



HUMAN RIGHTS
26 LUGLIO 2023

Notes on the UN Special Rapporteur
on the human rights of migrants:
practice, challenges and perspectives

di Luigino Manca

Professore associato di Diritto internazionale
Sapienza - Università di Roma

Notes on the UN Special Rapporteur on the human rights of migrants: practice, challenges and perspectives*

di Luigino Manca

Professore associato di Diritto internazionale
Sapienza - Università di Roma

Abstract [En]: The Human Rights Council is one of the main monitoring bodies of the United Nations Human Rights System. The aim of this paper is to study the role of such body in the field of migration. In this regard, specific emphasis will be paid to the UN Special Rapporteur on the human rights of migrants, created by the former Human Rights Commission in 1999 within the so-called special procedures. The mandate of the Special Rapporteur covers all countries and it was extended by the Human Rights Council more times (recently in 2023). The role of the Special Rapporteur will be examined taking into account its relevant and recent practice, also with reference to the protection of the rights of migrants in the pandemic situation. Such analysis is aimed to evaluate the contribution of the Special Rapporteur in the implementation and development of the international law of migrants.

Titolo: Note sul relatore speciale dell'ONU sui diritti umani dei migranti: prassi, sfide e prospettive

Abstract [It]: Il Consiglio dei diritti umani è uno dei principali organi di controllo del Sistema dei diritti umani delle Nazioni Unite. L'obiettivo di questo articolo è studiare il ruolo di tale organo nel campo della migrazione. A questo proposito, verrà data particolare attenzione al Relatore speciale delle Nazioni Unite sui diritti umani dei migranti, creato dall'ex Commissione per i diritti umani nel 1999 nell'ambito delle cosiddette procedure speciali. Il mandato del relatore speciale copre tutti i Paesi ed è stato prorogato più volte dal Consiglio dei diritti umani (recentemente nel 2023). Il ruolo del Relatore speciale sarà esaminato tenendo conto della sua prassi rilevante e recente, anche con riferimento alla protezione dei diritti dei migranti in caso di pandemia. Tale analisi mira a valutare il contributo del Relatore speciale nell'attuazione e nello sviluppo del diritto internazionale dei migranti.

Keywords: United Nations, Human Rights, Migrants, Special Rapporteur

Parole chiave: Nazioni Unite, diritti umani, migranti, relatore speciale

Content: **1.** Introduction: Object and Plan of the Paper. **2.** A Brief Overview of the Contribution of the Human Rights Council in the Field of Migration. **2.1.** The UN Special Rapporteur on the Human Rights of Migrants: Institutional Aspects, Functions and Current Practice. **2.1.1.** In particular, the Country visits Mechanism. **3.** Conclusive Remarks: The Opened Problem of the Consent and the Need to Encourage the Standing Invitation Mechanism.

1. Introduction: Object and Plan of the Paper

In recent years, both academics and human rights activists have increasingly focused on migration. This can be partly ascribed to growing fluxes of migrants, States' restrictive approaches towards migration, and the Covid-19 pandemic. The latter, as expected, has had a negative impact on the human rights of migrants.

* Articolo sottoposto a referaggio.

In this disheartening picture, it appears well suited to consider the contribution of the UN Human Rights Council in the promotion and protection of the human rights of migrants.

More specifically, this article focuses on the role of the UN Special Rapporteur on the human rights of migrants, operating within the “Special Procedures” of the Council¹.

Accordingly, the first part of the paper briefly illustrates the contribution of the Human Rights Council in the field of migration, while the second concentrates more specifically on the mandate and powers of the Special Rapporteur.

From a methodological point of view, it appears opportune to clarify that the analysis in its whole will not only focus on normative standards but also pay close consideration to the relevant and consolidated practice of the Rapporteur. In particular, it will be discussed its monitoring function, also following a comparative approach with other United Nations international monitoring bodies.

The main and general purpose of the contribution is to explore the Rapporteur’s possibilities and limitations. With reference to this last aspect, at the end of the paper, it will try to identify the appropriate legal measures necessary for the strengthening of its competencies, especially those related to the monitoring activity through on-site visits.

2. A Brief Overview of the Contribution of the Human Rights Council in the Field of Migration

As it is well known, the UN Human Rights Council (HRC) is the intergovernmental body that replaced the former UN Human Rights Commission (created in 1946 by the Economic and Social Council)².

