

## CALL FOR RESEARCH PROPOSALS

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### Hiil RESEARCH THEME ON TRANSNATIONAL CONSTITUTIONALITY: DEMOCRACY AND ACCOUNTABILITY IN THE CONTEXT OF INFORMAL INTERNATIONAL PUBLIC POLICY-MAKING

#### SUMMARY

*The Hague Institute for the Internationalisation of Law (Hiil) invites qualified senior researchers to submit proposals for research projects relating to the following core question:*

***How can forms of informal international public policy-making be made more democratic and accountable?***

*This Call for Research Proposals is open from 22 September 2008. The deadline for the submission of proposals is 8 December 2008.*

*The Call is governed by the Hiil Grant Regulations.*

*The amount allocated by Hiil for this research project has been fixed at €200,000. On top of this, prospective researchers will be subject to an additional matching requirement of no less than 30% of the total budget of the proposed project.*

*This Tender Document – consisting of 15 pages – provides an outline of the substantive parameters, explains the choice of this particular research topic and briefly elaborates on some related issues. It does so in order to assist potential applicants in drafting relevant, innovative proposals in response to this Call.*

*The documents referred to in this Tender Document can be downloaded from the Call's page on Hiil's website (see: <http://www.hiil.org/index.php?page=transnational-constitutionality>).*

*All proposals must be submitted in accordance with the procedure prescribed on the Call's page on Hiil's website (see: <http://www.hiil.org/index.php?page=application-procedure-2>).*

## I. Introduction

- 1) The current tender constitutes a Call for Topic-Based Research, in accordance with Article 13 of the Hiil Grant Regulations.
- 2) The tender is the result of a series of consultations, meetings and deliberations that took place in the context of one of the projects developed within the Hiil Forum under the working title: 'New Transnational Constitutionality'.
- 3) This document describes the process of consultations and exploration culminating in the current tender and articulates the manner in which this particular research theme relates to the general [Hiil Research Programme](#). Moreover, it proposes some basic definitions and categorisations, states the problem, explains the formulation of the core question, suggests additional relevant sub-questions, sets up substantive and procedural parameters for the desired research and enumerates criteria against which proposals will be assessed.
- 4) The definitions, distinctions, categorisations and prospective solutions articulated in this Tender Document should be regarded as indicative conceptual tools. Applicants may diverge from them as long as the submitted research proposal addresses the core question and demonstrates a clear correlation to the problem and the interrelated issues discussed below.

## II. Background

- 5) Already at an early stage, Hiil decided to initiate preliminary research in the field of constitutional law. Traditionally a key field within jurisprudence, constitutional law is nonetheless not immune to the wider phenomenon of the internationalisation of law. The impact of this phenomenon on national notions of constitutionality, the new challenges they face and the manner in which constitutions maintain their vitality and relevance in this new context constitute key issues that fall within the Institute's area of interest.
- 6) As part of the process of consultation in the context of this project, a first high-level expert meeting was convened and organised by Hiil in December 2007. This brainstorm session brought together academics with relevant expertise, as well as judges and other practitioners. The discussion had the character of an informal exchange of ideas, whereby participants were invited to freely and critically comment on the initial [Draft Concept Paper](#) prepared by Hiil for this project. The [Draft Concept Paper](#) was based on the premise that it was necessary to acquire a better, more thorough understanding of the impact that internationalisation has on domestic legal systems from a constitutional point of view. It specifically raised the question whether the formulation of 'transnational constitutional standards' constituted a promising avenue for tackling problems caused by internationalisation. This meeting strengthened Hiil's resolve to commission a study on constitutional law from a transnational perspective. Rather than immediately identifying a specific research focus, however, the main conclusion was that a more systematic way of tackling the variety of issues arising in this context was called for and that some notions required more clarification and/or exploration.
- 7) A follow-up meeting took place in May 2008 at the Peace Palace, The Hague, within the framework of the fifth *From Peace to Justice* conference of the Hague Academic Coalition (HAC). At this workshop, a [Revised Concept Paper](#) was presented, followed by critical comments by two experts and an interactive dialogue between discussants and the audience. The [Revised Concept Paper](#) expanded on the perspective for future research into the identification and formulation of

transnational constitutional standards, but its main contribution was in the establishment of a framework of distinctions and categorisations of constitutional functions, enabling a methodical examination of problems arising from internationalisation and providing a structured framework for future research.

