PluriCourts: The Legitimate Roles of the Judiciary in the Global Order

Since the end of the Cold War, states have established a cascade of international courts and tribunals (ICs) 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. ICs form the backbone in international regimes like the WTO, resolving disagreements among participating states. Still too weak and dependent on states, new ICs are called for to solve problems from climate change to corporate wrongdoing.

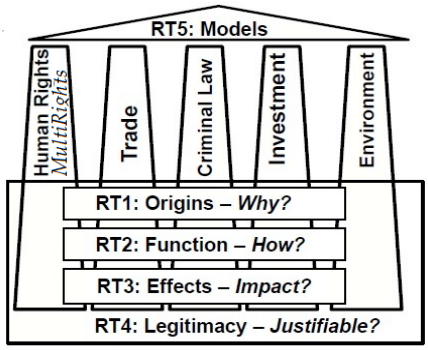
The primary research objective of PluriCourts is to analyze and assess the legitimate present and future roles of this plurality of international courts (thus: PluriCourts) and tribunals - an emerging global judiciary - in the international and domestic order.

Why worry about the legitimacy of the ICs? Many hail ICs 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. Critics claim that

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

The question of the *normative legitimacy* of ICs thus grows in urgency. Why should ICs 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 ICs? Indeed the very effectiveness of the ICs –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 ICs 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 ICs' interaction with national constitutional orders, and to differences among ICs, *e.g.* for world trade or human rights.



This normative assessment of ICs - 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 ICs: what did states want to achieve with the ICs, how have they been established and why do we have ICs for some international challenges - but not others? RT2 explores how ICs *Function,* operate and are structured. RT3 addresses the *Effects* of ICs, 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.

PluriCourts addresses several salient gender issues in these substantive parts of the project, including how rape has emerged as a 'gender crime' in international criminal law; the impact of gender imbalance among judges in ICs, and effects of their decisions on women.

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

legitimate sovereignty and state interests.

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

PluriCourts asks new questions about the legitimate role of each IC, 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 ICs during a time of rapid development; including individual ICs, their interactions and relations to other international institutions and with domestic courts, legislatures and executives.

PluriCourts will form a leading international centre for the study of ICs. It will engage 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 will be based in Oslo, supplemented by new and strengthened cooperation with international researchers and institutions. PluriCourts will generate 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 ICs individually and as a whole. The establishment of a Centre of Excellence is essential to fulfill these tasks.

State of the Art – Added Value

Much research has been carried out on how some of the ICs work. PluriCourts stands on the shoulders of the best scholars – and indeed includes several of them – in international law, international relations and international political theory, and will benefit from their combination.

International legal theory has traditionally studied individual ICs, their judgments, and effectiveness in resolving disputes in specialized issue areas. A recent concern is the *fragmented* international judicial system and potential problems of conflicting jurisdiction and jurisprudence among international courts (Koskenniemi 2006). Several research projects address topics relevant for PluriCourts. The Project on International Courts and Tribunals (PICT) at the New York University School of Law and **University College London** (**Shany** 2007**; MacKenzie** & al. 2010), and International Law in Domestic Courts (ILDC) at the **University of Amsterdam** (**Nollkaemper** 2011) resemble but are supplemented by PluriCourts, since they do not focus on the *legitimacy* of ICs.

The Copenhagen **iCourts** Centre of Excellence studies how international courts produce law that affect the interface with politics, nationally and internationally (Weiler &**Wind** 2003, **Wind** 2010). Their focus is inter-regional comparisons of courts in three sectors: economic law, human rights law and international criminal law; how they develop into autonomous areas of law; and the legitimation strategies of these courts: how they seek acceptance among international and domestic actors. PluriCourts' research develops and draws on that research, for five sectors and their interrelations, and with regard to domestic judiciaries. PluriCourts' objects of study also include arbitration bodies, and quasi-judicial authorities – *e.g*. that issue non-binding recommendations. PluriCourts' focus is not legitimation strategies as such, but rather normative legitimacy.

Current theoretical studies on the legitimacy of international law, such as *Global Administrative Law* at the New York University School of Law (Kingsbury &Krisch 2006), and the ever-increasing literature on the *constitutionalization of international law* (**Klabbers et al**. 2009, Dunoff &Trachtman 2009), do not focus particularly on ICs. The **Max Planck Institute for Comparative Public Law and International Law** (Heidelberg) hosts the project The Exercise of International Public Authority by International Institutions - including international courts (**von Bogdandy & al. 2010**). These projects have recently also focused on legitimacy issues (**Bogdandy** &Venzke 2012). Furthermore, the ERC project on conditions for effective international adjudication explores the factors that influence the capacity of international courts to achieve their stated goals (**Shany** 2012). Governance regimes have also been studied from the perspective of *pluralist* legal orders (Krisch

2010). PluriCourts *combines* these different strands when using the *legitimacy* of ICs as a prism to study the present and future global judiciary as an instrument of multi-level governance.

