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Human-security and its Multi-faceted Meaning under European Union Law. An Attempt for an Intersectoral Legal Approach

Alfredo Rizzo[*]

Abstract: In the post-Maastricht and post-9/11 scenario, the High representative for foreign affairs and security policy of the European Union (EU), Javier Solana, provided an attempt for a first conceptualisation on how the aim of 'human-security' could be introduced in the EU institutional framework, for the achievement of the main security purposes made urgent by the new challenges arisen in the international arena. Given the main peculiarities of the EU institutional and legal system, the paper further submits other areas of EU law where the same aim – human-security – might gain further relevance, though considering the different stages of development, beside the different kinds of EU competences, in each of same suggested areas.

Keywords: Human-security, European Union Law, Intergovernmental competences of the EU, EU policies

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Introduction

Human security became one central factor of current international politics and relations, following 1994 United Nations Development Program (UNDP) Report on Human Development[1], when a new understanding of security focused on 'individuals' security' as opposed to 'national security' has been clearly envisaged (Oberleitner 2003; Estrada-Tank 2013; Sen 2014, 26)[2].

It is also wise to remind how the UN General Assembly had stressed the 'complementary' character of the international community's competence, in support of the primary competence of national governments so as they can cope at best with new global challenges whose negative feedbacks are felt mainly by the individuals [3].

The few preliminary considerations above help to define single persons as true addressees of protection under relevant international law rules. This reveals the somehow unavoidable connections between human security aims and human rights promotion and protection, despite the institutional distinctions still existing between the two areas of policy and law (e.g., human rights are generally connected more directly to questions of judicial enforcement, Benedek 2022).

Recently, conclusion has been reached that the concept in question is applicable, in fact or potentially, to several areas of regulation, mainly if it comes to considering recent challenges the international community has been called upon to face in sectors such as the protection of human health (Rizzo 2021; Newman 2022). Following a cross-sectoral approach, it has been suggested that human security can help reshape the scope of international

1 UNDP Human Development Report, http://www.hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf.

2 UN Commission on Human Security, as established in June 2001 and co-chaired by former UN High Commissioner for Refugees, Sadako Ogata, and by Amartya Sen: final report, 'Human Security Now', presented to UN Secretary-General Kofi Annan on May 1, 2003.

3 UN General Assembly (UNGA) Res. 66/290 ' Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome' of 10 September 2012, in part. under its third paragraph '(…) human security is an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people. Based on this, a common understanding on the notion of human security includes the following: The right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential(…) (g) Governments retain the primary role and responsibility for ensuring the survival, livelihood and dignity of their citizens. The role of the international community is to complement and provide the necessary support to Governments, upon their request, so as to strengthen their capacity to respond to current and emerging threats. Human security requires greater collaboration and partnership among Governments, international and regional organizations and civil society (…)'.

law itself, so that it does not lose at least some of its fundamentals, particularly developed in recent decades under the same auspices of the United Nations.

Among other basic elements, mention may be made of the promotion and protection of human rights, especially of the most vulnerable ones, as well as the promotion of political and economic cooperation between international actors for the sake of peaceful international relations (Oberleitner 2022, 11 ff., De Sena e Starita 2023, 243-244). In this context, the principle of subsidiarity (as a basic standard of international relations as acknowledged by same UNGA above) can enter the picture with its bi-directional character (top-down and bottom-up), in order that individuals be adequately protected to the detriment, whenever required, of the States' sovereignty, in terms of a more developed approach to questions of international law (Carozza 2003, Follesdal 2011).

Always for an introductory overview, it might be added that the principle of *human dignity* 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 European Union (CFREU), 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 Europe 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, recent literature has been attracted by some institutional initiatives, promoted in particular by the High representative for Common Foreign and Security Policy (now renamed 'for foreign affairs and security policy'). While this is the specific objective of

the following chapter, it is wise to immediately mention here articles 2 and 3 Treaty of the European Union (TEU), one aimed at fixing the 'boundaries' of Union's action by establishing values on which same Union is based, and 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 (CFREU; Rizzo and di Majo 2014; Alpa and De Simone 2017). This is one first clear example on how 'values' and principles aimed at human protection in broad terms stand as true constraints for public authorities and are source of inspiration for the institutional action at both national and supranational levels.

