTs concerns aspects of regionalization and the so called fragmentation of international law: with ever more ICTs set up at the regional and international level, double standards might develop, or regional approaches to, for example, human rights law might ensue.

Finally, PluriCourts asks which strategies states and non-state actors had concerning the relationship of states and individual actors with these ICTs. States may have to find solutions on how to accommodate and implement ICT decisions at the national level (**Nollkaemper** 2011**)**. This raises the question which of the existing structural solutions which link national to international law –usually monist or dualist– are best suited to incorporate those new developments (Gardbaum 2009).

1.2 Why and when do states create ICTs? International Relations theory

ICTs create new puzzles for understanding international relations: Why have sovereign states created and acceded to independent, international courts who constrain them – in some areas – while other urgent issues such as environmental problems lack an ICT? Why do some regions (*e.g.* Asia and the Pacific) have few if any ICTs? PluriCourts' span of sectors allows testing of explanations, such as the type of coordination problem, disagreements on diagnosis or solutions (Scharpf 2007, Guzman 2008, Rittberger &Zurn 1991, **Helfer** 2006), or sheer political feasibility. Realist theories may dismiss ICTs as epiphenomenal to underlying power distributions (Goldsmith &Posner 2005; Mearsheimer 1994). Ideational, constructivist and other theories assume that governments' normative commitments or interest in symbolic functions affect ICTs, *e.g.* for free trade or human rights (Moravcsik 2000; Genschel &Zangl 2008). Institutionalists may stress the information states gain (Carrubba 2009; Kono 2008); actors' choice menus and veto points, and the impact in due course of ICTs on state preferences (March &Olsen 1989, 1998). Regime type, domestic political conflicts, mimicry, the need to signal to foreign actors, or blame shifting combined with path dependency may also explain commitments to ICTs (Moravcsik 2000; **Simmons** &Danner 2010). PluriCourts will help explain the range of responses among states, such as variable participation in the ICC, and support for the WTO Dispute Settlement or the Compliance Committee of the Kyoto Protocol (Spiro 2000; Koh 2003; **Hovi** and **Skodvin** 2008; **Skodvin** and **Andresen** 2009; **Hovi**, Sprinz &Bang 2010). This will help assess the political feasibility of alternate future models.

RT 2: The Structure of ICTs

Another important aspect of legitimate authority is how it is exercised. RT 2 thus addresses relevant aspects of the ICTs' *organization*, *composition* and *procedures*, such as rules of recruitment, and formalized and informal opportunities to influence decisions by central actors such as states, individuals or NGOs. Some aspects are common to many ICTs, but others are unique to each, with 'family resemblance' at most. PluriCourts considers the interplay of these ICTs, and the complexities wrought by multi-level regulation between the global, regional and national levels in relation to legislatures, executives and other judiciaries, and how they allow for exercise of power *at various stages of the policy cycl*e. The findings draw on law and political science to allow

assessment by such normative aspects of legitimacy as Rule of Law and Democracy.

2.1 The Structure – Legal aspects

PluriCourts studies how ICTs satisfy requirements of *independence and necessary expertise, due process guarantees and transparency* (**Ulfstein** 2009b). To what extent is gender a factor in recruitment (Grossman 2009) – with effects on court composition, judgments and outcomes? PluriCourts also examines how composition and process depend on their mandate, the parties, and the specific substantive area they serve: Can they hand down binding judgments or non-binding recommendations, and are they inter-state or open for individuals, global or regional, *etc*.?

The hierarchical order of national courts serves the finality, consistency, and implementation of the courts' decisions. Since ICTs are not organized in a hierarchical order, PluriCourts studies to what extent this may create *competing jurisdictions between different ICTs and forum shopping, conflicts between and inconsistencies* in their decisions, and how this affects ICT legitimacy. PluriCourts also examines to what extent ICTs threatens sectors that lack them, and the need for complementarity, horizontal or vertical integration between different ICTs (Lavranos 2008).

While the *principle of subsidiarity* militates in favour of national courts for such reasons as expertise and familiarity with local circumstances, avoiding national bias and ensuring effective implementation of international law count in favour of ICTs (**Keller** & al. 2010). A crucial topic is the different techniques of the procedural relationship between the international and national level, such as the requirement of exhaustion of local remedies and the principle of complementarity.

2.2 Institutional design and interaction across sectors – Political Science

IR theory should explain not only why states create ICTs, but also why they design ICTs *just so* (Fehl 2004). This affects the ICT's legitimacy, compliance and effectiveness. Some explain design as functional requirements of complex problems (Abbott & Snidal 2000): dispute resolution and judicial functions - criminal enforcement or constitutional/administrative review - may require impartiality, private access or compulsory jurisdiction (**Alter** 2006; Shelton 2009; Caron 2006).