¹ For a careful analysis of the United Nations Special Procedures and their evolution see, among others, C. COOK, *International Human Rights Mechanism. The Role of the Special Procedures in the Protection of Human Rights. The Way Forward After Vienna*, in *International Commission of Jurist Review*, 1993, pp. 31-55; N. RODLEY, *The United Nations Human Rights Treaty Bodies and Special Procedures of the Commission of Human Rights. Complementarity of Competitions?*, in *Human Rights Quarterly*, 2003, pp. 882-908; I. NIFOSI, *The UN Special Procedures in the Field of Human Rights*, Antwerpen, Oxford, 2005; H. HANNUM, *Reforming the Special Procedures and Mechanisms of the Commission on Human Rights*, in *Human Rights Law Review*, 2007, pp. 73-92; C. BREEN, *Revitalising the United Nations Human Rights Special Procedures Mechanisms as a Means of Achieving and Maintaining International Peace and Security*, in *Max Planck Yearbook of United Nations Law*, 2008, pp. 177-203; B. G. RAMCHARAN, *The Protection Roles of UN Human Rights Special Procedures*, Leiden-Boston, 2008; C. TOMUSCHAT, *Origins and History of UN Special Procedures: An Overview from their Inception to June 2007*, in *Human Rights Law Journal*, 2008, pp. 27-31; E. D. REDONDO, *Rethinking the Legal Foundations of Control in International Human Rights. The Case of Special Procedures*, in *Netherlands Quarterly of Human Rights*, 2011, pp. 261-188; K. GOLAY, I. BIGLINO, I. TRUSCAN, *The Contribution of the UN Special Procedures to the Human Rights and Development Dialogue*, in *Sur- International Journal on Human Rights*, 2012, pp. 15-38; H. CANTÚ RIVERA, *The Special Procedures of the Human Rights Council*, Cambridge, Antwerpen, Portland, 2015; R. FREEDMAN, J. MCHANGAMA, *Expanding or Diluting Human Rights? The Proliferation of United Nations Special Mandates*, in *Human Rights Quarterly*, 2016, pp. 164-193 and more recently A. NOLAN, R. FREEDMAN, T. MURPHY (eds.), *The United Nations Special Procedures System*, Leiden, 2017; R. K. M. SMITH, *UN Special Procedures: System Puppets or User’s Saviours*, in E. BRIBOSIA, I. RORIVE (eds.), *Human Rights Tectonics. Global Dynamics of Integration and Fragmentation*, Cambridge, 2018, pp. 41-68; E. DOMÍNGUEZ-REDONDO, *In Defense of Politicization of Human Rights: The UN Special Procedures*, New York, 2020; S. MYER, *The Success and Legitimacy of UN Treaty Bodies and UN Special Procedures in Clarifying the Content of Human Rights*, in *Exeter Law Review*, 2022, pp. 63-96.

² The General Assembly created The Human Rights Council via Resolution 60/251 of 15 March 2006. The bibliography relating to the HRC is quite wide. See P. ALSTON, *Reconceiving the UN Human Rights Regime: Challenges Confronting the New*

Questions relating to the human rights of migrants are continuously included within its agendas, and the body has intervened on the topic under consideration several times. It actively participates in the protection of the human rights of migrants through the adoption of non-binding acts, Resolutions and Recommendations specifically (widely regarded as soft law legal instruments)³.

These international acts usually also reaffirm some general principles. Among the Resolutions, we can mention those according to which all States have a “duty to effectively promote, protect and respect the human rights and fundamental freedom of all persons”, and “all migrants, regardless of their migration status, are human rights holders”.⁴

The attention of the Council has also been systematically drawn to problems and needs of vulnerable groups, especially unaccompanied and separated migrant children. On this specific point, the reading of resolutions confirms, *inter alia*, the relevance of the well-known principle of the best interest of the child, in line with the New York Convention on the Rights of the Child.⁵ Principle that can be regarded as forming

Human Rights Council, in *Melbourne Journal of International Law*, 2006, pp. 185-224; M. BOSSUYT, *The New Human Rights Council: A First Appraisal*, in *Netherlands Quarterly of Human Rights*, 2006, pp. 551-555; E. UPTON, *The Human Rights Council: First Impressions and Future Challenges*, in *Human Rights Law Review*, 2007, pp. 29-39; K. SHORT, *From Commission to Council: Has the United Nations Succeeded in Creating a Credible Human Rights Body?*, in *Sur – Revista internacional de Direitos Humanos*, 2008, pp. 146-171; M. BOVA, *Il Consiglio dei diritti umani nel sistema onusiano di promozione e protezione dei diritti umani: profili giuridici ed istituzionali*, Torino, 2011; R. FREEDMAN, *The United Nations Human Rights Council: More of the Same?*, in *Wisconsin International Law Journal*, 2013, pp. 208-251; B. G. RAMCHARAN, *The Law, Policy and Politics of the UN Human Rights Council*, Leiden, Boston, 2022; C. ZANGHÌ, L. PANELLA, *La protezione internazionale dei diritti dell'uomo*, Torino, 2019, pp. 112-143; J. GALLEN, *Between Rhetoric and Reality: Ten Years of the United Nations Human Rights Council*, in *Irish Studies in International Affairs*, 2016, pp. 1-19; E. TISTOUNET, *The UN Human Rights Council: A Practical Anatomy*, Cheltenham, 2020.

³ On the soft law, see, among others, M. R. SAULLE, *Lezioni di diritto internazionale*, Napoli, 1998, pp. 82-83; T. TREVES, *Diritto Internazionale. Problemi fondamentali*, Milano, 2005, pp. 262-266; R. MONACO, C. CURTI GIALDINO, *Manuale di Diritto internazionale pubblico. Parte generale*³, Torino, 2009, pp. 280-284; S. MARCHISIO, *Corso di diritto internazionale*³, Torino, 2021, pp. 71-72.; U. VILLANI, *Lezioni di diritto internazionale*², Bari, 2023, pp. 143-144. On this point, see also V.D. THÜRER, *Soft Law*, in *Max Planck Encyclopedia of Public International Law*, 2009; F. A. CÁRDENAS CASTAÑEDA, *A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin*, in *Anuario Mexicano de derecho internacional*, 2013, pp. 355-403.

⁴ See Human Rights Council, Resolution 41/7, 11 July 2019 and Resolution 47/12, 12 July 2021.

