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## ARTICLES



## CONCEPTUALIZING ACCOUNTABILITY IN INTERNATIONAL AND EUROPEAN LAW\*

Deirdre Curtin\*\* and André Nollkaemper\*\*\*

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### 1. INTRODUCTION

The articles in this special volume of the *Netherlands Yearbook of International Law* lie at the confluence of two recent trends in legal scholarship on public law and international systems of governance. One is the approach to (international and European) public law that seeks to revitalize traditional principles of public international law in order to take account of contemporary empirical realities. The other trend is the broadening outward of work on law and courts to include discussions on the wider political and institutional contexts in which governance increasingly takes place. Together these two trends constitute a broad scholarly agenda that has been limited for the purposes of this special issue to one aspect of ‘good gover-

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nance', namely the concept of accountability as conceptualized and applied in the context of both the international and European legal orders. That agenda is reflected in the range of work included in this special issue. It makes no attempt to be comprehensive but hopes by raising a variety of (international and European) legal topics that belong to the penumbra of a certain understanding (and practice in some instances) of 'accountability' it will foster and stimulate further reflection and study on this topic and its relationship to the more classic mechanisms of international law.

Accountability is a broad term that reflects a range of understandings rather than a single paradigm. Until recently, accountability was not a term in common use, nor did it figure as a term of art outside the financial contexts of accountancy and audit.<sup>1</sup> Today, as Richard Mulgan has aptly noted, the word 'crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic "governance"'.<sup>2</sup> What can be designated the original or 'core' sense of accountability is that associated with the process of being called 'to account' to some authority for one's actions.<sup>3</sup> Such accountability has a number of features: it is external, it involves social interaction and exchange and it implies rights of authority in that those calling for an account are asserting rights of superior authority over those who are accountable, including the rights to demand answers and to draw consequences, possibly including the imposition of sanctions. This sense of accountability is in line with the broad sense that Keohane and Grant describe: 'accountability' as involving the justification of an actor's performance *vis à vis* others, the assessment or judgment of that performance against certain standards, and the possible imposition of consequences if the actor fails to live up to applicable standards.<sup>4</sup>

In the context of a democratic state, the key accountability relationships in this core sense are those between citizens and the holders of public office, and within the ranks of office holders, between elected politicians and bureaucrats. Such accountability relationships are obviously familiar terrain for lawyers at the national level, much less so at the international level. Indeed, at the international level, where the principle of democracy has made only a limited entry at the level of the international legal order itself as well as with regard to the institutionalization of international organizations, a broad concept of 'accountability' is less familiar. International lawyers have traditionally focused on well-established legal principles

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1. See C. Harlow, *Accountability in the European Union* (Oxford, OUP 2002) p. 1.

2. R. Mulgan, "'Accountability": an Ever-Expanding Concept?', 78 *Public Administration* (2000) pp. 555-574, at p. 555.

3. *Ibid.*

4. See R.W. Grant and R.O. Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Review* (2005) pp. 29-43, at pp. 29-30.

such as state responsibility and the operationalization of a broader concept of accountability in the sense of an actor being held to account in an iterative and interactive process is still nascent. As Jutta Brunée has put it in her contribution: ‘notwithstanding its increasingly frequent invocation by international lawyers, the concept of “accountability” has not acquired a clearly defined legal meaning’.<sup>5</sup>

In recent years it has in particular been in the context of the European Union that a rather explicit discussion has taken place on core accountability issues in the sense defined by Mulgan, such as how voters can make their elected representatives answer for policies, how legislators (at both the national and the European levels) can scrutinize the actions of (European and national) public servants and make them answerable for mistakes etc. In fact that discussion even goes so far as to enable Walter van Gerven, a prominent European legal scholar, to entitle his contribution to this special issue, rather provocatively, ‘Which form of accountable government for the European Union?’<sup>6</sup> One can hardly envisage asking an equivalent question for any one other international organization.

The dominant form of ‘accountability’ in international law has traditionally been the mechanisms of (state) responsibility and (state) liability, characterized by a claim by injured parties against a wrongdoing state (or organization) with a view to obtaining reparation for the injury caused by wrongful acts. This legal form of state accountability dominates, for example the work by the International Law Commission on the responsibility of states<sup>7</sup> and the responsibility of international organizations.<sup>8</sup> Although, this mechanism is certainly of continuing importance, and deserves its place in this special volume on accountability, it currently reflects only a small fraction of what can be termed (evolving) accountability processes in contemporary international law. Indeed, as Jutta Brunée shows us in her contribution, there are an increasingly rich variety of other modes of international legal accountability. The rise of these alternative modes ‘is a reaction both to the limits of the conceptual structure that anchors the state responsibility regime and to the fact that states only rarely take the formal steps of invoking it’.<sup>9</sup> At the same time both in this introduction to the special volume, as well as in some of the individual

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5. J. Brunnée, ‘International legal accountability through the lens of the laws of state responsibility’, *infra* pp. 21-56, at p. 22.