Given above preliminary observations, it is worth examining, as a first field for legal-institutional analysis, how 'human security' is dealt under the 'intergovernmental' competences of the Union.

As a second field of analysis, when it comes dealing with EU's 'supranational' character (i.e., as an organization of States nonetheless enjoying peculiar features, including the significant role played by the European Parliament for the law-making process in several areas) 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 (AFSJ, emphasis added), prove how human security, though involved less 'explicitly', is however significantly considered as a crucial objective. Hopefully, this might help depicting the *status quo* of 'human security' under EU law, envisaging future progress in order to give further relevance to this aim also in the context of EU policies further evolution.

1. EU 'intergovernmental' Policies and Human Security

Common foreign and security policy (CFSP) and Common security and defense policy (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). This character is particularly proved by the institutional proceedings for the adoption of decisions (and related acts) in the relevant areas: indeed, unanimity rests as the general procedural rule in the Council of the EU, safe where differently stated (see art. 31 TEU after Lisbon reforms).

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 under the then High representative for CFSP Javier Solana's auspices[4]. Broad discussion

4 EU Council doc. 15895/03 of 8 December 2003, A Secure Europe in a Better World. European

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 c) 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 acts adopted in the CFSP and CSDP realm (see under arts. 28 and 29 TEU) perform as such 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[5], preventing the third countries involved from acting in contrast with an EU act in those fields (Brown 1996; Bartoloni 2014, 241).

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, to some extent similar to that of international law sources apt to impose *erga omnes* obligations (Monaco and Curti Gialdono 2009, 113-123; Picone 2008).

The significance 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 is recalled how, 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 that a peculiar relevance should be attributed to human security in missions abroad as well, including those that are technically

Security Strategy. Later, see A Human Security Doctrine for Europe, The Barcelona Report of the Study Group on Europe's Security Capabilities Presented to Javier Solana, 15 Sept. 2004.

5 In the International Court of Justice words (Judgment of 12 Oct. 1982, Delimitation of the Maritime Boundary in the Gulf of Maine Area, ICJ Reports 1984, p. 246): '(…) the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity', but, differently from acquiescence, 'estoppel is linked to the idea of preclusion' (p. 305).

placed outside strict 'warfare' scenarios, such as peacekeeping operations (Ronzitti 2014, 164).

In broad terms, the protection of basic rights of populations and of individuals should always – at least theoretically – prevail on military aims or tactics, though considering the formal prevalence of international humanitarian law rules (law of war) on human rights standards, at least following an *ius in bello* approach. On this, it might also be wise to recall that a convergence between the two branches of law (IHL and HRL) emerges anytime basic rights such as that to life and to be protected against inhuman or degrading treatments come into play in warfare contexts. A confirmation of this comes from some European court of human rights (ECtHR) case-law [6], in the implementation of the European Convention on Human Rights and fundamental freedoms (ECHR) (Milanovic 2012). Indeed, this Court has established that nothing forbids an extraterritorial application of same ECHR (then, beyond art. 1 standard), at least in warfare scenarios where a breach of human rights obligations (e.g., prohibition of arbitrary detention, art. 5 ECHR) had been perpetrated by troops of one of the ECHR Member States in missions abroad (Rizzo 2016, 228 and 230 ff.).

In the light of the many challenges and legal implications arising in abovementioned contexts, the Solana approach has particularly underlined how 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. This approach is exemplified, beyond the many criticisms around that case study, by the EULEX mission in Kosovo[7], 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 on local authorities (Zupančič and Pejič 2018).