⁵ The Convention was adopted by the UN General Assembly with Resolution 44/25 of 20 November 1989. Until now, the Convention is the human rights Treaty that has received the highest number of ratification (196 parties). See the ratification status available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (last access, March 2023). For an overview of this Convention, see, among others, D.A. BALTON, *The UN Convention on the Rights of the Child: Prospects for International Enforcement*, in *Human Rights Quarterly*, 1990, pp. 120-129; M.R. SAULLE (a cura di), *La Convenzione dei diritti del minore e l'ordinamento italiano*, Napoli, 1994; L. J. LEBLANC, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights (Human Rights in International Perspective)*, Lincoln, London, 1995; A. GLENN MOWER, *The Convention on the Rights of the Child. International Law Support for Children*, Westport, 1997; M. C. MAFFEI, *La tutela internazionale dei diritti del bambino*, in L. PINESCHI, *La tutela internazionale dei diritti umani. Norme, garanzie, prassi*, Milano, 2006, pp. 232-280; E. VERHELLEN, *Convention on the Rights of the Child. Background, Motivation, Strategies, Main Themes*, Antwerp, 2000; E. A. ENGLE, *The Convention on the Rights of the Child*, in *Quinnipiac Law Review*, 2011, pp. 793-819; S. MARCHISIO, *La Convenzione ONU sui diritti del fanciullo quale Magna Carta internazionale*, in R. CADIN, L. MANCA, V. R. PELLEGRINI (a cura di), *I minori stranieri in Italia*, Atti del Convegno in memoria di Maria Rita Saulle e Lê Quyên Ngô Đình, Roma, 2014, pp. 43-56; J. TOBIN (ed.), *The UN Convention on the Rights of the Child. A Commentary*, Oxford, New York, 2019; U. KILKELLY, *The UN Convention on the*

part of customary international law⁶. This best interest must be ensured “in both the development and implementation of [national] legislation and policies” relating to minors, “including by facilitating family reunification”.⁷ In considering the right to family reunification, it is surely relevant to recall that the Human Rights Council also recently has adopted a Resolution aimed, *inter alia*, to promote the exercise of such right.⁸

It comes as no surprise that, especially in these last years, specific attention was also paid to the effects of the COVID-19 pandemic on migrants. In this respect, the Council called upon all States “to take a human rights-based approach in their responses to the COVID-19 pandemic, explicitly including all migrants [...] with specific attention to those in vulnerable situations”.⁹

Intensive and equally important is also the contribution under the Universal Periodic Review (UPR)¹⁰. More frequently, at the end of this peer-review monitoring process, introduced for the first time in 2006, the Council adopts recommendations concerning the protection of migrants. This consideration is confirmed by the recent practice related to Italy. Several recommendations (adopted during the third cycle of revision), concerned the need to strengthen efforts in awareness raising to combat hate speech against, *inter alia*, migrants, the adoption of measures aimed to ensure the “non-criminalisation” of migrant rights defenders and the integration of migrants in the Country¹¹.

Rights of the Child: Incremental and Transformative Approach to Legal Implementation, in *International Journal of Human Rights*, 2019, pp. 323-337.

⁶ On this point, see I. INGRAVALLO, *La tutela internazionale dei minori dopo l'entrata in vigore del terzo Protocollo opzionale alla Convenzione del 1989*, in *La Comunità internazionale*, 2014, p. 347; D. I. SUPAAT, *Establishing the Best Interests of the Child as an International Custom*, in *International Journal of Business, Economics and Law*, 2014, pp. 109-114.

⁷ Human Rights Council, Resolution 47/12, 12 July 2021.

⁸ See Human Rights Council, Resolution 49/20, 8 April 2022.

⁹ *Ibidem*.

¹⁰ For a commentary to this procedure see, F. D. GAER, *A Voice not an Echo: Universal Periodical Review and the UN Treaty Body System*, in *Human Rights Law Review*, 2007, pp. 109-139; R. PISILLO MAZZESCHI, *L'Universal Periodic Review: controllo sull'adempimento di obblighi giuridici o meccanismo di cooperazione politica e diplomatica*, in *Diritti umani e diritto internazionale*, 2008, pp. 107-117; N. BERNAZ, *Reforming the UN Human Rights Protection Procedures: a Legal Perspective on the Establishment of the Universal Periodic Review Mechanism*, in K. BOYLE (ed.), *New Institutions for Human Rights Protection*, Oxford, 2009, pp. 75-92; J. DUGGAN-LARKIN, *Can an Intergovernmental Mechanism increase the Protection of Human Rights?: The Potential of Universal Periodic Review in Relation to the Realisation of Economic, Social and Cultural Rights*, in *Netherlands Quarterly of Human Rights*, 2010, pp. 548-581; A. M. THEVENOT-WERNER, *L'examen périodique universel du Conseil des droits de l'homme des Nations Unies au regard du droit international*, in *Journal de droit international*, 2012, pp. 1243-1279; R. WEST, *Piercing the Veil of State Sovereignty. The Role of the Universal Periodic Review in the Enforcement of Human Rights*, in *Irish Law Times*, 2014, pp. 73-76; K. WALTER, *Human Rights Treaties within the UPR Process: Opportunities and Limits of Inter-governmental Monitoring on Human Rights*, in *The Japanese Yearbook of International Law*, 2017, pp. 243-260; S. BERTOTTI, *Separate or Inseparable? How Discourse Interpreting Law and Politics as Separable Categories Shaped the Formation of the UN Human Rights Council's Universal Periodic Review*, in *International Journal of Human Rights*, 2019, pp. 1140-1165; C. ZANGHÌ, L. PANELLA, *La protezione internazionale dei diritti dell'uomo*, quoted, pp. 126-133.

