Relationalizing the EU's Fundamental Rights Responsibility

VB verfassungsblog.de/relationalizing-responsibility/

Joyce De Coninck

This article belongs to the debate » Extraterritorial State Obligations in Migration Contexts
31 July 2024

Human rights law traditionally governs a three-part relationship which connects the individual, the state, and its territory. It endows the individual (regardless of status) with a myriad of enforceable rights and imposes on the State several enforceable obligations to respect (negative obligation), protect (positive obligation) and fulfil (positive obligation) these rights within its territory.

The design of the EU's Integrated Border Management (IBM) governance model eschews the applicability and enforceability of international and European human (fundamental) rights law by significantly reconfiguring the relationship between each of these three prongs. Concretely, ongoing IBM transformations challenge and evade conventional human rights law by enacting its policies beyond the territory of the State, through cooperation with non-state actors and by sublimating individual claims. This contribution maps how these three traditional triggers for the applicability of human rights law are increasingly evaded in EU IBM policies, the responses to these evasion techniques and how a relational turn in the determination of human rights responsibility may be inevitable.

Externalization Techniques in IBM

First, externalization techniques (e.g., using drone technology to monitor high seas, cooperation arrangements with third countries, criminalisation of search and rescue missions), have allowed the EU and its Member States to shift the locus of border management outside of EU territories and thus execute border management beyond the territorial grasp of human rights law (see also here). An example of externalization is the evolution in the EU's border management surveillance methods: starting with naval assets for Mediterranean monitoring, progressing to airplane surveillance, then to unmanned drone surveillance, and currently to satellite surveillance. Each of these shifts has allowed surveillance to occur closer to States of departure (e.g., satellite surveillance occurring above the airspace of a third state), which prevents individuals from gaining ground in reaching the EU's borders. By increasing surveillance near the states of departure and reducing physical interactions with third-country nationals through unmanned surveillance infrastructure, the EU and its Member States minimize the potential for the extraterritorial application of human

rights law. Such techniques ensure that individuals are kept outside both the territorial and extraterritorial reach of EU Member States and the EU, thereby preventing any human rights obligations from arising for these actors.

Non-State Actors in IBM

Secondly, the cooperation between EU Member States, EU agencies and third parties, has decentred the primary role of States in implementing border management, by transferring operational and executive powers to non-state actors in line with their shared competence in EUIBM (Article 77(1)(c) TFEU). While the CJEU and the ECtHR continue to underscore the primary role of States in the implementation of border management policy – including their primary responsibility in protecting human rights – joint border management operations are increasingly executed through hybrid and mutable forms of cooperation between the EU Member States, EU entities, and third parties (e.g., third states, transnational corporations). This is problematic, because for human rights responsibility to arise, insight is needed into the chain of command of a given operation. In these hybrid and fluctuating modes of cooperation, where the chain of command is often kept confidential for public security reasons and may change during operations, the distribution of power and decision-making authority becomes obfuscated. In turn, this problematises determinations of which entity is effectively responsible for a line of conduct giving rise to human rights harms – a *sine qua non* to establish human rights responsibility (see here).

Non-Individualization in IBM

Finally, contemporary IBM techniques beyond the EU's territory are increasingly of a non-individualized nature, frustrating rights-based claims. When third country nationals arrive on EU Member State territories, Member State authorities are obligated – by virtue of EU and international law – to individually process international protection applications. Individualized reasoning must be provided in refusing an international protection application and in issuing return orders, which are subject to (suspensive) appeals. When effectuating border management measures *outside* of Member State territories, this degree of individualization is increasingly absent. In fact, in using technologies such as drone or satellite-based surveillance, EU (Member State) authorities, may be able to locate and effectuate push-/pullbacks without engaging in any form of individualized interaction at all (see here). The indiscriminate and de-individualized nature of these border management measures have as an immediate result that proving individualized harm – as commonly required to trigger individual rights – becomes notoriously more difficult. This was recently confirmed in *Hamoudi* before the EU's General Court, which held that the evidentiary standard to prove the individualized harm had not been met. According to the Court, the Applicant was not sufficiently distinguishable during an alleged night-time, covert pushback operation.

In short, IBM transformations result in externalized modes of border management facilitated through modern technologies and hybrid modes of public and private cooperation. These challenge the applicability and enforceability of human rights law, by decoupling potential harms from the three-pronged connection typically governed by human rights law.

Evolving Human Rights Law and Persistent Legal Design Flaws

The ongoing transformations perpetuate the multifarious human rights violations that occur at the EU's external borders. Increasingly louder calls for responsibility continue to go largely unanswered. And while evolutive interpretations of human rights law have been leveraged to remedy violative IBM conduct, legal design flaws continue to problematize access to remedies for human rights harms stemming from IBM.

The CFR's Extra-Territorial Reach?

Firstly, the EU Charter of Fundamental Rights, unlike many international human rights treaties, has no territorial limitation clause. Instead, Article 51 holds that the Charter applies to EU institutions, bodies, offices, and agencies, as well as Member States as soon as they are implementing EU law. While the precise meaning of this provision is debated (see here), a textual reading suggests that the Charter may be extraterritorially applicable, potentially providing 'higher' protection than its immediate counterpart, the ECHR. However, Article 51 is immediately caveated by Articles 52(3) and Article 53, which hold that while higher protection is permitted under the Charter, this cannot impair the autonomy, primacy, effectiveness, and unity of EU law (see here). It is thus uncertain whether the absence of territorial restraints truly means that the Charter can effectively be triggered extraterritorially both for the EU and its Member States, or whether this would upset the effectiveness of EU law, by placing an undue burden on the actors involved in EUIBM to respect fundamental rights extraterritorially in a manner that goes beyond their obligations under the ECHR.

