

ACIL Research Programme

The International Rule of Law (2013-2016)

Programme leaders:

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Table of Contents

1.	Introduction.....	3
2.	General Description of the Research Programme.....	3
2.1	Problem statement.....	3
2.2	Orientation and method.....	4
	<i>International orientation.....</i>	<i>4</i>
	<i>Disciplinary nature and methodology.....</i>	<i>5</i>
	<i>Quality control.....</i>	<i>5</i>
2.3	Relevance.....	5
	<i>Scientific.....</i>	<i>5</i>
	<i>Societal.....</i>	<i>6</i>
	<i>Education.....</i>	<i>6</i>
2.4	Organisation and vitality.....	7
3.	Research Themes.....	7
3.1	General part.....	8
3.2	Specific parts.....	9
	<i>Post-national law-making.....</i>	<i>9</i>
	<i>Shared responsibility in international law.....</i>	<i>10</i>
	<i>Interfaces between international, regional and national law.....</i>	<i>11</i>
	<i>International criminal justice – procedure and new crimes.....</i>	<i>12</i>
	Annex 01 – Research Group (as per 1 September 2013).....	14

1. Introduction

This document contains the research programme on the International Rule of Law (2013-2015), carried out within the Amsterdam Center for International Law (ACIL).

The document provides a general description of the research programme (section 2), and explains the main research themes and specific research activities carried out within it (section 3).

2. General Description of the Research Programme

2.1 Problem statement

The research programme on the International Rule of Law seeks to contribute to the academic and policy debate on the international rule of law.

The international rule of law remains a topic of much importance. Adding to the long recognized need to address inequality between states, use of force and intervention, and the undeveloped nature of dispute settlement, more recent developments make it imperative to reflect on the rule of law beyond these classical understandings. These developments include the ongoing expansion of the domain of international law, its intrusion into domestic legal systems and its direct consequences for the rights and obligations of individuals.

Yet, the concept of the international rule of law remains fundamentally contested and problematic, and the quest for its realization is counteracted by new features of the process of international law (or rule)-making and international law enforcement, which largely circumvent traditional forms of legitimization and patterns of cooperation and that spread responsibility over multiple international and national actors, making it more difficult to determine who is responsible for what.

Only a limited number of publications exist that at a more or less fundamental level address the concept and its theoretical and practical manifestations. Essentially no work has been done on the connection between the international rule of law and the domestic rule of law (including the activities of national courts) and for the other specific themes to be addressed in the present programme. In this respect the International Rule of Law programme has positioned itself in a niche in international legal scholarship.

The International Rule of Law (2013-2016)

Against this background, the research programme on the International Rule of Law seeks to accomplish a critical assessment of:

- concepts of the international rule of law that reflect and accommodate the distinct nature of the international legal order and that can serve, in turn, as a normative vantage point for critically assessing more specific trends in international law, namely
- trends in four selected areas that constitute key areas of the international rule of law: 1) post-national rule-making, 2) interfaces between international and national legal orders 3) shared responsibility, and 4) international criminal justice. There is no ambition of completeness – that clearly would be beyond the capacity of any research group within a three-year period. The topics have been selected on the basis of their connection with the grand themes of the international rule of law (law-making and enforcement) that give the international rule of law its distinct nature, combined with available expertise within the current research group.

The selected topics will be examined across a range of substantive areas of international law. Key among these is human rights, which is a defining element of a thickly defined international rule of law concept. Other areas that are explored include international criminal law, international refugee law and international economic law. These are not subject of analysis in their own right, but they will be explored from the perspective of the concept of the international rule of law.

2.2 Orientation and method

International orientation

The research programme seeks to contribute to the international academic debate on the International Rule of Law and its key manifestations. The ACIL and the programme leaders strongly encourage the researchers to publish in English in leading peer reviewed journals and books with leading international publishers. It regularly organizes conferences and seminars. It also encourages its members to participate (e.g. by responding to calls for papers) in international conferences abroad. Furthermore, the projects carried out within the framework of the research programme on the International Rule of Law are carried out in cooperation with several international research groups.