The best *international relations* (IR) research employs international legal and social science scholarship to explain the growth of ICs. Rationalist IR theory has asked why states establish such constraints on themselves and why states comply even with weak ICs. Research has hitherto tended to focus on a single IC or one issue-area such as trade or human rights, or the European context. PluriCourts employs a comparative approach that also draws on historical institutionalism to understand how the ICs emerge from and remain embedded in particular historical processes, and reshape actors' preferences. PluriCourts brings other findings about the feasibility and stability of institutions (**Zürn** 2005a) to bear on IC reform proposals, *e.g*. how ICs may foster cooperation equilibria – and may cause new political conflicts (**Voeten** 2010, **Alter** 2011, **Helfer** 2006).

In *normative international political theory* and political philosophy, several researchers have addressed institutions beyond the nation state, partly as a "cosmopolitan turn" in political philosophy. Some sketch sweeping cosmopolitan blueprints for global order reform, where international courts are crucial (Held &McGrew 2000). Others strands address single constitutional principles that should inform global legal reform processes: human rights (Buchanan 2004), or international protective and restorative action (Beitz 2009). Some legal or philosophical theorists consider *individual reform proposals:* a World Court of Human Rights (**Scheinin** 2006**;** Nowak, 2007; **Ulfstein** 2008), or accepting the ECtHR as a European Constitutional Court (Ryssdal 1991, Wildhaber 2002), or a 'cosmopolitan court of global corporate wrongdoing' (Caney 2006, Jackson 1998). PluriCourts develops such contributions whilst avoiding common charges that normative theorists are uninformed about how ICs work.(Hessler 2005, **Peters** 2006).

PluriCourts incorporates and expands on the ERC Advanced Grant project **MultiRights**, (www.multirights.net) (2011-2016) at the University of Oslo (UiO). MultiRights studies the legitimacy of multi-level *human rights* courts and tribunals, and considers reform proposals for global and European human rights organs: four models ranging from *Primacy of National Courts* to a *World Court of Human Rights*. Four normative standards of legitimacy are revised to assess these models: Human Rights values, Rule of Law, Subsidiarity, and Democracy. PluriCourts also incorporates the UiO project "The interaction between national courts and the European Court of Human Rights," of the European Science Foundation ECRP project "International Law through the National Prism: the Impact of Judicial Dialogue", based at the University of Amsterdam. PluriCourts expands these two projects by addressing ICs in *four additional* sectors, and their interactions.

Methodology

In order to gain traction on the comparative, multi-level and multi-disciplinary primary objective concerning the legitimacy of the ICs, PluriCourts must combine legal, empirical and normative elements. The project will thus draw on and contribute 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. PluriCourts includes both qualitative and quantitative empirical research, including comparisons among several states ("large-n"), case studies, and process tracing. Historians will therefore be incorporated, especially as regards RT1 (Origins). The political theorists use standard methods of normative reasoning: 'wide reflective'/'pragmatic' equilibrium (Daniels 2003; **Follesdal** 2009b, Fung 2007). The legal scholars employ recognized methods in international law (including empirical studies), applicable methods in the national jurisdictions, and comparative legal methods.

Research Plan: 5 research topics concerning 5 sectors

PluriCourts' researchers pursue the research objectives by addressing five interrelated Research Topics (RTs) in five sectors. The five sectors are chosen because their ICs have very different

origins, designs and effects (Kingsbury 2012). This focus allows PluriCourts to both respect the specificities of different ICs 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 ICs 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 ICs individually and as a whole.

5 Sectors

PluriCourts considers ICs 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 ICs 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 ICs, 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 ICs 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 ICs 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 ICs 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 ICs 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 'uni-

fied 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).

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 ICs (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 ICs. Thus sectors without ICs may suffer from 'externalities' from other sectors equipped with ICs. 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 ICs 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 ICs' *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 ICs, 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 ICs, as well as their mutual interaction and relationship with international and national legislative, executive and judicial organs, including domestic courts.

Research Topic 1: The Origins of ICs

One central requirement of legitimate authorities is that they have come about in appropriate ways. The origins of ICs are also essential in determining their intended and changing objectives, which should be juxtaposed with their effectiveness when addressing the legitimacy of ICs. RT1 combines legal research and political science to determine why and how states established ICs 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 ICs; and what roles did non-state actors play? ICs 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 ICs? Legal aspects

The legal research on the ICs' origins explores, first, states' and other stakeholders' ambitions in defining ICs' 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 ICs concerns aspects of regionalization and the so called fragmentation of international law: with ever more ICs 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 ICs. States may have to find solutions on how to accommodate and implement IC 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 ICs? International Relations theory

ICs create new puzzles for understanding international relations, some of which are already partially addressed by other centres: 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 IC? Why do some regions (*e.g*. Asia and the Pacific) have few if any ICs? PluriCourts' cooperation with other centres such as iCourts and the 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 ICs 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 ICs, *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 ICs on state preferences (March &Olsen 1989, 1998). Regime type, domestic political conflicts, mimicry, the need to signal to foreign actors, or blame shifting com-

bined with path dependency may also explain commitments to ICs (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.