Further discussion on Human security in the Union has been relaunched by the 2016 report on Global Strategy submitted by the then EU High representative for foreign affairs and security policy, Ms. Mogherini [8]. In

6 ECtHR of July 7th 2011 Al Skeini v. Un. Kingdom, Appl. 552721/07 and Al Jedda v. UK, Appl. 27021/08.

7 Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, OJ L 42, 16.2.2008, p. 92.

8 A Global Strategy for EU's Foreign and security policy (EU Global Strategy), https://www.eeas.europa.eu/eeas/global-strategy-european-unions-foreign-and-security-policy_en .

this perspective, and in accordance with related competences of the Union (meant as an organization enjoying intergovernmental and, as we will see, supranational characters), underlying tensions have been duly evidenced (Rangelov 2022).

At EU level, human security might first of all lack effectiveness due to institutional and procedural differences between intergovernmental (CSFP and CSDP) and supranational policies and competences, still persisting after Lisbon reforms. A recent trend proves a progressive alignment between, e.g., external policies and aims of judicial and police cooperation: indeed, same Mogherini's document focused mainly on security issues with the view of tackling at best current global threats[9] (Gatti 2018; Selchow 2018; Rizzo 2022b).

At the same time, the undeniable need that some of the EU policies and the effectiveness of related decisions be strengthened [10] might prove being inconsistent, and raise consequent issues, with the perspective that same Union's legal/territorial scope be enlarged to third countries where some of the EU fundamentals, such as the Rule of law and human rights standards, aren't respected in full (see arts. 2 and 49 TEU) (Pech and Kochenov 2021; Carta 2022).

Keeping in mind the above discrepancies, human security might anyway strengthen a path aimed at reducing the divide between these different kinds of EU policies and competencies, thus improving coherence among them with the view that the Union develops as an entity fully based on democratic values concretely applicable also to its external policies.

9 Sanctions (countermeasures) of the Union against non-EU States and nationals is an area of EU law that has particularly developed after international reaction to the 9/11 attacks (see C-402/05 P and C-415/05, Yassin Abdullah Kadi, ECLI:EU:C:2008:461). Such measures are in most cases based on CFSP decisions and on a subsequent decision based on a specific provision of the TFEU (art. 215). Once adopted under art. 215 TFEU, same EU sanctions are enforced by each EU member State by means of procedural law tools, including those with a criminal procedural law character: e.g., European Commission, COM (2022) 24, Proposal of 25 May 2022 for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU, and Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) TFEU.

10Such as those concerning cooperation in the Area of Freedom **S**ecurity and Justice, where fundamental human rights achieve peculiar significance, see infra.

2. The European Union's (Non-intergovernmental) Competences where Human Security Comes into Play

Moving to Union's competences out of the intergovernmental sphere, according to the following article 3 TEU human security is of relevance under many respects, though assuming different accents according to the several areas of EU law where it may come into play (e.g., when inserted in the context of the fundamental freedoms granted under the Union's system, being such freedoms notoriously prevalent on other public aims pursued at both the national and same Union's levels).

2.1. Area of Freedom Security and Justice (AFSJ)

Human security stands as an overall criterion of most of Union's policies in the AFSJ, 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 be clearly referred to, on the one hand, the protection of crimes' victims[11] and, on the other, the protection of the main rights, both substantive and procedural, 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[12]) (Lazzerini 2016; Di Stasi and Rossi 2021).

11See, in general, Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA**,** OJ L 315, 14.11.2012, p. 57. Previous such a broader act, see Directive 2011/99/EU of 13 December 2011 on the European protection order OJ L 338, 21.12.2011, p. 2, Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography OJ L 335, 17.12.2011, p. 1.

12Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1). For the relevant case-law, see, *ex multis,* C-128/18, Dumitru-Tudor Dorobantu, ECLI:EU:C:2019:857 and C-404/15 and C-659/15 PPU Aranyosi and Căldăraru, ECLI:EU:C:2016:198, relating to the need that imprisonment conditions and main procedural rights (see articles 4 and 6 CFREU) of the interested individuals be properly ensured in the Member State of the issuing judicial authority.