Disciplinary nature and methodology

The International Rule of Law programme is primarily a legal research programme, analyzing fundamental legal questions that are raised by the development of an international rule of law. Large parts of its research thus can be characterized as mono-disciplinary. However, in certain specific areas researchers engage and cooperate with academics from the social sciences, for example in the areas of international criminal justice and the interfaces between international, regional and national law.

The research programme combines various methods of research. It examines:

- questions of positive international law (e.g.: can rules of customary law or general principles of law on joint responsibility, or international criminal procedure, be identified?)
- empirical work (e.g.: mapping of processes of informal rule-making and shared responsibility, compilation of relevant national case-law)
- conceptual and theoretical work that is in part based on the examination of positive law and the empirical research (e.g.: can the international legal order be analysed in private or public law models, as a basis for the development of principles of joint responsibility?; what does the lack of effectiveness of rule of law promotion tell us about the (viability of) the concept of the rule of law employed by the UN?; can and should the international legal order accommodate contestation from external legal orders?).

Quality control

The International Rule of Law programme applies the performance criteria defined by the Faculty of Law.

2.3 Relevance

Scientific

The International Rule of Law programme is located at the cross-section of three fields of legal study. First, it contributes to the understanding of the development of the international order towards a rule-based system. As such, it has positioned itself as a programme in general international law, transcending the various sub-disciplines of international law. Secondly, it has a strong focus on the interaction between general international law and international criminal law, notably on prosecution of international crimes and international

The International Rule of Law (2013-2016)

criminal procedure, and international human rights law. Thirdly, it has positioned itself in the interactions between international and domestic law and deals with rule of law processes that are often fully national or at least not fully international.

Societal

The International Rule of Law programme seeks to make not only a contribution to the advance of legal scholarship but also to the promotion and protection of the international rule of law in practice. It is informed by the effects of lacuna in the international rule of law for relevant actors and seeks to offer ways of strengthening the international rule of law with a view to protect the interests of these actors.

In addition, the programme seeks to provide guidance to the institutions and states that on a daily basis seek to cope with the rule of law deficits. The protection of the rule of law continues to be under threat in most if not all states in the world. These threats acquire new dimensions as a result of the process of internationalization. The study into the nature of the processes of the international rule of law, and in particular the focus on interfaces with domestic law, thus can be of crucial importance for states around the world.

Through various ways, including consultancies by individual researchers, projects with stakeholders, conferences and seminars, the International Rule of Law programme connects to policy-makers and practitioners to provide guidance to policy processes and, vice versa, to receive input from stakeholders in the formulation and implementation of research questions. Examples include the involvement of judges in the research projects on interfaces and shared responsibility, the dissemination of research results of these projects to judges, international institutions involved in capacity building in the national judicial sector (EU, OSCE, UN), and the continuous engagement with the rule of law sector as part of the HiiL project the Dynamics of the Rule of Law.

Education

The International Rule of Law programme is closely linked to the educational programme of the Faculty and most researchers teach in the Bachelor as well as the Master. The Master Public International Law contains various courses related to the International Rule of Law, including criminal justice, human rights, accountability and International Law in Domestic Courts (ILDC). The ACIL supports the Research Master on the International Rule of Law,

which contains specialized courses on the International Rule of Law developed and taught by researchers of the programme, using results of their research. Students of this Research Master participate, through a so-called research traineeship, in the implementation of the research programme.