¹¹ See Report of the Working Group on the Universal Periodic Review, A/HRC/43/4, 27 December 2019.

Having said that, within the institutional context of the Council and with reference to its thematic mandates¹², specific mention should now be made of the Special Rapporteur on the human rights of migrants¹³.

2.1. The UN Special Rapporteur on the Human Rights of Migrants: Institutional Aspects, Functions and Current Practice

From an institutional point of view, this an independent body¹⁴, created in 1999 by the former Commission on Human Rights, and whose mandate has also been confirmed for other three years by the current HRC with the more recent Resolution No. 52/20 of 2023.¹⁵

Looking at the text, such Resolution contains a detailed list of functions and some general indications about the modalities of cooperation with the Council and the General Assembly:

- “(a) To examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, recognizing their disproportionate impact on migrants in situations of vulnerability, including women, children and those who are undocumented or in an irregular situation;
- (b) To request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families;
- (c) To formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur;
- (d) To promote the effective application of relevant international norms and standards on the issue, including the principle of non-discrimination;

¹² The practice of the “Thematic Mandates” was introduced by the former Commission on Human Rights. See generally, M. T. KAMMINGA, *The Thematic Procedures of the UN Commission on Human Rights*, in *Netherlands International Law Review*, 1987, pp. 299-323; O. FROUVILLE, *Les procédures thématiques: une contribution efficace des Nations Unies à la protection des droits de l'homme*, Paris, 1996; J. GUTTER, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community*, Antwerpen, Oxford, 2006.

¹³ For a general overview on the UN Special Rapporteurs, see R. BEATE, *Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights*, in *Max Planck Yearbook of United Nations Law*, 2000, pp. 289-330; S. P. SUBEDI, *Protection of Human Rights through the Mechanism of UN Special Rapporteurs*, in *Human Rights Quarterly*, 2011, pp. 201-228; S. P. SUBEDI, S. WHEATLEY, A. MUKHERJEE, S. NGANE, *The Role of Special Rapporteurs of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms*, in *The International Journal of Human Rights*, 2011, pp. 155-161; J. NAPLES-MITCHELL, *Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contribution to Human Rights*, *ivi*, pp. 232-248; A.C. BERGER, *Special Rapporteurs on Human Rights Bodies*, in *Max Planck Encyclopedia of Public International Law*, 2013, pp. 1-5.

¹⁴ The Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council provides that “Mandate-holders exercise their functions on a personal basis, their responsibilities not being national but exclusively” international (Article 4, para. 1). More specifically, the subsequent para. 2, states that “When exercising their functions, the mandate-holders are entitled to privileges and immunities as provided for under relevant international instruments, including section 22 of article IV of the Convention on the Privileges and Immunities of the United Nations”. Such Code of Conduct was adopted, by *consensus*, by the Human Rights Council (see Resolution 5/2 of 18 June 2007). For a critical analysis of this Code, see P. ALSTON, *Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?*, in *Harvard International Law Journal*, 2011, p. 588 et seq.

¹⁵ See Human Rights Council, Resolution 53/20, 3 April 2023.

- (e) To recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants;
- (f) To take into account gender, age and disability perspectives when requesting and analysing information and give special attention to the occurrence of multiple and intersecting forms of discrimination and violence against migrant women and girls, children, older migrant persons, migrants with disabilities and Indigenous migrants;
- (g) To give particular emphasis to recommendations on practical solutions with regard to the implementation of the rights relevant to the mandate, including by identifying best practices and concrete areas and means for international cooperation;
- (h) To report regularly to the Human Rights Council, according to its annual programme of work, and to the General Assembly, bearing in mind the utility of maximizing the benefits of the reporting process;”

This list indicates that the Special Rapporteur has a wide mandate. The new text embodied some novelties in comparison with previous Resolutions. In particular, there is a direct reference to the protection of other vulnerable groups, such as older migrants, persons with disabilities and indigenous migrants¹⁶.

Apart these specific aspects, surely more important, in general terms, the independent body’s task is to promote and protect the rights of migrants in all States, regardless of their ratification of the 1990 UN Convention on Migrant Workers and Members of their Family.¹⁷

As regards its promotion and prevention activities, the Special Rapporteur has the task to draft and submit reports or thematic studies to the Human Rights Council and the UN General Assembly. He or she may also participate in conferences, seminars or other meetings concerning the protection of migrants¹⁸.

¹⁶ Moreover, the specific task to promote the effective application of international rules was extended in order to include the principle of non-discrimination.

¹⁷ Such Convention, as known, was adopted by the General Assembly with Resolution 45/158 of 18 December 1990, after lengthy negotiations started at the end of 1970. The Convention entered into force, according to article 87, par. 1, in 2003 but, unfortunately, as of May 2023, it was ratified by only 58 States. On this international normative instrument, see generally, G. CELLAMARE, *La Convenzione delle Nazioni Unite sulla protezione dei diritti di tutti i lavoratori e dei membri della loro famiglia*, in *Rivista di diritto internazionale*, 1992, pp. 861-875; A. EGGERS, *Recent Developments in Human Rights: The International Convention on the Protection of All Migrants Workers and Members of their Family*, in *German Yearbook of International Law*, 1992, pp. 429-437; R. BARATTA, *La Convenzione delle Nazioni Unite sulla protezione dei lavoratori migranti: quali ostacoli all’adesione dei Paesi di ricezione dei flussi migratori?*, in *Rivista di diritto internazionale*, 2003, pp. 764 ss; R. CHOLEWINSKI, P. DE GUCHTENEIRE, A. PECOUD (eds.), *Migrations and Human Rights: The United Nations Convention on Migrant Workers’ Rights*, Cambridge, 2009; L. S. BOSNIAK, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Worker’s Convention*, in V. CHETAIL, *International Law and Migration*, Volume II; Cheltenham, UK, Northampton, MA, USA, 2016, pp. 28-58; S. D. WESTERN, S. P. LOCKHART, J. MONEY, *Does Anyone Care about Migrant Rights?: An Analysis of Why Countries Enter the Convention on the Rights of Migrant Workers and their Families*, in *International Journal of Human Rights*, 2019, pp. 1276-1299.

