



CHAPTER

11

**Special Rapporteur on
the Human Rights of
Migrants**

Special Rapporteur on the Human Rights of Migrants

The main functions of the Special Rapporteur on the Human Rights of Migrants¹ include examining ways and means to overcome obstacles to the full and effective protection of the human rights of migrants, recognizing the particular vulnerability of women, children, and those who are undocumented or in an irregular situation. The Special Rapporteur requests and receives information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families; formulates recommendations to prevent and remedy such violations, wherever they may occur; promotes the effective application of relevant international norms and standards; recommends actions and measures at the national, regional and international levels to eliminate such violations; and takes into account a gender perspective when requesting and analysing information, with special attention to the occurrence of multiple discrimination and violence against migrant women.

In the discharge of these functions, the Special Rapporteur gives particular emphasis to practical solutions for implementing the rights relevant to the mandate, including by identifying best practices and concrete areas in and means for international cooperation. The Special Rapporteur presents annual thematic reports to the Human Rights Council and the UN General Assembly; undertakes country visits; sends communications to States; participates in conferences, seminars and panels; and issues press releases on issues relating to the human rights of migrants. The current mandate holder, François Crépeau, took up his functions on 1 August 2011.

1. Migration and development activities since the 2006 High-level Dialogue

Jorge Bustamante, the former mandate holder, from 2005 to 2011, carried out numerous visits in the period following the first High-level Dialogue (HLD) on International Migration and Development in 2006, including to the Republic of Korea (“South Korea”), Indonesia, the United States of America, Mexico, Guatemala, Romania, the United Kingdom, Senegal, Japan and South Africa. He also carried out the key functions of the mandate, including reporting to the Human Rights Council and General Assembly annually, and following up on information received through communications to States regarding cases of concern.

The current Special Rapporteur, François Crépeau, undertook his first country visit to Albania in December 2011. In June 2012, he presented his first annual report to the Human Rights Council (A/HRC/20/24), which focused on the detention of migrants

¹ The mandate of the Special Rapporteur was first established by the UN Commission on Human Rights (UNCHR) in 1999, pursuant to UNCHR Resolution 1999/44, and extended by UNCHR Resolutions 2002/62 and 2005/47 and UNHRC Resolutions 8/10 and 17/12, each for a period of three years. The mandate is global in scope.

in an irregular situation. In October 2012 he presented his first annual report to the General Assembly (A/67/299), focusing on migration and climate change. He decided to dedicate his thematic work in 2012 to a study on the management of the external borders of the European Union and its impact on the human rights of migrants. In this context, he visited Brussels to liaise with key EU institutions and subsequently carried out country visits to Tunisia, Turkey, Italy and Greece in 2012. These visits provided the case examples for the study, which constituted the Special Rapporteur's thematic report to the UN Human Rights Council (UNHRC) in May 2013 (A/HRC/23/46), with the four country visit reports as addenda. Since assuming his functions as mandate holder, the Special Rapporteur has sent 33 communications to States.²

Since his appointment in 2011, the current Special Rapporteur has prioritized engagement in relevant international events, including the Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea, organized by UNHCR in Djibouti in November 2011; the GFMD Summits in Geneva in 2011 and in Mauritius in 2012; and the tenth and eleventh UN Coordination Meetings on International Migration and Development in New York in 2012 and 2013. In 2012 the Special Rapporteur also participated in an expert consultation on human rights at international borders organized in Geneva by the Office of the High Commissioner for Human Rights (OHCHR); a meeting on international migration, human rights and governance organized in Geneva by OHCHR and the Global Migration Policy Associates; and the thematic discussion on violence against migrants, migrant workers and their families held in Vienna by the UN Commission on Crime Prevention and Criminal Justice. The Special Rapporteur also participated at side events relating to the detention of migrants during the nineteenth and twentieth sessions of UNHRC in 2012.

2. Support provided to the Global Forum on Migration and Development

The Special Rapporteur attended the 2011 session of the Global Forum on Migration and Development (GFMD) in Geneva and participated in the GFMD Summit in Mauritius in 2012 as Rapporteur for the Common Space panel on “common ground and partnerships to protect migrants in distress.” He plans to continue engaging with the GFMD as a very relevant forum for his mandate in the years to come. The Special Rapporteur regrets the lack of attention given to the human rights of migrants by the GFMD, and is pleased to observe that while the GFMD was initially reluctant to invite the Rapporteur, this has since been rectified.

