



Human Rights of Undocumented Adolescents and Youth

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Executive Summary

International migration is emerging as one of the key issues affecting youth. Whether on their own or with family, adolescents and youth are increasingly migrating in search of survival, security, improved standards of living, education or protection from discrimination and abuse. Many are migrating in response to a complex mix of many of these factors. Although young migrants have great potential to contribute to the populations they join, and migration presents myriad positive opportunities for young persons, as well as for countries of origin and destination, a lack of protection, respect, and fulfilment of human rights within migration policies increases their vulnerabilities. In particular, limited regular channels for migration and policies that aim to reduce irregular migration – including punitive measures for irregular entry and stay and restricted access to rights and services in destination countries – make young migrants vulnerable to human rights abuses and limit the opportunities and benefits of migration. Such policies also present challenges for adolescents and youth in countries of origin, who may as a result be ‘left behind’ and face limited enjoyment of rights in the context of prolonged family separation.

This paper considers some of the main issues regarding human rights of undocumented adolescents (children between 10 and 18 years of age) and youth (young adults between 19 and 35 years of age), focusing on the challenges around immigration detention and access to education. Consideration of the numerous ‘pathways’ or routes into irregularity, which mean that young people often transition between various statuses during the course of their migration journey, as well of gender-related factors provides important context to the analysis. While migration has the potential to contribute to gender equality, gender-specific factors, including prevailing gender roles and gender discrimination, can influence the migration choices of adolescents and youth, as well as their experiences en route and trajectories and outcomes at destination, including the likelihood of them losing status and becoming undocumented.

Regardless of migration or citizenship status, all people hold a number of inalienable civil, cultural, economic, political and social rights without discrimination. Due to their specific vulnerability, children are afforded additional protections under the Convention on the Rights of the Child. However, despite the international framework designed to protect and promote the human rights of all individuals and the specific provisions protecting those under the age of 18, adolescents and youth experience numerous human rights violations. In countries of transit and destination, undocumented adolescents and youth are frequently subjected to enforcement measures that violate their rights and face restrictions on their access to services and justice as a result of law, policy and practice. The lack of separation between immigration enforcement and the provision of services and the mechanisms for protection and redress further disempowers migrant adolescents and youth, as they are unable to claim their rights and access protection without potential negative consequences as a result of their migration status.

One clear example is immigration-related detention, which violates numerous rights of adolescents and youth, with potentially significant short- and long-term impacts on physical and mental health, as well as on personal and social development. The extreme segregation and limited human rights in the context of immigration detention – in terms of its procedural use, its length and its conditions – not only violate these rights and prevent any positive benefits of migration in the short term, but can also hamper the social and economic integration of undocumented adolescents and youth. In the case of adolescents, the very fact of detention is a direct human rights violation; the Committee on the Rights of the Child has made clear that detention of children on the sole basis of their migration status or that of their parents, is a violation of the Convention on the Rights of the Child, is never in their best interests and is not justifiable.

The impacts of restrictive laws, policies and practices on the well-being and development of migrant adolescents and youth are also particularly visible in the case of the right to education. Despite global recognition as a right that is not only fundamental in itself, but also key to empowerment and development, the right to education is often restricted for undocumented adolescents and youth. Whether or not these young people remain in the destination country or migrate elsewhere, restrictions on access to education and a lack of opportunities for them to regularise their status not only result in an abuse of their human right to access education, but also result in a great waste of potential and can have harmful mental health impacts.

Both examples - immigration-related detention and education - shed light on specific challenges around mental health and psycho-social development faced by undocumented adolescents and youth that require urgent attention. In countries where adolescents enjoy additional legal entitlements and rights because they are under the age of 18 (and thus legally children), this rarely extends to resolving their migration status, resulting in prolonged periods of anxiety about the future, with negative implications for enjoyment of rights and well-being during childhood, as well as after. Moreover, any such additional protections afforded to adolescents because they are children often end abruptly on reaching the age of majority (usually 18 years). This sudden change in treatment does not reflect research on physical and mental development in humans. On the contrary, research shows that cognitive and social-emotional development continues after the age of 18, providing strong justification for additional protections for youth.

As they make the transition from childhood to adulthood, undocumented adolescents and youth are forced to adjust to the reality and limitations of living with an irregular migration status. The impact is largely unexplored, but may leave them particularly vulnerable to exploitation and abuse and present

significant psycho-social and developmental challenges. These challenges are not only harmful in the short term, at a critical stage of individual development, but severely limit the opportunities and benefits of migration enjoyed by individuals and their communities in the long term as well. The issues around labour rights for young undocumented workers are also inter-linked; respect of labour rights and civic and political empowerment of undocumented adolescents and youth are also essential to protect their rights and support their development.

The paper concludes by calling on the international community and national policy-makers and stakeholders to adopt an age-sensitive approach to migration and development that considers not only children, but also the situation of youth. Two points are critical. Firstly, there is a pressing need for legislative and policy reform to respect the human rights of all people in the context of migration, regardless of age or status. The need to protect the human rights of adults, both as parents of children and as individual rights-holders, must be recognised. Secondly, the special protections granted to children under international and national law and policy should not automatically disappear when a person turns 18 years old. The particular issues that undocumented adolescents and youth face during their transition between childhood and adulthood can make them more vulnerable to exploitation and abuse and may pose significant psycho-social challenges. Only by recognising and addressing these vulnerabilities and empowering adolescents and youth to claim their rights, can the positive potential of youth migration be fully enjoyed.

The international community must prioritise legislative reform and the exchange of promising practices, such as those presented in this paper, to realise human rights, tackle practical obstacles through concrete measures and initiatives, ensure minimum standards, and empower adolescents and youth in countries of origin, transit and destination to be active citizens of their communities.

Recommendations

1. **Adopt a comprehensive age-sensitive human rights framework for the management of migration.**

Migration policies have a direct impact on the enjoyment of human rights by adolescents and youth. States should evaluate and reform legislation and policy to ensure that the human rights of adolescents and youth in the context of migration, regardless of their migration status, are protected, promoted and fulfilled, including regarding access to family reunification. This should include recognition that civil, cultural, economic, political and social rights must be enjoyed without restriction based on migration status. Age and gender issues should be specifically considered and addressed. In particular, adolescents and children must enjoy the special protections afforded to them in a child rights framework, including implementation of the guiding principles of the CRC —the best interests of the child, non-discrimination, the right to life, survival and development, and the right to participation and being heard. Further, this special protection should not cease as soon as adolescents turn 18 years old, but be adapted to provide suitable support for youth in the context of migration.

2. **Make full use of the Convention on the Rights of the Child as a tool for advancing the rights of children affected by migration.**

In addition to guiding legislative and policy reform processes, the CRC Committee has recommended that the CRC periodic reporting mechanisms should be used by States and civil society to evaluate more systematically the implementation of the Convention in relation to all children affected by migration. This should include collaboration between children's rights and migrants' rights organisations, as well as a stronger role for national human rights institutions. International treaty bodies and national and local organizations concerned with children's rights should continue to monitor the situation of migrating children, raise concerns when their rights are at risk, and support efforts by national governments to adopt laws, policies and procedures that respond to the rights and needs of children in international migration situations.

3. **Empower adolescents and youths to access and enjoy their human rights and proactively address existing obstacles to this access and enjoyment.**

Migrant adolescents and youth should be systematically empowered to defend their rights, in particular through access to competent and effective legal representation in all proceedings that can affect their status, rights and freedoms. At the same time, measures to remove existing legal and practical barriers should be proactively pursued. In the case of education, legislation should explicitly state the right to education for all children regardless of status, and include access to non-compulsory education for older adolescents and youth. Access to education, training, and support services in countries of origin, transit and destination should be non-discriminatory, for example regarding fees, diplomas, flexible educational programs, school counselling, health services, and financial assistance.

4. **Separate service provision and immigration enforcement.**

In order to safeguard access to rights and essential services for adolescents and youth, a clear separation between service provision and immigration enforcement must be implemented in law and in practice. Requirements for public officials to report undocumented migrants to immigration authorities should be eliminated. Service providers should be prohibited from sharing personal information for immigration enforcement purposes, and enforcement practices should not be carried out in or near services.

5. Include adolescents and youth affected by migration in social protection systems, policies and programs.

Policies, programs and measures to protect children from poverty and social exclusion must include adolescents and youth in the context of migration, regardless of status, and consider their particular needs and vulnerabilities. The capacity of social protection systems to detect, refer and support situations of vulnerability beyond material poverty should be strengthened. In countries of origin, the specific situations and needs of children 'left behind' should be addressed by social protection provisions. In particular, measures to support single-parent families and strengthen families in their child-care role, including community-based social services, and special services for children living outside a family environment, including kinship care, should be put in place. Awareness-raising campaigns stressing that adolescents and youth from migrant homes constitute a vulnerable and growing population must be developed and implemented. In countries of destination, migrant households with children should be a specific target group of social policies and programmes.

6. Protect nationals abroad regardless of status through consular services.

Countries of origin should disseminate accessible information regarding rights and develop programmes to provide protection and support services for migrant nationals, regardless of status, through consular networks in countries of destination. This should include an active role in the prevention of unlawful immigration detention, and in particular child detention. An age-sensitive rights framework should be ensured in policies and practices of consular protection, including ensuring that any measure adopted is in accordance with the best interests of the child.

7. Reform immigration detention policy and practice to comply with international law.

Immigration detention violates human rights of adolescents and youth. Undocumented youth should not be subject to punitive measures, including immigration detention, solely as a result of their migration status or for immigration purposes. Deprivation of the liberty of young migrants should only be used as a last resort and in full accordance with international standards for detention and procedural guarantees. Immigration detention of adolescents must be prohibited. Suitable alternatives to detention should be provided for adolescents, and for their families when accompanied.

8. Adopt a Best Interest Assessment and Determination Procedures.

Countries of transit and destination should carry out Best Interests Assessments and Determination procedures to ensure the rights of child and adolescent migrants, both in the short and the long term. The procedures should ensure, *inter alia*, every due process safeguard, including child participation; a key role of child protection authorities, rather than migration control bodies; adequate budgets; and protection measures that must not include any kind of deprivation of their liberty.

9. Promote regular migration and access to secure residence status.

Irregular migration status and living with the uncertainty of insecure residence hinders integration in destination societies and has significant short- and long-term implications for the development and enjoyment of rights of adolescents and youth. Regular migration status facilitates the integration of young migrants and the benefits of migration to be enjoyed by individuals and wider society. States should enhance regular migration channels for work and family reunification, and make accessible permanent mechanisms to access long-term regular migration status on the basis of reasonable conditions (such as years of residence, participation in education, and connections to destination society).

Irregular residence should not prevent access to permanent residence status and citizenship when other requirements are met. Requirements that discriminate against women and girls should be eliminated. Family reunification policies should enable children 'left behind' to join their parents, or parents to join their children, in the destination country, thereby avoiding irregular and unsafe migration channels.