2.2. Asylum Policy and Law

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 (CFREU) 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 1951, 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 CFREU. This is not against (in terms of a too extensive reading) with the so called 'Dublin system'[13] 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.

In addition, 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[14].

Thus, *non-refoulement* applies whenever international protection seekers are under the authority of one State member to the ECHR, 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 (Lenzerini 2012).

13Regulation 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L 180 29.6.2013, p. 3, so called 'Dublin III'.

14ECtHR of Feb. 23rd, 2012, Appl. 27765/09, Hirsi Jamaa and others v. Italy.

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 proceedings 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, the ban of *refoulement* is not based on a purely theoretical approach. Indeed, on the one hand, that 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, that same principle applies in cases where the individuals involved might be rejected to any other State, including those members to the European Union (under mentioned art. 3 n. 2 Dublin III Regulation), 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 actually breached, although that same State is part to the Geneva Convention or even whether other constitutional standards coherent with *non-refoulment* are formally in force into that State (Rubio-Marín 2014; Rizzo 2015; Ferreira 2022).

Beside abovementioned issues dealing with the 'international protection' of third countries nationals under relevant EU law sources and case-law, it also seems appropriate to recall the related aspects of those seeking to be accepted on the basis of a request that the State, unlike the general law on asylum seekers and refugees (under Articles 18 and 19 TFEU), can accept 'voluntarily'. A case in point deals with so called 'humanitarian visas' foreseen under EU regulation n. 810/2009 establishing a Community Code on Visas (Visa Code)[15]. In the judgment of 7 March 2017[16] concerning the understanding of Art. 25 Visa Code, the Court found that facts raised by the case fell outside same Code's (and EU law's) scope, and that a Member State

15OJ L 243, 15.9.2009, p. 1-58. See more recently Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System OJ L 248, 13.7.2021, p. 11.

16Case C-638/16 PPU [GC], X and X v. Belgium.

of the Union would thus not be under an obligation to issue humanitarian visas – due to the 'voluntary' character of such visas – to third country nationals seeking international protection.

On the other hand, Advocate General observed that, account taken of relevant CFREU provisions, beside the 'voluntary' character of the visa covered by Regulation 810/2009, other considerations and a different approach should be taken if the

> 'refusal to issue the visa exposes the applicant to a genuine risk of infringement of the rights enshrined in the Charter particularly the rights of an absolute nature, such as those relating to human dignity (Article 1 of the Charter), the right to life (Article 2 of the Charter), the integrity of the person (Article 3 of the Charter) and the prohibition of torture and inhuman and degrading treatment (Article 4 of the Charter) and, moreover, where there is a risk that those rights will be infringed in relation to particularly vulnerable persons, such as young, minor, children whose best interests must be a primary consideration in all actions taken by public authorities, in accordance with Article 24(2) of the Charter' [17].

In brief, Advocate General wisely found that few differences exist between those seeking for asylum or international protection and visa applicants under Regulation 810/2009, where related reception proceedings and conditions in the third country of depart or transit suffer from lacks that are apt to expose individuals to the same risks to life or freedom. In both cases, the State has few choices on the related request for protection, unless it is ready to infringe general asylum law and above mentioned basic human rights (Del Guercio 2017).

2.3. Solidarity in the Areas of Borders Checks, Asylum and Immigration

In connection to mentioned asylum/refugees' policies' issues, 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. This 'burden-sharing' approach has been confirmed by the Union judiciary against the position of some Union's members aimed at neglecting the mandatory

17See under p. 137 of Advocate General P. Mengozzi conclusions of 7 February 2017 in the same case C-638/16 PPU [GC], X and X v. Belgium. Reference is made to the Charter of fundamental rights of the European Union (CFREU).

character of such principle and connected Commission's decisions distributing quotas of international protection seekers among EU Member States (Rizzo 2017a; Morgese 2018).

2.4. International Agreements on Refugees' Management

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, above 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 (Rizzo 2017b).

2.5. Irregular Migrants

Above considerations deal basically with situations where individuals are potentially or effectively entitled for international protection, be it individually applicable (asylum seekers) or collectively extendable to specific individuals' groups (refugees).