Research Topic 2: The Function of ICs

Another important aspect of legitimate authority is how it is exercised. RT 2 thus addresses relevant aspects of the ICs' *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 ICs, but others are unique to each, with 'family resemblance' at most. PluriCourts considers the interplay of these ICs, 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 Function – Legal aspects

PluriCourts studies how ICs 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 ICs are not organized in a hierarchical order, PluriCourts studies to what extent this may create *competing jurisdictions between different ICs and forum shopping, conflicts between and inconsistencies* in their decisions, and how this affects IC legitimacy. PluriCourts also examines to what extent ICs threatens sectors that lack them, and the need for complementarity, horizontal or vertical integration between different ICs (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 ICs (**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 ICs, but also why they design ICs *just so* (Fehl 2004). This affects the IC'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 ICs 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 ICs in different issue-areas and regions, and the resultant opportunity space for themselves and other political actors ranging from cooperation, borrowing and conflicts among ICs to states' 'forum shopping' as addressed under the legal

issues (*e.g*. the *MOX Plant* cases Ireland vs UK). The range of sectors and collaboration with other centres lets PluriCourt integrate and generalize existing research and helps explain compliance and effectiveness in RT 3.

Research Topic 3: The Effects of ICs

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 ICs 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 IC 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 ICs 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 ICs, 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 IC decisions, such as the development of new interpretation techniques by ICs 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 ICs, or the acceptance of interpretations across ICs, and by national states (**Shany** 2012). PluriCourts will examine to what extent ICs 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 ICs: 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 ICs? On the other hand, do national courts influence the reasoning of ICs? Do ICs 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 ICs that lack enforcement? Why do some ICs 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 ICs ruling. Standing tribunals, compulsory jurisdiction and private access may further the independence of ICs, inducing compliance (**Alter** 2006; Kono 2008; Zangl 2008). Deliberation – public reason-giving – at various stages may also boost social acceptance of the IC 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 ICs 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?

Research Topic 4: Legitimacy Deficits?

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

4.1 Claims of legitimacy deficits of ICs

RT4 takes stock of political debates about the legitimacy deficits of ICs, 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 ICs, and hence about reform proposals. The mapping specifies aspects of ICs studied by other RTs, the puzzle of why such 'legitimacy talk' about ICs 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 IC. A working hypothesis that *legitimacy standards appropriate for ICs must promote the same fundamental values as those of domestic institutions – revised in light of the specific objectives of ICs 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 ICs 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 ICs 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 ICs *some* normative legitimacy from principles of *sovereignty* and *legality*. PluriCourts explores whether ICs 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 ICs 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 ICs' *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 ICs – whose gender imbalance is only one of several worries (Grossman 2009)? What modes of extra-democratic *accountability* by each IC can be secured, *e.g*. through legal checks, according to conflicting theories of legitimacy? Yet ICs increasingly exercise authority over countries with weak rule of law (**Helfer** & al. 2009). *A working hypothesis is that ICs 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 ICs vis-à-vis domestic politics, lawmaking and courts, and global *vs* regional ICs. *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 ICs. This draws on RT 3 findings on

effectiveness: the effects wrought by ICs 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 ICs? (Franck 1995, Nagel 2005, **Follesdal &Pogge** 2005, **Forst** 2010**, Follesdal** 2011a) If so, for *each individual* IC, or the global judiciary as a whole? Should ICs be assessed by their global distributive effects?

Research Topic 5: Models

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

5.1 Features of relevant models

Some urge states to re-gain control over ICs 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 ICs 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 ICs 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 ICs. ICs may form part of a global order with *federal and confederal elements of (de)centralization* among domestic, regional and global levels.
- *Control vs independence.* ICs' 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 ICs. Should individuals, attorneys, NGOs or companies be entrusted more control in ICs?
- *Formal vs informal control.* ICs may be subject to combinations of formal controls and self-regulation, *e.g.* the legal principles of litispendence (preventing simultaneous cases before different ICs), res judicata (preventing subsequent cases before different ICs) 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 IC, and the 'balancing' among ICs, and between ICs 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 ICs; 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 ICs might be developed, for the global judiciary to maintain legitimacy? Where may other bodies than ICs 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, Patomäki 2003)?

References full list at www.follesdal.net/doc/PluricourtsII-ref.rtf