- 8) The main categorisation put forward in the [Revised Concept Paper](#) concerns the different functional dimensions of democratic constitutions that may be affected by internationalisation:
  - a. constitutional standards regarding institutional set-ups and competence allocation;
  - b. constitutional standards regarding the requirements of accountability and democracy in the exercise of public authority; and
  - c. constitutional standards regarding the protection of individual rights.
- 9) The workshop's discussions were very helpful for the purpose of narrowing the focus of this Hiil research project.<sup>1</sup> The general view was that the institutional and competence dimension of constitutional standards did not necessarily call for transnational solutions. That is because problems in this field – such as power shifts within a national legal order – remain primarily domestic problems, which should be tackled principally by adapting domestic constitutional arrangements. The dimension of individual rights protection received much attention during the discussions. The universality of human rights, the (non-)availability of a judicial remedy against international action and the location of human rights standards within the global hierarchy of norms are subjects of much ongoing debate and academic research. With this in mind, however, the added value of additional, Hiil-sponsored efforts might be too limited to make a significant difference.
- 10) What surfaced as the most promising avenue for future legal research in a transnational setting, in terms of identifying problems that are pertinent while still being the object of only limited legal scholarship, was the issue of democracy and accountability in the context of internationalisation. Consequently, Hiil took the decision to narrow the focus of the research theme to this dimension.
- 11) The scope of this research project was further refined by focusing on *informal* modes of transnational cooperation in public policy-making. The workshop's participants seemed to be in agreement with the view that, while classical and formalised treaty making and decisions adopted by international institutions are not unproblematic when examined from the point of view of maintaining constitutional standards, a greater threat is posed by the informal aspects of modern 'governance'. Governance – as opposed to government – covers, among other things, policy coordination between public and private actors, often across multiple levels of government and through informal networks. It is here that procedures and decisions have a direct or indirect effect on citizens and domestic institutions, while it is almost impossible to pinpoint responsibility for individual decisions and to enforce democratic accountability.
- 12) The eventual focus of this project relates directly to the central research question of the (general) [Hiil Research Programme](#) and, more particularly, to the third principal theme identified therein.<sup>2</sup>
- 13) The focus on transnational cooperation in *public* policy-making (as opposed to *private* regulation) is motivated *inter alia* by the fact that several issues concerning transnational cooperation between

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<sup>1</sup> The following paragraphs very briefly state the main conclusions Hiil drew from this workshop. For a more detailed account, see the [Workshop Report](#).

<sup>2</sup> For details, see the [Hiil Research Programme](#).

private actors – including constitutional issues – are already covered under the heading of another Hiil research theme, on Private Actors and Self-Regulation.<sup>3</sup>

- 14) In keeping with the Institute's settled practice, Hiil solicited the services of an external consultant for the purpose of drafting an [Inventory Report](#) 'mapping' existing academic work on the topic.<sup>4</sup> Researchers who plan to submit a project proposal pursuant to the current tender are strongly encouraged to make use of this document when formulating their proposals.

### III. Substantive research parameters

#### 1. The core question

- 15) The core question to be addressed in all project proposals submitted pursuant to this Call for Research Proposals is phrased as follows:

***How can forms of informal international public policy-making be made more democratic and accountable?***

- 16) The following paragraphs in this section elucidate the core question by stating, explaining and illustrating the underlying problem by means of certain conceptual tools and indicative definitions. Additional (sub)questions are also suggested, as well as a possible research perspective for a transnational solution. Prospective applicants are encouraged to exercise discretion and creativity – leading, as the case may be, to different approaches or to the use of new or redefined conceptual tools, definitions and perspectives – as long as the submitted research proposal addresses the stated problem, describes how the project will attempt to answer the aforementioned core question and demonstrates clear links to the interrelated issues arising in this context.

#### 2. Analytical framework and basic definitions

##### 2.1 Internationalisation

- 17) 'Internationalisation' is a very broad term. For current purposes, the focus is on the term's legal dimension, particularly in the area of public law. States and individual government actors increasingly cooperate across national borders. They do so in light of problems that are themselves increasingly transnational in nature. This includes tackling problems that can only be sensibly dealt with in an international setting, as well as problems with respect to which it is believed that they can be better dealt with in this manner. Internationalisation further includes international cooperation with a view to pursuing particular public policy objectives and enhancing policy effectiveness.<sup>5</sup> The focus of this research theme is on the internationalisation of governmental action, including (independent or semi-independent) statutory agencies.
- 18) Internationalised government action can take different forms. The most prominent form is the conclusion of international treaties and the setting-up of international organisations. Next to that,

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<sup>3</sup> See Tender Document on *Private Actors and Self-Regulation*, available at: <http://www.hiil.org/index.php?page=transnational-constitutionality>.

<sup>4</sup> See 'Inventory Report on Literature and Research Regarding Democracy and Accountability in the Context of Informal International Public Policy-Making' (August 2008) (hereinafter, the 'Inventory Report').

<sup>5</sup> For further elaboration, see the (general) [Hiil Research Programme](#). Also of interest in this context is the 2004 report of the United Nations Secretary General's High Level Panel on Threats, Challenges and Change: 'A More Secure World: Our Shared Responsibility' (UN Doc. A/59/565).

however, there is a plethora of forums for *informal* international cooperation, and this is the primary concern of this research theme. In addition to informal processes involving representatives of national governments, this category also includes forms of informal international cooperation between other public actors or institutions, such as parliaments, courts, regions and municipalities, ombudsmen and independent regulators.

- 19) Internationalisation is often an appropriate response to the challenges of the day, and in yet other contexts it is simply unavoidable. Nonetheless, from a democratic constitutional perspective, this process may raise problems or create challenges that must be dealt with.

### 2.2 *Constitutionalism*

- 20) A national constitution founds the state to which it applies, attributes power to public authorities and sets the fundamental rules that regulate the interaction between public bodies, between the state and the individual and also, in some instances, the horizontal relationship between individuals. Constitutionalism, as opposed to individual constitutions, means the achievement according to which all public power is established and regulated by constitutional norms that are attributed to the people as the ultimate source of public authority and are superior in rank to all other laws or legal acts.
- 21) 'Constitutional standards', on the other hand, shall here stand for a variety of related terms: constitutional principles, constitutional guarantees, constitutional safeguards, constitutional control and so forth, as well as standards derived from the rule of law, separation of powers, civil rights and so forth.