The specific condition of those who materially exploit the irregularity of third-country nationals who cross or who already reside in the territory of the Union, finds specific discipline in various sources of supranational rank, starting from directive 2011/36 fighting the trafficking in human beings[18] .

18Directive of 5 April 2011 concerning the prevention and suppression of trafficking in human beings and the protection of victims, which replaces the framework decision of the Council 2002/629/JHA, OJ L 101, 15 April 2011, p. 1.

The matter, for Italy, is implemented via art. 12 of the Consolidated Law on Immigration[19].

Another story deals with both those who are victims of the trafficking practices and of those who aim at rescuing people in such 'victimization' conditions (for a recent overview also on other relevant case-studies on those matters, Caracciolo et al. 2022).

In this context, it seems wise to recall the Council of Europe's Parliamentary Assembly Resolution 2059 of 2015[20]. According to this Resolution, the term 'migrants' should not be accompanied by the 'illegal' adjective, in cases of irregular mobilization of third country nationals. Indeed, the term 'illegality' should be marginalized from the scope of application of both national and supranational legislations, due to the main humanitarian purposes underlying the rescue and the reception of those who are victims of exploitation in migratory contexts. The 'irregular' character of these individual situations would therefore better describe the cases emerging from the aforementioned framework, precisely because such individuals are ready (and even forced) to make journeys that expose them, despite themselves, to situations of danger for their freedom and safety. On the other hand, those who intervene in such irregular contexts in order to save the life and security of the migrants should not be criminalized for their rescuing initiatives.

As for cases concerning the overlap between the condition of irregularity of the foreigners on the territory of Member States of the Union and the possible request by same individuals for international protection, the regulatory sources and the jurisprudence of the Union offer some guidance. The matter is primarily governed by Directive 2008/115[21]: this legislative act, while specifically dealing with the management of irregular immigration phenomena as subsequently included under art. 79 TFEU, via the Lisbon treaty reforms, must be interpreted in the light of some general criteria which can also be derived from the legislation concerning persons seeking international protection.

It is however wise to specify that the Court of Justice of the Union has not accepted the possibility that an application for asylum or international protection is suitable as such to confer 'regularity' on the stay of a third-

19Legislative Decree 25 July 1998, n. 286, Consolidated text of the provisions concerning the regulation of immigration and rules on the condition of foreigners (GU n. 191 of 18.8.1998 - Suppl. Ord. 139).

20Text adopted by the Standing Committee, acting on behalf of the Assembly, on 22 May 2015 (see Doc. 13788, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Mr Ionuţ-Marian Stroe).

21Directive 2008/115/EC of 16 December 2008 establishing common rules and procedures applicable in the Member States to the return of illegally staying third-country nationals OJ L 348, 24.12.2008, 98.

country national in the territory of the Union[22]. In fact, according to the same Court, the relevant EU legislation, in requiring that the receiving State deals with the situation of such individuals, grants to the latter a right of judicial appeal against the relevant decision if it rejects the application for international protection or asylum. However, the same legislation at EU level only allows that, while pending the expiring of the related procedure resulting from the appeal, the expulsion of the interested individual(s) be just 'suspended': in doing so, this reading weakens the preceptive content of a provision of directive 2013/33[23], which, on the contrary, appears to ban any expulsion in a similar factual context.

As a general remark, and apart from mentioned critical features, it must be finally underlined that Directive 2008/115 aims to grant the right of access to justice (see art. 47 CFREU) for anyone whose request for remedying his/her own irregular condition ('regularization') had been rejected by the competent administrative authorities of the receiving Member State of the Union [24] (Molnar 2019; Delvino 2020; Spencer and Tryantafiliddou 2020).

2.6. Readmission Agreements

Such agreements pertain to the management of irregular migrants (see sub-chapter above). The Tampere (Finland) European Council held on 15 and 16 October 1999, openly declared the need that '*illegal immigration'* be tackled, '*especially by combating those who engage in trafficking in human beings and economic exploitation of migrants*'. To this aim, same Presidency invited the Council to conclude '*readmission agreements'* or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries.