A second research question is why some ICTs expand their authority, as some argue has occurred with the CJEU and the ECtHR (Helfer &Slaughter 1997; Keohane & al. 2000a; Posner & Yoo 2005). Hypotheses include power-hungry judges, absent state reigns; governments which attempt to boost citizens' trust (Carrubba 2009, **Alter** 2008, **Follesdal** 2009a), or active transnational advocacy networks and epistemic communities (Risse, Ropp, & Sikkink 1999; **Simmons** 2009; **Voeten** 2007; 2008). A third puzzle is interaction amongst ICTs in different issue-areas and regions, and the resultant opportunity space for themselves and other political actors ranging from cooperation, borrowing and conflicts among ICTs to states' 'forum shopping' as addressed under the legal issues (*e.g*. the *MOX Plant* cases Ireland vs UK). The range of sectors lets PluriCourt generalize beyond existing research and helps explain compliance and effectiveness in RT 3.

RT 3: The Effects of ICTs

Normative accounts hold that the effects of rules and decisions are relevant for the legitimacy of those who issue them. RT3 thus considers the *effects* of the ICTs by several standards, including legal effectiveness, *i.e.* compliance, and *de facto* impact in relation to their objectives. Studies of effectiveness require examination of the *legal* content of ICT findings, compliance by states, and broader effects studied by *political science*. Why do some domestic courts, other state organs and other actors comply with some ICTs more than others? Why, to what extent and with what effects do they regard them as binding legal authority? How do domestic organs such as courts influence some ICTs, and what can we learn from this about aspects of their legitimacy, including effectiveness and responsiveness (**Zürn** &Joerges 2005)?

3.1 Compliance and Legal Effectiveness – Law

PluriCourts studies legal questions concerning the effectiveness of ICT decisions, such as the development of new interpretation techniques by ICTs to further the objectives of relevant treaties,

including the relationship between interpretation and law-making (**Brunnée** &Toope 2010, **von Bogdandy** &Venzke 2011), possible conflicting interpretations of international law between different ICTs, or the acceptance of interpretations across ICTs, and by national states (**Shany** 2012). PluriCourts will examine to what extent ICTs interfere with domestic constitutional organs, especially national courts, but also the legislature and the executive (*Keller* &Stone Sweet 2008). It will also study the epistemic authority of ICTs: what characterizes their modes of reasoning, compared to their domestic counterparts and other forms of 'public reason' (Habermas 2003, Rawls 1999a)? How do their concepts, principles and distinctions diffuse and migrate? Does such migration of legal reasoning compensate for formal dualism between the international and domestic legal order, and for non-binding decisions by ICTs? On the other hand, do national courts influence the reasoning of ICTs? Do ICTs and national courts in practice work as an integrated judiciary despite belonging to different legal orders – with implications for their accountability?

3.2 Compliance and Effectiveness – IR Theory

Why do states endure costly compliance with ICTs that lack enforcement? Why do some ICTs secure more state compliance than others, and – somewhat independent of this: why do some of them promote or achieve their objectives better than others? Research challenges include how to track effects of states acting 'in the shadow of the courts.' Somewhat competing explanations to be assessed include coercion, self interest and normative persuasiveness of the ICTs ruling. Standing tribunals, compulsory jurisdiction and private access may further the independence of ICTs, inducing compliance (**Alter** 2006; Kono 2008; Zangl 2008). Deliberation – public reason-giving – at various stages may also boost social acceptance of the ICT or its rulings (**Deitelhoff** 2009; Gastil & al 2010; Petersen 2009; Risse 2000), and this may match with domestic institutional features, *e.g*. the legal tradition (common law, civil law, and Islamic law) (Powell &Mitchell 2007).

Do ICTs and compliance therewith help solve or manage the initial problem – crucial to the 'output' aspects of legitimacy (Young 1999)? Are degrees of legalization and judicialization relevant variables (Kono 2008)? The sectors are selected to systematically test such theories, drawing on RT2 & 4: Do normative standards or social perceptions of legitimacy help explain compliance?

RT 4: Legitimacy Deficits?

PluriCourts examines critiques that ICTs suffer from 'legitimacy deficits,' and calls to establish new ICTs. We revise 'domestic' normative principles and values to assess ICTs in different issue areas.

4.1 Claims of legitimacy deficits of ICTs

RT4 takes stock of political debates about the legitimacy deficits of ICTs, inductively mapping how, when and where various actors raise such concerns in foreign policy statements, parliamentary debates, official governmental reports, media *etc*. based on elite interviews, public opinion surveys and media content analysis. Actors disagree about the diagnosis 'legitimacy deficit' as applied to the global judiciary: about symptoms, criteria for improvement and new ICTs, and hence about reform proposals. The mapping specifies aspects of ICTs studied by other RTs, the puzzle of why such 'legitimacy talk' about ICTs occur - and how it might matter (Koskenniemi 2003).