¹⁷ See Special Rapporteur on the Human Rights of Migrants, Report on the visit, Mission in Hungary (10 to 17 July 2019), doc. A/HRC/44/42/Add.1, 11 May 2020.

¹⁸ See <https://www.ohchr.org/en/special-procedures/sr-migrants/about-mandate>.

With reference to the production of the thematic studies above, the activity of the Special Rapporteur can be considered intense and more frequent. Among recent reports – drafted also upon receipt of inputs by various actors, such as civil society and national human rights institutions (NHRIs)¹⁹ – one can include the following: Report on the “impact of climate change on the human rights of migrants”,²⁰ Report on the “impact of COVID-19 on the human rights of migrants”,²¹ Report on “ending immigration detention of children and seeking adequate reception and care for them”,²² Report on the “Right to freedom of association of migrants and their defenders”,²³ and Report on “Access to justice for migrant persons”.²⁴

In a depth analysis of the content of Reports is outside the aim of this paper. It suffices here to underline that, in general terms, all reports have a consolidated structure; usually, they also contain recommendations to States or other entities, including civil society and migrants’ associations.²⁵

Again, the practice indicates that reports are aimed to protect all migrants or specific group of them. In this latter context, for instance, reports may cover the human rights of children²⁶ and unaccompanied children. On this subject, special mention should be done to the recent Report aimed to eradicate the immigration detention of children²⁷. The Special Rapporteur, once underlined the negative impact of the detention on the children welfare²⁸, has invited States “[...] to work towards the complete elimination of immigration detention [...] by developing and implementing human rights-based non-custodial alternatives to detention”.

¹⁹ On the NHRIs see, among others, E. DECAUX, *Evolution and Perspectives for National Institutions for the Promotion and Protection of Human Rights*, in A. A. SICILIANOS, C. BOURLOYANNIS-VRAILAS (eds.), *The Prevention of Human Rights Violations. Contributions on the Occasion of the Twentieth Anniversary of the Marangopoulos Foundation for Human Rights*, The Hague, 2001, pp. 233-243; B. G. RAMACHARAN (ed.), *The Protection Role of National Human Rights Institutions*, Leiden, 2005; M. QUAFISHEH, *The International Status of National Human Rights Institutions: A Comparison with NGOs*, in *Nordic Journal of Human Rights*, 2013, pp. 55-83; G. DE BECO, R. MURRAY, *A Commentary on the Paris Principles on National Human Rights Institutions*, Cambridge, 2015; E. SANTIEMMA, *Le istituzioni nazionali per la promozione e la protezione dei diritti umani*, Roma, 2016; K. LINOS, T. PEGRAM, *What Works in Human Rights Institutions?*, in *American Journal of International Law*, 2017, pp. 628-688; M. MAYRHOPER, *National Human Rights Institutions and their Monitoring Function*, in *European Yearbook on Human Rights*, 2017, pp. 223-236; and it is permissible also to refer to L. MANCA (a cura di), *Le istituzioni nazionali per la promozione e la tutela dei diritti umani. Profili teorici, comparativi e prassi*, Napoli, 2021.

²⁰ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. A/77/189, 19 July 2022.

²¹ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. A/76/257, 30 July 2021.

²² See Report of the Special Rapporteur on the Human Rights of Migrants, doc. A/75/183, 20 July 2020.

²³ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. A/HCR/44/42, 13 May 2020.

²⁴ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. A/73/178/Rev.1, 25 September 2018.

²⁵ See, for instance, Report of the Special Rapporteur on the Human Rights of Migrants “on the impact of bilateral and multilateral trade agreements on the human rights of migrants, doc. A/HRC/32/40, 4 May 2016.

²⁶ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. A/64/213, 3 August 2009.

²⁷ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. A/75/183, 20 July 2020.

²⁸ The Rapporteur note as follows “[i]n recent years, a consensus has emerged among international community that detention damages children’s physical, developmental, emotional and psychological health, depriving them of their fundamental rights and their childhood”, *Ibidem*, para. 13. Emphasis added.

Other reports deal with the protection of migrant domestic workers²⁹ and those who are deprived of their liberty³⁰. Again, in line with the mentioned Resolution no. 52/20 of 2023, some reports set out major questions relating to the promotion and protection of the women's rights³¹. In fact, lett. f) of the Resolution, as referred above, engaged the Rapporteur “[t]o take into account a gender perspective when requesting and analysing information, and to give special attention to the occurrence of multiple forms of discrimination and violence against migrant women”.

For the sake of completeness, it must be pointed out that, through these thematic studies, the international body has the opportunity to provide standard of treatment of migrants in accordance with international law and also to share best practice cases.

