BOOK REVIEW

Joyce De Coninck, *The EU's Human Rights Responsibility Gap, Deconstructing Human Rights Impunity of International Organisations*, Hart Publishing 2024, 280 pages

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In her book, *The EU's Human Rights Responsibility Gap, Deconstructing Human Rights Impunity of International Organisations*, based on her dissertation, Joyce De Coninck addresses a perennial question about how third country nationals (TCNs) who have been subjected to unlawful human rights conduct by the European Union (EU) can seek and obtain legal redress. In the current EU political and legal context — characterised by a migration management mode which aims to reduce the number of incoming TCNs through 'a strict application of the "in/out" dichotomy, which relies on methods of externalisation, informalisation, securitisation including militarisation, digitalisation, and agencification'[1] — De Coninck engages in an 'arduous endeavour', as she rightfully puts it.[2] Namely, she sets out to analyse the intersection between the responsibility rules applicable to the EU under EU law and international law, on the one hand, and the human rights regime under EU and international law, on the other.

Following this analysis, which spans multiple legal domains and also substantive areas of EU law, she tests the outcome of her theoretical legal framework on four practical cases in the area of integrated border management (IBM). More concretely, she tests the EU's normative commitment to the principle of *non-refoulement* in four scenarios corresponding to the 'four-tier access control model' of IBM.[3] The first scenario focuses on visa regulation under EU law, the second scrutinises the maritime operation Sophia in the Mediterranean, the third zooms in on Frontex conduct in the Aegean Sea in concert with the Greek Coastguard, and the fourth one delves into the informalisation of readmission agreements, focusing in particular on the EU-Turkey Statement.

What is unique about this book is its angle of scrutiny on the question of the human rights responsibility of the EU — which De Coninck defines as 'transversal', as opposed to unidimensional accounts of how to identify the most promising avenues for judicial redress in concrete cases of alleged human rights violations on behalf of the EU. While the latter approach does not question the existing human rights architecture of the EU, De Coninck reverses the questions posed. She is not interested in identifying the right adjudicative body and avenue *in order to* hold the EU responsible for human rights harms, but goes beyond this

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[1] Joyce De Coninck, *The EU's Human Rights Responsibility Gap, Deconstructing Human Rights Impunity of International Organisations* (Hart Publishing 2024) 30.

[2] ibid Foreword, v.

[3] ibid 25 and note 70: The 'four-tier access control model' of IBM 'encompass[es] measures in third countries (1); cooperation with neighbouring countries (2), control measures at the EU border (3) and measures within EU territory including measures concerning return (4)'.

first level of analysis. What she does can be defined as a meta-analysis of whether and to what extent the existing EU human rights regime in combination with the EU's responsibility framework allows TCNs to seek and obtain redress more broadly. Her book asks whether this is possible at all. The effort put into pursuing this complex objective is tremendous. The work is very well researched, with detailed and comprehensive references and a clear structure, offering flowing text which could easily be used for instructional purposes.

The book is divided into four parts, whereby the first part introduces the chosen methodology and sets the scene, creating a sense of urgency about why the offered knowledge is not only timely, but crucial to understanding and possibly remedying the identified shortcomings of the underlying EU's human rights and responsibility legal frameworks; the second part offers a thorough legal analysis, on the one hand, of the human rights obligations of the EU and of international organisations more broadly, and on the other, of the rules establishing responsibility for the EU and for international organisations more broadly; the third part applies the findings from part II to the four scenarios pertaining to different aspects of the IBM, as outlined above; and the fourth part offers a way forward with suggestions on how to overcome the identified shortcomings.

In part I, De Coninck identifies the sources of human rights norms which govern the conduct of the EU. From the perspective of international law, the EU is guided by customary international human rights law (human rights norms) and the Articles on the Responsibility of International Organizations (ARIO) (responsibility rules). From the perspective of EU law, it is the Charter of Fundamental Rights of the EU and the EU general principles which form the EU human rights architecture. The link between the two is the right to an effective remedy, which has the status of an international customary norm.[4] In terms of approach, the author engages, firstly, in a functional appraisal of the EU's human rights responsibility regime[5] and, secondly, in a transversal and applied appraisal which combines theory and practice in the four different concretised illustrations of EU IBM mentioned above.[6] Finally, she gives an account of the IBM context in which these appraisals are tested. The latter is one of 'transnational cooperative governance' where many actors' (states, international organisations and businesses) conduct is governed by different sets of human rights rules, which results in normative misalignment thus 'mak[ing] it attractive for different actors to collaborate, as increased and diversified forms of collaboration may in effect, minimise the risk of any one of these actors being held responsible under (international) human rights law for contributions to human rights harms'.[7] The transnational cooperative governance has led to the instrumentalization of technology which serves to severe the jurisdictional link required to trigger human rights protection of TCNs before reaching EU territory, creating 'jurisdictional black holes'.[8] Moreover, IBM is an area of shared competence between the EU and the Member States (MSs), making it difficult to concretise

[4] De Coninck (n 1) 3, citing Article 8, Universal Declaration of Human Rights; William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) 273.
[5] De Coninck (n 1) citing Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25(3) European Journal of International Law 645.
[6] De Coninck (n 1) 10.
[7] ibid 13.
[8] ibid 16.

ex-ante the competence division, which poses great difficulties for the attribution of unlawful human rights conduct to the EU, the MSs or both.

