Human security and individuals' free movement under Union's law: an updated overview in a global multi-faceted crisis∗

Alfredo Rizzo INAPP

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Human security has become one central factor of current international politics and relations, following 1994 United Nations Development Program (UNDP) Report on Human Development, when a new understanding of security focused on "individuals' security" as opposed to "national security" has been clearly envisaged.

It should also be added that the principle of *human dignity* currently supports as such the "security" of all human beings. Indeed, under Human rights Law (HRL) and International Humanitarian Law (IHL), human dignity as well as all the subsequent basic fundamental human rights as currently listed, for instance, in the first Chapter of the Charter of fundamental Rights of the Union, pertain to the human being as such, regardless of his/her nationality, in conformity with the modern approach to this specific category of rights as established ever since the UN Declaration on human rights and in most of Western countries' constitutions established in the post WW II.

This is made even clearer in the Preamble to 1966 UN Covenant on civil and political rights, stating what follows: "*Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (…) Recognizing that these rights derive from the inherent dignity of the human person…".* On more definite aspects where human dignity might assume specific relevance, art. 10 of the same Covenant, on conditions for any deprivation of individual liberty, reminds that "*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".*

As far as European Union (EU) is concerned, it is wise to mention, above all, articles 2 and 3 Treaty on the European Union (TEU), one aimed at fixing the "boundaries" of Union's action by establishing values on which same Union is based, the other, aimed at indicating the main Union's objectives. In the first provision, "human dignity" is considered primarily, as it is repeated in the same Charter of fundamental rights of the European Union. This is one first clear example on how "values" and principles aimed at human protection in broad terms stand as true restraint for public policies and are source of inspiration for the public authorities and institutional action at national, international and supranational levels.

As a first field of analysis, it is worth examining how "human security" is dealt under the "intergovernmental" competences of the Union. As a second field of analysis, beside more traditional areas of EU law such as environmental policy and the free movement of persons inside the Union, other fields, such as the Area of Freedom Security and Justice, prove how human security, though involved less "explicitly", is however significantly considered as a crucial overall objective. This will help depicting the *status quo* of "human security" under EU law, envisaging future progress in order to give further relevance to this aim also for future EU evolution.

I. Common Foreign and Security Policy and Common security and defense policy **CFSP and CSDP** rest at the core of intergovernmental cooperation at the EU level, by comparison with other policies listed in the Treaty on the functioning of the European Union (TFEU).

Human security, in those areas, has been considered ever since the Maastricht reforms and it deals basically with the *European security strategy* (ESS) established some years after the same Maastricht reforms by the then High representative for CFSP (now renamed "for foreign affairs and security policy") Javier Solana.

Broad discussion exists on the legal effects of the Union's acts in this area of law. While, as a general rule, "international" security is expressly mentioned under art. 21 d) TEU, as a reminder of what already exists under the same United Nations Charter, the means utilized by the same Union are not comparable, in strict legal terms, to those utilized for the achievement of aims pursued under the TFEU. Indeed, while common actions or positions (which are the categories of acts adopted in the CFSP and CSDP realm) are enabled as such to perform mandatory effects on and between the EU Member States, as far as the addressees of such acts are concerned (e.g., third countries to which a specific CFSP or CSDP action or position is addressed in the context of, e.g., reestablishment of

peace and security), the mandatory character of such legal sources is more debated. For some, such a mandatory character could stem from some general principles applicable in the realm of international relations, such as the *estoppel* mechanism. Following same Solana approach, Union acts or agreements in the field of international security should be accepted as international legal sources aimed at defining more stringent obligations also for non-EU States to which such EU law sources might be addressed, establishing general rules that, when dealing in particular with the protection of human rights, including the protection of life and safety of individuals, might achieve a mandatory character apt to impose *erga omnes* obligations or *ius cogens* duties.

In fact, the relevance of these obligations, with a specific reference to the protection of human rights in warfare or quasi-warfare contexts, has been already recognized in mentioned Solana document where it reminds that in modern international law those standards have often taken precedence over States' "sovereignty" as a "classic" standard for contemporary international relations, generally overriding individuals' interests for the sake of global peace. This implies a peculiar relevance that must be attributed to human "security" also in missions abroad, including those that are technically placed outside strict "warfare" scenarios, such as peacekeeping operations. As a consequence, at least in broad terms, the protection of basic rights of populations and of individuals should always – at least theoretically – prevail on military aims or tactics. In this perspective, the military mission should intervene in most cases in support of local authorities, including the judiciaries, with the view of restoring an institutional framework where misconducts or crimes against both soldiers and civilians be adequately verified and prosecuted in accordance with the Rule of law and the relevant procedural standards and rights. One clear example of this approach is given by the EULEX mission in Kosovo, in support and training of the local authorities by means of magistrates and police forces coming from EU Member States with the view of verifying and prosecuting crimes connected with the crisis under the 1999 Kosovo's secession from Serbia. Currently, as from 2018 related investigative and judicial tasks have been transferred to local authorities.