6. W. van Gerven, ‘Which form of accountable government for the European Union?’, *infra* pp. 227-258.

7. The ILC completed its work on state responsibility in 2001: see Articles on Responsibility of States for internationally wrongful acts (hereafter: Articles on State Responsibility). The commentary is contained in Vol. II, Part Two, paras. 77 et seq. *Yearbook of the International Law Commission* (2001), at p. 292. The Articles are also contained in the Annex of UN Doc A/Res/56/83 of 12 December 2001.

8. The ILC has been working on the topic of responsibility of international organizations since 2002; a set of draft articles was adopted in first reading in 2004 and 2005.

9. See Brunnée, *infra* n. 5, at p. 22.

contributions a certain conceptualization of ‘accountability’ underlies the attempt to use it analytically also in a discourse rooted in (international) legal science. This approach is, we would suggest, in its infancy and the editor’s wish has been to stimulate debate in a rather open fashion rather than limit the (scientific, legal) parameters too much at the outset.

## 2. SHIFTS IN GOVERNANCE

Responsibility and liability as accountability mechanisms were clearly not sufficient to address the problems stemming from the transfers of powers to entities beyond the state, in particular international organizations. The shifts in governance and public authority in recent decades away from the territorial state towards different forms and levels of governance, within and beyond the parameters of the traditional nation state<sup>10</sup> has not been matched by a shift in accountability relationships beyond that applicable within the confines of the territorial state. This results in gaps in the accountability of (public) actors for the exercise of public authority. Though accountability gaps may well have always existed even where public powers were predominantly exercised within the confines of the state, the shift of powers away from the state has made the gaps much more politically salient and acute.

In recent decades, states and international organizations have attempted to respond to these shifts in governance by developing alternative models of accountability that do not involve traditional state responsibility. Examples include compliance regimes under international environmental agreements, human rights reporting and complaint mechanisms etc. Such mechanisms do not involve a determination of responsibility or of liability. It is wrong, however, to say that they are as a result not governed by, or of interest to, international law. In domestic law, ministerial responsibility is not a matter of liability, yet it is certainly governed by (constitutional) law and certainly is of interest for the maintenance of the rule of law. This is not very different for international accountability mechanisms. Even when such mechanisms do not result in a formal determination of responsibility or the imposition of remedies, they are shaped by international law in a more general sense and are subject to part of the system of accountability in the international legal order.

It is in response to the shifts in governance and the slow attempts to close gaps in the control over the exercise of public power that scholars that have engaged in

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10. See further, K. van Kersbergen and F. van Waarden, *Shifts in Governance and Problems of Legitimacy and Accountability* (Social Science Research Council, Netherlands Organization for Scientific Research, July 2001).

a much more fundamental and wide-ranging discussion of the potential and limits of the concept of accountability as a (political) mechanism of controlling public power, wherever exercised and in whatever form. Initially these discussions took place mainly within the disciplines of international relations<sup>11</sup> as well as public administration<sup>12</sup>; in recent years, however, this theoretical debate has started to trickle into the manner in which some international law scholars study the concept of accountability and its application in practice in the international legal order. In the view of Ige Dekker in this volume this may even lead to a new conceptual legal perspective on accountability based on ‘a more modern and realistic view of the plurality of legal phenomena in present day legal systems’.<sup>13</sup>

Armed with these changing empirical realities and concerned by the steady undermining of the rule of law and the risk that public power will not be checked by any accountability processes, lawyers and other social scientists are increasingly recognizing that this leaking away and dispersion of public power must be challenged, if necessary at the post-national level. That challenge may include the need to redefine and reallocate some principles and processes of accountability at the international level itself.<sup>14</sup> More fundamentally, it may require a rethinking of the concept, aims and forms of accountability as not all forms of public power can and should be subjected to similar principles and processes. Existing largely nationally based accountability procedures may not, however, be adequate for the multi-layered, partly public and partly private governance constellations that exist in practice in the early years of the twenty first century.

### 3. CONCEPTUAL ISSUES

How exactly then must we understand the concept of accountability? There are indeed many different approaches and definitions<sup>15</sup> but two broad lines that emerge in the literature can be distinguished as ‘giving account’ and ‘holding to account’. The former views accountability as the *act* of disclosing information and justifying behaviour, without more.<sup>16</sup> The latter is, however, a more demanding definition as it requires in addition the possibility that the actor will have to face consequences.

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11. See for example, the work by Keohane and Grant, *supra* n. 4, and references they cite.