10. Strengthen efforts to combat xenophobia, racism and discrimination towards migrants and 'left-behind' households.

Irregular entry or stay should not be criminalised, and states should strive to improve knowledge and to address negative perceptions of migrants in countries of origin, transit and destination, in order to protect adolescents, youth and their families from violence and discrimination, and to promote access to rights, equity, respect, social cohesion and social and economic integration. Undocumented adolescents and youth should have equal access to swift and effective redress mechanisms to reduce impunity and to fulfil states' commitment to non-discrimination. Countries of destination should ensure that violence and xenophobic attitudes, discourse and actions by civil servants and public institutions (school, health care system, courts, police, etc.) and communities are effectively addressed and subject to legal proceedings where appropriate, publicly rejected, and progressively eradicated.

11. Prioritise prevention of violence against adolescents and youth in the context of migration and assistance to survivors.

Adolescents and youth in the context of migration are more vulnerable to violence in countries of origin, transit and destination, due to specific, migration-related factors such as parental absence, legal and social exclusion, and xenophobia. Some of these vulnerabilities are gender-based. In order to address these risk factors and rights challenges, States should review and reform their national violence-prevention legal frameworks, policies and programmes to ensure that they explicitly include adolescents and youth in the context of migration and address their particular vulnerabilities.

12. Raise awareness about safe migration and realities in destination countries, including regarding rights, risks and opportunities.

Countries of origin and destination should develop programmes that provide accessible information regarding safe and regular migration channels, any potential harm that irregular migration might give rise to (including human trafficking), and practical data on destination countries and cities (e.g. travel, job placement, rights, and health care availability). Information on assistance available to migrants during transit and at destination is also necessary (e.g. legal aid services, government services, counselling, women's groups, and human rights organizations).

13. Build capacity of youth-led organizations working on adolescents and youth migration issues.

Supporting grassroots, youth-focused organizations, would better connect policy-makers with the realities and needs of young people, enabling them to minimize the negative aspects of adolescent and youth migration while leveraging the benefits and opportunities. Youth-led initiatives often lack the expertise, staff experience and long-term relationships to make a sustainable impact on issues like migration. Financial support and technical capacity-building are necessary for youth-led organizations to function effectively.

14. Develop evidence-based policy making on the basis of data collection.

Efforts should be made to develop a system to collect data on a regular basis on international irregular migration, and the impact of all public policies - migration control mechanisms, regularization programs, etc. - on the rights and living conditions of adolescents and youth. Data disaggregated by age, sex, country of origin, education, occupation, skill level and other relevant information such as migration status, issuance of entry, exit and work permits, and changes in nationality, should be collected and disseminated. States should ensure the inclusion of households affected by migration in local statistical and data systems, as well as in nationally-representative living standards, expenditure, and labour force surveys. Consultation with vulnerable groups, including populations affected by migration, should take place before formulating a particular policy or programme. This would facilitate evidence-based, coherent, rights-based and comprehensive policy design, and the inclusion of adolescents and youth affected by migration in local planning and budgeting processes. States should ensure that such data collection is not used for immigration control purposes.

Introduction

International migration has emerged over the years as one of the key issues affecting youth.¹ Whether on their own or with family, adolescents and youth² are increasingly migrating in search of survival, security, improved standards of living, education or protection from abuse.³ Young migrants have great potential to rejuvenate and contribute to the populations they join, particularly in contexts where populations are ageing due to low birth rates. However, while international youth migration can present multiple positive opportunities for adolescent and young migrants as well as countries of origin and destination, a lack of protection and promotion of rights within migration policies increases their vulnerabilities.⁴ In particular, limited regular migration channels and policies to reduce irregular migration, including punitive measures for irregular entry and stay and restricted access to rights and services in

destination countries, make young migrants vulnerable to human rights abuses and limit the opportunities and benefits of migration.

Despite an international framework designed to protect and promote the human rights of all individuals, with specific provisions protecting children's rights, adolescents and youth experience numerous human rights violations in the context of migration. Due to their age, children, including adolescents, can be particularly vulnerable. Restrictions of regular migration impact the way parents⁵ and families migrate, increasing the likelihood of children of migrant parents, unwillingly 'left behind'⁶ in countries of origin, experiencing prolonged periods of family separation and reduced access to rights and services as a result of parental absence, and becoming irregular migrants⁷ themselves.⁸ When irregular

- 1 For example, The World Development Report shows that 50 to 90 per cent of youth wish to migrate, although mainly temporarily (Sabates-Wheeler, R. *The Impact of Irregular Status on Human Development Outcomes for Migrants*, Human Development Research Paper 2009/26, July 2009). See also data compiled by UNICEF, which found that globally, there are approximately 35 million international migrants between the ages of 10 and 24 years, which represents about 17 per cent of the total migrant population. Among the 35 million adolescent and youth international migrants, 20 to 24 year olds account for some 44 per cent (15 million), followed by middle and late adolescents (15-19 years of age) who comprise 32 per cent (11 million), while early adolescents (10-14 years of age) represent 25 per cent (9 million) (UNICEF, *Adolescents, Youth and International Migration: Figures and Facts*, 2011). However, it is important to note that these figures do not accurately account for irregular migrants. Data is often available on migrants apprehended and subject to enforcement – e.g. arrests at border control points, numbers in immigration detention, and return figures (through voluntary programmes or enforced) – but is of differing reliability, not comparable, and not an indication of the total irregular migrant population. Some undocumented migrants may be counted in population censuses in some countries, but this is very limited. See for example Koser, K, *Irregular migration, state security and human security*, 2005; M. Jandl et al. *Report on methodological issues*, November 2008; Triandafyllidou, A., *CLANDESTINO Project Final Report*, November 2009 [hereafter *Clandestino report*, 2009]. Furthermore, where statistics are available, they are frequently not disaggregated by gender and/or age. Even when attention is given to the registration of separated children (and then often only those who seek asylum), little or no attention is given to undocumented children with their families, and practice varies regarding whether they are recorded as individuals, as dependents, or at all.
- 2 For the purposes of this chapter, an 'adolescent' is anyone between 10 and 18 and a 'youth' is anyone between 19 and 35 years of age. Therefore adolescents are also children with additional protection in the child rights framework, as a 'child' is anyone up to 18 years of age, in line with the Convention on the Rights of the Child. The authors note that the term 'youth' can be considered derogative in some contexts, but is used here to follow United Nations terminology.
- 3 GMG, *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, pp. 53, 2008.
- 4 Human Rights Council *Report of the Special Rapporteur on the Human Rights of Migrants*, A/HRC/11/7, Geneva, 14 May 2009, para. 22 [hereafter *Special Rapporteur Report*, 2009].
- 5 In the chapter, the term 'parents' is used to refer to parent(s) or other primary caregiver(s).
- 6 In countries of origin, many parents have no choice but to leave their children behind when they migrate, and there are very few regular channels for children to join their parents later. Many parents make the difficult decision to migrate nonetheless, in order to secure a better life for their children. To draw attention to these structural challenges, quotation marks are used around the term 'left behind' in this chapter.
- 7 In this chapter the terms 'undocumented' migrant and 'irregular' migrant (or migrant with irregular status) are used interchangeably, although it is important to note that 'undocumented' migrants are not always entirely without documentation. For example, they may have had a valid permit which has expired, or have a residence permit but be working without the proper permission.
- 8 See for example, UNICEF, *Access to Civil, Economic and Social Rights for Children in the Context of Irregular Migration*, Submission to the UN CRC Day of General Discussion on *The Rights of All Children in the Context of International Migration*, 28 September 2012. [hereafter *UNICEF Access to Civil, Economic and Social Rights*, 2012].

migrants, these vulnerable groups face restrictions on their access to basic rights and services in countries of transit and destination as a result of law, policy and practice. Undocumented adolescents and youth are subjected to enforcement measures, such as detention and deportation, which can also result in family separation, as well as restricted access to

basic services and justice. The lack of separation between immigration enforcement and the provision of services and mechanisms for protection and redress disempowers migrant adolescents and youth, as they are unable to claim their rights and access protection without potential negative consequences as a result of their migration status.

Definitions of adolescence and youth

No consensus on definitions globally

'Adolescence' is defined as the period following the onset of puberty during which a young person develops from a child into an adult. Therefore, it is very individual and there is no scientific or legal consensus on a specific age definition. The United Nations (UN) uses the age cohort 10-19 when referring to adolescence.⁹ However, individuals may experience some of the key physiological and psychological changes from an age earlier than 10, and later than 19 years. The upper boundary is often raised to 21 or 25 years of age in contexts dealing with physical, social and mental health and development, with reference to the on-going development during these years. 'Adolescence' itself is not usually defined in legislation, though definitions are often linked to national laws setting the age of majority and legal ages for additional rights and responsibilities associated with adulthood.

In the case of 'youth', while often defined in domestic laws, there is still no uniformity, and very few countries use the definition of 'youth' as elaborated by the UN, which uses the age cohort 15-24 when collecting global statistics on youth.¹⁰ For instance, in Mexico, the term 'youth' includes persons between 12 and 29 years of age; in Costa Rica, youth designates persons between the age of 12 and 35; the Dominican Republic defines youth as persons between 15 and 35 years of age, and other countries, like Nicaragua, have a definition of youth which includes only persons of 18 years of age and older, so as not to overlap with adolescent legislation. In Africa, many countries define youth as comprising individuals between the ages of 15 and 29 years. For some countries, the age is extended up to 35 years, as is the case of Ghana, Nigeria and Senegal. Given the different definitions of youth between European Union member states, there is no official EU definition, though the age cohort 15-29 is frequently used.¹¹

Thus, in some countries, both 'adolescents' and 'youth' may also be children. Although children may be granted certain rights and responsibilities at different ages, by law,¹² there is international consensus on the legal definition of a child, stemming from the Convention on the Rights of the Child (CRC), which defines a child as 'every human being below the age of 18 years'.¹³

Definitions in this chapter

Given that there is no universal definition or consensus on definitions of 'adolescence' and 'youth', for the purposes of this chapter, the term 'adolescent' refers to the age cohort 10-18, and 'youth' to the age cohort 19-35.¹⁴

9 See UNICEF, *Adolescence: An age of opportunity, The State of the World's Children*, 2011.

10 See UN General Assembly, Resolution A/40/256, 6 May 1985, para. 19. In 1985, the UN celebrated the first International Year of Youth. On its tenth anniversary, the General Assembly adopted the World Programme of Action for Youth, setting a policy framework and guidelines for national action and international support to improve the situation of youth. Since then, all the statistical services of the United Nations system have used as a reference the age cohort of 15-24 years to collect global statistics on youth.

11 See for example, Eurostat, *Youth in Europe: A statistical portrait*, Eurostat Statistical Books, 2009 Edition; European Commission, *EU Strategy for Youth – Investing and Empowering*, COM 2009, 200 final, Brussels, 27 April, 2009.

12 Such as the level of participation allowed in judicial proceedings, or where the child has been involved in a criminal act.