### 2.3 *'Thin' and 'thick' conceptions of constitutionality*

- 22) Rule of law scholars and practitioners are familiar with the distinction between 'thin' and 'thick' conceptions of this term. By way of analogy, it may be useful to employ this distinction as a conceptual tool in the current context as well.
- 23) 'Thin' can stand for formal (or formalistic) definitions of constitutional standards. It would describe approaches concentrating on the lawful allocation of power and the observance of the correct procedure, largely irrespective of content. 'Thick', by contrast, can stand for further-reaching and more substantive approaches to constitutional standards. It then becomes important not just whether procedures are followed but also whether the process leads to meaningful and adequate outcomes. It becomes important whether standards are only met *de jure* or also *de facto*.
- 24) 'Thin' conceptions, because they represent a baseline, will tend to define the observance of constitutional standards only in terms of 'compliance' or 'breach'. Compliance is certified if standards are above the baseline, while a breach occurs if they drop below it. It is with 'thick' conceptions in mind that more subtle phenomena, such as the 'erosion' or 'hollowing-out' of standards, can in fact be detected. These phenomena are not quite yet a downright 'breach' of standards but are nevertheless apparent if what is desired is more than the bare minimum.

### 2.4 *Transnational constitutional standards*

- 25) Transnational standards can be conceived as neither purely domestic nor purely international in nature. They represent an innovative approach to upholding domestic rights and principles as national constitutions are impacted – and possibly eroded – by internationalisation. While domestic law, on the one hand, does not always help to address problems arising in the context of

internationalisation and international constitutionalism, on the other hand, is still underdeveloped, transnational constitutional standards can be seen as exceeding the boundaries of both these traditional paradigms of national and international law. Transnational constitutional standards could be devised for use by domestic institutions and/or transnational accountability networks.<sup>6</sup>

### 2.5 *Democracy and accountability*

- 26) Constitutions in democratic states do not merely provide fundamental rules governing state institutions and their relations with the individual for their own sake. They serve the overarching purpose of ensuring that the constitutional design eventually adopted complies with the fundamental notions of democracy and accountability.<sup>7</sup> Both elements play an important role in guiding the design (and the desired effects) of constitutions in many states.
- 27) The 'thin' versus 'thick' distinction described above can also be applied to the notions of democracy and accountability.<sup>8</sup> What should be noted is that problems become apparent when one adheres to 'thick' conceptions. Under a 'thin' conception, for instance, the maintenance of the parallel delegation and accountability chains would not depend on democratic oversight or participation in reality but on the lawfulness of the delegation and the preservation of formal accountability relationships. Under a 'thick' conception, however, while the chain of delegation and accountability in the context of internationalisation may be formally uninterrupted, the length of the chain may be seen to be problematic. Moreover, the complexity, intransparency, confidentiality, necessary speed and bargaining freedom that characterise international negotiations all mean that often even government ministers only have a limited view of the actions of their specialist civil servants; the oversight position of national parliaments, even where the political will to engage in thorough scrutiny exists, is even more compromised. In addition, in cases where international policy agendas are not politicised in elections but concealed from public view as something 'technical', the question arises to what extent the conduct of such policies is truly legitimised by the constituents.
- 28) In the study of the accountability and democratic legitimacy of informal international policy-making, account should be taken of the distinction between input and output legitimacy.<sup>9</sup> An institution or process enjoys output legitimacy if the results it delivers meet popular demand and expectations and if its performance is perceived as satisfactory. This may even be the case if the institution or process itself is intransparent and non-representative. Input legitimacy, meanwhile, is gained when an institution or process satisfies standards of democracy and accountability and if it maintains a representative character while bringing about results. Here, a key issue is that of participation in the process of norm creation. For example, it has been suggested that the European Union's (EU) oft-cited lack of legitimacy is concentrated on the input side – such as lack of openness and a weakly developed parliamentary culture – whereas the output does not in fact go against the will of large sections of the population. Future research into informal international policy-making may employ the same distinctions to reveal a more nuanced understanding.

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<sup>6</sup> For more details, see Part III, Section 6, below.

<sup>7</sup> For further discussion about the meaning of 'democracy' and 'accountability', with an emphasis on the latter, see the [Inventory Report](#), Section 3.

<sup>8</sup> In the general sense of this suggestive distinction, as explained above. This should not to be confused with the specific 'thin' versus 'thick' distinction found in the debate regarding accountability, which concerns the kind of sanction potentially entailed by rendering someone accountable. See further the [Inventory Report](#), Section 3.1.

<sup>9</sup> An established notion in the literature, notably promoted in the works of Fritz Scharpf. See further the [Inventory Report](#), Section 4.3.