As from Lisbon reforms, under Art. 79, para. 3 TFEU, '[t]*he Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States*'. This provision can be read in connection to Art. 78(g) same TFEU, where it is stated that ' (…) *a common European asylum system* (…)' might include, inter alia; '(…) *partnership and cooperation with third*

22Joined cases C-924/19 PPU e C-925/19 PPU, FMS v. Országos & o., ECLI:EU:C:2020:367

23Directive 2013/33/UE on the reception of international protection seekers, OJ L 180, 29.6.2013, p. 96, see in part. under art. 46 para. 5, reading as follows: '(…) *Member States shall allow applicants to remain on their territory until the time limit within which they can exercise their right to an effective remedy has expired or, if this right has been exercised within the time limit, pending the outcome of the appeal'.*

24See in part. p. 147 of CJEU, FMS contro Országos mentioned above, under n. 22.

countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'.

In recent practice, the Union has concluded an increasing number of readmission agreements (EU readmissions) with so-called 'transit' third countries, i.e., countries other than those of depart of the persons subjected to refoulement measures (see above on both regular and irregular migrants). However, such 'transit' third countries often do not provide with fair proceedings and connected individual guarantees usually required for asylum seekers or refugees (one should include the need to comply with the general criterion of non-refoulement expressly sanctioned by art. 19 of the Charter of Fundamental Rights of the European Union).

Above deficiencies cause increasing worries when it comes to considering that readmission agreements in most cases deal with migrants that have not been considered (in one EU country) entitled to get international protection. Thus, as for the standards of protection offered by third 'transit' states to those to whom a provision implementing a readmission agreement applies (irregular migrants), the same deficit in terms of individual guarantees emerges in parallel in the implementation of readmission agreements concluded bilaterally between the interested non-EU country and one EU Member State, due to the non-exclusive character of the competence enjoyed by the Union in this field (Carli 2019; Rizzo 2017b).

2.7. Temporary Protection

In the realm of migratory issues, it is wise to refer also to a recent implementation of the legal regime concerning temporary protection of those fleeing from Ukraine. A decision of March 2022[25] applies art. 5 of an EU Directive on the displaced of 2001[26], 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

25Council implementing decision n. 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022, p.1.

26Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12.

for mutual recognition of professional qualifications of same third country nationals, with specific reference to those fleeing from Ukraine[27] (Rizzo 2017a; Peers 2022; Thym 2022).

3. Other Areas of EU Law where Human Security is (or Might be) Relevant

Besides the above areas of EU law that, in accordance with art. 3 TEU, specifically deal, even if not always explicitly, with human security issues, there are other areas where human security, though not directly concerned, is nevertheless one implied aim with peculiar relevance for each single EU policy. We will give a first overview that might need a further in-depth inspection for future analysis.

3.1. Sustainable Development and EU Environmental Policy

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[28] and is also mentioned in articles 3 n. 5, and 21 n. 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 the EU level, in 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 favor of the environment and sustainable development - Political and action program of the European Community in favor of the environment and sustainable development* [29], the renown 'Brundtland' Declaration is recalled. Indeed, para. 12 of such resolution reads as follows:

> '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'.

27Commission Recommendation (EU) 2022/554 of 5 April 2022 on the recognition of qualifications for people fleeing Russia's invasion of Ukraine OJ L 107 I, 6.4.2022, p. 1.
28United Nations Conference on Environment and Development of 3-14 June 1992, A/CONF.151/26 (Vol. I).
29OJ 17 May 1993, C 138, in part. p. 12.

A growing trend is acknowledged towards the establishment of a true duty under international customary law forcing the State to keep a safe environment both abroad and inside own national borders. In recent times, this trend has been confirmed also by a relevant case-law of the International Court of Justice by means of an extensive understanding of treaty law rules related to both the State's international liability and more specific environmental protection standards [30]. For some, the latter decisions lack consideration of pre-emptive aims pursued under the precautionary principle, particularly relevant in cases of environmental damages with trans-boundary effects (Francioni 2012; Bakker and Francioni 2016). 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.