13 Convention on the Rights of the Child (CRC), Article 1.

14 It is understood that 'adolescent' and 'youth' in this paper do not refer to legal categories.

Even if an adolescent or youth has regular or citizenship status in a country, they can be severely impacted by these policies, if a parent or sibling is undocumented. As well as constant fear of a family member being arrested, detained or deported, and family separation, even citizens can face reduced access to their rights and services or be deported to another country, due to the migration status of their parents.¹⁵ 'Returned' adolescents and youth – those who have been deported to their, or their parents' country of origin – also face numerous human rights challenges, particularly if they have spent a considerable period of their formative years in the country of destination. Further, all adolescents and youth in the context of irregular migration, in countries of origin, transit and destination, especially young girls, are particularly vulnerable to abuse, exploitation, trafficking and other human rights violations.

Where adolescents do enjoy additional legal entitlements and rights within a child rights framework because they are children, this rarely extends to resolving their immigration status. They therefore often experience prolonged periods of anxiety and uncertainty about the future, with negative implications for enjoyment of rights and well-being during childhood, as well as after. Moreover, any such additional protections afforded to adolescents because they are children, often end abruptly on reaching the age of majority (usually 18 years). For example,

in some countries, adolescents are protected from immigration detention and deportation,¹⁶ but can be targeted for such immigration enforcement from their 18th birthday. Undocumented adolescents are often entitled to compulsory education, notwithstanding barriers in practice, but not entitled to access higher education or the labour market as undocumented youth.

This sudden change in the treatment and protection between adolescents and youth, as soon as an adolescent turns 18 years, is not supported by research, which shows that cognitive and social-emotional development continues after the age of 18, providing strong justification for additional and specific protections.¹⁷ Further, there are a number of issues felt by undocumented adolescents and youth, particularly during their transition between childhood and adulthood, when they must adjust to the reality of living as an adult with irregular migration status and the limitations this has, that are largely unexplored and may leave them particularly vulnerable to exploitation and abuse, and present significant psycho-social and developmental challenges. These challenges are not only harmful for undocumented adolescents and youth in the short term, at a critical stage of their development, but severely limit the opportunities and benefits of migration enjoyed by individuals and their communities in the short and long term.

15 As Bhabha pointed out "...in most countries citizen children born to immigrant or non-citizen parents have no rights to bring or keep their parents with them, though similarly situated adults do have those rights to family unity or reunification. And yet, no one disputes that the family is vital to the well-being and upbringing of a child ... Why then don't citizen children have the right to maintain this group so fundamental to their well-being in the country of their birth?" (Bhabha, J., *Un "vide juridique" – Migrant Children: The Rights and Wrong*, 2007, in Bellamy, Carol, and Zermatten, Jean (eds.), *Realizing the Rights of the Child*, Swiss Human Rights Books, vol. 2, Rüffer & Rub, Zurich). Further, research from the United States finds that there are persistent educational disadvantages for citizen children of undocumented migrants compared to citizen children of regular migrants, including fewer average years in education. The authors note that the high levels of stress, lack of money for academic enrichment activities, and pressures to work lead many to drop out of school (Frank D. Bean et al., *Unauthorized Immigrant Parents: Do Their Migration Histories Limit Their Children's Education?*, US 2010 Project Research Policy Brief: Discover American in a New Century, Russell Sage Foundation: New York, 2010). Research has also found that early cognitive development of children can be negatively impacted by parental factors such as less access to stimulating professional child care and fewer financial resources to invest in children. These limitations, plus lower-quality jobs, increase parental stress and reduce the amount of stimulation that parents can provide and purchase for young children (H. Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children*, pp. 135-136, Russell Sage Foundation: New York, 2011).

16 For examples, see UNICEF, *Children in the Context of Migration and the Right to Family Life*, 2012 Submission to the UN CRC Day of General Discussion on *The rights of all children in the context of international migration*, 28 September 2012, [hereafter *UNICEF Migration and the Right to Family Life*, 2012].

17 See for example, research by Eveline Crone and The Leiden Brain and Development lab regarding brain development during late adolescence and youth (beyond 18 years of age) (<http://brainanddevelopmentlab.nl/>). For example, E. Crone & R. Dahl (2012) 'Understanding adolescence as a period of social-affective engagement and goal flexibility' *Nature Reviews: Neuroscience* Volume 13, pp.636-50, September 2012 [hereafter *Crone, various*].

At the same time, migration policies can be characterized as inconsiderate of age, such that children, adolescents, and youth are near invisible. The impacts of migration policies on these migrants are not adequately evaluated and accounted for to ensure respect of the principle of non-discrimination and protection of their human rights. Efforts to do so, through the design and implementation of evidence-based policies, are further hampered by the lack of disaggregated data.¹⁸

This chapter considers some of the main challenges regarding access to basic rights for undocumented adolescents and youth. It consists of three sections. Section one provides further contextual information on irregular migration, highlighting pathways into irregularity and gender-related factors. Section two gives an overview of the human rights framework relevant to undocumented adolescents and youth, and the child rights framework relevant to undocumented adolescents.

Section three, the main body of the chapter, considers key issues in relation to civil, cultural, economic, political and social rights for undocumented adolescents and youth, using the examples of detention and education by way of illustration. Immigration detention has been selected as it is an example of immigration policy and practice that violates an array of civil, cultural, economic, political, and social rights. It is pertinent both due to the extent of the rights violations incurred and the ubiquity of its systematic use and acceptance as a legitimate measure in the control of migration. Education has been selected, as one of the most fundamental and well-recognized rights globally, in itself, and as key to empowerment and development. When considering the opportunities and benefits of migration for individuals and societies, access to education

is pivotal. Education is also a pertinent example because of the clear differentiation in treatment between those under 16 or 18 years of age and those older, raising a number of specific issues for undocumented adolescents and youth. The interlinked issues of labour rights and of civic and political empowerment are also considered, as well as the situation in countries of origin, with a focus on some of the key challenges for adolescents and youth unwillingly 'left behind' in countries of origin (see In Focus boxes).

Due to the differing legislation and policy towards people under the age of 18 and those older (as will be presented in Section 2), these sections consider separately the human rights concerns related to undocumented adolescents and those related to undocumented youth. However, there is much overlap and the analysis also addresses similarities in the experiences of the two age groups. The chapter concludes that there is a pressing need for legislative and policy reform to respect the human rights of adolescents and youth in the context of irregular migration. Further, the special protection granted to children under international and national law and policy should not automatically disappear when a person turns 18 years old. The particular issues that undocumented adolescents and youth face during their transition between childhood and adulthood can make them more vulnerable to exploitation and abuse and pose significant psycho-social challenges. Only by recognising and addressing these vulnerabilities can the positive potential of youth migration be fully enjoyed. Case studies and testimonies, as well as examples of promising legislation, are presented throughout. Recommendations for advancing towards this common goal are also presented.

¹⁸ The previous Special Rapporteur on the Human Rights of Migrants has asserted that there is a general absence of an 'age' approach in migration policies, creating a serious need for accurate and rights-based statistical information on the number of children and adolescents involved in the international migration process (Report of the former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, 14 May 2009 (A/HRC/11/7)). Likewise, the Committee on the Rights of the Child, in its General Comments on Unaccompanied Children, has stated that the establishment of a detailed and integrated system of data collection for unaccompanied and separated children is a prerequisite for the development of effective policies that permit the full implementation of the rights of children (Committee CRC, General Comment No. 6, On *Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, para. 99, 1 September 2005).

Section 1: The context of irregular migration

Pathways into irregularity

Irregular migration refers to instances where a person lacks regular residence or immigration status in a transit or destination country.¹⁹ Thus, the term is broad and can refer to a wide variety of migratory situations. Irregular migrants often enter the country of destination regularly and move into a situation of irregularity after loss of employment or residence status,²⁰ arbitrary confiscation of documents by employers, rejection of a claim for international protection, etc. When such situations occur, many migrants have already developed personal ties and connections with destination societies and decide to stay with their families in the destination country. Thus it is also important to note the temporary and transient nature of immigration statuses. Many migrants experience various different statuses at different times; for example, they may migrate regularly, lose their status, and later have the opportunity to regularise their status.

Adolescents and youth may migrate for a variety of reasons, and may do so with or without family members. Adolescents and especially youth may have specific reasons to migrate, such as the prospect of receiving a better education and employment opportunities, as well as access to better services (health care, availability of material goods and services) in destination countries. These factors draw workers, including adolescents and youth, into informal and unprotected labour sectors in destination countries. Additionally, family reunification of children 'left behind' has contributed to the increase in the number of adolescent and young migrants, either alone or accompanied by other adults.

Particularly within the context of the global economic and financial crisis, a trend is emerging in which states are limiting avenues for regular migration (including family reunification), and harshening deportation and detention policies, rendering irregular channels the only alternative for migration. Restrictions for family reunification according to the age of dependent children can be particularly limiting for adolescents and youth, excluding children over 18 years of age from migrating through family reunification altogether, and in some destination countries, imposing additional requirements even from age 15 or 16.²¹ At the same time, regular employment opportunities are increasingly focused on particular work sectors, which can exclude young migrants who may not have the desired level of expertise. Thus, opportunities for adolescents and youth to migrate regularly are highly limited.

Local laws promote regular labour migration for youth in Bosnia and Herzegovina

In Bosnia and Herzegovina, a legal basis for monitoring migration flows and reducing the risks associated with irregular migration has been established. Domestic laws and regulations were reviewed in 2010 and local laws now recognize the role of Public Employment Services, or Youth Employment Regional Councils, in organizing temporary migration and circular migration schemes.²²

19 Global Migration Group, *International Migration and Human Rights: Challenges and opportunities on the threshold of the 60th anniversary of the Universal Declaration of Human Rights*, pp. 7, Geneva, 2008.

20 Permits may not be renewed for a number of reasons, including, *inter alia*, loss of employment, changes in the rules and requirements, administrative barriers, including high fees, discretion and lack of information. See e.g. Düvell F. *Paths into Irregularity: The Legal and Political Construction of Irregular Migration*, European Journal of Migration and Law 13, pp. 275–295, 2011.

21 For example, Denmark will only grant family reunification to dependent children over the age of 15 in specific circumstances, for example, if the child has no appropriate caregiver in the country of origin. Additional information available at: http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/children/children-between-15-and-18.htm.

22 C. Salzano for MDG Achievement Fund (forthcoming) *The Youth, Employment and Migration window (MDG-F YEM): Review of achievements and successes*, pp.31.

Further, adolescents are even more prone to becoming undocumented, since, as children, their migration status is linked directly to that of their parents, unless they were able to acquire citizenship on the basis of being born in the destination country. When a parent's visa or work permit expires, their child usually automatically becomes undocumented. Independent consideration of the best interests of the child is rarely given when deciding on parents' applications for residence status, for humanitarian or international protection purposes, meaning that children are particularly vulnerable to inappropriate refusals of regularisation. Children frequently inherit the migration status of their parents, even when they are born in the destination country, due to restrictions in requirements for citizenship in many destination countries and arbitrary practices for birth registration based on parents' status.

Thus, young migrants, and particularly adolescents may, and often will, transition between regular and irregular situations and among different categories during the course of their migratory journey. For example, as noted, children 'left behind' by parents in countries of origin may migrate irregularly and unaccompanied to join their parents. If they do not qualify for official family reunification within the destination country, they may become undocumented, living with their parents (even if their parents have regular status). The family may be able to regularise their status at a later stage, or the same adolescent or young person may later qualify for regularisation based on years of residence and ties to the country of destination.²³

Gender-related factors

Gender-specific factors affect the composition of irregular migration, the impacts of migration on countries of origin, transit and destination, and vulnerabilities throughout the migration process.