4.2 Debated Aspects and Theories of Legitimacy

The research addresses debated aspects of legitimacy, identifying their most defensible specification for each ICT. A working hypothesis that *legitimacy standards appropriate for ICTs must promote the same fundamental values as those of domestic institutions – revised in light of the specific objectives of ICTs and the complexities wrought by the multilevel order of which they are part.* Findings help address deficiencies in procedures, institutions or substantive norms.

Normatively convincing specifications of the following aspects draw on the findings of RT4.1 and different theories of the legitimacy of international law that each fit the aspects of legitimacy together in more or less consistent arguments (**Besson &Tasioulas 2010**). Each theory asks whether and how the authority exercised by ICTs can be justified to those subject to that authority, be it

states, individuals or companies. They offer competing accounts of the intricate relationship between legality, social compliance and normative justifiability – *e.g*. when and why perceived normative legitimacy enhances compliance (**Zürn** 2005b). They also disagree about how the various aspects should be interpreted and weighted, and how they interplay. The theories will in turn be tested by the bottom-up approach of RT4.1: are ICTs that cause most concern, the most illegitimate?

PluriCourts will investigate central tensions in the field, such as those between 'cosmopolitan' normative theories (**Pogge**, Caney 2005) and community-focused theories defending states (Miller 2007); and 'ethical' accounts (Griffin 2009; **Tasioulas** 2007; 2010) *vs* 'political'/ 'institutional' accounts (Rawls 1999b; Beitz 2009; Raz 2010).

Consent and democratic and representative influence. PluriCourts scrutinizes claims that state consent only grants ICTs *some* normative legitimacy from principles of *sovereignty* and *legality*. PluriCourts explores whether ICTs engaged in judicial review of domestic decisions threaten *democratic rule variously understood,* and *accountability e.g*. when making law by dynamic interpretation (Pettit 1997, Waldron 2006, **Bellamy** 2007, **Follesdal** 2009c, Keleman 2011, **Zürn** 2011a). A central issue is how ICTs respond to public concerns in concrete cases and in general practice, *e.g*. states' opposition to the ECtHR in the 2011 case *Lautsi v Italy* of crucifixes in Italian classrooms.

Rule of Law values that PluriCourts addresses include respect for ICTs' *legal mandate*; *due process;* the need for *predictability* which challenges a fragmented institutional and legal order (Koskenniemi 2006), *independence of the judiciary,* and *transparency.* How can the *rule of law* prevail, rather than the rule of men in ICTs – whose gender imbalance is only one of several worries (Grossman 2009)? What modes of extra-democratic *accountability* by each ICT can be secured, *e.g*. through legal checks, according to conflicting theories of legitimacy? Yet ICTs increasingly exercise authority over countries with weak rule of law (**Helfer** & al. 2009). *A working hypothesis is that ICTs serve important roles as recipients AND bestowers of legitimacy, in complex 'diagonal' checks and balances in our multilevel legal order* - 'upgrading' domestic constitutional theory.

The principle of *subsidiarity* expresses a preference for local authority, placing the burden of argument with attempts to centralize (**Follesdal** 2013a). PluriCourts will bring subsidiarity to bear on the authority of ICTs vis-à-vis domestic politics, lawmaking and courts, and global *vs* regional ICTs. *A working hypothesis is that different theories of subsidiarity have very different implications.*

Compliance and effectiveness: PluriCourts unpacks these complex principles – serving as a *dependent* variable when compliance and effectiveness result from perceived legitimacy, and when compliance and effectiveness in turn *provides* legitimacy to ICTs. This draws on RT 3 findings on *effectiveness*: the effects wrought by ICTs upon states, domestic courts, individuals *etc*., furthering various objectives (Underdal &Young 2004, **Shany** 2009), as distinct from states' legal *compliance*.

PluriCourts also considers contested 'output' principles including *Global justice and respect for human rights values*. Are equality, human rights and fairness relevant for assessing ICTs? (Franck 1995, Nagel 2005, **Follesdal &Pogge** 2005, **Forst** 2010**, Follesdal** 2011a) If so, for *each individual* ICT, or the global judiciary as a whole? Should ICTs be assessed by their global distributive effects?

RT 5: Models

This RT draws conclusions regarding improving ICTs, both existing ICTs and the pros and cons of new ICTs based on their respective legitimacy merits – different across sectors.