2.4 Organisation and vitality

The International Rule of Law programme is carried out by a research group of about 40 persons who are internationally recognized scholars in the field of public international law and international criminal law (see overview of participating researchers in [Annex 01](#)). Programme leaders are André Nollkaemper and Göran Sluiter. The Programme Leaders are responsible for the programme as a whole in terms of its development, evaluation and for general guidance of the programme. Some specific, externally funded, projects within the programme are lead by senior researchers, who are responsible for the output of that project. The programme is developed to be long-term and builds on past established experience and research. It is conducted within the ACIL, which is a Centre of Excellence of the University of Amsterdam. The research programme was recognised by the Board of the University of Amsterdam as focal point of research of the Faculty and the University.

A large part of the research is carried out under 2nd and 3rd flow funds. On the one hand this confirms the excellent quality of the researchers and their research output, but on the other hand may cause insecurity as regards the sustainability of the programme. Continuous efforts are therefore undertaken to secure funding and researchers are strongly encouraged to apply for external funding. However, the programme is described in such a way that the core of the research on the international rule of law would sustain also with less funds. The success rate of the ACIL in accessing external research funds in the past decades (including Pioneer, VICI, VIDI, VENI, ECR, ESF and 6th and 7th Framework programmes) gives all reason to assume that additional funds will be obtained in the future.

3. Research Themes

The research programme consists of a general part and four specific parts. The specific parts are interconnected and overlap in several areas.

3.1 General part

A first aim of the research programme is to reflect on the concept of the international rule of law and to contribute to the understanding of how the concept may apply at the international level.

The concept of the international rule of law remains essentially contested. The influential definition adopted by the UN stipulates that the rule of law ‘...refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards...’¹ Central dimensions in this definition are law-making, enforcement and human rights. However, applied to the international level, this definition raises fundamental problems and questions that will be subject of analysis. For instance, it can hardly be maintained that ‘all persons, institutions and entities, public and private’ are accountable at the international level, nor are international laws commonly equally enforced and independently adjudicated.

The general part seeks to accomplish a critical assessment of possible concepts of the international rule of law that reflect and accommodate the specific nature of the international legal order. It will relate such concepts to the specific parts identified below, notably the normative and empirical implication of the increasing resort to informal rule-making, the interfaces between international, regional and legal systems, and the diversity of actors involved in the quest for responsibility.

Under the general theme, the research programme will also critically reflect on certain issues that in the UN definition are considered to be constitutive elements of the international rule of law.

First, special attention is paid to the role of human rights as a possible constitutive element of the international rule of law. While, given the wide diversity in human rights practices around the world, there is much to be said in favour of a thin definition of the (international) rule of law, human rights protection is part of the definition of the international rule of law

¹ UN Doc. S/2004/616, Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, 23 August 2004, p. 4, para. 6.

adopted at UN level. It also is commonly used in conjunction with the rule of law as a basis for critique of international institutions such as the UN Security Council.

Second, the research programme will inquire into international refugee law in relation to the international rule of law. Research addresses the discrepancy between the (extended) mandate of UNHCR and the obligations states have assumed regarding refugees and the lack of a distributive mechanism in the international refugee law regime (this is related to the project on shared responsibility).

Third, attention will be paid to dispute settlement – which often is seen as a constitutive element of the rule of law, but which cannot easily be transplanted to the international level. Investment arbitration is a particularly fertile ground of study due to the explosive growth in investment agreements and arbitration proceedings over the last decades.

3.2 Specific parts

In order to make fundamental and substantial contributions to the broad theme of the international rule of law, the research programme focuses on four themes that are central to the concept of the international rule of law.

Each of these themes serves to cluster collective and individual research projects, as well as to allow for synergies. The themes are not isolated. A central aim of the research programme is to examine the connections between the various dimensions of the international rule of law.

Post-national law-making

The central question under this theme is how the concept of the international rule of law is affected by the emergence of diverse forms of international rule-making that do not easily fit in classic definitions of 'law'. Examples of such rule-making are various types of decisions taken by institutions established under multilateral environmental agreements, the World Health Organization, and the UN Security Council. Such decisions may have direct legal consequences, or, even if it concerns non-legally binding rules, may pre-empt later national or international decisions.