In countries of origin, prevailing gender roles and relations impact the experiences of adolescents and youth 'left behind', their access to social rights, and their personal and social development. For example, migration of a parent affects the division of household responsibilities. Depending on whether the mother or father has migrated, this often entails additional responsibilities for either adolescent and young girls or boys in 'left-behind' households, according to their gender roles and responsibilities. Thus, adolescent and young boys may be expected to take up employment to help support the household, and girls to take on care roles,²⁴ with a corresponding impact on access to rights and development. Such arrangements can also reinforce gender roles and limit opportunities for adolescents and youth, as well as affect the likelihood that they choose to migrate and their experiences of migration.

Indeed, gender-specific factors, including prevailing gender roles and gender discrimination, influence the migration choices of adolescents and youth, as well as their trajectories, integration and outcomes.²⁵ Many adolescent children migrate to escape sexual abuse, social stigma, or pressure to marry.²⁶ Gender can also affect the age at which adolescents and youth choose to migrate, and whether they do so alone, accompanied by adults or in a group.²⁷

23 For examples, see UNICEF, *Migration and the Right to Family Life*, 2012.

24 UNICEF / UNDP, *Background Paper for the 2007 Global Forum on Migration and Development*, pp. 5-6; Cortés, R., *Children and Women Left Behind in Labor Sending Countries: An Appraisal of the Social Risks*, UNICEF Division of Policy and Practice Working Paper, August 2008 [hereafter Cortés, 2008]; Cortés, R., *Adolescents' Rights, Gender and Migration: Challenges for Policy-Makers*, ADAP Learning Series, UNICEF April 2011 [hereafter Cortés, 2011].

25 OHCHR, *The Rights of All Children in the Context of International Migration*, Committee on the Rights of the Child, 2012 Day of General Discussion Background Paper, pp.7, August 2012, [hereafter *CRC DGD Background Paper*, 2012].

26 For an overview of cases of abuse-related migration, see: Jolly, S., *Gender and Migration*, Overview Report. BRIDGE, UK c.f. *CRC DGD Background paper*, 2012, pp.7.

27 Cortés, 2011, pp.5.

In many countries, discrimination against women can also leave adolescent girls and young women with inadequate access to information regarding safe migration, work opportunities and rights in destination countries, increasing their vulnerability to abuse, exploitation, forced labour and trafficking, and separation from their family.

At the same time, adolescent boys and young men can be more vulnerable to physical violence and violence involving weapons at the hands of smugglers and border guards.²⁸

Adolescent girls vulnerable to trafficking in the Philippines

According to a comprehensive analysis of trafficking in the Philippines conducted by UNICEF and ILO in 2007, adolescents subjected to trafficking are generally female, between 14 and 17 years of age, from large households (5 to 10 family members), and with some years of schooling (from primary school to at least the first year of high school).²⁹

The typical trafficked adolescent is either on the verge of joining the labour force or has already entered the working age population (typically 15 years of age and above), although many may have started working at a much younger age. The probability of being a victim of trafficking increases generally with age, but culminates as a child approaches working age.³⁰

Further, migration policies tend to limit regular migration channels for adolescent girls and young women, and relegate them to the most vulnerable labour sectors or render them dependent on male migrants. Young women often migrate as agricultural workers, domestic workers, carers of the elderly, sex workers, entertainers, and other occupations that are generally under-regulated, with poor working conditions regarding remuneration, working hours and legal protection. In such circumstances, particularly where the migration status is dependent on the employer, young women are vulnerable to exploitation and abuse and to becoming undocumented if and when they have the strength to exit the situation.

Another main channel for many adolescent girls and young women to migrate is through family migration, to join a spouse or parents.³¹ However, on dependent spousal visas, they are again vulnerable to losing their status if the relationship breaks down. This is a particularly significant concern in situations of violence, where often women have a choice between keeping themselves, and their children, in violent situations or becoming undocumented.³²

Thus, gender factors and discrimination can be reasons for migration, affect migration journeys, routes and outcomes, and increase the likelihood of losing status and becoming undocumented in countries of transit and destination.

On the other hand, migration has the potential to contribute to women's emancipation, by challenging gender inequalities and promoting equal access to rights, including quality education, full participation in society, protection, and decent work with equitable wages.

28 Boland, K., *Children on the Move: A Report of Children of Afghan Origin Moving to Western Countries*, UNICEF, February 2010.

29 ILO-IPEC, *Trafficking in Children in Asia: Regional Review*, 2000

30 UNICEF and ILO, *Child trafficking in the Philippines. A situational analysis*, 2007.

31 Cortés, 2011, pp.5.

32 PICUM, *Strategies to End Double Violence Against Undocumented Women - Protecting Rights and Ensuring Justice*, PICUM: Brussels, 2012.

Section 2: Overview of the international human rights framework and differences according to age

Under international human rights law, all individuals of all ages hold civil, cultural, economic, political and social rights without discrimination, regardless of migration or citizenship status. These rights are formally guaranteed in international legal instruments, including the International Bill of Human

Rights - which comprises the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR),³³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR) - as well as other core international human rights instruments.³⁴

Guiding principles for the realization of human rights

There are core principles that guide the realization of human rights, which are outlined in the ICESCR and other treaties. States must avoid discrimination in access to these basic rights (including on the basis of sex, race, nationality or other status), ensure minimum core obligations, and take progressive steps towards the full realization of rights.³⁵

The Committee on Economic, Social and Cultural rights has stipulated that the principle of non-discrimination applies for migration status.³⁶

Using the 'maximum of its available resources,' every State has the primary obligation to:

- *respect* (refrain from violating);
- *protect* (prevent third parties from violating);
- *fulfil* (take necessary measures to guarantee the enjoyment, such as the implementation of legislation and the allocation of funds);
- *monitor* (measure the progress of); and
- *promote* (ensure the broadest possible awareness and understanding of) human rights.

This is equally compulsory for all states: origin, transit and destination countries in the context of migration.

33 Note that the ICCPR contains a few articles which refer specifically to rights of citizens (Article 25) and those lawfully residing in the State (Articles 12.1 and 13).

34 International human rights instruments relevant to migration, such as: Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC) and its Optional Protocols, International Convention on the Rights of All Migrant Workers and Members of Their Families (ICMW), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Convention against Transnational Organized Crime (CATOC) and its two associated Protocols, ILO Conventions and Recommendations – Migration for Employment Convention, 1949 (No.97), Migration for Employment Recommendation, 1949 (No.86), Migrant Workers Convention, 1975 (No.143), Migrant Workers Recommendation, 1975 (No.151), Minimum Age Convention, 1973 (No.138), Worst Forms of Child Labor Convention, 1999 (No.182)– Convention Concerning Decent Work for Domestic Workers. The international criminal law instruments are also relevant: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Sea or Air. Some regional human rights instruments also establish and guarantee basic rights to all individuals; such as the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, the American Convention on Human Rights, and The African Chapter on Human Rights, among others.

35 ICESCR, Article 2. For explanation of the concept of progressive realization, see CESCR, General Comment 3 *On The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 24 May 2004.

36 The Committee on Economic, Social and Cultural rights has stated that the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation (CESCR, General Comment 20 *On non-discrimination in economic, social and cultural rights* [art. 2, para. 2, of the Covenant]), para. 30, E/C.12/GC/20, 2 July 2009.

Both the ICESCR and ICCPR have a number of provisions that are specifically important when considering the treatment of migrants, including adolescents and youth, in countries of transit and destination. All people within a state's jurisdiction, including undocumented migrants, should be guaranteed economic, social and cultural rights, including: the right to education;³⁷ the right to an adequate standard of living (including adequate housing, food and clothing);³⁸ the right to health;³⁹ and the right to protection of the family unit.⁴⁰ Civil and political rights include: birth registration;⁴¹ life,⁴² liberty and security of person;⁴³ freedom from torture and inhumane and degrading treatment⁴⁴ and arbitrary deprivation of liberty;⁴⁵ and equality before the law.⁴⁶ Rights related to prohibition of forced labour,⁴⁷ the right to work and to decent work,⁴⁸ as well as freedom of association⁴⁹ are also pivotal, given undocumented workers' vulnerability to workplace exploitation.⁵⁰

Further, adolescents are provided additional protections as children, most notably in the UN Convention on the Rights of the Child (CRC), which prescribes minimum standards, which states must adhere to regarding the treatment of children in their jurisdiction.⁵¹ States parties to the CRC must ensure that its provisions and principles are fully reflected and given legal effect in relevant domestic legislation,⁵² and policies must be guided by the four general principles of: non-discrimination, the best interests of the child, the right to life, survival and development, and the rights of the child to express their views, and be heard, in all matters affecting them (see box).

37 ICESCR, Article 13.

38 ICESCR, Article 11.

39 ICESCR, Article 12.

40 ICESCR, Article 10.

41 ICCPR, Article 24.

42 ICCPR, Article 6.

43 ICCPR, Article 9.

44 ICCPR, Article 7.

45 ICCPR, Article 9.

46 ICCPR, Article 14.

47 ICCPR, Article 8.

48 ICESCR, Articles 6 and 7.

49 ICCPR, Article 22.

50 See also International Labour Organisation (ILO) Instruments *Forced Labour Convention* (No. 29), 1930; *Abolition of Forced Labour Convention*, (No. 105), 1957; *Freedom of Association and Protection of the Right to Organise Convention* (No. 87), 1948, *Right to Organise and Collective Bargaining Convention* (No. 98), 1949.

51 This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party (Human Rights Committee, General Comment No. 31).

Guiding principles of the Convention on the Rights of the Child

Non-discrimination, Article 2:

(1) "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

Best interests of the child, Article 3:

(1) "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Right to life, survival and development, Article 6:

(1) "State Parties recognize that every child has the inherent right to life. (2) State Parties shall ensure to the maximum extent possible the survival and development of the child."

Right to be heard, Article 12:

(1) "State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

In addition to these overarching principles, the CRC sets out a number of particular rights recognized to *all* children. These include: the rights to access health care and education;⁵³ a right to social security;⁵⁴ a right to registration at birth;⁵⁵ a right against arrest and detention except as a means of last resort;⁵⁶ a right against separation from his or her parents;⁵⁷ a right to special protection and assistance when deprived from a family environment;⁵⁸ a right to be protected from economic exploitation and hazardous labour;⁵⁹ and, a right to protection against violence.⁶⁰ The CRC also emphasizes the importance of continuity for children in the context of alternative care arrangements, which is particularly relevant in situations where children and adolescents settle in a destination county but may be subject to deportation proceedings.

The CRC requires states to provide the fundamental rights set out in the treaty to all children within its jurisdiction, not just those who are nationals of the state: “the enjoyment of rights stipulated in the

Convention ... [must] be available to all children ... irrespective of their nationality, immigration status or statelessness.”⁶¹

A child’s rights-based approach to migration policy would seek to ensure the ‘best interests of the child’ are the primary consideration at all stages of the process, and that the minimum requirements of the rights afforded specifically to children under the CRC are met.