Clearly, recommendations contained in the report are not binding acts. In spite of their legal nature as soft law acts, such recommendations are not devoid of efficacy: their unquestionably carry significant political and moral weight and in this respect they may be considered one of the fundamental normative reference points for all States.

Most striking is the Special Rapporteur's monitoring function. The methodologies employed in this monitoring work are twofold. Briefly, the body is both entitled to receive and examine information relating to a violation of the human rights of migrants in a said State, as well as to organise an actual visit to the alleged place of violation.

As regards the first mechanism, the Special Rapporteur may send a State a communication aimed at obtaining information about alleged violations of international obligations linked to its mandate. More frequently, these communications are sent jointly with other thematic mandate-holders. Recently, for instance, the Rapporteur, together with the Special Rapporteur on extrajudicial summary or arbitrary executions, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on minority issues, sent a communication to Bangladesh relating to the killing of a human rights defender and the death of some refugees, members of the Rohingya minority.³²

Looking once again at the current practice, institutional co-operation with UN treaty bodies is also important. Recently, for instance, the Special Rapporteur and the UN Committee on the Protection of the rights of All Migrant Workers and Members of their Families³³ adopted a Joint Guidance on the

²⁹ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. E/EC.4/2004/76, 12 January 2004.

³⁰ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. E/CN.4/2003/85, 30 December 2002.

³¹ See Report of the Special Rapporteur on the Human Rights of Migrants, doc. A/HRC/41/38, 15 April 2019.

³² See doc. AL/BDG 5/2021, 18 November 2021.

³³ Such Committee of independent experts is the treaty body of the quoted 1990 UN Convention for the Protection of the Rights of Migrants Workers and Members of their Family.

Impacts of the Pandemic on the Human Rights of Migrants.³⁴ Within such document, the two bodies expressed concern about the situation of migrants – “[...] the COVID-19 pandemic is having serious and disproportionate effects on migrants and their families globally. Migrants who are in an irregular situation or undocumented are in situation of even greater vulnerability. Migrants in many cases already do not have effective access to medical care, education and other social services, work in unstable jobs - usually without benefits or the right to unemployment benefits - and in some cases have been left out of the social assistance measures implemented by States [...]” – and emphasised the need to ensure the exercise of their rights (access to social services, to the education, the health services) and to prevent any kind of discrimination.³⁵ The relevance of this institutional synergy is self-evident. The institutional dialogue, in fact, is aimed to improve coordination activities in the field of migration. On the other hand we can add that this interaction is consistent with the provisions included in the mentioned Resolution No. 52/20 of 2023³⁶. In particular, the practice of Joint Communications to be welcomed with really satisfaction. Given that the Special Rapporteur is devoid of coercive powers, Joint Communications can represent a form of reinforced international pressure capable of persuading States to respect their international obligations.

In this specific context, among the monitoring activities made jointly with other Rapporteurs, no less important is the practice to formulate comments on the national legislation and policy. Once again, the main aim of this activity is to bring the attention of States on the need to respect the international rules relating to the human rights of migrants. This practice, naturally, is not of marginal significance, given that the body has the possibility to express its disappointment and to make specific recommendation, when necessary, on the legislation adopted. Recently, the body has expressed concern about the approval of the Citizenship (Amendment) Bill 2016 in India “which appears to discriminate against a number of ethnic and religious minorities” living in the Country³⁷. Again, it is not rare the case in which comments are made also on draft bills. This happened, for instance, in 2023, with reference to the introduction of the “illegal migration bill” in the House of Lords of the United Kingdom³⁸. With a Jointly

³⁴ See UN Committee on Migrant Workers, UN Special Rapporteur on the Human Rights of Migrants, Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, 26 May 2020.

³⁵ *Ibidem*.

³⁶ This consideration confirms the complementary nature of the Rapporteur’ mandate of monitoring.

³⁷ See Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and the Special Rapporteur on freedom of religion or belief, Communication, OL IND 2/2019, 13 February 2019, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24333>.

³⁸ See, Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Special Rapporteur on violence against women and girls, its causes and

Communication, some Rapporteurs have invited the State concerned to examine the impact that such Bill “...would have, if adopted, on the human rights of migrants, including those in need of international protection”³⁹.

The impact of body’s intervention, during the domestic legislative process, is more evident (especially in a preventive key). The Rapporteur may evaluate whether draft bills are compatible with the international law and, if necessary, may call States to comply with their human rights obligations⁴⁰.

2.1.1. In particular, the Country-Visits Mechanism

As regards the second monitoring mechanism, the so-called “country visits”, these are the most efficient way to gain direct and immediate information about the current state of migrants in a said country⁴¹. Thus, this paper would like, lastly, to delve deeper in these.

During these visits, the Special Rapporteur may speak to governmental bodies, NGOs, national human rights institutions and, more importantly, migrants themselves. The dialogue with the civil society is more appreciate by the body and it is perfectly understandable given that information provided especially by NGOs has become essential for the functioning of the body in all its field of action, in particular with reference to the monitoring activity. Therefore, the absence of this interaction, also in the more recent practice relating to the country visits, has been a subject of concern. For instance, the Special Rapporteur, in 2022, has conducted a visit to Poland and Belarus. With reference to this latter State, in the Statement made at the end of the visit, the body underlined that “...unfortunately [he] was not able to find any local Belarusian civil society organization working on monitoring and reporting on the human rights situation

consequences, Jointly Communication, OL GBR 9/2023, 4 May 2023, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27973>.