The International Rule of Law (2013-2016)

In the light of this development, the project will revisit the very distinction between law and non-law in the context of decisions of international institutions, the impact of post-national rule-making, for instance in terms of their pre-emptive effect on formal norm and rule-making, and the consequences in terms of the rule of law.

These questions will also require an evaluation of the necessity and opportunity to revise traditional and mainstream conceptualizations of sources of international law which cannot currently accommodate these pluralized and informal norm-making processes at the international level.

These questions are examined as part of the project *Framing and Taming Post-National Rulemaking: Views from Public International Law, European Public Law, and European Private Law (ARCHITECTURE)*, which was recognised as a priority research area by the University of Amsterdam. This project is carried out in conjunction with the Amsterdam Centre for European Law and Governance (ACELG) en the Centre for the Study of European Contract Law (CSECL).

Shared responsibility in international law

This project will examine to what extent the current principles and procedures of international responsibility are adequate for addressing situations where two or more subjects of international law jointly contribute to or cause legal injury. This question is of much importance in view of the fact that in many areas of international law and policy, states engage in joint action with other states, international institutions, or private actors. In such cases, the question is how responsibility will have to be allocated if legal injury or damage occurs.

This question is to a large extent influenced by the contents of primary obligations – states are jointly responsible if they have accepted an obligation to act jointly. For this reason the research will inquire into the structure of (collective) primary obligations in areas such as joint military operations, environmental law and refugee law, including questions of burden-sharing. For another part, the question is concerned with the contents and development of secondary obligations, such as joint, or joint and several responsibility, causation, and complicity.

The International Rule of Law (2013-2016)

The multiplicity of actors involved in wrongful conduct has direct implications for the international rule of law. Responsibility, and in particular its prime consequences (return to legality and reparation for injury) are key concepts of the international rule of law. In case of collaboration, driven by interdependence, it becomes more difficult to identify who is responsible for what.

These questions are examined as part of the project *Shared Responsibility in International Law (SHARES)*, funded via an Advanced Research Grant awarded to André Nollkaemper by the European Research Council.

Interfaces between international, regional and national law

This project examines the pluralistic relationship between the international, regional and national legal orders. Much of modern international law concerns matters that exist not only between states, but also within states. The relationship between international law and national law can result in conflicts, as international institutions may require that national law is set aside. Conversely, domestic institutions may frustrate the ambitions of an international rule of law. However, in particular cases, such institutions can correct and lead to the adjustments of international decisions that lack support at national level.

To some extent, the regional international organizations, such as the EU, the EFTA and the WTO, and their courts, find themselves in a position comparable to that of national courts, when considering the reception and application of general international law in their legal systems. Especially the EU Courts' approach to the reception of international law has radically altered the position of a large number of international agreements within the legal order of certain member states, such as the UK and Germany. Several questions identified above, those relating to legal pluralism, apply similarly to such international courts and will be examined as part of the research project.

The project will expand the available empirical material on the practice of national courts, which will be conducted as part of the project *International Law in Domestic Courts (ILDC)*. On that basis, it will critically reflect on the competing claims for hierarchy between legal orders and on possible modes of accommodation.

The International Rule of Law (2013-2016)

The project also will examine legal and cultural pluralism in international human rights law. The international rule of law as a formal category presumes equal protection of rights throughout the world for all individuals and communities. But clearly, the nature, scope and normative content of human rights may vary widely between states, regions and even supra-national organisations. The project will inquire on what grounds the international rule of law *should* leave room for (cultural) diversity at national level and to what extent the rule of law *can* enclose (cultural) diversity and pluralism, while at the same time promoting legal certainty and predictability.

Under this heading, the research programme also will inquire into questions relating to regulatory regimes and their legitimacy from a rule of law viewpoint, in particular when such regimes, as seems to be the case more and more rely on privately agreed standards.