Thus adolescents and youth, regardless of migration status or age, have numerous internationally codified civil, economic and social rights that must be guaranteed by countries of origin, transit and destination. Adolescents, as children, also enjoy additional protections within a child rights framework, most notably on international level by the CRC.

Further, there are some regional treaties that explicitly recognize the protection of young people’s rights.

52 CRC, Article 4.

53 CRC, Article 28.

54 CRC, Article 26.

55 CRC, Article 7.

56 CRC, Article 37(b).

57 CRC, Article 9. The right to family life is protected through a number of CRC provisions. For further analysis, see UNICEF *Migration and the Right to Family Life, 2012*.

58 CRC, Article 20.

59 CRC, Article 32.

60 CRC, Article 19.

61 Committee on the Rights of the Child, General Comment No.6.

Regional treaties recognise young people as a group whose rights deserve special protection in Ibero-America and Africa

The Iberoamerican Convention on Rights of Youth⁶² and the African Youth Chapter recognize young people as a group whose rights deserve special protection and affirm that ratifying nations will be committed to protecting their human rights, including preventing discrimination, and promoting employment and vocational training.

The African Youth Chapter⁶³ has a section dedicated to youth in diaspora:

Article 3: Freedom of Movement

1. Every young person has the right to leave any country, including his/her own, and to return to his/her country.

Article 21: Youth in the Diaspora

States Parties shall recognise the right of young people to live anywhere in the world. In this regard, they shall:

- a) Promote the equivalence of degrees between African educational institutions to enable the youth to study and work in State Parties.
- b) Promote the recruitment of African youth with specialized skills, in the spirit of African solutions for African problems, according to national policies and priorities.
- c) Facilitate youth organisations to liaise and collaborate with the African youth Diaspora.
- d) Establish structures that encourage and assist the youth in the diaspora to return to and fully re-integrate into the social and economic life in Africa.
- e) Promote and protect the rights of young people living in the diaspora.
- f) Encourage young people in the diaspora to engage themselves in development activities in their country of origin.
- g) Offer equal access to young women to employment and promote their participation in all sectors of employment.

⁶² Iberoamerican Convention on Rights of Youth [Entered into force in 2008]. Ratified by Bolivia, Costa Rica, Dominican Republic, Ecuador, Honduras, Spain and Uruguay. See articles 26, 27 and 29.

⁶³ African Youth Chapter [Entered into force on 8 August 2009]. Ratified by Angola, Burkina Faso, Côte d'Ivoire, Djibouti, Gabon, Gambia, Guinea-Bissau, Libya, Lesotho, Mali, Mozambique, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Senegal, Seychelles, Togo, Uganda, Zambia and Zimbabwe.

Section 3: Access to civil, economic and social rights

Despite the comprehensive human rights framework guaranteeing minimum access to rights and services for all people, undocumented adolescents and youth face numerous violations of and barriers to accessing basic civil, economic and social rights.

As a result of policies and conditions in countries of transit and destination, adolescent and young migrants with an irregular migration status may be subjected to immigration enforcement practices, such as disproportionate identity checks, immigration raids, and detention, in circumstances which contradict international human rights, including labour and child rights standards, and experience restricted or no access to certain public services. They often face restrictions in accessing basic rights and services such as birth registration, education, housing, health care and social security, both in law and in practice, with significant negative implications for rights, development, opportunities, health, and well-being, both in the short and long-term. It is also important to consider the disproportionate impact of limited access to services, including sexual and reproductive health care and women's shelters, on young women and girls.

There are some states – both countries of origin and destination – that are effecting laws to protect the rights of undocumented migrants, including adolescents and youth.

National constitution mandates Ecuador to protect its migrants abroad regardless of status

According to the Constitution of Ecuador (2008) migration is a human right. Article 40 explicitly states that no person can be deemed illegal because of their migrant condition. Further, it states that:

“The State, through the relevant entities, shall develop, among others, the following actions for the exercise of the rights of Ecuadorian persons abroad, regardless of their migratory status:

1. The State shall provide them and their families, whether they live abroad or in the country, with assistance.
2. The State shall provide care, advisory services and integral protection so that they can freely exercise their rights.
3. The State shall safeguard their rights when, for any reasons, they have been arrested and imprisoned abroad.
4. The State shall promote their ties with Ecuador, facilitate family reunification and encourage their voluntary return.
5. The State shall uphold the confidentiality of personal information located in the files of Ecuadorian institutions abroad.
6. The State shall protect transnational families and the rights of their members.”

However, even in countries which have laws providing rights and protection to undocumented adolescents and youth, there are often significant barriers in practice, preventing them from enjoying those rights. These barriers include, *inter alia*, administrative obstacles (such as requirements for identity documents, social security numbers and proof of address), the complexity of the administrative, judicial and other systems, discrimination, lack of training and information (for both service providers and undocumented families), financial barriers, linguistic hurdles, fear that accessing services will result in immigration enforcement,⁶⁴ and mental health challenges,⁶⁵ among others. Further, since most rights are interconnected and interdependent, even though a system might provide for the right to education, the absence of adequate housing or health care will seriously prejudice the enjoyment of that right.

Additionally, it is important to note that in many countries, economic and social rights are being threatened by the adoption of a strict economic approach to social rights, where access to essential social services is not seen as a right but based on contribution. This 'legitimatises' policies which exclude particular social groups, such as undocumented migrants.⁶⁶ As countries in Europe face economic crises, there are concerns that exclusion from basic services will increase.⁶⁷ Further, new political threats, such as the proliferation of xenophobic and criminalising speech regarding undocumented migrants, may lead to the increased restriction of migrants' economic and social rights, including access to education and health care for adolescents and youth.⁶⁸

64 Considering the fundamental rights considerations of apprehending irregular migrants, the Fundamental Rights Agency of the European Union has elaborated common principles to guide immigration enforcement authorities, including non-sharing of personal information between services providers and immigration authorities, and lack of enforcement actions near essential services. See Fundamental Rights Agency, *Apprehension of Migrants in an Irregular Situation – Fundamental Rights Considerations*, 9 October 2012.

65 Migrant adolescents, particularly unaccompanied adolescents, may suffer from psychological distress, behavioural problems and traumatic stress reactions, and be prone to internalising problems they face. They are thus at higher risk for the development of psychopathology (Bean, T., Derluyn, I., Eurelings-Bontekoe, E., Broekaert, E., & Spinhoven, P., *Comparing Psychological Distress, Traumatic Stress Reactions, and Experiences of Unaccompanied Refugee Minors with Experiences of Adolescents Accompanied by Parents*, *The Journal of Nervous and Mental Disease*, 195: 288–297.

66 Committee ESCR, General Comment No. 20 On *Non-discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2, of the *International Covenant on Economic, Social and Cultural Rights*, E/C.12/GC/20, 2 July 2009; and Committee CESCR, General Comment 3 On *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, May 24, 2004.

67 For example, Spain has recently restricted access to health care services to undocumented migrants, initially citing financial reasons. While legal entitlements to health care services for undocumented children have been maintained on an equal basis as national children, entitlements for undocumented adults have been reduced to 'emergency' and maternity care. While positive in relation to child rights, this is a violation of the rights of undocumented youth to the highest attainable standard of health. For more information, see PICUM, *Spain: A step backward in the right to health care for all*, Press release, 31 August 2012. In this regard, the ESCR Committee recommended Spain to "ensure that, in accordance with the Committee's general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12 of the Covenant) and the principle of universal health care, the reforms adopted do not limit the access of persons residing in the State party to health services, regardless of their legal situation" (E/C.12/ESP/CO/5, 6 June 2012, para. 19).

68 For example, in Israel, in response to a petition filed by the Hotline for Migrant Workers, TAU Refugee Rights Clinic and ACLB Migrants Rights Clinic against the Municipality of Eilat, claiming discriminatory segregation of children based on their race, ethnicity and residence status, the Municipality defended its policy of segregated schooling and rejected its obligation to provide equal schooling for migrant children with, *inter alia*, the following statements: "The State of Israel and the municipality of Eilat are not obliged to include those who have infiltrated Israel and are residing illegally in Israel, in its educational system [...] humanitarian obligations do not and cannot include all rights granted by the State to its citizens, including equality of education"; "In general, we can say that most infiltrators possess little - if any - awareness about the importance of education for their children [...]. The presence of the petitioners in Israel is not meant to culminate in their naturalization, acceptance in Israel, assimilation or integration in any way [...]. The petitioners' ungratefulness for the shown benevolence and their insolent and aggressive demands reflect mainly on the petitioners themselves and on whoever guided them in submitting this petition." Following a decision of the Beersheba District Court on 5 August 2012 condemning the policy of segregation, the High Court of Justice also voiced its criticisms and ordered the city to integrate the children of migrants and asylum seekers into the local school system. The municipality has agreed to end the segregated schooling, in place for four years, and to provide assistance and special classes to ease migrant children's integration into the municipal school system (UNICEF, *Access to Civil, Economic and Social Rights*, 2012, pp. 19). Another example, though for younger children, is in Greece, where the Greek Vice-Minister of the Interior sent a Letter to municipalities in Crete on 2 October 2012, asking that public nurseries send a list of the non-Greek children attending, stating also their countries of origin. The Vice-Minister stated the aim of the data collection as to respond to a specific Golden Dawn MP's question raised in the Greek Parliament. The local council responsible for nurseries in the city of Ierapetra refused to share this data (PICUM Bulletin, 24 October 2012).

State policies which formally criminalise irregular migration pose significant legal and practical hurdles. Some states have enacted laws and policies that impose a duty on public officials (government employees, including social workers, and in some cases even health care and education workers) to report the presence of undocumented migrants to migration authorities. Such policies effectively negate the rights of undocumented adolescents and youth to access services. In many countries, the enforcement of migration control by the police also denies access to justice for undocumented migrants, as reporting crime or abuse leads to deportation rather than prosecution. This can make undocumented adolescents and youth particularly vulnerable to violence, abuse, and exploitation, particularly when experiencing adult transitions, such as entering the informal job market or renting a property, without enjoying vital protection and access to redress as an individual before the law.⁶⁹

At the same time, enforcement practices mean that everyday activities such as travelling by car and crossing the street can be wrought with anxiety and fear, as they could lead to arrest, detention and deportation if stopped for any reason by the police, causing further distress and alienation for undocumented adolescents and youth. In addition to direct restrictions on opportunities for undocumented adolescents and youth, fear and social exclusion further limit their ability to engage and contribute to their societies.

TESTIMONY:
**Potential of undocumented youth
 jeopardised in the United Kingdom**

"Your young years passing by and you are like in that capsule, you see. You can't realise yourself fully. If you have some skills, opportunities or talents, anything that you can demonstrate... if you are a good worker or a craftsman, anything that you can use and give some benefits to this society, you can't 'open' it because you are in this capsule. You are locked in because you are afraid. You are afraid to say a word about yourself. That's how it really is."