The Special Rapporteur will focus his 2013 report to the General Assembly on analysing international governance processes on migration, in particular, whether human rights are effectively mainstreamed in these processes, and this will include an analysis of the GFMD.

² Within the period 1 August 2011 and 18 March 2013.

3. Identified good practices

In the course of the Special Rapporteur's work, he will continue to highlight good practices as one method of assisting States in working towards the protection of the human rights of migrants.

For example, in the context of his report to UNHRC in 2012 on the detention of migrants in an irregular situation, the Special Rapporteur identified a number of non-custodial measures as an alternative to the detention of migrants in an irregular situation, including:

- (a) The registration of migrants with relevant authorities and the issuance of them with official registration documents to these migrants
- (b) The deposit of documents (passport or other identification documents) with relevant authorities
- (c) Release on bail, bond, or under surety or a guarantor
- (d) Periodic reporting to State officials
- (e) Case management or supervised release
- (f) Designated residence
- (g) Electronic monitoring
- (h) Home curfew or house arrest
- (i) Voluntary return programmes

Research has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and assistance. The alternatives have also proven to be considerably less expensive than detention, not only in direct costs, but also in terms of avoiding the longer-term costs associated with detention, such as the impact on health services, integration problems and other social challenges. In the context of his mandate, other good practices highlighted by the Special Rapporteur include:

- States accepting country visits by UNHRC special procedures³
- States following up on recommendations from special procedures
- States responding to communications by special procedures

³ The special procedures of the Human Rights Council are set by independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. The Special Procedures System is a central element of the United Nations human rights machinery. As of 1 January 2013, there were 36 thematic and 12 country mandates.

4. Challenges identified in carrying out the Special Rapporteur's work

In carrying out his work, the Special Rapporteur has identified a number of challenges, including the following:

- (a) Insufficient human and financial resources provided to the mandate;
- (b) Slow ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), as well as the total absence of engagement on the part of countries of the Global North;
- (c) States continuing to conceptualize migration as an internal matter, and their reluctance to frame the issue within the framework of international human rights law;
- (d) Migration dialogues often taking place outside UN and human rights frameworks, with a focus on development and political aspects without properly integrating human rights concerns.

5. Gaps evident within the migration and development sphere

The Special Rapporteur is acutely aware of the complex nature of migration, including its development, economic, and political aspects, as well as the many interests at play. Despite this, the Special Rapporteur continually observes the gaps regarding the human rights of migrants, which manifest themselves in a number of ways:

Lack of knowledge

The Special Rapporteur notes a lack of knowledge and understanding, at all levels, of the human rights framework as it applies to migration, and, particularly, irregular migration. This is evident from the intergovernmental level down to the management level on the ground.

There is particular concern about a lack of human rights terminology, including the blurring of categories such as migrant smuggling and trafficking in human beings. While trafficking, by definition, includes exploitation and entails a number of serious human rights violations, smuggling is essentially the service of moving people from point A to point B, and does not necessarily involve any human rights violations (although it often does, especially when the border is difficult to cross).

It is important to avoid stigmatizing terminology such as “illegal migrant” or “illegal migration”; preferable expressions include “irregular migration” and “migrants in an

irregular situation”, which are in accordance with relevant international human rights standards. Although it may be an administrative offense, irregular migration is not a crime per se (against persons, property or security). The use of the expression “illegal migrant” should therefore be avoided at all costs.

Using incorrect terminology that negatively depicts individuals as “illegal” contributes to the negative discourses on migration and further reinforces negative stereotypes against migrants. Such language also legitimates a discourse of the criminalization of migration, which, in turn, contributes to the further alienation, discrimination and ill treatment of these persons on a daily basis.