On the precautionary principle, it is wise to recall Principle 15 of mentioned Rio Declaration according to which:

> 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.

In its judgment of December 22nd, 2010, the Court of Justice of the European Union (CJEU) stated as follows:

> 'A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of the substance at issue, and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research (…). Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialize, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective (…)' [31].

Under relevant international law principles and rules a general duty of compensation has been assessed for cases where behaviors of both public

30See, among others, Advisory Opinion of 8 July 1996, Legality of The Use by A State of Nuclear Weapons, ICJ Reports 1996 and Judgment of 25 September 1997, ICJ Reports 1997 s.c. Gabčíkovo-Nagymaros case. See also Judgment of 20 April 2010, Pulp Mills on the River Uruguay, ICJ Reports 2010.

31C-77/09, Gowan, I-13533, at p. 75-76.

and private actors are apt to cause harms or true damages with cross-borders (or beyond-borders) effects. Besides, a general duty of compensation for environmental damages is acknowledged in several international law tools on the liability for, e.g., pollution or dangerous activities [32].

It is also wise to recall the international law doctrine and practice inspired on Polluter Pays Principle (PPP), now clearly established under same art. 192 TFEU. This principle relates to a strict liability criterion. According to CJEU[33]:

> 'The application of the 'polluter pays' (…), would be frustrated if persons involved in causing waste, whether holders or former holders of the waste or even producers of the product from which the waste came, escaped their financial obligations as provided for by that directive, even though the origin of the hydrocarbons which were spilled at sea, albeit unintentionally, and caused pollution of the coastal territory of a Member State was clearly established'.

At the same time the CJEU, in the same case, conceded (following the strict liability approach) that a producer cannot be liable to bear the related costs of the pollution '(…) *unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur'* (Adshead 2018; de Sadeleer, 2012; Giuffrida and Amabili 2018).

The considerations above show that, in the realm of the international organizations and the European Communities/European Union context, environmental policy has progressed by strengthening its 'humanitarian' objectives, though with different approaches, in particular under a human rights law perspective[34]. Indeed, while the ECtHR has stressed that environmental protection could as such be referred to the protection of basic human rights (arts. 2 and 8 ECHR), the same kind of protection has not assumed the rank of a fundamental right of the individual under art. 37 of the CFREU (Rizzo 2018).

At the same time, thanks also to recent achievements such as the Rio Declaration, further progress can be registered in the perspective that environmental misconducts assume specific significance as true international crimes under both international and European law. As an example, one should not underestimate current discussion on the definition, at both levels, of an *ecocide*, idiomatically inspired to *genocide*, due to the gravity

32See, e.g., 1969 Brussels Convention on the Compensation for damages related to hydrocarbons' pollution establishing the International Oil Pollution Compensation Fund, IOPCF. According to the IOPCF Claims Manual, any loss of property and economic loss are covered, though if limited to reinstatement to 'reasonable measures' (see IOPC Fund 2016).
33C-188/07, Commune de Mesquer v Total France SA and Total International Ltd., I-4501.
34ECtHR of Jan. 26th 2019, appl. 54414/13 and 54264/15, Cordella and others v. Italy.

and broadness of relevant behaviors' (even of individuals, under a Statute of Rome approach) consequences on the environment (Rizzo 2022a).

3.2. Free Movement of Workers

In the internal market sector, one clear example on how human security might achieve significance 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 both national and Union law.

Under current art. 45 para. 3 TFEU, restrictions on 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[35].

The balancing between relevant opposed interests is now listed under art. 27 of directive 2004/38 on free movement of EU citizens in the Union[36]. Serious concerns have been recently raised due to the pandemic in connection with the chance that each National Health System might oppose reasons of national public health and security to the implementation of the relevant freedom for EU citizens to move across Union's internal borders (Rizzo 2021).