Non-State Actors: Cooperative Conduct, Separate Responsibility Regimes

Secondly, developments in human rights law have long acknowledged the role and significant impact non-state actors may have on the continued protection of human rights (see here). This has given rise to the emergence of a business and human rights framework, and to a slightly lesser degree, the emergence of a framework governing international organisations and human rights. Within the EU's legal framework specifically, the EU as a *sui generis* international organization is bound by the fundamental rights provisions embedded in the Charter, and similarly, private corporations are increasingly bound by fundamental rights provisions (see here). Despite the emergence, development, and co-existence of these three frameworks to establish human rights responsibility (of Member States, the EU, and private corporations), notable legal design flaws continue to obstruct access to an effective remedy for individuals experiencing harm from border management cooperation between these three actors.

The most notable legal design flaw flows from the fact that although these actors may jointly contribute to single border management measures giving rise to a single human rights harm, their responsibility will be tested against separate sets of rules governing human rights responsibility, and this will be done before different courts of law. It is thus entirely plausible that cooperation between EU Member States, EU entities, and private corporations may give rise to a single human rights harm, but that none of the complicit actors will be held responsible according to their respective rules of responsibility before their respective courts. In turn, this means that an individual may be subjected to a human rights harm that cannot be attributed to any of the actors, and thus does not generate any legal responsibility, giving rise to a significant and worrisome responsibility gap (see for a similar finding concerning Europol here at para 77-78). Even if this obstacle of attribution could be overcome, human rights responsibility presupposes that there is clarity about the human rights obligations that are binding upon the complicit non-state actors. It is unlikely that the positive, negative, procedural, and substantive human rights obligations that stem from human rights commitments, apply to Member States, the EU, and private corporations in an identical fashion (see here).

The Individual and Evidentiary Burdens

Finally, the erasure of the individual in IBM measures could be at least partially remedied by relaxing the requirement to show individual and direct harm, particularly where public authorities and/or private actors retain (almost) exclusive access to evidence capable of corroborating or refuting human rights complaints. While this relaxing of the evidentiary burden has partially occurred before the ECtHR, it has not yet been dealt with by the EU's courts in questions concerning the EU's responsibility.

Two Ways of Rethinking Responsibility

Because these legal solutions fall short of truly aligning the EU's IBM with effective human rights protection, a redesign of the EU's human rights regime that is premised upon the following two observations seems inevitable.

Relationalizing Responsibility for Joint Conduct of States, IOs and Private Corporations

Firstly, States, (*sui generis*) international organizations, and private corporations are fundamentally different by nature. It appears untenable to transplant concretized positive, negative, procedural, and substantive human rights obligations as they apply to States to non-state actors. A common objection to this argument posits that a differential set of human rights obligations would give rise to less demanding human rights standards for non-state actors. However, this is not necessarily the case, as different public and private actors need not and cannot all contribute to the fulfilment of human rights *commitments* in an identical manner. Moreover, currently non-state actors may very well escape any form of responsibility due to being functionally distinct from States, even though the powers and means exercised

by non-state actors allows considerable influence to be exerted over individual human rights. It may very well be the case that such powers absolve complicit Member States from any human rights responsibility. And precisely this risk is what prompts the second observation.

Towards a Relational Approach to Responsibility

One shortcoming of the contemporary human rights regime stems from the perception that human rights duty-bearers are static entities, capable of being captured and governed by unchanging and constitutional-like rules. Seen through this lens, the human rights regime is not attuned to assign responsibility for actions resulting from hybrid modes of cooperative governance as evinced by the IBM regime (for similar issues beyond EUIBM and Europol, see Sarmiento). IBM involves intractable modes of hybrid governance with multiple public and private actors collaborating beyond EU territory and impacting individuals collectively. These actors interact to different degrees in different border management operations. Their interactions influence the degree of power exerted within each border management measure on a case-by-case basis. This form of hybrid governance sits uneasy with the relative rigidity that characterises the contemporary human rights regime. An alternative way of construing responsibility, mindful of these changeable modes of hybrid governance, could be to construe human rights responsibility from a relational perspective.

Relationality in this sense requires foregrounding the relationship between the complicit actors, and their contributions, rather than trying to discern separate and individualized conduct. A relational approach finds support in international law through (soft) rules on shared responsibility (see here and here), as well as in relational theories in international relations scholarship (see here). Similarly, the CJEU has acknowledged the need to remedy issues of attribution stemming from convoluted cooperation between EU agencies and Member States in the interest of ensuring access to an effective remedy (see here). For human rights to remain effective, a relational shift appears inevitable.

SUGGESTED CITATION De Coninck, Joyce: *Relationalizing the EU's Fundamental Rights Responsibility, VerfBlog,* 2024/7/31, https://verfassungsblog.de/relationalizing-responsibility/, DOI: 10.59704/1fa508dd65167252.

Explore posts related to this:
