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The EU's Human Rights Responsibility Gap: Deconstructing Human Rights Impunity of International Organisations

Joyce de Coninck

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***233** During my classes, I frequently refer to the following famous statement from the landmark 1986 judgment in *Parti Ecologiste Les Verts v European Parliament* (294/83) EU:C:1986:166 at [23]:

"... the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty."

It was indeed the first time that the Court of Justice explicitly recognised the European Community (now the Union) as being a legal order rooted in the rule of law, inherently supported by a "complete ***234** system of legal remedies" (at [23]). In my lectures, I explore the intricate architecture of judicial remedies, and, like many of my colleagues, I often find myself confessing to my students that the lofty principle proclaimed in *Les Verts* does not always resonate in practice. This candid admission becomes particularly evident when addressing the stringent admissibility conditions for actions for annulment brought by individuals—a standard shaped by the Court of Justice's restrictive interpretation since the landmark *Plaumann* ruling of 1963 (*Plaumann & Co v Commission of the European Economic Community* (25/62) EU:C:1963:17)—or in relation to the limitations of the Court of Justice of the European Union's (CJEU) jurisdiction concerning the Common Foreign and Security Policy, which have recently come under the spotlight.

Now, I will be inspired to delve deeper into an additional issue tied to the "responsibility gap", eloquently highlighted by Dr Joyce de Coninck in her insightful work, which I have the privilege to reflect upon in this review. Indeed, the author demonstrates in her work the existence of a systemic deficiency in the European Union's (EU) judicial remedy system, stemming from the significant challenges in holding the Union and its bodies accountable for their contributions to human rights harms, particularly within the framework of the Union's integrated border management policy.

To reach this conclusion, Dr De Coninck meticulously examines the applicable legal frameworks governing the accountability of international organisations, both under general international law and EU law. She has, indeed, made the thoughtful and valuable choice of examining two legal frameworks: the *lex generalis* of public international law, primarily embodied in the Articles on the Responsibility of International Organizations, and the *lex specialis* of EU law. This dual approach proves highly instructive for readers interested in the unique characteristics of the EU as an international organisation.

She then conducts an in-depth analysis of the functioning of the EU's integrated border management policy to assess whether the existing responsibility framework adequately addresses potential fundamental rights violations in this context. She uncovers two principal sources of difficulty.

The first, which she describes as "normative incongruence", arises from the ambiguity surrounding the human rights obligations imposed on international organisations, including the EU, within the framework of their border management policies. Dr Joyce de Coninck highlights that the obligations imposed on the EU within the framework of its integrated border management policy lack sufficient substantive clarity. While EU institutions and bodies are generally required to respect the EU Charter of Fundamental Rights (art.51), the author compellingly argues that the concrete obligations derived from the Charter would benefit from greater specificity. This issue stands in contrast to the approach taken by Member States under the Common European Asylum System, which includes harmonisation measures that clarify obligations related to key rights enshrined in the Charter (see, inter alia, Regulation 2024/1348 establishing a common procedure for international protection in the Union; Directive 2024/1346 laying down standards for the reception of applicants for international protection (recast); and Regulation 2024/1347 of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted). These rights include, for instance, the right to human dignity (art.1), the right to liberty and security (art.6), and the right to an effective remedy (art.47), particularly in the context of managing migrants and asylum seekers.

Adopting a similar harmonisation strategy for EU bodies and institutions could significantly enhance their obligations within the integrated border management framework. The current lack of clarity around these obligations poses a substantial obstacle to holding the EU accountable, especially given the requirement to demonstrate a "sufficiently serious breach" of EU law to establish liability. How can a breach be deemed sufficiently serious or clear when the obligations themselves are ambiguous? In this regard, the author also appears to advocate for differentiating the standards applicable to international organisations from those applied to states. I struggle to be convinced by this argument. In my view, the ***235** requirements stemming from human rights are indivisible, particularly when it comes to absolute fundamental rights, such as the prohibition of inhuman and degrading treatment. It is hard to see how different standards could justifiably be applied to these various actors.

Additionally, the author notes that the scope of the Charter is not entirely transparent. Unlike the European Convention on Human Rights, the Charter does not impose a jurisdictional clause, but she identifies "unresolved questions" regarding its scope that demand clarification (p.157). This uncertainty further complicates efforts to ensure the EU's accountability in this area, leaving critical gaps in the legal framework that undermine effective enforcement.