12. See for example, M. Bovens, ‘Analysing and Assessing Public Accountability. A Conceptual Framework’, *European Governance Papers* No. C-06-01, EUROGOV, 2006 (available at <<http://www.connex-network.org/eurogov/>>).

13. See I. Dekker, ‘Making sense of accountability in international institutional law’, *infra* pp. 83-118, at p. 87.

14. See for example, B. Kingsbury et al., ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) Nos. 3 and 4.

15. See for example, the general discussions by authors such as Harlow, *supra* n. 1 and Mulgan, *supra* n. 2

16. Mulgan, *ibid*.



The concept of ‘holding to account’ not only obliges actors to disclose information and justify their behaviour but also requires a social *relationship* between the actor and what can be loosely termed an accountability forum of one type or another, and moreover may require the establishment of a mechanism (e.g., a non-compliance procedure) by which account can be rendered. In this special volume we use the term ‘accountability’ in this second sense. It refers to a process in which an actor explains conduct and gives information to others, in which a judgment or assessment of that conduct is rendered on the basis of prior established rules or principles and in which it may be possible for some form of sanction (formal or informal) to be imposed on the actor.<sup>17</sup>

Accountability often is understood as a retrospective process that involves giving an account of prior conduct. However, this view of accountability is being increasingly challenged by approaches that argue for a more participative and ongoing process of accountability.<sup>18</sup> Accountability may equally be understood as having a prospective aspect, potentially embracing issues such as participation and standard setting. One example among many is the process of explanation and justification by the UN Secretary General to the General Assembly for the failure to protect the safe haven in Srebrenica in 1995.<sup>19</sup> Though it concerned events (and failures) that have already taken place, both the report and the consequences drawn are essentially of a forward looking nature, seeking to improve peace-keeping operations. Indeed, some objectives of accountability (such as prevention) necessarily connect past and future conduct. In his contribution to this special volume, Wouter Werner observes that the institution of state responsibility, which links undesired events to wrongful behaviour in the past, is increasingly accompanied by more forward looking methods, such as risk-management and precaution.<sup>20</sup>

The fact that accountability can have retrospective as well as prospective ambitions and effects means that the concept straddles the distinction between primary and secondary norms. Its prospective ambitions also make it useful to bring some notions of good governance under the concept of accountability, as a means of securing the acceptable use of public power according to some standards of behaviour.<sup>21</sup>

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17. M. Bovens, ‘Analysing and Assessing Public Accountability. A Conceptual Framework’, *European Governance Papers* No. C-06-01, EUROGOV, 2006 (available at <<http://www.connex-network.org/eurogov/>>); Grant and Keohane, *supra* n. 4; Brunnee, *infra* p. 22.

18. See for example, J.M. Moncrieffe, ‘Accountability: Ideas, Ideals, Constraints’, 8 *Democratization* (2001) pp. 26-50.

19. Report of the Secretary-General pursuant to General Assembly Resolution 53/35. The Fall of Srebrenica, UN Doc. A/54/549.

20. W.G. Werner, ‘Responding to the undesired state responsibility, risk management and precaution’, *infra* pp. 57-81.

21. This was first level of accountability of the ILA, International Law Association, *Report of the Seventy-first Conference, Berlin 2004* (London, International Law Association, 2004), pp. 172 et seq.

#### 4. CONSTRUCTING A CONCEPT OF ACCOUNTABILITY IN INTERNATIONAL LAW

The main virtue of the concept of accountability in the context of international law is that it allows us to move the conceptual discussion beyond the traditional concept of responsibility of states or international organizations as the primary accountability mechanism in international law. We can distinguish at least five respects in which this liberating effect may manifest itself and in which we find the potential conceptual value of the concept of accountability. These pertain to the aims of accountability, the actors who are held accountable, the persons or institutions to which accountability must be rendered, the process of accountability and the levels of accountability.

First, the *aims of accountability* are wider than these traditionally recognized as the objectives of responsibility of states and international organizations. Accountability is in essence an instrument to secure control of public power. Robert Keohane writes that ‘Properly applied, it can be a useful tool to limit abuses of power’.<sup>22</sup> But behind this general aim, accountability serves a variety of complementary but sometimes also competing objectives. The aims of protection of the rule of law and compensation and satisfaction of victims that are traditionally linked with state responsibility remain potentially relevant as aims of the broader concept of accountability. But thinking in terms of accountability may open new and broader dimensions, highlighting for instance the contribution of accountability to the protection of democratic values,<sup>23</sup> both in the sense of involving citizens through democratic procedures, as well as involving them in public accountability processes. Literature on accountability has also emphasized the contribution that accountability may make to ‘catharsis’ or closure. For example, it appears rather unlikely that the international criminal tribunals for the former Yugoslavia and Rwanda will have many effects in terms of prevention. However, they may contribute to closure, at least for ‘the international community’ that failed to act and that does carry its share of responsibility. Accountability can also contribute to the protection or renewing the integrity of organizations and to cybernetic learning. Wouter Werner observes in this volume that non-compliance procedures can facilitate practices of social learning.<sup>24</sup>

The above list of aims is by no means exhaustive. Underlying these relatively specific objectives, accountability may serve larger, less tangible objectives, per-

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22. R.O. Keohane, Abuse of Power, Assessing accountability in world politics, 27 *Harvard International Review (Defining Power)* Issue 2, Summer, pp. 48-53, at p. 48 (2005).