Natalia, 26, Ukrainian, interviewed by A. Bloch, N. Sigona & R. Zetter⁷⁰

The implications for social cohesion of having a group of disenfranchised and excluded young people must also be considered. For example, civil society organisations have reported concern that undocumented adolescents and youth may be forced to turn to petty crime in order to survive, due to lack of employment possibilities, particularly in times of economic crisis. As many countries deny regularisation and prioritise deportation of migrants with any criminal record, the negative implications for undocumented adolescents and youth cannot be underestimated. Such policies also represent a clear violation of the right to equality before the law, as it punishes migrants twice for the same infraction. This particularly affects undocumented adolescents and youth who may have spent much of their life in a destination country, and yet face deportation, or perpetual irregularity, due to a misdemeanour during adolescence or youth.

⁶⁹ At the same time, life-course scholars and adolescent brain development researchers note the difficulties and challenges for young people to adjust through adolescent and adult transitions (Gonzales, 2011, pp. 615; Crone, various). In this context, undocumented young adults may be more vulnerable to exploitation and abuse during these transition periods, due to their immigration status and reduced social support networks and safety nets.

⁷⁰ A. Bloch, N. Sigona & R. Zetter, *No right to dream: The social and economic lives of young undocumented migrants in Britain*, pp.33, City University London and University of Oxford Refugee Studies Centre, Paul Hamlyn Foundation, , 2009 [hereafter, *No right to dream*, 2009].

Nevertheless, some undocumented adolescents and youth manage to regularise their stay in the destination country. This chapter highlights the negative impacts that a period of social exclusion and restricted access to rights has on the social and economic integration of adolescents and youth

in the future, wherever they may live. When adolescents or youth are able to regularise their stay in a destination country, these negative impacts may continue to be felt directly by the destination country, as well as by the young migrant.

TESTIMONY: An undocumented adolescent in Cyprus

Nicos travelled to Cyprus at the age of five with a family, who were friends of his family in Syria. However, after a short time, the family decided to leave Cyprus, and left Nicos with some other friends. So Nicos became undocumented and was left to fend for himself from an early age. He only attended school for one year. By age 12 he found employment on a construction site, doing small jobs until he was 14, when he took on the work of a normal employee. When he was 16, he was badly injured in an accident at work but was too afraid to seek medical assistance. One day he was travelling with a friend on their motorbike when they were stopped by the police. The police did not believe that Nicos was only 16 and had no papers. He was beaten by the police. He persuaded them to verify his identity with his teacher from the primary school he attended for one year, who recognised him and confirmed that he was an undocumented child. Nicos was then taken to the welfare services, but was refused support because he was undocumented.

A few months later, the NGO KISA, which works to support migrants and refugees in Cyprus, was made aware of his case. They found him and helped him file a claim for asylum and register in school, for a training course to become a plumber. With the assistance of the school, he found a job as a plumber, but the Labour Office did not approve his employment because asylum seekers are only permitted to work in farms and agriculture in Cyprus. At the same time he was unable to find irregular employment as before, due to the economic crisis in Cyprus. At age 18, he was destitute again, without any welfare or other support.⁷¹ Shortly after his 18th birthday,⁷² Nicos was called for his asylum interview and asked questions about Syria – like what he would do if he returned there – that he could not answer, having little memory of his country of birth. Speaking about his experiences at a roundtable meeting⁷³ on 17 October 2012, Nicos described his feelings of frustration at a system that considers him a migrant, when he has spent his whole life in Cyprus and considers Cyprus his home, speaks Greek, and has a Greek Cypriot girlfriend. He asked what he could do to survive while waiting for resolution of his status, with no welfare support and no job. He wanted only the same as other children and young people. A couple of days after the meeting, Nicos received a positive answer to his claim for asylum and refugee status.

71 For more than a year he received welfare support and lived with other young migrants. However, he was then told he had to find a (foster) family to live with, as the welfare cheque could not be issued in the name of a child. He managed to find a family and lived with them for six months, but the family did not receive any payments and he left because he felt ashamed to be a burden for the family.

72 The asylum service of Cyprus does not currently examine the asylum applications of unaccompanied minors until the applicants become adults.

73 *Child poverty and well-being: Spotlight on the situation of migrant children in Cyprus and the EU* co-organised by the Commissioner for Children's Rights in Cyprus, the European Parliament in Cyprus and Eurochild, PICUM and Kisa in Nicosia, Cyprus.

The following sections further elaborate on the main issues faced by undocumented adolescents and youth through the examples of immigration detention and the right to education. As there is significant differentiation in legislation and policy regulating detention and education for adolescents and for youth, the issues affecting adolescents and youth will be considered separately. Nonetheless, analysis clearly points to the overlap and similarities in the experiences of undocumented adolescents and youth, and the need for consideration of the vulnerabilities of youth as well as adolescents, for the opportunities and benefits of youth migration to be fully enjoyed by all. Policies in both areas are shown to place restrictions on the rights of undocumented adolescents and youth, with significant implications for the short and long term for their health, well-being, development and socio-economic integration.

Immigration detention

Many states currently approach migration management from an 'enforcement', 'criminalization', or 'border control' perspective. As such, many states' policies lead to the administrative or criminal detention of migrants at some point in the immigration process.⁷⁴ Thus, despite a comprehensive framework protecting people from arbitrary deprivation of liberty and inhuman and degrading treatment, and guaranteeing due process before the law, many undocumented adolescents and youth find themselves detained in appalling conditions for considerable periods of time, without meaningful access to a lawyer or judicial review. As in most countries irregular entry and stay remains an administrative infraction, they have not committed any criminal offence. Nevertheless, immigration detention which violates numerous civil, cultural, economic, political and social rights is often systematically used and considered a legitimate means of migration control.

Further, despite the additional protections afforded to children, in most countries, adolescents are treated under the same rules as adult migrants, and subjected to immigration detention along with adults. Therefore, this section considers first the rights violations specific to undocumented adolescents in immigration detention, through analysis of the additional protections in the CRC. Then, as policy and practice usually result in the detention of adolescents and youth under the same circumstances - where the process, duration and conditions all pose similar human rights challenges for adolescents and youth - these issues are presented together.

Challenges specific for undocumented adolescents in immigration detention

In addition to the human rights enshrined in the Universal Bill of Rights, adolescents are afforded additional protection as children, for example by the CRC. The CRC allows the detention of children in the context of youth justice, exclusively as a last resort and for the shortest appropriate period of time.⁷⁵ This is not the case for immigration-related detention, as there has not been a criminal offence. The CRC Committee has made clear that 'children should not be criminalized or subject to punitive measures because of their or their parent's migration status. The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.'⁷⁶ Further, the Committee has affirmed that 'detention on the sole basis of migration status is in violation of the CRC' and that 'detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.'⁷⁷

74 Victor Abramovich, Pablo Ceriani and Cernadas Alejandro Morlachetti, *Migration, Children and Human Rights: Challenges and Opportunities*, pp.30, UNICEF: Geneva, 2010 [hereafter *Migration, Children and Human Rights, 2010*].

75 CRC, Article 37(b). See also *CRC DGD Background Paper*, pp.23, 2012.

76 UN Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration*, Report of the 2012 Day of General Discussion, para. 78, 2013.

77 Committee CRC, General Comment No. 6, On *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, para 6.1, 1 September 2005.

The right to appropriate legal assistance is also clear. Further, the CRC requires that the best interests of the child should be a primary consideration in all decisions affecting them. Although some state policies justify immigration detention as a means to serve the child's best interest, by preserving family unity, this is not a correct interpretation of the CRC. The Committee on the rights of the child has underlined that, 'regardless of the situation, detention of children on the sole basis of their migration status or that of their parents, is a violation of children's rights, is never in their best interest and is not justifiable'.⁷⁸

While references are sometimes made to the child's best interests, detention practices are usually carried out without proper assessment of best interests or a Best Interest Determination Procedure (BID), critical tools for ensuring that adolescent migrants are treated according to the provisions of the CRC and other human rights obligations applicable to people less than 18 years old. The Best Interests Assessment (BIA) and BID procedures imply that appropriate weight will be given to fulfilling child protection objectives in both the short and long term in decision-making affecting children, as well as a number of due process safeguards and key participation of child welfare authorities.⁷⁹

When it is in the best interests of the child to remain with his or her parents, a policy that properly respects child rights would provide alternatives to detention for the entire family, on the basis of family unity, rather than detaining a child with his or her parents in order to keep the family together.⁸⁰ In this regard, the CRC Committee has recently stated that 'to the greatest extent possible, and always using the least restrictive means necessary, States

should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians if they are present in the transit and/or destination countries and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved.'⁸¹

High Court sets standards in South Africa

In Case 22866/2004, the High Court of South Africa investigated the circumstances of the detention of migrant children held in a repatriation centre and ordered that they be immediately removed and placed in an appropriate place of care or safety. The court stated that:

- a) a child's best interests are of paramount importance in every matter concerning a child;
- b) unaccompanied foreign children that find themselves in the country irregularly should have legal representation appointed to them by the state;
- c) the detention of children in the Repatriation Centre is unlawful and invalid, and should cease immediately; and
- d) authorities have to work on detailed practical arrangements to ensure that unaccompanied foreign children are dealt with in accordance with the principles set out in legal instruments, such as the Constitution, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child.

...

78 UN Committee on the Rights of the Child *The Rights of All Children in the Context of International Migration*, Report of the 2012 Day of General Discussion, para. 32, 2013. See also *Special Rapporteur Report, 2009*, para.62; UNICEF Australia, *Submission to the National Inquiry into Children in Immigration Detention*, written submission to the Human Rights and Equal Opportunity Commission, 2003.

79 For example, see UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008.

80 See *Special Rapporteur Report, 2009*, para.62.

81 UN Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration*, Report of the 2012 Day of General Discussion, para. 79, 2013.

Nonetheless, detention of undocumented adolescents continues in conditions below these standards.⁸² For example, a report in *The Zimbabwean*⁸³ tells the story of Dakari, who was detained at age 15 at the Soutpansberg Military base for two months, ostensibly because there was no transport available for his deportation and that of other migrants. Conditions kept getting worse, as he was at the mercy of elderly inmates, some of them convicted criminals.

“The building was made from iron sheets and we only received one meal a day, just bread, sometimes with soup. Since we were mixed with thugs and other adults, they would take the soup from us. It was very difficult for the children to find a place to sleep. There was nothing to do in the detention centre: no toys, balls or place to play.”

Nevertheless, most countries have no special provisions or policies aimed at addressing the issue of adolescent migrants in this context.⁸⁴ The former Special Rapporteur on the Human Rights of Migrants noted growing concern over the number, and treatment, of children in immigration detention.⁸⁵

As well as the *fact* of detention being a breach of children’s rights, the *conditions* in detention can also present numerous rights violations. Detention centres tend to be run by prison authorities or private security companies, without appropriate training in either child or migrant rights. Access to economic and social rights, including to education and health, are extremely limited in detention. Detention is also a *de facto* breach of the right to housing, as detention centres are entirely unsuitable accommodation for adolescents. Adolescents are frequently detained in overcrowded conditions, with adults other than their family members, and are highly vulnerable to violence and abuse in such situations. Access to legal representation and due process are highly problematic.