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 (Gargiulo 2011; Rizzo 2011; Adinolfi 2014; Orlandini and Chiaromonte 2017).

3.3. Health Policy

As we all know, Health 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.

35CJEU case 41/74, van Duyn, p 1337; case 36/75, Rutili, p. 1219; case 30/77, Bouchereau, p. 1999

36OJ L 158 of 30.4.2004, p. 77.

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')[37], 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 816/2006[38], 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 (Govaere 2008).

In the Covid-19 pandemic context, same Union has based some relevant acts aimed at tackling in the most consistent and effective way the new challenges[39], on art. 168 para. 5 TFEU, that confers on the Union a *concurring* competence for cases where health issues imply problems of 'common security' on the whole of the EU legal space (Rizzo 2021).

3.4. Cyber-security

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 in some areas related to internal market purposes (Pocar 2010, 286).

An example on this connection is proved by the adoption at EU level of Regulation 2019/881 on ENISA, the European Union Agency for Cybersecurity and on information and communications technology cybersecurity certification[40].

One should not forget the 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

37WTO Ministerial Conference 14 November 2001, WT/MIN/(01)/DEC/2.
38OJ L 157, 9.6.2006, p. 1.
39Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a program for Union action in the field of health ('the EU4Health program') for the period 2021-2027 and repealing the regulation (EU) no. 282/2014 (OJ L 107, 26.3.2021, p. 1).
40OJ L 151, 7.6.2019, p. 15.

control of exports, brokering, technical assistance, transit and transfer of dual-use items[41].

4. Few 'Preliminary' Concluding Remarks

- 'Human security' as an overall objective is spread, as we tried to show above, throughout various areas of Union law and policies, though it is not always clearly referred in relevant documents and case-law.
- As we tried to show in the first Chapter above, coherently with its original conception, it was firstly introduced as a guiding principle for CFSP and CSDP aims, particularly in the context of the post-9/11 challenges raised worldwide by terroristic acts and for the pursuit of the several kinds of missions as currently foreseen under arts. 42 par. 1 and 43 par. 1 TEU[42] (Rizzo 2016, 113-114 and 155).
- Out of the intergovernmental sphere, in some areas (e.g., environmental law, asylum and irregular migratory status) Human security has gained a specific meaning with the view of expanding as far as possible a protective approach to some basic human rights. This might prove abovementioned overlap between human security and human rights policy and standards, whose strict interconnections are still discussed at the doctrinal level (see supra, Benedek 2022).
- At the same time, a 'shadows and light' picture appears from the above summary. Indeed, in areas where asylum policy aims and international agreements overlap (with reference to, e.g., readmission agreements of irregular migrants), several lacks precisely in terms of compliance with human rights standards still arise. In such contexts, human security aims, and human rights protection might be mutually supportive.
- Indeed, the negative feedbacks of, e.g., a readmission agreement arise each time basic human rights standards are not respected in a third country of readmission. In such cases, beyond the specific rights of applicants for asylum or international protection, both human security and the protection of basic human rights – such as protection from illegal detention, torture, inhuman or degrading treatments – , should prevent the EU and each EU Member State from engaging themselves internationally by means of such agreements.

41OJ L 206, 11.6.2021, p. 1.

42Such missions have been inspired on both the missions Chapter VII UN Charter and on the Petersberg tasks established previous the Maastricht reforms under the Western European Union (WEU) established 1954 and expired at the entry into force of the Lisbon treaty reforms (2011), see Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty – Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom, Brussels, 31 March 2010.

- In a broader perspective, it still seems uncertain whether this objective (human security) can prevail over other interests, in particular those that mainly concern the State as a true international actor, at least in areas as, inter alia, public health, borders control and migratory policies.
- Above conclusion must however 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 especially meaningful in balancing different perspectives and in applying human rights standards as true constraints for national public authorities in each EU Member State, with the view of enhancing the 'humanitarian' spirit of the law in particularly challenging contexts where abovementioned legislative tools could be relevant.

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