23. This is the focus of Van Gerven, *infra* p. 229.

24. Werner, *infra* p. 70.

haps most importantly, the objective of enhancing the legitimacy of international and European law as such.<sup>25</sup> For instance, the accountability mechanisms of the World Bank Inspection Panel and non-compliance mechanisms under international agreements may legitimize tough standards imposed on some states by providing means to allow implementation and to accept standards. In his contribution, Walter van Gerven makes the point that the entire process of ‘accountable government’ in the European Union ‘is about making the Union’s structure more democratic and the Union’s decision-making process more legitimate’.<sup>26</sup>

Though responsibility-for-wrongfulness doctrine does not necessarily exclude any of these broader aims, the fact is that the conceptual constraints of that doctrine have led most scholars to emphasize aims such as prevention, rule of law, and compensation to the exclusion of other possible aims. The use of the concept of accountability does not have similar constraints and may open new perspectives on a wider set of aims.

Second, the concept of accountability allows for a wider understanding of the *actors involved in processes of accountability*. While the actor who engages in a process of justification in international law typically is the state, this certainly is not necessarily so. Depending on the situation, accountability processes may involve different state entities (legislative or executive etc.) but also private entities that assume (quasi-) public powers. One of the objectives of this special volume is to shed more light on the capacity of the current international legal order to subject subjects other than just states to proper accountability processes and mechanisms. In particular, the issue of accountability as applied to international organizations receives attention, yet not all other possible actors could be included within the confines of this special volume (for example, non-governmental organizations among others).

Third, the manner in which our definition expands the traditional concepts of international law is also clear when we focus on the *persons or institutions to which account must be rendered*. We consider accountability primarily in terms of a social relationship between an actor and a forum of one type or another. In principle an actor is accountable to some other person or entity, not in the abstract or in isolation.<sup>27</sup> Here again there are multiple – and often complementary – possibilities. Accountability may be rendered to states as such, but also to individuals or private entities. At the same time it is becoming increasingly salient to think of accountability in much broader terms to the public in general (public accountability) or to a sub-set thereof, for example the international community. In this special

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25. Van Gerven, *infra* p. 116.

26. *Ibid.*

27. But see J. Gardner, ‘The Mark of Responsibility’, 23 *Oxford Journal of Legal Studies* (2003) p. 157.

volume, for instance, it is noted that non-compliance procedures often help to create deliberative structures that include non-State actors.<sup>28</sup> Not dealt with in this special volume are the use of, for example, freedom of information laws and practices to provide some form of accountability to the broader public as well as the rise of new-style accountability forums (for example, the European Ombudsman) as well as the re-invigoration of existing ones (for example, the growing role of the European Parliament and indeed of – some – national parliaments as broader accountability forums). Such thinking and focus on non-traditional actors and forums introduce new ideas that formally fall outside the rather narrow categories of the law of state responsibility.

The fourth aspect in which the accountability concept allows us to go beyond the responsibility-for-wrongfulness doctrine concerns *the process (or mechanisms) of accountability*. Traditionally, the focus of international lawyers has been predominantly on legal accountability. The features of legal accountability (or: ‘accountability through the rule of law’) are, first, that an actor is held to account for acts that conflict with international obligations and, second, that the procedure of justification and possible consequences is governed by law.<sup>29</sup> One example is judicial review. This is particularly well developed in the European Union where the European Court of Justice can be considered to fill in accountability gaps as new cases are brought before it.<sup>30</sup> Another example of legal accountability in international law are principles of state responsibility and state liability.

But accountability is not confined to legal accountability. State responsibility and responsibility of international organizations captures only a small fraction of accountability processes in international law.<sup>31</sup> It also encompasses political accountability, a term referring to accountability of holders of political authority (primarily the executive government) through political processes.<sup>32</sup> The prime example is democratic accountability. As noted by Walter van Gerven in this volume, political accountability of the executive government refers to the duty of government to *render account* (and to explain) to an elected parliament in respect of action undertaken in the past or proposed for the future by the government or its agents. In addition, political accountability also refers to the fact that the executive branch can be *held responsible* by parliament for action undertaken in the past.<sup>33</sup>

Political accountability need not be limited to democratic accountability, and indeed democratic accountability is not necessarily suited for application at the

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28. Werner, *infra* p. 70.