II. Moving to Union's competences out of the intergovernmental sphere, under the following article 3 TEU, human security extends to, e.g.,

1) **environmental policy**, in accordance with a clear reference to sustainable development issues. Indeed, sustainable development, as a basic standard (entailing also non-environmental policy objectives and including socio-economic issues as well as issues of health policy at a global

dimension) for the states, is enshrined under principles 3 and 4 Rio Declaration adopted at the 3-14 June 1992 United Nations' Conference on Environment and Development and is also mentioned in articles 3 para. 5 and 21 para. 2 d) TEU, in terms of relations with the rest of the world and specifically the European Union's external action, and in the Preamble to the Treaties. At p. 5 of the Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 1 February 1993 concerning a Community program of policy and action in favour of the environment and sustainable development it has been reminded that : "*In the report of the World Commission for the Environment and Development (Brundtland), sustainable development is defined as a development that meets current needs without compromising for future generations the ability to meet your needs".* However, Union law goes even beyond such standards at least when it comes considering the existence of some basic principles such as the precautionary principle and the "polluter pays" principle, standing at the core of same Union action in this field.

2) In the **internal market sector**, one clear example on how human security might prevail over some basic freedoms emerges under some rules that deal with **free movement of workers.** In particular, some restrictions to such fundamental freedom under, originally, the Treaty of the European Community, dealt with public policy aims that could be established under same Union law. Current provision under art. 45 para. 3 TFEU restrictions of the relevant freedom are allowed, even though in the Court of Justice of the EU's view such limitations should be read "restrictively", in order that the relevant freedom is not impaired on the substance. While this approach aims at granting the national security by contrast with the relevant freedom recognized by the treaties, the **social security** policy of the Union aims at awarding all workers moving around Union's countries with the possibility of keeping their social assistance and the relevant periods of contribution, in consideration also of their previous jobs provided in the home country or other EU countries. Some of the relevant prerogatives derived from the system of mutual recognition of social security rights achieved by individuals across Union's Member States are extendable to third country nationals legally residing in the Union.

3) Recently, human security stands at the core of Union's policy on **cyber security.** However, this aim is connected to what is listed under art. 114 TFEU, on the approximation of laws (see e.g., recent EU Regulation 2019/881 on ENISA, the European Union Agency for Cybersecurity and on information and communications technology cybersecurity certification). One should not forget strict interlinks between issues of control on Dual-use items (including those used for cyber-

surveillance purposes), human rights protection, international humanitarian law (IHL) and the fight against terrorism as also recently reiterated in the Commission recommendations on internal compliance programs for controls of research involving dual-use items under Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.

4) **Health policy** objectives have been quoted as well. As we all know, this policy, currently regulated under art. 168 TFEU, has made Union's action of specific significance due to the level of challenges posed by the pandemic. An explicit aim to give prevalence to human safety, also in the field of the international trade on pharmaceuticals, has been clearly envisaged in the WTO Ministerial Conference of 14 November 2001, held in Doha (so called, the "Doha declaration"), which recognized "*the right of WTO Members to use, to the full, the provisions in the TRIPS agreement which provide flexibility (...) to protect public health and, in particular to promote access to medicines for all*" . The contents of the Doha declaration have been reported in the first "recital" of regulation 816/2003, establishing a "compulsory license" which the holder of the patent on the marketed product would enjoy for protection of public health purposes expressly identified in the same directive, consistent with those indicated by the Doha declaration.

5) Human security stands as an overall criterion of most of Union's policies in the **Area of Freedom Security and Justice**, though expressed without the adjective "human". This can be reasonable if we refer to the policies on borders controls and cooperation in the field of both civil and criminal justice. In those areas, in fact, security might be at a first sight meant as a main purpose at the (partial) detriment of the "human" significance of same security. At the same time, in the justice sector, "human security" may clearly be referred to, on the one hand, the protection of crimes' victims and, on the other, the main procedural rights (see on this also provisions under both the European Convention on Human Rights and those listed in the Chapter VI of the Charter on fundamental rights of the EU) of anyone prosecuted or convicted for a crime across the Union (in the context of, e.g., the implementation of the European Arrest Warrant, EAW).

6) In the area of **asylum policy** and beyond same clear indications from current legislative framework, one should consider the "security" of those fleeing from third countries due to reasons connected to the protection of their fundamental rights, including some basic freedoms (we might refer to above category of fundamental human rights under the lens of the protection of the human dignity). This right has been acknowledged in the same Charter of fundamental rights of the

European Union under articles 18 and 19 and has been detailed in subsequent legislation. Both the European Court of Human rights and the same Court of Justice of the European Union in this field have implemented international standards under the Geneva Convention and N.Y. Protocol, establishing the right to claim for asylum under a *par ricochet* reading of the prohibition of torture and other inhuman or degrading treatments under art. 3 ECHR, corresponding to art. 4 Charter of fundamental rights of the Union. This is not against (in terms of a too extensive reading) with the Dublin system in the Union, which in principle doesn't deal specifically with substantive aspects of refugees' protection, being the legislative framework for the coordination of asylum applications between Union's member states.