### 3. Problem statement

#### 3.1 Bodies, networks and processes under consideration

- 29) The processes under consideration here are international, as opposed to domestic. They involve cross-border policy coordination and/or standard setting, but not by way of *formal* international rule making (as when treaties are concluded or when an international organisations is empowered to issue binding norms). The 'informality' of these processes, then, relates in the first place to the fact that it is not clear what legal regime, if any, is applicable to them. Already at the national level, for example, the democratic accountability of independent regulatory agencies gives rise to accountability problems. These problems are exacerbated when processes transcend borders, as this further impedes any domestic democratic oversight, scrutiny and attribution of responsibility to an individual minister or agency. While international processes of this kind thus seem to lie beyond the reach of the (constitutional) control of the domestic legal system of any of the parties concerned, they are also not governed by public international law; hence their characterisation as '*informal*'.
- 30) Furthermore, these processes comprise several distinctive aspects demonstrating their informal character in an additional sense to the one stated above. First, it is more structured than loose international consultation but not as formalised as, for example, an international legislative process with a fixed procedure. This relative informality concerns the identity of the decision-makers, the character of the decision-making procedure as well as the character of the decisions actually adopted. The membership, decision-making and voting rules, as well as the delimitation of competences, are not necessarily laid down in any written domestic or international instrument. Nor is there a prescribed form for decisions to be taken; they are not even necessarily self-executing but may constitute a gentlemen's agreement to be implemented domestically. There is not even necessarily any fixed moment in time when a decision takes effect, as policy coordination can span periods of time without any final conclusion. On the other hand, it would be plausible to assume that such processes can be located on different points of a sliding scale, with aspects and degrees of informality (in the sense used in this paragraph) varying from one instance to another. Importantly, however, even when steps towards formalising these processes are apparent, as would be the case, for instance, if the relevant parties agreed to self-regulate the manner in which discussion takes place and decisions are taken, these examples remain part of the category of processes under consideration here. This is because such processes would still not be regulated by either national or international (public) law. It follows that there would still be no guarantee that attempts at self-regulating such international activities would necessarily take into account adequate constitutional considerations. All this is in addition to questions that necessarily arise as to the authority (competence) to establish such procedural rules and as to whether they are in any sense binding or enforceable.
- 31) Informal bodies, networks or processes that may be listed as prominent examples in the present context are the Basel Committee on Banking Supervision (and possibly the other committees established in the framework of the Bank for International Settlements), the International Association of Insurance Supervisors (IAIS), the Committee of European Securities Regulators (CESR), the European network of competition authorities, the European Regulators' Group for electricity and gas, the European Regulators Group for electronic communications networks and services, the EU Council working groups, comitology and the EU Open Method of Coordination (OMC).

### 3.2 *The problematic aspect of informal international public policy-making*

- 32) The informality and the international character of the described processes may lead to serious problems in the context of democracy, transparency, accountability and representative governance. Traditional political accountability to a public body, such as the European Commission or a national parliament, is eroded and plays a supplementary role at best.<sup>10</sup> That is largely because the processes take place in a 'grey' area between domestic and formal international treaty law. It is almost impossible to pinpoint the responsible participant for a particular decision – or to sanction him – when decisions are taken consensually, in confidentiality and by means of 'soft law' with no immediate tangible effect of its own. To mention an example from the EU political context, the deliberative aspect of the Open Method of Coordination is perceived to be an example of inaccessible policy coordination that contributes to the EU democratic deficit.<sup>11</sup>
- 33) As external accountability in policy coordination is weak, an important form of accountability applicable to policy-making networks is peer accountability (mutual accountability). Under this form of accountability, participants expose themselves to assessment by fellow participants and to possible reputational damage for poor performance. This, however, carries the inherent risk of complacency and ineffective evaluation in retrospect due to shared strategic interests. External actors seeking to extract accountability are often 'sucked into' the network itself.<sup>12</sup> The resulting heightened risk of insufficient outside checks is abuse of power, arbitrariness, maladministration, poor-quality regulation and sub-optimal allocation of public funds. Scandals following from a lack of a sense of accountability, such as the discovery of maladministration and nepotism resulting in the resignation of the Santer Commission in 1999, can be avoided through better institutionalised oversight.
- 34) Moreover, the decision-making itself often lacks a representative character. In regulatory networks – formal or informal – large stakeholders, for instance, tend to be well represented and well consulted, whereas small enterprises and consumers are not.<sup>13</sup> In informal intergovernmental processes, the exclusion of the domestic parliamentary opposition means a power shift to the executive. This affects not only the legitimacy but also the quality of decision-making, since the pressure of external accountability to well-informed stakeholders and third-party assessors also benefits learning and quality improvement.<sup>14</sup>
- 35) Compensating for accountability deficits with enhanced transparency is not always feasible either. In European regulatory networks, it is not always clear which regime regarding access to information for stakeholders applies, as the question arises from which authority the issued documents actually emanate (the Commission or the domestic regulator).<sup>15</sup> The transparency of 'soft' intergovernmental processes with respect to the general public is easily escaped, as no actual binding decisions result from these processes.

<sup>10</sup> C. Scott, *Accountability in the Regulatory State*, 27 *Journal of Law and Society* (2000), p. 38.

<sup>11</sup> A. Benz, *Accountable Multilevel Governance by the Open Method of Coordination?* 13 *European Law Journal* (2007), p. 505.

<sup>12</sup> C. Harlow and R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach', Eurogov paper C-06-02 (2006).

<sup>13</sup> See S.A.C.M. Lavrijssen-Heijmans, *Onafhankelijke mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen voor good governance*, dissertation (Tilburg, 2006), p. 411.