29. Brunnee, *infra* p. 24.

30. There are of course limitations to its role in this regard since access to justice in particular for private litigants is limited. See further, Harlow, *supra* n. 1, pp. 147-159.

31. Brunnee, *infra* pp. 24 and 39.

32. Van Gerven, *infra* p. 228.

33. *Ibid.*

international level where there are no directly elected parliaments (with the exception of the European Parliament) and where national parliaments generally have little control over the actions and inactions of their 'own' government at the international level. The notion of political accountability takes the forms of accountability processes of states *vis-à-vis* international organizations, for instance in the form of non-compliance procedures.<sup>34</sup> As noted earlier however,<sup>35</sup> the fact that such mechanisms do not involve a determination of responsibility or of liability does not mean that they are not governed by, or of interest to, international law.

Moreover, though the form and nature of political accountability is fundamentally different to legal accountability, it may well serve similar purposes to legal accountability. In this volume, Walter van Gerven indeed notes that the maintenance of the rule of law is an essential element of democratic accountability, for instance parliamentary control of executive action.<sup>36</sup> However, the manifestations are quite different, whether or not the executive acted in conflict with international obligations is key to legal accountability, but will generally only be of marginal significance in political accountability. A fundamental question that hitherto has received only scant attention is whether and, if so, what political forms of accountability may compensate for the absence of available avenues of legal accountability or vice versa.

Another mechanism of accountability is administrative accountability. This refers to processes of an administrative nature, such as resignation of civil servants or disciplinary penalties. An example is the resignation by Benon Sevan, the former director of the United Nations' oil-for-food program, in relation to independent reports of corruption in the program. The term accountability is also used in this sense in the Report of the Redesign Panel on the United Nations system of administration of justice, writing that an 'integrated and effective system of accountability requires that managers assume authority and responsibility for their decisions and, if necessary, answer for them within the context of the management structure and the justice system'.<sup>37</sup> Like political accountability, administrative accountability may be related to an alleged breach of international law, but is not necessarily so.

The above three types of accountability (legal, political and administrative) do not pretend to cover the entire spectrum of possible accountability mechanisms. One could also include mechanisms of financial, institutional or reputational accountability.<sup>38</sup> The usefulness of making such distinctions depends in part on the

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34. Werner, *infra* pp. 68 et seq.; Brunée, *infra* pp. 32 et seq.

35. *Supra* pp. 6-7

36. Brunée, *infra* pp. 48 et seq.; Dekker, *infra* pp. 91 et seq.

37. UN Doc. A/61/205 (2006), par. 120.

38. Grant and Keohane, *supra* n. 4.

actor with which one is dealing. Indeed, one of the problems encountered by this special volume is that the exercise of powers by private entities is not easily subject to the familiar forms of legal, political or administrative accountability. It requires new frames for understanding and new (normative) perspectives to identify principles and processes that are better suited to these forms of governance. Attempts to develop principles and procedures of an administrative law nature may fill in part of the puzzle both at the national level and at the international level,<sup>39</sup> but it is equally relevant to look beyond public law models and to recognize the independent contribution that can be made by private sector processes.<sup>40</sup>

Fifthly and finally, the term accountability also gives us useful tools to study problems pertaining to the *levels of accountability*.<sup>41</sup> Many of the problems of the current accountability gap are caused by the fact that government and governance operate across different levels (sub-national – national – regional – international; general – functional; public – private). A major question then is whether and how accountability mechanisms at one level can supplement or fill gaps that arise at other levels or even straddle various levels.

One manifestation of this question is whether holding member states of an international organization to account can fill part of the lacuna caused by the difficulty in holding international organizations as such accountable. This aspect is addressed both in the contributions of Ige Dekker<sup>42</sup> and of Esa Paasivirta and Pieter Jan Kuijper<sup>43</sup>. Another question relating to the accountability for governance divided over multiple layers is whether procedures at domestic level can compensate for shortcomings at the international level. This is an important focal point of the contribution of Walter van Gerven (relating to the role of domestic parliaments *vis-à-vis* the European executive).<sup>44</sup> August Reinisch examines to what extent international and domestic courts can apply domestic law in procedures involving international organizations.<sup>45</sup> These contributions illustrate interactions between different levels of governance and their evolution as a matter of (legal and institutional) practice. Likewise, the question whether private parties can be adequately involved in existing political or legal accountability mechanisms or whether, rather,

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39. Kingsbury et al., *supra* n. 14, at p. 24.