³⁹ According to the Jointly Communication “[...] the proposed legislative text, in its current form, could severely restrict access to the territory of the United Kingdom, including by limiting the access through regular migration channels and to procedures for international protection. The provisions could also seriously undermine, inter alia, the right to seek asylum, the right to liberty, the principle of *non-refoulement*, the prohibition of collective expulsions, and the rights and best interests of the child, in violation of the United Kingdom’s obligations under both international human rights and refugee law”, *Ibidem*.

⁴⁰ The relevance of prevention activity was underlined by the same Human Rights Council in its Resolution No. 51/14 of 6 October 2022. The international body recognizes “*the particular importance of the role played by the system of special procedures as a tool in preventing human rights violations and abuses* by, inter alia, monitoring, reporting and/or making recommendations to States and other stakeholders [...]”, para. 18. Emphasis added.

⁴¹ On this issue, see I. NIFOSI, *The UN Special Procedures in the Field of Human Rights*, quoted; F. D. GAER, *Picking and Choosing? Country Visits by the Thematic Special Procedures*, in A. NOLAN, R. FREEDMAN, T. MURPHY (eds.), *The United Nations Special Procedures System*, quoted, pp. 87-130.

of migrants”⁴². According to the Special Rapporteur “this seems to reflect a larger worrisome issue of lack of civic space and criticism of governmental policies in the country”⁴³.

Having said that, generally speaking, from a comparative analysis of the practice relating to country visits, it emerges that the Rapporteur has widely exercised this task immediately, since its creation. His first visit took place in Canada in 2000. Several other countries have since been visited, including Hungary, Japan, Malta, Mexico, South Africa, Turkey and Italy⁴⁴.

According to the Article 11, lett. c) of the mentioned Code of conduct, all visits are prepared “in close collaboration with the Permanent Mission of the State concerned accredited to the United Nation office at Geneva”. Country visits may be organised upon request of the Special Rapporteur, or at the invitation of a Government. Practically, most visits are undertaken at invitation of the State. The Special Rapporteur may organise first visits and follow-up visits in order to monitor the status of implementation of the previous recommendations made. For example, with specific reference to a study concerning the management of the external borders of the European Union, in 2014, the Special Rapporteur has conducted a visit of follow-up in Italy⁴⁵.

Again, a review of the practice indicates that visits have also been organised to promote the ratification of international treaties. This is the case of the mission organised in 2006 in the Republic of Korea. The final report explicitly asserted that one of the main purposes of the visit was “to promote the ratification of the 1990 International Convention on the Protection of the Rights of All Migrant Workers”⁴⁶, unfortunately without success.

More broadly, there is no fixed practice about mission duration, or places to visits; for instance, the Special Rapporteur has visited asylum reception centres⁴⁷, police stations⁴⁸, transit zones at the airports⁴⁹ and removal centres.⁵⁰

⁴² See “End of visit statement of the Special Rapporteur on the human rights of migrants, Felipe Gonzáles, on his visit to Poland and Belarus (12-15 July 2022)”, 28 July 2022, p. 2, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/162/55/PDF/G0216255.pdf?OpenElement>.

⁴³ *Ibidem*.

⁴⁴ At the time of writing (May 2023), the body has conducted 39 visits.

⁴⁵ See Special Rapporteur on the Human Rights of Migrants, Follow-up mission to Italy (2-6 December 2014), doc. A/HRC/29/36/Add.2, 1 May 2015.

⁴⁶ See Special Rapporteur on the Human Rights of Migrants, Report on the visit, Mission to The Republic of Korea (5 to 12 December 2006), doc. A/HRC/4/24/Add.2, 14 March 2007, p. 4 (para. 2).

⁴⁷ See Special Rapporteur on the Human Rights of Migrants, Report on the visit, Mission in Hungary (10 to 17 July 2019), doc. A/HRC/44/42/Add.1, 11 May 2020.

⁴⁸ See Special Rapporteur on the Human Rights of Migrants, Report on the visit, Mission to Greece (25 November – 3 December 2012), doc. A/HRC/23/46/Add.4, 18 April 2013.

⁴⁹ See Special Rapporteur on the Human Rights of Migrants, Report on the visit, Mission to Turkey (15 to 30 June 2012), doc. A/HRC/23/46/Add.2, 17 April 2013.

⁵⁰ See Special Rapporteur on the Human Rights of Migrants, Report on the visit, Mission to The United Kingdom of Great Britain and Northern Ireland (21 to 26 June 2009), doc. A/HRC/14/30/Add.3, 16 March 2010.

Upon conclusion of the visit, the Special Rapporteur drafts a report. From a methodological point of view, all reports are drafted following specific guidelines. In brief, they are more detailed and contain general information about the mission, places visited and the level of cooperation received from national authorities during the visits. Such cooperation is an important and essential feature of the mechanism under consideration; it is clear, indeed, that the full assistance of national authorities is necessary for the success of the mission itself, and this is confirmed by the fact that the report devotes a specific section to this issue⁵¹.

On this point, it should be noted that according to the Terms of Reference for country visits of the mandate holders, adopted by the Human Rights Commission since 1998 and revised by the current Human Rights Council in 2016⁵², States have the duty to ensure some guarantees and facilities to the Special Rapporteurs, such as the freedom of movement in any part of the country and the freedom of inquiry. This latter, it implies that the body have access, *inter alia*, to the “documentary materials considered necessary to fulfil the mandate”, to prisons or other detention centres. States also are called to ensure a direct dialogue with witnesses and private persons; dialogue that has to be undertaken confidentially.