Gaps in migration policy and governance

With the above overarching points in mind, the Special Rapporteur on the Human Rights of Migrants notes the following gaps in some key areas of migration:

Detention

As observed in the current Special Rapporteur’s first thematic report to the Human Rights Council (A/HRC/20/24), the detention of migrants in an irregular situation is becoming increasingly widespread, and States use a wide range of reasons to justify these practices. However, the right to liberty and security of person and the protection against arbitrary detention remain applicable in all situations where there is deprivation of liberty, including in immigration control. Legitimate objectives for detention are the same for migrants as for anyone else: when someone presents a risk of absconding from future legal proceedings or administrative processes, or presents a danger to their own or public security. Thus, detention should never be mandatory; it should only be a means of last resort. If used, reasons must be put forward by States to justify detention, and such reasons should be clearly defined and exhaustively enumerated in legislation.

Migrants who are detained find themselves in an especially vulnerable situation, as they may not speak the language of the detaining country and, therefore, not understand why they are detained or be aware of ways to challenge the legality of their detention. This may lead to situations in which migrants in detention are denied key procedural safeguards, such as prompt access to a lawyer, interpretation and translation services, and necessary medical care; means of contacting family members or consular representatives; and ways of challenging detention.

The long-term administrative detention of migrants, sometimes over a year, is frequent. Immigration detention remains far less regulated and monitored than criminal detention, leaving migrants at risk of, inter alia, prolonged detention, inadequate conditions and mistreatment. The Rapporteur has observed that migrants are sometimes detained

in unacceptable substandard conditions and can become victims of violence, and has received reports of sexual violence and abuse.

The Special Rapporteur is concerned that migrants are detained in a wide range of places, including prisons, police stations, dedicated immigration detention centres, unofficial migration detention centres, military bases, private security company compounds, disused warehouses, airports and ships, among others. Privately run migrant detention centres, in particular, pose difficulties in terms of monitoring. Where detention regimes are in place, States must ensure that migrants are kept in adequately monitored, dedicated detention centres, and should under no circumstances be detained together with criminal offenders in prisons or other criminal facilities.

Attention also needs to be paid to categories of migrants who may have particular protection needs while in detention. Detained women migrants are vulnerable to sexual violence; pregnant women migrants are also often detained. Children, including unaccompanied ones, and families with children should never be detained, as adequate alternatives to detention are available and/or should be put in place. Victims of trafficking are detained when they are not properly identified as such, and are sometimes prosecuted if they violate immigration laws and regulations relating to irregular entry or use of false documents.

Detention can be particularly damaging to vulnerable categories of migrants, including victims of torture, unaccompanied older persons, persons with mental or physical disabilities and persons living with HIV/AIDS. Another category of vulnerable migrants – stateless persons – do not benefit from the consular or diplomatic protection of a State, often do not possess identity documents and do not have a country to which they may be returned, and are, therefore, especially vulnerable to prolonged detention.

Criminalization of irregular migration

In 2008 the former Special Rapporteur presented a report to the Human Rights Council on the criminalization of irregular migration (A/HRC/7/12). Criminalizing irregular entry and/or stay can lead to unnecessary detention, prevent migrants from accessing such key rights as health or housing and encourage stigmatization, hostility and xenophobia against migrants.

Xenophobia

Lack of understanding about the human rights of migrants makes them an increasingly vulnerable group and easy targets of xenophobia. The Special Rapporteur observes that, as a result of this lack of information and understanding about migration, its root causes, and the positive contributions of migrants to society, migrants are increasingly subject to xenophobia, anti-migrant sentiment, hate speeches and hate crimes, which

in themselves are human rights violations and can lead to further, more serious human rights abuses, particularly when physical violence is involved.

Migrant children

Migrant children continue to be a particularly vulnerable category of migrants. In 2009 the former Special Rapporteur presented a report to the Human Rights Council on the protection of children in the context of migration (A/HRC/11/7). He noted that children who are unaccompanied or separated from their parents are particularly vulnerable to human rights violations and abuses at all stages of the migration process, and that the lack of distinction between adult and child migrants is a major challenge. Better knowledge about the rights of these children and the obligation to protect them is paramount.