<sup>14</sup> M. Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge: CUP, 1998).

<sup>15</sup> See S.A.C.M. Lavrijssen-Heijmans, *Onafhankelijke mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen voor good governance*, dissertation (Tilburg, 2006), p. 408.

- 36) The *ex post* review of decisions designed to implement informal international understandings, for instance by parliaments or administrative courts, cannot completely compensate for the lack of transparency and accountability at the input stage. The individual domestic implementation measures are not necessarily unlawful or questionable in themselves. Insofar as they are based on the international understandings, however, their review is incomplete if the international understandings are left out of the review. At the same time, the review of those understandings is lacking and cannot be performed by the domestic courts according to the national standards. For political review, the implementation stage is in practice too late to make a difference.

### *3.3 Illustrative examples*

#### *The Basel Committee on Banking Supervision*

- 37) The Basel Committee on Banking Supervision (the 'Basel Committee') was established in 1974 in the framework of the Bank for International Settlements (BIS). The Committee's members are representatives of the central banks (and, where the central bank is not responsible for bank supervision, also of the authority that does possess this power), originally, of the G-10.<sup>16</sup> The principal goal of the Committee is to prevent bank failures. The need for international cooperation or coordination in this context is explained by the fact that, in a global market, banks can easily escape the supervision of one state by relocating to another jurisdiction where the control or regulation of banking is less stringent.<sup>17</sup> The Committee currently meets four times a year. Various subcommittees have also been established along the years in order to tackle with appropriate expertise more specifically defined issues or aspects.
- 38) It is clear that the activities of the Basel Committee are not subject to the legal control of any of domestic legal systems of the states participating in its activities. At the same time, however, the Committee is also not regulated by international law, and that is what makes this example capable of illustrating the kind of process under consideration in this Tender Document. As put by one author, '[b]ecause it operates outside international law, the BCBS is not a classical multilateral organisation. It has no founding treaty, and it does not issue binding regulations. Rather, its main function is to act as an informal forum to find policy solutions and to promulgate standards'.<sup>18</sup>

As explicitly stated in its own documentation, the Basel Committee:

does not possess any formal supranational supervisory authority. Its conclusions do not have, and were never intended to have, legal force. Rather, it formulates broad supervisory standards and guidelines and recommends statements of best practice in the expectation that individual authorities will take steps to implement them through detailed arrangements – statutory or otherwise – which are best suited to their own national systems.<sup>19</sup>

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<sup>16</sup> See <<http://www.bis.org/bcbs/history.pdf>>. The representatives come from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom and the United States.

<sup>17</sup> D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, 18 *Governance* (2005), pp. 611-632, 619.

<sup>18</sup> *Ibid.*

<sup>19</sup> See <<http://www.bis.org/bcbs/history.pdf>>.

- 39) Though not formally binding, the standards issued by the Basel Committee have a far-reaching impact, also as regards the many states that are not represented on the Committee.<sup>20</sup>
- 40) The Basel Committee has been praised by many as one of the most successful and effective examples of international coordination, at least insofar as financial standards are concerned.<sup>21</sup> At the same time, however, others have highlighted the problematic aspects of the activities of this rather small and homogenous 'club' of central bankers from the point of view of democracy, legitimacy and accountability. Critics of the Basel process have deemed it 'fundamentally flawed' and even 'dangerous'.<sup>22</sup> The main arguments raised in this context are that – due to their relative independence – the legitimacy and accountability of central banks is already questionable at the domestic level, a concern that becomes more acute when they engage in transnational activities; that the informal atmosphere at the Committee diminishes the transparency of the process; that these weaknesses render the Basel process more vulnerable to regulatory capture by certain actors; that even though the Committee only issues 'soft law' to be implemented nationally, opponents cannot in fact bring about an effective challenge at the domestic level; and that the Basel Process is an example of 'regulatory imperialism', since a few representatives of influential countries set global standards, which *de facto* also bind the states not taking part in the process if they wish to take part in the important markets.<sup>23</sup>
- 41) It is worth mentioning, however, that the Basel Committee, presumably mindful of these points of critique, has changed its procedures over the years, with a view to enhancing its democratic legitimacy and accountability. This fact in itself does not diminish the suitability of the Basel Committee to serve as an illustrative example of the kind of informal international processes that HiiL seeks to further explore following the current tender. It remains an open question, however, whether the example of the Basel Committee can only serve to elucidate the problem or whether the manners in which the Basel Committee has tried to address these problems indeed indicate (a step towards) a possible solution.<sup>24</sup>

*Informal international networks in the field of competition law*

- 42) Informal international cooperation in competition law and policy takes place in different regions and at various levels. Although the HiiL project does not concentrate on the EU specifically, the example of the European Competition Network (ECN) may serve as an additional illustration of the subject of

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<sup>20</sup> See in general D. Wood, *Governing Global Banking: The Basel Committee and the Politics of Financial Globalisation* (Ashgate Publishing, Ltd., 2005).

<sup>21</sup> D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, 18 *Governance* (2005), pp. 611-632.

<sup>22</sup> John LaFalce, as quoted by Michael S Barr and Geoffrey P. Miller, 'Global Administrative Law: The View from Basel', 17 *European Journal of International Law* (2006), pp. 15-46, at p. 17. Anna Marie Slaughter also expressed critical views with respect to Basel, see for example 'Global Governance Networks, Global Information Agencies, and Disaggregated Democracy', in K. H. Ladeur (ed.), *Public Governance in the Age of Globalization* (2004).