This research theme is supported by the project *International Law in Domestic Courts (ILDC)*, published by Oxford University Press and conducted at the ACIL, coordinated by André Nollkaemper and Erika de Wet, through the research network that is being built around that project with financial support under the ERCP programme *International Law through the national prism: the impact of judicial dialogue* sponsored by the ESF, and through the project *the Dynamics of the Rule of Law*, exercised jointly with the *Wissenschaftszentrum Berlin für Sozialforschung* (Berlin) and La Trobe University (Australia) and sponsored by the HiiL.

International criminal justice – procedure and new crimes

International criminal justice is an important component of the international rule of law. It serves to curtail the exercise of public power in two ways. First, we have witnessed since the end of the nineteenth century international penalisation of conduct which is to a large degree the exercise of public authority (genocide, crimes against humanity, war crimes and aggression). Second, the international community has set up international criminal tribunals to prosecute the aforementioned; because of their very penal nature, these tribunals exercise public authority, which in the applicable procedural law must be regulated in accordance with the rule of law standards.

The first line of research of this theme is the strengthening procedural mechanisms, both conceptually and practically, which serve the enforcement of substantive international penal norms. These procedural mechanisms may be found at the international and national level

(transitional justice). It will be explored which procedural developments and innovations best serve the interests of fair and effective war crimes trials. In addition, it will be examined how institution-building can contribute to more efficient and fair administration of international criminal justice.

The second line of research explores how 'new generation' international crimes – terrorism, trans-border environmental crimes, large scale corruption, cybercrime, piracy, trade in human beings – are related to the traditional core crimes (aggression, genocide, crimes against humanity, war crimes). The primary research question is whether they are conceptually distinct from core crimes, usually characterized by state involvement, or whether the differences between those categories are increasingly blurring. Following naturally from this conceptual investigation, the question arises at what institutional level criminal law enforcement should ideally be organized. Currently, criminal repression of 'new generation international crimes' is primarily governed by inter-state co-operation in criminal matters. It will be investigated whether criminal law enforcement at a global or regional level will serve as an appropriate alternative *de lege ferenda*.

Annex 01 – Research Group (as per 1 September 2013)

Programme Leaders

- André Nollkaemper
- Göran Sluiter

Professors

research fte

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2. Pieter Jan Kuijper	0,08
3. Guénaél Mettraux	0,10
4. André Nollkaemper	0,90
5. Göran Sluiter	0,30
6. Erika de Wet	0,00
7. Harmen van der Wilt	0,36
8. Marjoleine Zieck	0,00

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2. Rosanne van Alebeek	0,40
3. Jean D'Aspremont	0,08
4. Kiki Brölmann	0,40
5. Maarten den Heijer	0,40
6. Machiko Kanetake	1,00
7. Hege Kjos	0,60
8. Jim Mathis	0,15
9. Janne Nijman	0,13
10. Ilias Plakokefalos	1,00
11. Ingo Venzke	1,00
12. Annemarieke Vermeer-Künzli	0,32
13. Annemieke van Verseveld	0,34
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6,22

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5. Emma Irving	1,00
6. Catharina Koops	1,00
7. Anne van Mulligen	1,00
8. Natasa Nedeski	1,00
9. Enrico Partiti	1,00
10. Kelly Pitcher	0,60

The International Rule of Law (2013-2016)

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12. Tim Staal	1,00
13. Cassandra Steer	0,60
14. Isabelle Swerissen	1,00
15. Vincent Vleugel	1,00
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17. Sander Wirken	1,00
18. Krit Zeegers	1,00

16,64

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4. Maria Laura Ferioli
5. Yaron Gottlieb
6. Mark Klein
7. Erik Kok
8. Karel de Meester
9. Ieva Miluna
10. David Moszkowicz
11. Amaka Okany
12. Antonina Okuta
13. Sadie O'Mahoney
14. Res Schürch
15. Chris Soler
16. Talontsi Stanislas
17. Antonietta Trapani
18. Sergey Vasiliev
19. Karin Wester