Economic, social and cultural rights

In 2010 the former Special Rapporteur presented a report to the Human Rights Council on the rights to health and adequate housing in the context of migration (A/HRC/14/30). He emphasized that the enjoyment of these rights by all individuals in society – regardless of their citizenship, nationality and immigration status – is not only an end in itself as a matter of entitlement, but also a crucial means to ensure equitable human development and social integration of migrants in host societies.

The Special Rapporteur also liaised with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on preparing his upcoming report to the Human Rights Council on migrants' right to health (A/HRC/23/41).

Borders

Some receiving States have responded to irregular migration by intensifying border controls, in some cases “externalizing” them to countries of origin and transit by using bilateral agreements and/or aid to transform these countries into buffer zones that reduce migration pressures on the receiving States, without any accompanying measures to ensure respect for the human rights of migrants in the process.

Lack of capacity

There appears to be a lack of trained personnel, in both governments and intergovernmental organizations, who work on migration issues from a human rights perspective. The financial crisis, which led to budget constraints in a number of UN Member States, has had a negative impact on the resources devoted to migration issues. The Special Rapporteur sees a need for increased training of public officials

at all levels, including within government ministries, on migrants' human rights; on the technical level, such training must include the police, border guards, immigration officers and detention centre staff.

Coordination gaps

While noting the important work of the GMG as the inter-agency coordination body on migration, the Special Rapporteur remains concerned about the continuing lack of a coordinated international approach to migration, which should have at its core a respect for human rights. There is a need to strengthen and reaffirm the essential role of the GMG, with increased focus on the human rights of migrants. There is also a need for greater involvement of the United Nations in the global debate on migration, which seems difficult to achieve so long as the GFMD remains a “government-led, informal, non-binding and voluntary process” focused on migration and development without giving enough attention to the human rights of migrants.

6. Recommendations for the 2013 High-level Dialogue

The Special Rapporteur suggests that the 2013 HLD should have an explicit and cross-cutting focus on the human rights of all migrants, including the human rights safeguards surrounding migrant detention. More specifically, the HLD could invite Member States to explore alternatives to immigration detention and address some of the other gaps noted in the previous section.

In particular, the 2013 HLD should promote real recommendations to States in the fields identified. These include strong recommendations on means to progressively abolish the administrative detention of migrants and concrete recommendations about securing all the relevant procedural safeguards for all migrants in detention.⁴

In addition to issues relating to detention, it is proposed that the HLD focus on a number of other key human rights concerns relating to migrants, and States and their non-State partners are called on to:

- (a) Focus on the fact that irregular entry and stay should never be considered criminal offences. Although they may constitute the violation of some administrative rules, they are not crimes per se against persons, property or national security. Irregular migrants are not criminals per se and should not be treated as such.
- (b) Ensure consistency in terminology, including by avoiding the use of the term “illegal migration”; keep clear the distinction between trafficking and smuggling; and ensure that irregular migrants, including smuggled migrants, are not criminalized.

⁴ See the recommendations of the current Special Rapporteur in his report to the Human Rights Council (A/HRC/20/24, Paragraphs 68–78).

- (c) Ensure awareness-raising on the human rights of migrants among the general public, as well as specific training of professionals dealing with migrants. All necessary measures must be taken to combat xenophobia and xenophobic violence against migrants, including through public discourse that fosters inclusiveness, non-discrimination and the recognition of diversity and pluralism as social assets; legislation, policies and practices to that effect; and the empowerment of all institutions, including human rights institutions, to implement and monitor such legislation, policies and practices.
- (d) Ensure effective protection of the human rights of children in countries of origin, transit and destination at every stage of the migration process and in all migration management procedures. Children should always be treated as children first and foremost, and the principle of the best interests of the child should always guide all decisions regarding children, whatever their status and circumstance. Avoiding the detention of migrant children, and giving them access to appropriate education and health care services, should be key objectives.
- (e) Ensure the enjoyment of all economic, social and cultural rights – including the rights to education, health and adequate housing – for all migrants, irregular migrants included.

While States have the power to admit or deny the entry of foreigners, they have an obligation to respect the human rights of all migrants in the process. Unless otherwise specified in rare cases, human rights are not reserved for citizens: they benefit everyone who is on any State's territory or within its jurisdiction, whatever their status.