The second difficulty identified by the author is referred to as "liability incongruence", which stems from the complexities of holding international organisations—and the EU in particular—accountable, especially when implementing policies executed in partnership with multiple actors, such as Member States or private entities. Building on a detailed analysis of the law of responsibility under both traditional international law and EU law, the author illustrates the complexity of implementing such a remedy, particularly in cases involving shared responsibility. This is especially relevant in the context of border management within the Union, which is shaped by the actions of a wide range of actors, both public and private.

The author further highlights that the case law of the Court of Justice sometimes lacks consistency, particularly concerning the conditions of causality and attribution, which would benefit from greater precision. These ambiguities not only complicate the process of establishing responsibility but also undermine the clarity and predictability required for effective legal remedies in such a multifaceted policy domain.

This analysis is not confined to abstract theorisation; it is firmly anchored in concrete examples. The author substantiates her theoretical insights with a series of case studies, encompassing return and readmission agreements with third countries, measures implemented at the EU's external borders, and instances of operational cooperation with third countries.

Dr Joyce de Coninck's work, as is now evident, represents a highly valuable addition to the existing literature. Through her case study on border management, the author makes significant contributions to several fields: the law of responsibility of international organisations in general, judicial protection within the EU, the substantive law of border management within the EU, and, more broadly, the protection of (asylum seekers') human rights in Europe.

This book also exposes a critical shortcoming in the EU's judicial system, which, as noted in the introduction, is meant to exemplify a Union founded on the rule of law. Years ago, I argued in an article that managing the arrival of refugees in Europe, while safeguarding fundamental rights and upholding solidarity, was a litmus test for the EU (C. Rizcallah, "Facing the Refugee Challenge in Europe: A Litmus Test for the European Union" (2019) 21 European Journal of Migration and Law 238). It is clear that progress in this domain has not lived up to expectations. The issue raised in the book under review compounds the ongoing challenges, illustrating that even the fundamental principles of the rule of law are now jeopardised in the context of EU's migration policies. Moreover, the author demonstrates that this problem extends beyond migration policy; it is structural in nature, potentially leaving victims of violations in other areas similarly deprived of effective remedies.

Yet, the triad of values—democracy, the rule of law, and human rights—defines, as the Court of Justice has declared, the "very identity" of the EU (Hungary v European Parliament and Council of the European Union (C-156/21) EU:C:2022:97 at [127]). How, then, can we reconcile this identity with a reality where victims of human rights violations tied to EU policies are left without a clear legal pathway to hold perpetrators accountable? This troubling gap calls into question the Union's fidelity to its foundational principles and its ability to uphold effective judicial protection—a cornerstone of its legal order. ***236**

Dr De Coninck goes beyond precisely and comprehensively identifying the issue at hand. From a forward-looking, *de lege ferenda* perspective, she advocates for a shift in the model of responsibility to ensure a holistic approach that accounts for the contributions of various actors to human rights harms. Her proposal is rooted in scholarship on "relationality" and calls for the development of a framework for shared responsibility under international law. In essence, she argues for moving away from focusing solely on the individual roles of actors and instead emphasising their interactions.

The interdependence and interactions among actors within the framework of integrated border management create significant challenges for identifying causal links and attributing responsibility. As the author points out, the individual actions of these actors may, in isolation, appear compliant with human rights obligations. However, when considered collectively, these actions can result in violations.

To address this, she develops a "rudimentary sketch" of what relational human rights responsibility could look like (p.270 and following), based on four key principles:

Individuals should be in a situation in which they no longer have to attribute specific unlawful conduct to each of the complicit actors, before different courts and according to different rules.

Human Rights obligations as they apply to the EU and International organisations should be specified.

Rules on causation and on the burden, standard and method of proof should be clearly defined and articulated.

An effect-based approach to ascertain which actors bear responsibility for human rights harms should be adopted.

While one can intellectually appreciate such a proposal, its implementation appears potentially more complex. The central question it raises lies in determining who would be competent to adjudicate such "relational responsibility"

and on what legal basis. As it stands, the CJEU is responsible for establishing the EU's liability, while national courts address the liability of Member States for violations of EU law. How can such fragmentation be avoided? Would this require a treaty change? As for the conditions governing the EU's liability, art.340(2) of the Treaty on the Functioning of the European Union states that "[t]he Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties." Would the author's proposed changes thus necessitate amending this provision? While the book is undoubtedly rich and thoroughly developed, one might regret that the author's proposal was not further elaborated or explored in practical terms. This, however, in no way diminishes the interest readers will undoubtedly find in this book. This rather inspires hope that Dr de Coninck will further advance her theory in upcoming publications.

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