<sup>23</sup> For an overview of the main critical arguments against the Basel process, see M.S. Barr and G.P. Miller, 'Global Administrative Law: The View from Basel', 17 *European Journal of International Law* (2006), pp. 15-46, at pp. 18-21.

<sup>24</sup> Barr and Miller, for example, argue that the Basel process 'has come a long way from the purely closed "club" model of its origins', so much so that it can be seen as 'a model for international rule-making with greater accountability and legitimacy'. See M.S. Barr and G.P. Miller, 'Global Administrative Law: The View from Basel', 17 *European Journal of International Law* (2006), pp. 15-46, at p. 17. See also D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, 18 *Governance* (2005), pp. 611-632.

the envisaged research.<sup>25</sup> The ECN represents a form of new governance, bringing together national competition authorities and the European Commission in a relatively informal network. The network's purpose, based on Regulation 1/2003, is for member authorities to exchange information and coordinate competition policy throughout the Union. The ECN is neither an EU institution nor a domestic body, it does not have legal personality and it does not have any formal power to adopt binding decisions. Nevertheless, competition authorities that are part of the network share information on individual competition law cases, they decide together on competence allocation and their consensus-based policy coordination leads to what is called 'regulatory convergence' between the authorities of different states. This means that transnational legal and economic policy choices on the handling of cases, which are informally agreed, are translated into domestic policies, as each participating authority is expected to implement the understandings reached within the network.

- 43) The result is therefore regulation in a grey area of constitutional law where accountability enforcement is highly problematic. The network partly escapes both European and national law standards, and it does not render account to any single forum as a single body. Minutes and conclusions are not published. To the extent that it is not clear from which institution a network document actually emanates, it is also unclear to what extent market participants have access to information and access to justice regarding their cases or under what law this would fall.
- 44) The independence of regulatory agencies, such as competition authorities, already gives rise to accountability problems at the purely domestic level. Networks of such agencies exacerbate the problem from the classical point of view of political accountability: to the already limited extent that a minister may give policy instructions to the authority, such instructions have only partial effect if the authority also participates in international policy coordination by consensus and is then bound by informal understandings concluded within the transnational network.

#### **4. Additional research questions**

- 45) In connection with the attempt to provide an answer to the core question identified above, many interrelated sub-questions will arise. It is likely that these will include the following:
  - a. What types or modes of informal international public policy-making are there? What are the common and distinguishing features of such modes?
  - b. What standards (for the purpose of upholding the notions of democracy and accountability) currently apply to informal international public policy-making?
  - c. What are the concrete problems that different types of informal international public policy-making cause with respect to democracy and accountability? Who are the 'victims' of these problems?
  - d. Are such problems common, almost by definition, to any such form of international informal cooperation, or is a case-by-case examination unavoidable?
  - e. To what extent do actors in these forms of informal international policy-making take into account the issues of democracy and accountability? To what extent are they aware of problems arising in this context?

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<sup>25</sup> The ECN can serve as an illustration of cross-border governance and informal regulatory convergence that also takes place between states outside the European Union. See further the [Inventory Report](#), Section 2.1.

- f. In what cases would purely domestic solutions be insufficient to resolve the concrete problems?
- g. In what cases would purely international solutions be insufficient to resolve the concrete problems?
- h. In what cases would innovative, transnational solutions offer a more satisfactory remedy to the concrete problems?
- i. How would transnational constitutional standards have to be formulated?
- j. To whom would such standards have to be addressed (courts, political institutions, professionalised audit bodies), or: who should be entrusted with the task of ensuring that modes of informal international public policy-making are sufficiently democratic and accountable?
- k. Considering that the focus here is on informal processes, a fundamental and crucial question that necessarily arises is whether, or to what extent, formality is in fact a precondition of submitting public power to legal (constitutional) standards? Put differently, is it at all possible to impose constitutional standards and at the same time keep the 'constitutionalised' processes and agencies informal (in the sense of paragraph 30 above)?
- l. As regards those cases where steps toward formalising the processes are taken by the relevant actors themselves, are constitutional considerations duly taken into account when drafting such rules? What is the binding force, if any, of such self-imposed procedural rules? Are they enforceable?

##### **5. Clarifications as to the scope and focus of the desired research project**

- 46) As stated and explained above, the focus of this research theme is on *informal* international processes and modes of cooperation, as opposed to formal forms of international cooperation, such as the establishment and work of intergovernmental organisations. Indeed, it may be the case that informal forms of cooperation at times take place in the shadow of the activity of international institutions. To that extent, international institutions are not left entirely out of the proposed research project. Nevertheless, it should be stressed that research proposals submitted pursuant to the current tender should *not* focus on democracy and accountability in the context of the activity and decisions of international institutions themselves.
- 47) In terms of the geopolitical scope of the research, proposals should *not* focus exclusively on informal processes within the context of the EU or between EU Member States. Analysis of the European and global levels should be kept strictly separated. It may be true that both levels present the similar basic problem; nonetheless, the specific features of the EU may call for a different framework of analysis of informal cooperation that takes place in the shadow of the EU institutions. Hiil's principal interest in this research theme relates to processes at the global level or at the very least processes that transcend the EU framework. Reference to analogous processes, problems, analyses and solutions from the EU context may be made if this is seen to be useful, as long as this does not amount to be the cardinal focus.
- 48) Finally, informal international processes may in many cases involve not only government officials and agencies but also private actors. Moreover, the phenomenon of transnational private regulation is apparent in many fields. What needs to be stressed here is that the research Hiil seeks to commission in connection with this research theme should not focus on private actors. This is what