Further, the detention of adolescents, whether with or without accompanying family, is extremely detrimental to their health and well-being, including in the long term.⁸⁶ Thus detention of adolescents is a clear violation of children’s rights. Procedural safeguards and suitable alternatives are being developed in some countries to protect undocumented adolescents and fulfil their rights in situations of immigration enforcement which often lead to inappropriate immigration detention.

82 LHR, *Monitoring Immigration Detention in South Africa*, Lawyers for Human Rights, June 2012.

83 Ncube, M., *Children behind bars: detained teenage migrants suffer in SA*, *The Zimbabwean*, 26 September 2012.

84 *Migration, Children and Human Rights, 2010*, pp.31. See also the research conducted by the University of Lanús and UNICEF TACRO on detention of child migrants in Latin American and Caribbean countries (UNLa-UNICEF *Estudio sobre los estándares jurídicos básicos aplicables a niños y niñas migrantes en situación migratoria irregular en América Latina y el Caribe*, Lanús, 2009).

85 See generally *Special Rapporteur Report, 2009*. In this context, the CRC Committee has urged states to impose detention measures ‘for the shortest time and in conditions that meet, at least, the minimum standards of detention as set out in human rights law. This includes ensuring a child-friendly environment; separation from adults who are not the child’s parent or guardian (even if the child is above the age of 16 years); child protection safeguards; and, independent monitoring.’ (UN Committee on the Rights of the Child [2013] *The Rights of All Children in the Context of International Migration*, Report of the 2012 Day of General Discussion, para. 80).

86 See for example UNICEF & Children’s Legal Centre, *Administrative Detention of Children: a Global Report*, Discussion Paper, February 2011; International Detention Coalition, *Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum Seeker and Irregular Migrant Children Affected by Immigration Detention*, pp.48-57, 2012; Medical Association for Prevention of War (Australia), *Children in detention: The Effect Of Detention Centres On The Health Of Children*, MAPW Position Paper adopted May 2002; Australian Human Rights Commission, *A last resort? National Inquiry into Children in Immigration Detention*, 13 May 2004; J. Burnett et al., *‘State Sponsored Cruelty’ Children in immigration detention*, Medical Justice: London, 2010.

Procedural safeguards for undocumented children in New Zealand

In principle children may only be detained in exceptional circumstances and as a last resort, according to the Immigration Department's operations manual on border entry (INZ 2010b). Provisions relating to alternatives to detention,⁸⁷ representation by a 'responsible adult',⁸⁸ and participation in proceedings (ability for children to express their views on detention and have these views considered at any proceedings affecting them)⁸⁹ are explicitly laid out in the *Immigration Act 2009*.

These procedural safeguards bring the legislation in closer conformity with international human rights obligations. However, the *Immigration Act 2009* does not include an explicit presumption against detention of children, or any reference to CRC obligations and the best interests of the child as a primary consideration.⁹⁰

Such efforts are being supported by civil society, for example, through research and campaigning efforts to raise awareness about the realities of immigration detention for children and about promising practices, as well as through targeted campaigning and advocacy work in specific countries.

Global campaign calls for end of child detention

A Global Campaign to End Immigration Detention of Children⁹¹ was launched on 21 March 2012 at the 19th session of the United Nations Human Rights Council in Geneva. The aim of the campaign is to denounce and end the use of child detention. It is currently endorsed by over 80 national, regional and international organisations worldwide.

As well as news, the campaign website shares videos of children speaking about their experiences of detention, and proposes ways for members of the public to engage in the campaign. These include signing a global petition, which will be presented to the Human Rights Council in 2013, or supporting the campaign as an organisation. Children are also invited to record a message of support for other children in detention.

The launch of the campaign was preceded by research and identification of promising practices. The campaign has 'focus months' with national activities in particular countries, supporting the on-going international campaign work. Focus countries include Australia, Greece, Mexico, Israel, Malaysia, South Africa and the United States. Countries have been chosen for the campaign based on the extent of the problem in country, combined with the commitment from local civil society groups.

87 New Zealand *Immigration Act 2009*, s.331.

88 New Zealand *Immigration Act 2009*, s.375.

89 New Zealand *Immigration Act 2009*, s.377.

90 Ngatai, J. (2010) *Study on Children and Migration*, Human Rights Commission, 14 May 2010.

91 Additional information available at: endchilddetention.org.

However, where there are additional protections for children, a prevailing issue is identification as a child. Age assessment procedures have been strongly criticised by civil society, including medical professionals, as arbitrary and discretionary, and in the case of physical examinations such as x-ray scans of bones, as technically inaccurate.⁹²

TESTIMONY: Arbitrary decision-making about age leads to detention of child in Lebanon

It is common practice in Lebanon that, in instances where there is uncertainty about the age of a person, a local ‘major’ (government official) will issue a determination of age. Although a circular issued by the Director General of the General Security rescinded this practice, it did not provide for an alternative mechanism for assessing age, so the practice continues, and there is no consistent legal process for establishing age. For example, in 2009 a fourteen year-old boy was arrested, and promptly released into his parents’ custody after reporting his age. According to police processes within Lebanon, the event and reported age of the child should have been documented. Approximately two years later, the boy was again arrested and detained. The records from the prior detention should have confirmed the child’s statement that he had not yet reached the age of majority. However, the police assessed that the boy was an undocumented migrant worker and therefore detained him for a period of approximately one month in a facility for adults.⁹³

Challenges facing both undocumented adolescents and undocumented youth in immigration detention

Depriving anyone of their liberty arbitrarily is a violation of their human rights enshrined in the ICCPR. The Working Group on Arbitrary Detention has affirmed that mandatory or automatic detention must be considered arbitrary in all cases.⁹⁴ Detention may only be imposed after conducting an individual assessment in each case, for the shortest time possible, and in compliance with all procedural safeguards, including access to administrative or judicial review and remedy.⁹⁵ The Human Rights Committee has stated that custodial measures could be considered arbitrary, and so a violation of the right to liberty, if they are not necessary and proportionate. In other words, custodial measures can be used to prevent the person from absconding, only if they are both necessary in the individual case, and not disproportionate to this goal.⁹⁶

There is no empirical evidence to support the view that detention deters irregular migrants.⁹⁷ As the Special Rapporteur on the Human Rights of Migrants has noted, despite increasingly tough detention policies being introduced over the past twenty years in countries around the world, the number of irregular arrivals has not decreased.⁹⁸ The common justification that there is a ‘risk of absconding’ is undefined and lacks legal certainty, making detention under this reasoning potentially arbitrary. Indeed, the Court of Justice of the European Union has found criminalisation and detention purely due to irregular stay to be illegal, even if a deportation order has been issued and not complied with.

92 See for example, Separated Children in Europe Programme (SCEP), *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012.

93 Migrant Forum in Asia, *Written submission of Migrant Forum in Asia to the Committee on the Rights of the Child Day of General Discussion*, pp.4, 28 September 2012.

94 *CRC DGD Background Paper*, 2012, pp.23.

95 The Working Group on Arbitrary Detention also considers deprivation of liberty as arbitrary ‘when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without possibility of administrative or judicial review or remedy’ (Working Group on Arbitrary Detention, A/HRC/16/47, annex, para.8(d) c.f. *Report of the Special Rapporteur on the Human Rights of Migrants*, François Crépeau, 2 April 2012 (A/HRC/20/24), para.22 [hereafter *Special Rapporteur Report*, 2012])

96 “The notion of ‘arbitrariness’ must not be equated with ‘against the law’, but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context” (Human Rights Council, Communication No. 560/1993, para.9.2 c.f. *Special Rapporteur Report*, 2012, para.11.

97 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, pp.7, 2012.

98 *Special Rapporteur Report*, 2012, para.8.

Irregular stay does not warrant detention in the European Union

In its recent case law, the Court of Justice of the European Union has clarified that in the EU, an undocumented migrant cannot be detained for the sole reason that they are irregularly staying in the country, even if they have not followed an order to leave the country.⁹⁹ EU law, in the 'Return Directive',¹⁰⁰ allows undocumented migrants to be temporarily detained pre-deportation, when certain procedural safeguards and conditions are met, including the measures being necessary and proportionate. Detention in the absence of deportation proceedings was found to be contrary to the aim of the 'Return Directive' of returning irregularly staying non-EU migrants. The same reasoning applies when detention would not be in a correctional facility. A fine may be imposed as a penalty for irregular stay,¹⁰¹ but irregular stay alone is not sufficient justification for detention.

Nevertheless, the administrative detention¹⁰² of migrants in an irregular situation without individual assessments, including of youth, is systematic globally. The decision to detain an irregular migrant is frequently taken by administrative bodies, without adequate judicial supervision and regular review. Youth in detention are frequently denied key rights and procedural safeguards,¹⁰³ such as prompt access to a lawyer, interpretation/translation services, necessary medical care, means of contacting family or consular representatives, and ways

of challenging detention. Detained youth may find themselves in an especially vulnerable situation, as they may not speak the language and therefore understand why they are detained, or be aware of ways to challenge the legality of their detention.¹⁰⁴ Their youth can further increase their vulnerability in such contexts.

The duration of the administrative detention of migrants, particularly adolescents and youth, is also a major concern. Undocumented adolescents and youth are often detained for prolonged periods of time, up to years in some cases. For some, this represents a significant proportion of their adolescence or youth, where they are imprisoned, segregated from society and their peers, with potential negative impacts on personal and social development.

As in the case of adolescents, the conditions of detention faced by youth also pose significant human rights challenges. Evidence from inspections of detention facilities, for example in various EU member states, indicates that on many occasions, detention conditions are substandard to the extent to potentially contravene the prohibition on inhuman and degrading treatment and the right to dignity.¹⁰⁵ The conditions may also increase the risk of further violations of economic, social and cultural rights, including the right to health, food, drinking water and sanitation. Information gathered by the Special Rapporteur indicates that adolescents and youth are sometimes detained in unacceptable substandard conditions in overcrowded facilities with poor hygiene, limited or no sanitation, and infrequent meals.

99 *El Dridi v. Italy*, Judgment of the Court (First Chamber), 28 April 2011, in Case C61/11 PPU.

100 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (see preamble and chapter IV).

101 *Md Sagor v. Italy*, Judgment of the Court (First Chamber), 6 December 2012, in Case C-430/2011.

102 Irregular entry or stay remains an administrative infraction in most countries. The Working Group on Arbitrary Detention has held that "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention" (A/HRC/7/4, para. 53 c.f, *Special Rapporteur Report, 2012*, para.13).

103 See generally *Special Rapporteur Report, 2012*.

104 *Special Rapporteur Report, 2012*, para.15.