5.1 Features of relevant models

Some urge states to re-gain control over ICTs by specifying their task and their substantive scope, restricting interference by the principle of subsidiarity; and by controlling the election of judges. The 'masters of the treaties' should return to *intergovernmentalism*. Or should ICTs be subject to *direct democratic accountability at the global level* (Archibugi & al. 2010)? Another scenario focuses on *non-state* actors (individuals, corporations, litigants, attorneys, NGOs *etc*) who allegedly represent the ultimate subjects of international regulation better than states. Others urge a global order of *informal self-regulation* to secure non-domination, *e.g*. networks of judges (Slaughter

2004). Yet others emphasize accountability mechanisms (Kingsbury, 1998). Further models urge formal, institutional elaboration of *constitutionalism* applied to international legal institutions (**Follesdal** 2002; **Klabbers** et al., 2009, Dunoff &Trachtman 2009, **Kumm** 2004, 2009).

PluriCourts elaborates such models along four different dimensions (*cf.* Goldstein & al. 2000):
- *Centralized vs decentralized judiciary.* More or less powers may be placed with ICTs or domestic courts to secure familiarity with local circumstances yet avoiding forum shopping and conflicting or inconsistent decisions, *e.g.* to ensure complementarity in substantive jurisdiction and/or horizontal integration and/or vertical relationships among the ICTs. ICTs may form part of a global order with *federal and confederal elements of (de)centralization* among domestic, regional and global levels.
- *Control vs independence.* ICTs' independence promotes and protracts from their legitimacy. How best combine democracy, procedural controls and other forms of accountability? Should democratic control occur at national and/or international level? What, therefore, can and should be the role of the mediated public sphere at either levels?
- *States vs non-state actors.* Non-state actors are ever-more important, as rights- and duty-bearers and as vocal interest groups – yet states have been loci of democratic control and legitimacy, and are cornerstones of international law and politics, including ICTs. Should individuals, attorneys, NGOs or companies be entrusted more control in ICTs?
- *Formal vs informal control.* ICTs may be subject to combinations of formal controls and self-regulation, *e.g.* the legal principles of litispendence (preventing simultaneous cases before different ICTs), res judicata (preventing subsequent cases before different ICTs) and the doctrine of precedent. Also, should informal control by public debate in the public sphere and networks play a role?

5.2 Assessment of the models: Normative Legitimacy

PluriCourts assesses the models developed in 5.1 by the revised contested standards of legitimacy in 4.2, including their objectives. Particular attention is paid to the 'balancing' among different standards of legitimacy for each ICT, and the 'balancing' among ICTs, and between ICTs and domestic courts. Due account is taken of the role of national and international democratic organs.

5.3 Assessment of Feasibility and Stability

Each model is elaborated enough to identify crucial institutional and attitudinal preconditions, and their likely incentives and abuse structures drawn from comparative historical analyses. *E.g.*: do parties agree sufficiently on the need for such adjusted ICTs; are opportunities for collective will formation and trust present or likely? Is international 'solidarity' feasible for this issue area? - and in the other sectors where ICTs might be developed, for the global judiciary to maintain legitimacy? Where may other bodies than ICTs suffice or be preferred? Central issues are 'feasibility' and 'stability:' Which models are 'realistically utopian' (Rawls 1999b), given veto players' interests? What 'stabilizing mechanisms' may sustain compliance (cf **Zürn** 2011b, Nagano 2006, _ENREF_53_ENREF_60Patomäki 2003)?

Milestones, Deliverables

	Year 1 2013	Year 2 2014	Year 3 2015	Year 4 2016	Year 5 2017	Year 6 2018	Year 7 2019	Year 8 2020	Year 9 2021	Year 10 2022
Milestones										
Research Topics	*Start RT1-4*		*Start RT5*						*End RT1-3*	*End RT 4 and 5*
Conferences w/topics	*Legitimacy*		*Data identified for comparison in RT1-3*		*Conclusions and ICT status update*			*Findings*		*General findings*
PostDoc publications		*1 PostDoc, 3 articles*		*1 PostDoc, 3 articles*		*1 PostDoc, 3 articles*		*1 PostDoc, 3 articles*		*1 PostDoc, 3 articles*
		1 PostDoc, 3 articles		*1 PostDoc, 3 articles*		*1 PostDoc, 3 articles*		*1 PostDoc, 3 articles*		*1 PostDoc, 3 articles*
		(UiO)		*(MultiRights)*						
Dissemination workshops										
MultiRights complete										
Midterm review completed										
Work plan for years 6-10										
Model curriculum					*(completed)*					*(revised)*
PhDs defended					*1x*			*2x*		*2x*
Plan futureMA/PhD courses										
Deliverables										
PhD courses	*RT1, RT4*	*RT2.1, RT3*	*RT1.1, RT4.2*	*RT2, RT3*	*RT1, RT5*	*RT2, RT4*	*RT1, RT3*	*RT2, RT4, RT5*	*RT1, RT3*	*RT4, RT5*
Publications			*Books/articles*		*Books/articles*		*Books/articles*		*Books/articles*	*Books/articles*

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