40. G. Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) pp. 1-28.

41. The term levels is a different one from that used by the ILA, which used it to distinguish between the level of primary norms, liability and responsibility. Here we refer to levels of governance.

42. Dekker, *infra* pp. 112 et seq.

43. E. Paasivirta and P.J. Kuijper, 'Does one size fit all?': the European Community and the responsibility of international organizations, *infra* pp. 169-226, at pp. 184 et seq.

44. Van Gerven, *infra* pp. 254-256.

45. A. Reinisch, 'Accountability of international organizations according to national law', *infra* pp. 119-167.

private procedures should be developed to supplement procedures that were tailored to a specific political and legal context and that cannot be easily disassociated from that context.

The picture that emerges from these various dimensions can be complex and indeed overwhelming. But it is of fundamental importance to see the complementary relationships between these various modalities. Accountability gaps that results from shifts in power and that create the risk of abuses of power may require a conflation of various forms of accountability for various actors vis-à-vis various constituencies.

## 5. RELEVANCE OF ACCOUNTABILITY PRACTICES IN THE EU

The composition of this special volume is based on the assumption that the evolving debate on accountability in the European Union may at least in some respects be relevant to our thinking on accountability in international organizations and international law in general. It is indeed striking that the European Union displays more overt willingness and recognition of the fact that the ostensibly non-legal concept of accountability has an increasingly significant role to play in ensuring that the exercise of public power by various actors and across various levels does not escape all external and public control. Perhaps it is the very originality of this particular international organization with its far reaching aims of integration, its ‘transfer’ of sovereignty in certain and increasingly less limited areas, its exercise of public power and its innovative institutional features and strengths, that have made it more open to importing complementary mechanisms of accountability alongside strictly legal and traditional ones.

In some sense then one can speak of the European Union as being at the cutting edge in terms of ensuring that the activities of international organizations are one way or another (bottom up and top down) being held to account, somewhere and to someone in varying ways. The fact that the principles and mechanisms of the European legal order are to a large extent new and overtly dynamic in their contours seems to have had a liberating effect when compared to the shackles of international law principles stemming from the classical international legal order as such. That said, to be at the cutting edge in a certain sense is not the same as saying that the EU has got all the answers or that it has evolved the perfect conceptual model that is being applied seamlessly in practice. Nor indeed that the kind of public powers being exercised by the EU and its institutions is subject of a direct analogy with other more classically inter-governmental international organizations.

Is the debate on accountability in the EU really relevant to the debate on accountability in the wider international legal order? Charles Leben observed that in some respects EC law provides a model and possible horizon for international



law.<sup>46</sup> But any lessons from the EU debate cannot be transposed mechanically to the debate in the international legal order. Many of the concepts and principles that are thought relevant to the EU are bound to its relatively centralized and increasingly state-like features. In the international legal order international organizations have been relatively transparent, appearing more as forums rather than as actors. Though most organizations express ambitious common aims, modern international law has been characterized by a gap between normative ambitions and institutional structures. However, the powers of international organizations have become dramatically stronger over the past decades, leading towards more centralization and to international organizations appearing more and more as actors in their own right rather than merely as forums. One of many consequences is that the legitimacy of the decision-making of international organizations has now been recognized as a fundamental problem of international governance that is not dissimilar to the often-analyzed problems of legitimacy in the European Union. In that respect, the discussion on accountability in the EU may indeed be inspirational for the emerging debate on accountability in the international legal order. This is not the same as suggesting that any distinct institutional and other solutions that are emerging and evolving in the context of the EU may be ripe for transplant beyond the confines of that highly specific and intensely supranational (in parts) international organization.

A distinct but nonetheless related question is whether the special features of the EU prevent the EU from being subject to the same principles of (legal) accountability that apply to 'other' international organizations. Esa Paasivirta and Pieter Jan Kuijper argue in this volume that the special features of the EU at least in some respects require it to be exempted from general principles applying to the accountability of international organizations.<sup>47</sup> Their point in this regard is that in some respects the analogy is more properly the model of a 'state' rather than that of an international organization; when this is the case then the accountability principles of international organizations as such is not the proper match. It may be doubted whether one can speak at all of more or less uniform principles of accountability that apply to some or all actors exercising public powers. But at least in the narrow form of accountability dealing with responsibility for wrongful acts, it is generally accepted that one can identify a set of principles applying equally to, respectively, all states and all international organizations. The question then is whether these principles apply equally to the EU or rather straddles both categories in some distinctive and unique fashion?

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46. Charles Leben, 'Hans Kelsen and the Advancement of International Law', 9 *EJIL* (1998) pp. 287-305, at p. 298.