Looking at the practice, generally speaking, the body has expressed appreciation about the degree of cooperation received by States. This is, without a doubt, a positive feature. It means that States have understood the relevance of such cooperation as a crucial component of the Rapporteurs’ work.

The final part of the report usually contains general or specific recommendations addressed to the State concerned or other entities, such as international organizations⁵³.

3. Conclusive Remarks: The Opened Problem of the Consent and the Need to Encourage the Standing Invitation Mechanism

In light of the above, some general conclusions can be drawn on the limitations and contributions of the mandate of the Special Rapporteur on the human rights of migrants.

It is clear that the Human Rights Council plays a critical role in the promotion and protection of migrants’ rights. Within this context, the Special Rapporteur constitutes a key point of reference in terms of both policy setting, and monitoring activity.

⁵¹ This is typically comprised in the first section of the report.

⁵² See Revised Terms of Reference for Country Visits by Special Procedures mandate holders of the United Nations Human Rights Council (based on Appendix V, E/CN.4/1998/45), available at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/SP/ToRs2016.pdf> (last access: May 2023).

⁵³ For instance, see See Special Rapporteur on the Human Rights of Migrants, Follow-up mission to Italy (2-6 December 2014), quoted, para. 111 and subsequents. The report contains various and specific recommendations to the European Union.

Remarkable are the Rapporteur's monitoring functions. The possibility of making country visits, especially, constitutes one of this mandate's main strengths, for two main reasons. Firstly, in this way, the Rapporteur can establish a direct dialogue with the Government in order to individuate the best solution for the protection of human rights of migrants⁵⁴; secondly, he or she may cooperate (in various ways) with local NGOs. On the one side, this cooperation, as anticipated above, can be considered the main target of the visits; on the other, this participatory approach is strictly in line with the working methods of other international monitoring bodies⁵⁵. True, from a legal perspective, the Special Rapporteur cannot adopt binding instruments – as a direct consequence of its legal status – but its Recommendations – and, more specifically, the publication of the results of its investigations –, can generate some kind of “public pressure”.⁵⁶

This could influence the conduct of the State considered, inducing the latter to change its law or practice. To put it differently, we cannot underestimate the effects of the Special Rapporteur's mandate.

The main legal obstacle to country visits remains State consent. Although States are not obliged to give their consent,⁵⁷ in practice they are expected to do so, showing the international community that they are ready to cooperate with international bodies in protecting human rights. Actually, States should be encouraged to issue a “standing invitation”.⁵⁸ This is an open invitation, by States, to all thematic procedures; civil society, including NGOs and NHRIs, may play a key role in this respect, prompting States to issue standing invitations.

As of May 2023, only 128 UN Member States (out of 193) have extended a standing invitation⁵⁹. This data confirms the reluctance of States to accept supervision mechanisms different from the well-known reporting procedure; mechanisms that, more probably, are regarded as intrusive. In the short-term, the

⁵⁴ On this point it appears opportune to remember that the importance of such dialogue is confirmed also by the already mentioned Code of Conduct. According to Article 11, Mandate-holders “[s]eek to establish a dialogue the relevant governmental authorities and with other stakeholders, the promotion of dialogue and cooperation to ensure the effectiveness of special procedures being a shared obligation of the mandate-holders”.

⁵⁵ For an overview on the role of NGOs in the United Nations human rights treaty bodies, see, among others, F. D. GAER, *Implementing International Human Rights Norms: UN Human Rights Treaty Bodies and NGOs*, in *Journal of Human Rights*, 2003, pp. 339-357; S. SEJIWSKA-KOZLOWSKA, *The Role of Non-Governmental Organisations in Individual Communication Procedures before the UN Human Rights Treaty Bodies*, in *The Journal of Eurasian Law*, 2016, pp. 123-138; F. McGAUGHEY, *Non-Governmental Organisations and the United Nations Human Rights System*, Abingdon, New York, 2021. More specifically, with reference to the United Nations Human Rights Council, see I. TERLINGEN, *El Consejo de Derechos Humanos y las ONGs*, in J. ALMQVIST, F. GÓMEZ ISA, *El Consejo de Derechos Humanos: oportunidades y desafíos*, Bilbao, 2006, pp. 51-56; L. Nader, *The Role of NGOs in the UN Human Rights Council*, in *Sur- International Journal on Human Rights*, 2007, pp. 7-28; F. McGAUGHEY, *Non-Governmental Organisations and the United Nations Human Rights System*, quoted.

⁵⁶ All reports are published on the Special Rapporteur website.

⁵⁷ For more considerations on the relevance of the consent, among others, see I. NIFOSI, *The UN Special Procedures in the Field of Human Rights*, quoted, p. 65.

⁵⁸ For general considerations on this mechanism, see, among others, A. MARCHESI, *La protezione internazionale dei diritti umani*, Torino, 2021, p. 159.

⁵⁹ The data is available at <https://spinternet.ohchr.org/StandingInvitations.aspx>.



wish is for more States to issue a standing invitation. This, as suggested on several occasions by the former UN Human Rights Commission⁶⁰ and by the UN Human Rights Council, may strengthen the reputation of States as upholders of migrant protection and, more importantly, the monitoring role of the Rapporteur.

⁶⁰ See Commission on Human Rights, Resolution 84/2002, 26 April 2002 and Resolution 76/2004, 21 April 2004.