It should also be added that the ECtHR, under art. 3 ECHR and article 4 of Protocol n. 4 ECHR, has associated the legal effects of *refoulement* of international protection seekers perpetrated on the high seas to the effects of *refoulement* of such individuals from the territory of one ECHR's Member State, to the extent that same *refoulement* occurs from one vessel flying the flag of one Member State of the ECHR, therefore equating that vessel to the territory of one of those states to which ECHR applies under its article 1. Thus, *non-refoulement* applies whenever international protection seekers are under the authority of one ECHR's member State, even if the latter's agents operate abroad or on the high seas. Even more amply and substantially, if *refoulement* entails the risk for international protection seekers of being subjected to treatments prohibited by mandatory rules of international law (i.e., article 40 UN Draft Articles on the Responsibility of the State, so called ius cogens rules including the prevention of torture or of enslavement), such practice is subjected to a general ban, even if the persons concerned might represent a "danger" for the security of the receiving State.

Coming to EU law, a specific provision of Dublin III Regulation (art. 3 n. 2) explicitly bans any refoulement of international protection seekers from one member State to another if in this second State proven systemic deficiencies in the procedures for examining asylum applications exist, such as to expose the applicants to the risk of inhuman or degrading treatment prohibited by art. 4 of the Charter. In essence, the presumption under which all the Member States of the Union would respect certain standards of protection and therefore would be on an equal footing as regards the possibility of being qualified as competent states under the Dublin system is no longer absolute (iuris et de iure) but has become debatable (iuris tantum).

Making a long story short, *non-refoulment* is not based on purely theoretical approach. Indeed, on the one hand, such a principle applies in cases where the asylum seeker or the international protection seekers is/are fleeing from a State that is not part to the Geneva Convention and where relevant fundamental human rights obligations are not fully respected; on the other, it is also clear that same principle applies in cases where the individuals involved might be rejected to any other State, including those members to the European Union, where basic human rights (including rights connected with a migratory status, such as same right to ask for international protection, together with the right to life and protection from inhuman or degrading treatments) are *in concreto* not respected, although that same State is part to the Geneva Convention or even whether other constitutional standards coherent to that principle (*non-refoulment*) are formally in force into that State.

7) In this context, art. 80 TFEU on the **solidarity principle** in the fields of border checks, asylum and immigration inspires the decisions from the Union's institutions in order that the burden for the management of asylum applications is shared between EU Member States with the view that the right of access of international protection seekers to the Union's borders be fully respected. In a judgment of 2018 this "burden sharing" approach has been confirmed against the position of some Union's members aimed at neglecting the mandatory character of such principle and connected Commission's decisions distributing quotas of international protection seekers among EU Member States.

8) All principles and mechanisms above should now be confronted also to the practice of the international agreements ("**statements**") aimed at putting on a third "transit" State (non-EU) the main liability for the management of international protection seekers coming from other non-EU countries. The situation with Turkey seems more "tricky", due to same Turkey participation in the Council of Europe. In fact, one should not forget how this State has applied, some years ago, for art. 15 ECHR to be implemented, in order that checks on full respect by Turkish authorities and judiciaries of some of the freedoms and rights under same Rome Convention be "suspended", due to a state of emergency proclaimed by same Turkish government. Such emergency still continues, according to recent EU Commission's and international reports. Needless to say, such problematic issues are even more apparent with regard to Libya and practical conditions of third country nationals in transit in that State and wishing to access EU borders. This is obviously particularly meaningful for a "statement" between the Italian government and Libya, mainly if one comes

considering, on the one hand, international advises from, e.g., UN High Commissioner for Refugees (see also several statements on the situation in Libya and same Council of Europe recommendations), and, on the other, art. 10 para. 3 of the Italian Constitution on the protection of asylum seekers.

9) As a final "overview" we should refer to recent implementation of the legal regime concerning temporary protection of those fleeing from Ukraine. A decision of March 2022 applies art. 5 of an EU Directive on the displaced of 2001, aimed at allowing institutions to implement a mechanism of acceptance, in any of the EU member State, of people leaving their home country in cases of sudden humanitarian crisis. This happened basically in the context of the Kosovo crisis of 1999 and is again applicable in the current warfare context, with important implications such as the duty for the receiving EU country to provide for socio-labor inclusion of same individuals, also entailing the enactment of a mechanism for mutual recognition of professional qualifications of same third country nationals, with specific reference to those fleeing from Ukraine.

III. Few concluding remarks. "Human security", as an overall objective, is spread, as we have tried to show above, throughout various areas of Union law and policies. In a broader perspective, however, it seems still uncertain whether this objective can prevail over other interests, in particular those that mainly concern the State as a whole, as a true international actor, at least in areas such as border controls and migratory policies. However, this conclusion must be confronted to recent developments in both legislation and jurisprudence, at the international (ECHR), supranational (EU) and national levels. In particular, the role of national and supranational judiciaries appears to be particularly significant in balancing different perspectives and in applying human rights standards as true constraints for national public authorities in each EU Member State.

Alfredo Rizzo

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