is meant by employing the term 'public' in the core research question. 'Public' here does not mean 'open'; rather, it is meant to contrast the processes under consideration here with others instances that exclusively involve private actors and thus cannot be regarded as part of *public* policy making. These instances are beyond the scope of this research theme.<sup>26</sup> On the other hand, informal processes that bring together government officials as well as private actors may be of interest.

## **6. Transnational constitutional standards as a possible solution?**

### *6.1 General*

- 49) Beyond explaining and analysing the problem(s) discussed above, Hiil expects each project proposal to suggest conceivable solutions for further exploration. While Hiil welcomes and encourages the creativity of applicants in this endeavour, the following paragraphs offer some possible directions that researchers are invited to discuss and/or explore further in the proposals (alongside other solutions, as the case may be).
- 50) Without stating a definite conclusion on this point, it nonetheless seems that purely national solutions to the problems created by informal international public policy-making have inherent limitations. Policy coordination largely escapes parliamentary control *ex ante*, since the processes are informal and have no apparent beginning or end point, when a calling to account would clearly be appropriate. It also escapes judicial review *ex ante*, as there is no decision to review at that time, and even if a decision can be reviewed, it may not conflict with existing national law. Moreover, it is questionable whether the question of the democratic character of the process leading up to the decision is suitable for judicial review. For while the participants in such processes are bound by domestic (constitutional) law, the processes themselves are not. Nor do they fall under international law insofar as it is concerned with classical treaty making. Democratic accountability or transparency are also not among the international norms entailing an *erga omnes* obligation.
- 51) Against this background and given the perceived shortcomings of domestic and international law in the current context, it may be advisable to further explore the prospects of transnational constitutional standards as a possible solution. Would it be possible and desirable to identify and formulate transnational constitutional standards concerning democracy and accountability, in order to meet the challenge of informal international public policy-making? Transnational standards can be conceived as neither purely domestic nor purely international in nature. Arguably, the promise that they hold is that courts and, in this context, above all political institutions can adhere to a 'thick' or substantive conception of constitutional standards without excessively jeopardising the functioning of international cooperation. Rules could be upheld, but on the basis of standards common to the affected states. In return, predictability and legal certainty would be enhanced for the international informal decision-making bodies or networks if the constitutional standards invoked were not merely applicable to a single state. Ideally, if the standards that are upheld are transnational, then such standards will either be met for *all* affected states or for *none* of them. In other words, this will prevent a situation in which the assessment of the process or its outcome from a constitutional point of view will differ from one state to another.
- 52) In this context, two questions in fact need to be addressed. Firstly, what would be the content of such transnational standards and what might be its source? Secondly, who would make use of such

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<sup>26</sup> See the separate Tender Document on Private Actors and Self Regulation. More information is available at <http://www.hiil.org/index.php?page=private-actors-and-selfregulation>.

standards, once identified and/or formulated? The two following subsections suggest two distinct yet potentially complementary avenues of inquiry.

#### 6.2 *Transnational constitutional standards for domestic enforcement*

- 53) Since the most effective framework for lawful coercion exists at the domestic level, it appears desirable to formulate standards for use by (primarily) domestic institutions. As far as the content of such standards is concerned, it is not suggested that domestic constitutional standards can simply be expanded or reproduced so as to cover informal international public policy-making, just as they cover domestic action. However, transnational standards may be based on the *essence* of certain standards that states find worth upholding even when they engage in internationalisation. The formulation of transnational standards is therefore not a matter of classical comparative constitutional law regarding the state of domestic law, but an attempt to distil a number of relevant standards in the specific context of internationalisation and to *adapt* them to informal international public policy-making. It is quite possible, for example, to tentatively shift the focus from traditional domestic notions of democratic elections, parliamentary sanctioning and judicial review to notions more closely related to transparency, participation, complaint mechanisms, professionalised audits and quality assessment.

#### 6.3 *Transnational standards for accountability networks*

- 54) An innovative proposal for matching intergovernmental networking could be for accountability forums to organise themselves into transnational networks themselves.<sup>27</sup> Examples of such accountability networks would include the network of European ombudsmen, the network of courts of auditors in the EU and the Member States, the interwoven European judiciary comprising domestic courts and the ECJ and inter-parliamentary networks. As regards the content of these standards, there is a clear empirical interest to expose which types of standards such international accountability networks currently employ. Furthermore, there might be a normative interest to formulate certain common standards. Indeed, international accountability networks comprising both domestic and international bodies could well be an ideal context for the application of assessment standards that are neither purely domestic nor purely international in nature. They could not be purely domestic because the object of the assessment is not an individual domestic institution but a cross-border network in which not all participants fall under the same domestic law and standards would vary between countries even if they did. They should not be purely international either because accountability networks are not governed by international law any more than the policy networks are in the first place. Furthermore, international assessment criteria are aimed at international institutions (such as the European Court of Auditors), whereas domestic institutions participating in the accountability network also retain a mandate under domestic law, which is usually more far-reaching. In short, international accountability networks would seem to call for a transnational hybrid of standards to wield against informal international policy-making processes.

### **IV. Formal parameters and assessment criteria**

- 55) In its search for an answer to the central research question posed above, Hiil is looking for innovative, empirically informed and analytically sound approaches.

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<sup>27</sup> C. Harlow and R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach', Eurogov paper C-06-02 (2006).

- 56) The Call is subject to the Hiil Grant Regulations as well as the General Terms and Conditions for Hiil Grants. The generally applicable assessment criteria are stipulated in Article 18 of the Hiil Grant Regulations. In making the selection, as far as the quality of the proposals is concerned, much weight will be given to the assessment to be rendered by international peer reviewers.
- 57) Without prejudice to the assessment criteria contained in the Hiil Grant Regulations, the following criteria and parameters are of particular relevance for those who wish to submit a proposal. The criteria mentioned below clarify and/or complement the assessment criteria contained in Article 18 of the Hiil Grant Regulations in relation to this Call:

***Research parameters***

- a. Hiil seeks a multi-disciplinary approach, involving both jurists and experts from other relevant disciplines.<sup>28</sup>
- b. Hiil looks for a clear link between innovative conceptualisation and theorisation, on the one hand, and innovative analyses of the related practice, on the other.<sup>29</sup> In this context, selected case studies of the impact of informal international cooperation in public policy making are required.
- c. Hiil seeks a combination of both normative (legal and non-legal) and empirical perspectives.
- d. Hiil seeks a truly international approach, to be reflected both in the composition of the research group as well as in the focus of the research.

***Output***<sup>30</sup>

- e. Proposals should elaborate clearly how the link between academia and practice will be established (in the research and through workshops, websites or other means).
- f. Output must include, as a minimum, a major publication, coupled with workshops, seminars and so forth. Other forms of output, such as strategic recommendations, reports and training will also be of interest.
- g. Proposals should contain a clear knowledge-dissemination plan.

***Project timeline***

- h. All projects should run and achieve end results within a period of two years.

***Funding parameters***

The selected research proposal shall eventually be commissioned in accordance with the following provisions:

- i. Hiil has reserved a maximum of €200,000 for this Call.
- j. A minimum of 30% in matching funds (with respect to the total budget of the proposed project) is mandatory. Accordingly, where an application is made for the entire amount that Hiil has reserved for this call (i.e. €200,000) the matching must amount to at least €85,715. Matching funds can be provided either in monetary form or in the form of specifically allotted research time. In determining the matching percentage, only the personnel costs (salaries)

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<sup>28</sup> See also Art. 18(h) Hiil Grant Regulations.

<sup>29</sup> See also Art. 18(b) Hiil Grant Regulations.

<sup>30</sup> See also Art. 18(g) Hiil Grant Regulations and Arts. 68-75 General Terms and Conditions for Hiil Grants.

relating directly to staff assigned to the project will be taken into account; indirect administrative overhead costs are excluded.

- k. Applications failing to comply with this requirement shall be deemed inadmissible. In the context of prioritising admissible proposals – and assuming similar levels of quality – proposals with a higher matching percentage than the one indicated above will receive higher preference.
- l. Hiil may formulate changes to the research proposals submitted during this Round as a condition for granting an award. By submitting a research proposal to Hiil in the context of this Call, applicants agree that Hiil has this authority.
- m. In principle, Hiil will only select one project. However, in accordance with paragraph (l) above, Hiil reserves the right, should it consider this necessary, to propose a clustering of two or more projects, provided that each project meets the relevant quality requirements.
- n. The principal applicant and the institution with which he/she is affiliated will be obliged to enter into a Funding Agreement with Hiil.

58) In addition to the quality assessment prescribed by the Hiil Grant Regulations and the criteria mentioned in paragraphs (a)-(n) above, the proposals will also be assessed on the basis of the following additional criteria:

- a. The degree to which the proposal can be linked to or is relevant to Hiil's overall research agenda and other projects that have already been selected or which are being developed (see Hiil's website for information).
- b. The degree to which the proposal can be linked to or is complementary or relevant to other projects - by external actors - exploring similar issues.

59) Hiil reserves the right not to grant any award if the quality assessment of the received proposals does not meet expectations or if it is concluded that the criteria stipulated above and/or in the Grant Regulations have not been fully satisfied.

## **V. Applications and contact**

- 60) This Call will formally commence on 22 September 2008. Proposals must be submitted to Hiil by midnight (CET) on 8 December 2008.
- 61) All applications must be made in strict compliance with the application procedure stipulated in the announcement of this tender. Failure to comply with this procedure may lead to the inadmissibility of the proposal concerned. Applicants should take care to ensure that their applications adhere to all the admissibility requirements, as stipulated in the Grant Regulations (available at <http://www.hiil.org/index.php?page=downloads>).
- 62) All inquiries with respect to this Call for Research Proposals should be directed to Morly Frishman (Hiil Policy Officer), preferably by email at [morly.frishman@hiil.org](mailto:morly.frishman@hiil.org), or otherwise by phone at +31 (0)70 349 4409.