

The Mandate and Practice of the UN Special Rapporteur on the Human Rights of Migrants: Some Reflections in the Light of International Law¹

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Abstract

The UN Special Rapporteur on the human rights of migrants is an independent body, created by the former Commission on Human Rights, and whose mandate has also been confirmed by the current Human Rights Council. The article explores the fundamental role of the Rapporteur in the promotion and protection of migrants, considering relevant and recent practice of the body. With specific reference to the monitoring task of the Rapporteur, in particular, more emphasis has been placed on the monitoring mechanism based on the country visits, which provides direct information about the real situation of migrants and the implementation of the international legal obligations relating to the human rights of migrants, also thanks to the direct dialogue with national human rights institutions (NHRIs), Non-governmental Organisations (NGOs) and other civil society actors. The practice analysed in this work showed that the Rapporteur has used this monitoring tool on several occasions. However, there are practical limitations that are strictly linked to the need to acquire the prior consent of the State concerned. Consequently, in order to reinforce the supervision role of the Rapporteur, the article concludes underlying the importance to develop further the standing invitation practice.

Key Words:

United Nations, Special Rapporteur, human rights, migrants, monitoring

1. Introduction

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. 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 Council (for a general overview of the United Nations Special Procedures see, among others, Cook, 1993; Nifosi, 2005; Ramcharan, 2008; Tomuschat, 2008; Golay et al., 2012; Cantú Rivera, 2015; and more recently Nolan et al., 2017; Domínguez-Redondo, 2020). 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 on the mandate and practice of the Special Rapporteur. The main scope of

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this contribution is to examine the latter's potentials and limitations. From a methodological point of view, the study in its whole will be conducted taking into account the normative documents and the relevant practice of the Rapporteur, also using a comparative approach in order to better understand its *modus operandi*.

2. 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). 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; among the most recent contributions see Freedman, 2013; Ramcharan, 2015; Gallen, 2016; Freedman et al., 2017; Tistoune, 2020). 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 specifically.

These international acts usually also reaffirm some general principles. Among these, 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” (Human Rights Council, 2019; 2021).

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 Convention on the Rights of the Child (adopted 20/11/1989, entered into force 2/9/1990, 1577 UNTS 3, 1989 CRC).³ 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” (Human Rights Council, 2021).

It comes as no surprise that, more recently, 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” (Human Rights Council, 2021).

Within the institutional context of the Council and with reference to its thematic mandates⁴, specific mention should now be made of the Special Rapporteur on the human rights of migrants.

³ Until now, the Convention is the human rights treaty that has received the highest number of ratification (196 parties) (UN, 2022).

⁴ The practice of the “Thematic Mandates” was introduced by the former Commission on Human Rights (see generally Kamminga, 1987; Gutter, 2006).

3. The UN Special Rapporteur on the Human Rights of Migrants: Institutional Aspects and Practice

From an institutional point of view, the UN Special Rapporteur on the Human Rights of Migrants is an independent body, created in 1999 by the former Commission on Human Rights. Its mandate has also been confirmed by the current Human Rights Council (2020). In general terms, this independent body's task is to promote and protect the rights of migrants in all States, regardless of their ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18/12/1990, entered into force 1/7/2003, 1990, 2220 UNTS 3, 1990 ICRMW) (Special Rapporteur on the Human Rights of Migrants, 2020a; generally on the ICRMW Cellamare, 1992; Eggers, 1992; Baratta, 2003; Cholewinski et. al. 2009; Bosniak, 2016; Western et al. 2019).

As regards 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 migrants (UN Human Rights Office of the High Commissioner, 2022). With reference to the production of the thematic studies above, the activity of the Special Rapporteur can be considered intense and frequent. Among recent reports – drafted also upon reception of inputs by various actors, such as civil society and national human rights institutions (NHRIs) – one can include the following:

- Report on the impact of COVID-19 on the human rights of migrants (Special Rapporteur on the Human Rights of Migrants, 2021);
- Report on ending immigration detention of children and seeking adequate reception and care for them (Special Rapporteur on the Human Rights of Migrants, 2020b);
- Report on the right to freedom of association of migrants and their defenders (Special Rapporteur on the Human Rights of Migrants, 2020c);
- Report on access to justice for migrant persons (Special Rapporteur on the Human Rights of Migrants, 2018).

All reports have a consolidated structure; usually, they also contain recommendations to States or other entities, including civil society and migrants' associations (e.g., Special Rapporteur on the Human Rights of Migrants, 2016).

Most striking is the Special Rapporteur's monitoring function. The methodologies employed by the Special Rapporteur 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 (Special Rapporteur on the Human Rights of Migrants et al., 2021).

Looking at the 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 Families adopted a Joint Guidance on the Impacts of the Pandemic on the Human Rights of Migrants (UN Committee on the Protection of the rights of All Migrant Workers and Members of their Families, 2020). Within this 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 [...]” (p. 1)

They emphasised the need to ensure the exercise of the rights of the migrants (access to social services, education, health services) and to prevent any kind of discrimination (p. 1). The relevance of this institutional synergy is self-evident, and the practice of Joint Communications to be welcomed. 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.

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 country. 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. From a comparative analysis of the practice relating to country visits, it emerges that the Rapporteur has widely exercised this task. 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 Italy.

Country visits may be organised upon request of the Special Rapporteur, or at the invitation of a Government. Practically, most visits are undertaken at the invitation of the State. The Special Rapporteur, in line with the practice of the others UN Special Rapporteurs, may organise first visits and follow-up visits; this latter typology of visits is usually organised in order to evaluate the status of implementation of the previous recommendations made.

Again, a review of the practice indicates that visits have also been conducted to promote the ratification of international treaties. This is the case, for instance, for 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” (Special Rapporteur on the human rights of migrants, 2007, p. 4); unfortunately this was without success.

There is no specific practice about mission duration, or places to visits; for instance, the Special Rapporteur has visited asylum reception centres (Special Rapporteur on the human rights of migrants, 2020a), police stations (2013a), transit zones at the airports (2013b) and removal centres (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 detailed and contain general information about the mission, places visited, and the level of cooperation received from national authorities. Cooperation is an important feature of the mechanism under consideration; it is clear, indeed, that the full assistance of national authorities is essential for the success of the mission itself. This is confirmed by the fact that the report devotes a specific section to this issue. The final part of the report usually contains general or specific recommendations to the State.

4. Conclusive Remarks: 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.

Remarkable are the Rapporteur's monitoring functions. The possibility of conducting 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; secondly, he or she may cooperate (in various ways) with local NGOs. On the one side, this cooperation can be considered the main target of the visits; on the other, this inclusive approach is in line with the working methods of other international monitoring bodies. True, the Special Rapporteur cannot adopt binding instruments (as a 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”. Among others, all reports are published on the Special Rapporteur's website. This has the potential to 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 obstacle to country visits remains State consent. Although States are not obliged to give their consent (for more considerations see Nifosi, 2005, p. 65), 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” (for general considerations on this mechanism, see Marchesi, 2021, p. 159). 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 January 2022, only 128 UN Member States (out of 193) have extended a standing invitation. 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 wish is for more States to issue a standing

invitation. As suggested on several occasions by the former UN Human Rights Commission and by the UN Human Rights Council, this may strengthen the reputation of States as upholders of protection for migrants and, more importantly, the monitoring role of the Rapporteur.

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