47. Paasivirta and Kuijper, *infra* pp. 212 et seq.



## 6. A SPECIAL ISSUE ROADMAP

In order to further develop our understanding of the processes of accountability in the international legal order, as well as of the potential benefit of using the concept of ‘accountability’ in the context of international law in the first place, we selected at the outset six topics. In making these choices we did not aim to be comprehensive; rather we hoped that the manner in which these six topics have been juxtaposed, and the more general conceptual context within which they have been placed in our introduction to this special volume, will foster and stimulate further reflection and study on this highly salient concept and its relationship with the more classic mechanisms of international law.

The first contribution, Jutta Brunnée’s *International legal accountability through the lens of the law of state responsibility*, places the topic squarely in the domain of international law properly speaking, with a focus on international *legal* accountability.<sup>48</sup> However, as the title of her contribution indicates, she identifies and explores the room between the traditional concept of state responsibility and the wider concept of international legal accountability. This approach indicates that it is possible and indeed useful to think of accountability as a set of concentric circles where, from a legal perspective, responsibility and liability may form the core, legal accountability (other than responsibility and liability) provides a second circle and non-legal (yet legally relevant) forms of accountability feature in more distant circles.

Jutta Brunnée’s contribution supports and develops the core contention underlying this special volume, namely that in modern international law, state responsibility has lost much of its initial conceptual and political power and that we may indeed need to resort to wider and intrinsically non-legal concepts such as accountability. She also explains that the elements that we use to construe the concept of accountability in general (a wider group of actors, different implementation methods etc.) are also features of international legal accountability as compared to the concept of state responsibility, and that this is precisely the merit and value of taking our thinking forward on the basis of legal accountability. In *Responding to the undesired state responsibility, risk management and precaution*, Wouter Werner further develops some of the shortcomings of the traditional model of state responsibility that were identified in Jutta Brunnée’s article.<sup>49</sup> For the purposes of this special volume, the main contribution made by this chapter is a new conceptualization of the objectives of State responsibility (and implicitly of accountability) as a way of organizing our dealings with undesired events or situations. It focuses on the development of legal structures that relate obligations of states not

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48. *Infra* pp. 21-56.

49. *Infra* pp. 57-81.

to previous wrongful acts but to ‘the management of risks and the realization of a common future’. In terms of the analytical and conceptual framework we have previously outlined, this contribution can be understood as highlighting accountability as a principle allowing future behaviour to be influenced and eventually prevented. Starting from this more general perspective, Wouter Werner then compares the rules of State responsibility with some other ways of dealing with undesired events, in particular risk-management (dealing the mastering of time and disciplining of the future) and precaution (dealing with conditions of late modernity or ‘world risk society’). This approach thus illustrates the usefulness of taking a broader and more forward looking perspective on responsibility and, though not made explicit in the contribution itself, accountability, as it offers us the conceptual tools for comparing alternative arrangements for influencing social and political behaviour.

In the third contribution the focus shifts from the accountability of states to the issue of the potential accountability of international organizations. *Making sense of accountability in international institutional law*, by Ige Dekker, is not only a study of accountability of international organizations on the basis of the work and recent reports of the ILA on the subject, but rather much more fundamentally challenges the reader to be much more nuanced and open-minded in her understanding of the evolving concept of accountability than a traditional legal analysis would prompt.<sup>50</sup> At the same time, Dekker doubts whether the ILA Committee has really succeeded in conceptualizing the concept of accountability as an actual or potential part of the existing legal system of international organizations. He presents an alternative conception of accountability (as well as of international organizations) by employing a different legal theoretical perspective (inspired by the institutional theory of law). This conceptual legal perspective is in his view ‘more in line with the character, development and needs of the modern international legal system’. One of the key questions he raises relates to the underlying basis and justification for the legal and the non-legal dimensions and forms of accountability and questions their continuing validity in the light of contemporary empirical realities.

*Accountability of international organizations according to national law* by August Reinisch is a study of one aspect of the broad concept of accountability of international organizations as it was developed by the International Law Association: the question whether and to what extent international organizations are bound by national law and may become accountable in the event of non-compliance with such law.<sup>51</sup> An important aspect of this contribution is that it shows that in examining accountability of certain actors, it may be necessary to shy away from the distinction between primary and secondary rules – a distinction that was strictly applied by the ILC in its work on international responsibility. Understanding whether and

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50. *Infra* pp. 83-118.

51. *Infra* pp. 119-167.

how international organizations are accountable under domestic law, requires a preliminary assessment of the applicability of domestic law to such organizations in the first place. That leads directly to what is surely the most important dimension of this contribution for the purposes of the special volume: the question whether international organizations as creatures of the international legal order, can be held accountable at a different level of governance – the domestic legal order. This chapter argues that this is indeed the case, showing that this is just one of what we believe is an increasing number of instances where accountability processes straddle different, but not always well organized or differentiated, levels of governance.

In the fifth contribution, *Does one size fit all?: The European Community and the responsibility of international organizations* by Esa Paasivirta and Pieter Jan Kuijper we move to the questions raised by the special nature of the European Community and the European Union and to its cybernetic role for the wider international legal order.<sup>52</sup> Apart from insights on the specific nature of the EC as a subject of international responsibility, the fundamental point that this article contributes in the current context is its stress on the fact that very significant differences exist between various actors and indeed between various international organizations, despite preliminary assumptions that the exercise of power by all actors (and international organizations) should be subjected to accountability processes. International organizations are very different from one another, and also face different kinds of challenges and practical problems. Paasivirta and Kuijper conclude that this militates against the idea of uniform rules – a conclusion specifically developed and applied to the EC.

The final contribution, *Which form of accountable government for the European Union?* by Walter van Gerven is the only contribution in this special volume that specifically focuses on the concept of political responsibility rather than on legal accountability and responsibility (though several of the earlier contributions touch on this distinction).<sup>53</sup> Van Gerven inquires into what governmental structure the European Union should ideally adopt in the future, providing an in depth discussion of various models of political accountability that in some aspects are specifically tied to the special situation of the EU but that, as noted earlier, also may have relevance for other forms of international organization. This analysis also highlights one other dimension of the concept of accountability as developed in this introduction, that of multi-level accountability, as it is argued that Member State parliaments have a role to play in controlling the Council of Ministers as an EU institution, and controlling the numerous committees and networks of Member State officials and regulators participating in the implementation and application of Union laws and policies.

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52. *Infra* pp. 169-226.

53. *Infra* pp. 227-258.

## 7. CONCLUDING REMARK

We believe that for all their differences, the contributions in this special volume fundamentally support the proposition that accountability is a meaningful concept and that, in the words of Robert Keohane, ‘properly applied, it can be a useful tool to limit abuses of power’.<sup>54</sup> But there is more to be said! We have shown that both in conceptual and analytical terms the concept of accountability is capable of being applied in a legal scientific discourse. Moreover, the fact that some discussion takes place in a number of contributions of existing (legal and institutional) ‘practices’ illustrates that it is possible to put various bits of the accountability ‘puzzle’ together even where the governance in question has shifted to the international level. Accountability straddles various debates, including the legal scientific one and the more practical one, also at the level of international law and practice. We hope that the manner in which the special volume has been constructed as well as the various contributions, both severally and taken together, underline not only the salience of the topic of accountability for international law scholars and for international organizations of various kinds, but also the urgent need for further research and study. In particular, we hope that the overall contribution of this special volume is to illustrate that much more analytical precision is needed at the level of the conceptualization of ‘accountability’ than is perhaps customary.

The approach and outcome of the work undertaken by the ILA with regard to the accountability of international organizations<sup>55</sup> exemplifies the point that even when a specific and focused attempt is made to apply the concept of accountability to international organizations in general, the underlying conceptual approach may still be very limited. In other words, there is some evidence that some of the exploratory work that has been undertaken within the confines of traditional international law is marked by extreme caution and a non-fundamental approach to the changing contours of the exercise of public power. The development of a more conceptual understanding of accountability in its various ramifications than hitherto was customary in international legal scholarship is arguably urgent. One of the underlying purposes behind putting together this special volume on accountability has been to illustrate that in international law, dominated by traditional concepts and principles of international law, there is need and room for innovation and adaptation and also for contextual ‘learning’ from other international organizations (the European Union?) and other disciplines. At the same time within this context it has only been possible to lift a small part of the veil but we do hope that this introduction sketching certain conceptual parameters together with the varied – and rich – individual

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54. Keohane, *supra* n. 22.

55. International Law Association, *Report of the Seventy-first Conference, Berlin 2004* (London, International Law Association, 2004), p. 13, Resolution No. 1/2004.

chapters will provide an inspiring beginning. Modesty in terms of what has been possible to achieve in the context of this special volume is certainly appropriate.

#### *ABSTRACT*

*This article introduces in general terms the concept of accountability and its potential relevance to international and European legal scholarship. It argues that the scale of the shifts in governance and public authority away from the territorial state towards different forms and levels of governance, within and beyond the parameters of the traditional nation state, call for shifts in accountability relationships beyond that applicable within the confines of the territorial state. This, in turn, requires a rethinking of the concept, aims and forms of accountability applying in international and European law. The articles explore five aspects of the concept of accountability: the aims of accountability, the actors involved in processes of accountability, the institutions to which accountability must be rendered, the process of accountability, and the levels of accountability. In each regard, the concept of accountability enables us to move beyond traditional concepts of the international legal order such as liability and responsibility and to gain a better understanding of appropriate responses to abuses of power resulting from shifts in authority.*