Substantively, the book is quite pessimistic, despite the author's genuine attempt to find a workable solution to the well-known difficulties to hold the EU responsible for human rights harms from the perspective of TCN's who try to reach the EU in search of refuge. In part II, and as illustrated in the four scenarios in part III, the book reveals serious legal design flaws, which the author refers to as 'normative and liability incongruences'. More concretely, she argues that there is normative incongruence as far as the content of the applicable human rights norms is concerned. They are not sufficiently concrete as to give rise to negative, positive, procedural and substantive obligations for the EU as an international organisation (as opposed to states). There is also incongruence with respect to liability, which manifests on two levels. On the first level, an individual faces an insurmountable number of obstacles in their attempt to hold the EU *independently* responsible for its contribution to unlawful human rights conduct. On the second level, the current responsibility rules are not designed in a way to make it feasible for the individual to hold the EU responsible *together with* state and non-state actors for human rights harms, thus foreclosing the possibility of *shared responsibility* for all implicated actors. In brief, under the current human rights responsibility framework of the EU, it is practically impossible for TCNs to successfully seek redress for suffered human rights harms on the part of the EU, either separately or together with MSs (or other actors). More regrettably, this is the case regardless of whether the harm constitutes an operational or a legislative act on behalf of the EU and, further still, regardless of whether there are explicit human rights safeguards incorporated in the relevant secondary acts governing the alleged conduct, as in the case of Frontex (scenario 3).[9]

In order to shake off any feeling of all-consuming disappointment, in the fourth and final part of the book, De Coninck puts forward a proposal for a relational human rights responsibility regime for the EU, inspired by the work of André Nollkaemper.[10] This regime denotes a departure from the traditional model of *independent responsibility* under international and EU law, thus better responding to the contemporary power dynamics characterised by EU transnational cooperative governance in the area of IBM. It also ought to concretise the human rights commitments of international organisations (and, more concretely, of the EU) into justiciable obligations. Drawing for inspiration on business and human rights law, on the one hand, and environmental law, on the other, the author suggests that concretising the *non-refoulement* commitment could take place through mechanisms such as 'due diligence, certification, impact assessments, and review mechanisms both independently and in relation to States', resulting in the development of 'common but differentiated obligations' for the EU specifically, as compared to states' obligations.[11] At various points, the author illustrates that different approaches to shared responsibility already exist in the different areas of EU law,[12] which, if applied to the adjudication of human rights harms, could yield more

[9] De Coninck (n 1) 229.
[10] André Nollkaemper, 'Shared responsibility for human rights violations: a relational account' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation – Transnational Law Enforcement and Migration Control* (Routledge 2017).
[11] De Coninck (n 1) 271.
[12] E.g. in the area of data protection, citing Case C-755/21 P *Marián Kočner v Europol* EU:C:2024:202, where the CJEU accepts that a system of joint and several liability applies, as compared to the cases CJEU (General

promising results for redress from an individual TCN perspective. The fact that this has not happened points to the deliberate choices made by the CJEU to eschew the EU from responsibility for contributions to unlawful human rights conduct, especially as regards TCNs in the area of IBM. This is confirmed by De Coninck's observation that:

> the very loopholes, inconsistencies, and legal lacuna which characterise the EU's human rights responsibility framework and that of [international organisations] more generally, form an excellent breeding ground for the design of a border management system that instrumentalises these very drawbacks to construct a regime that in its very architecture pursues an anti-human rights agenda in its effects.[13]

However, De Coninck cannot put up with such a conclusion, and she even attempts to assess the possibility of holding the CJEU, as a body of the EU, accountable for alleged human rights violations, thus incurring independent or shared responsibility for internationally wrongful acts. This is explicitly so in scenario 1 (discussing visa regulation)[14] and implied in scenario 4 (discussing the EU-Turkey Statement).[15] This is perhaps simply a desperate act of hope, as it seems a non-starter, because there is no higher appellate court which could establish that the CJEU has erred on points of law and fact.

In the end, despite the concerningly repetitive analysis in the four different scenarios,[16] all of which resulting in the impossibility to establish responsibility for unlawful human rights conduct by the EU, the author does not espouse the 'end of human rights' paradigm,[17] despite the serious legal flaws revealed in the EU legal architecture of human rights and responsibility. Instead of engaging with critical legal theory and TWAIL approaches, De Coninck aims to go beyond critique and to offer a glimpse of optimism by following up on the book's findings. Consequently, she is currently working on substantiating and delimiting the scope of the relational human rights responsibility framework of which she is a proponent.

Court) T-600/21 *WS and Others v Frontex* EU:T:2023:492 and Order in Case T-136/22 *Hamoudi v Frontex* EU:T:2023:821.

[13] De Coninck (n 1) 265.

[14] ibid 183ff.

[15] ibid 249.

[16] As De Coninck notes herself, ibid 245.

[17] ibid Foreword vi.