105 See for example Hammarberg, T, *It is wrong to criminalise immigration - Viewpoints by T. Hammarberg, Commissioner for Human Rights*, Council of Europe: Strasbourg, 2009; Baldaccini, A., *The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Return Directive*, European Journal of Migration and Law 11 (1): 1-17, pp.15, 2009; *Bail for Immigration Detainees* (BID), Immigration Detention in the UK - FAQs, pp.2, pp.5, 2008; O'Nions, H., *No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience*, European Journal of Migration and Law 10: pp. 149-185, pp.168, pp.179, 2008; PICUM, *PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe* PICUM: Brussels, pp.34-37, 2009. See also the forthcoming report from the Special Rapporteur on Migrants on the Protection of the Rights of Migrants at the External Borders of the European Union, and the annexed country reports on Greece, Italy, Tunisia and Turkey.

The Special Rapporteur has also been made aware that mental and physical health of detainees is often neglected. Doctors and nurses are not always available and may not have the authority to properly treat their patients, *inter alia* when they need hospitalisation. Furthermore, reproductive health care for young women, especially pregnant women, is not available in all places of detention.¹⁰⁶ Research regarding the health impacts of immigration detention show that the health of detainees often deteriorates significantly, as a result of respiratory infections, communicable diseases such as scabies, chicken pox, fungal skin infections, or gastrointestinal problems.¹⁰⁷ There is also a growing body of evidence regarding the negative impacts on mental health, with sleep disorders, depression, anxiety, post-traumatic stress syndrome and self-harm common.¹⁰⁸ Despite the obvious need, most detention centres completely lack mental health care services. There are even cases of migrants dying in detention due to restricted access to health care services or suicide.¹⁰⁹ The impacts of deteriorating physical and mental health can be significant for adolescents and youth at a critical stage in their development, and lead to long-term and chronic health problems.

TESTIMONY: Youth describes his feelings during detention in Australia

Morteza Poorvadi arrived on Christmas Island, Australia at age 16 and spent four years in detention at Port Hedland, Woomera and Villawood detention centres. Describing his experience, reported in the Sydney Morning Herald,¹¹⁰ he says:

“There was a point of hopelessness, of thinking why am I alive... They took away everything I was living for - friends, education, freedom. That time from 16 to 20, it’s the time when your personality develops. That one year in Woomera did the most damage to me, there was nothing there, not even a book, a newspaper. The first book I got was a Bible. I slashed my wrists, drank shampoo, did a 12-day hunger strike, sewed my lips. It became a bit of a game for us, ticking the things you have done off a list.”

106 *Special Rapporteur Report, 2012*, para.25. See also, for example, *Report to the Government of Greece on the Visit to Greece Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 27 January 2011*, CPT/Inf (2012) 1, Council of Europe, Strasbourg, January 2012.

107 Médecins Sans Frontières, *The impact of detention on migrants’ health, Briefing Paper*, January 2010 [hereafter *Médecins Sans Frontières, 2010*].

108 Médecins Sans Frontières, 2010; Robjant et al., *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, *The British Journal of Psychiatry* 194: 306-312, 2009; Steel et al., *Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees*, *The British Journal of Psychiatry* 188: 58-64, 2006; Gatwick Detainees Welfare Group, *A prison in the mind: the mental health implications of detention in Brook House Immigration Removal Centre*, pp.8-13, November 2012; see also page 5 for literature review/ additional sources.

109 For example, D. Taylor & M. Taylor, *Detention Centre Deaths Spark Police Investigations*, *The Guardian*, 5 August 2011; ACLU, *DHS Announces 11 Previously Unreported Deaths In Immigration Detention*, American Civil Liberties Union Press release, 17 August 2009; H. Athwal, *Three Deaths in Immigration Detention*, Institute for Race Relations, 4 August 2011; P. Mickelborough, *Almost 1000 people have died trying to enter Australia, study finds, including 27 in detention centres*, *Herald Sun*, 22 October 2012.

110 *The other side of the fence*, *The Sydney Morning Herald*, 19 July 2008. Morteza Poorvadi was an asylum seeker, but detained due to the policy of mandatory detention in Australia.

The Special Rapporteur has also received reports indicating that migrants – men, women and children – suffer violence in detention, and that the behaviour of guards is not always adequately monitored, especially if they are employed by private security companies.¹¹¹ The prevalence of serious acts of violence towards migrants in detention centres and during transportation to detention centres and deportation proceedings is increasingly being reported.¹¹² This includes sexual violence, torture, and inhuman and degrading treatment. Victims of violence suffer serious physical and psychological trauma, which can also affect their children when they are forced to witness the abuse. Adolescents and youth may suffer such traumas more acutely due to their young age. Further, young women and girls who survive sexual violence may be particularly vulnerable to social stigmatisation and exclusion when they re-enter their communities.¹¹³ Sexual violence also exposes young migrants to HIV/AIDS and other sexually transmitted diseases, for which treatment is unavailable in many detention settings, and which may cause further stigmatisation.

Thus, irregular adolescents and youth are frequently deprived of their liberty and detained in conditions below the minimum standards afforded to people within the sphere of criminal justice.¹¹⁴ Current practices of immigration detention violate the civil, cultural, economic, political, social rights of undocu-

mented adolescents and youth. The negative impacts of arbitrary detention on adolescents and youth cannot be underestimated. While adolescents are afforded some protection against unsuitable detention in some countries, this protection ceases as soon as they reach 18 years of age. Being subject to detention at this time may not only violate several of the rights of undocumented adolescents and youth, but have significant and long-term negative implications for their development at a critical time in their lives, as well as for mental and physical health.

Access to education, training and leisure time is also highly restricted in detention, with negative impacts on health and well-being during detention, as well as the future integration and prospects of adolescents and youth once they are liberated, particularly if they have been detained for prolonged periods when they would be gaining valuable educational, vocational and social experience.

Some countries, such as Argentina and Venezuela, are recognising that detention is not a suitable measure of immigration enforcement without further justifications, and are codifying this in their laws. Non-custodial measures with minimal interference in the right to liberty are being developed, for use when necessary in the short term for deportation proceedings.

111 *Special Rapporteur Report, 2012*, para.30.

112 See generally Birnberg Peirce & Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns, *Outsourcing Abuse*, July 2008; ACLU, *ACLU Demands Federal Investigation Into Charges of Abuse by Border Agents*, American Civil Liberties Union Press release, 10 May 2012; Human Rights Watch, *"If You Come Back We Will Kill You": Sexual Violence and other Abuses against Congolese Migrants during Expulsions from Angola*, May 2012 [hereafter *Human Rights Watch, 2012*].

113 *Human Rights Watch, 2012*, pp.30. Following the visit of the UN special representative on sexual violence in conflict, Margot Wallström, to border areas of Angola and the Democratic Republic of Congo, the Angolan government said it would step up efforts to prevent serious abuses during expulsions of migrants, by implementing a zero-tolerance policy among its security forces against sexual abuse, and increase cooperation with UN agencies to monitor expulsions and train relevant security forces. The Angolan government has also started building new detention facilities for migrants, so-called "detention centres for illegal migrants" in several parts of the country, which opens a window of opportunity to improve detention conditions and implement an effective oversight. However, Human Rights Watch notes the failure of the Angolan government to credibly investigate past abuses and prosecute perpetrators (*Human Rights Watch 2012*, pp.3).

114 See for example *Special Rapporteur Report, 2012*, para.31.

Presumption against detention and alternatives in Argentina and Venezuela

Argentina

The National Immigration Law¹¹⁵ stipulates that migrants (regardless of age) should not be detained during deportation procedures before administrative or judicial bodies. A judicial authority may authorise detention as a last resort measure in exceptional cases.

Venezuela

The Migration Law¹¹⁶ prohibits detention of all migrants. It provides several alternatives for the purpose of ensuring the enforcement of a deportation or removal action. The competent authority may impose on a foreigner who is subject to a deportation action, the following precautionary measures:

1. Periodic reporting to the competent authority.
2. Prohibition from leaving the location in which s/he resides without corresponding authorization.
3. Provision of adequate monetary bail, for which the economic condition of the foreigner must be taken into account.
4. Residence during the administrative procedure in a designated locality.
5. Any other measure deemed appropriate to ensure compliance with the competent authority's decision, provided that the measure does not involve deprivation or restriction of the right to personal liberty.

These measures must not exceed a period of 30 days.

Thus, immigration detention frequently violates numerous rights of adolescents and youth, with potential significant short- and long-term impacts on physical and mental health, personal and social development. The extreme segregation and limited access to rights in detention not only prevents any positive benefits of migration in the short term, but can hamper the social and economic integration

of undocumented adolescents and youth. Thus, negative impacts of immigration detention are felt by countries of origin, transit and destination in the long term. Immigration enforcement measures must respect the human rights of all migrants, regardless of age and status, in order for the positive potential of migration to be enjoyed by individuals and societies.

115 In Argentina, National Immigration Law 25.871 on the principle of non-detention.

116 Migration Law No. 37.944, 24 May, 2004, Article 46 c.f. UNICEF, *Examples of Good Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration*, UNICEF: Geneva, 2010.

Access to civil, economic and social rights for adolescents and youth 'left behind' in countries of origin

In countries of origin, many adolescents experience prolonged family separation, as parents often have little choice but to leave their children behind when they migrate, and there are few regular channels to join parents at a later stage.¹¹⁷ If the parent has irregular status in the destination country, this also restricts the possibilities for periodic family reunion in the country of origin, as parents would not be able to return to the destination country where they live and work. As well as a challenge regarding the right to family life, this can significantly impact on access to other rights.

Although children of migrant parents who remain in countries of origin and do not migrate, do not usually face legal discrimination and can benefit from improved living conditions and access to education and health care due to remittances,¹¹⁸ they do face numerous practical obstacles to enjoying basic rights arising from parental absence. These may arise when an adolescent's legal guardian or representative is required for administrative matters in schools, medical facilities and welfare services. Even if they are not required directly, parents' identity documentation is sometimes needed to access services, such as birth registration.

As well as a right in itself that must be guaranteed, birth registration normally enables obtainment of a birth certificate,¹¹⁹ an official record of the registration and legal personhood. This document can be key to accessing other rights and services, as

well to protecting children from mistreatment due to doubts about their age, other forms of abuse and exploitation, and statelessness if they later migrate irregularly and are unable to prove their nationality.¹²⁰ However, strict requirements for documentation, such as birth certificates, valid passports and marriage certificates, can present major barriers for parents in 'left-behind' households, when the other parent has migrated. Such barriers increase the likelihood of children reaching adolescence and even youth without having had their birth registered.

Parental absence may also necessitate adolescents and youth to work to support their families, or take on other household responsibilities, such as the care of younger siblings or older relatives and household chores. 'Left-behind' households may endure financial difficulties for a number of reasons, even if the parent manages to send some remittances. For example, the departure of a parent can leave a family without access to social protection in those cases where insurance was linked to the person's employment. Families often go to great lengths to secure the funds for one family member to migrate, so they may have few remaining assets and large debts. Further, the assumption that children of migrant parents who remain in countries of origin receive an income through remittances can lead to their discriminatory exclusion from programmes to support disadvantaged children, despite need, and increase vulnerability to poverty and social exclusion. Thus, adolescents in 'left-be-

117 Many parents make the difficult decision to migrate nonetheless, in order to secure a better life for their children.

118 Remittances sent to countries of origin function as private social protections and play an important role in supporting adolescents and youth left behind. For many households, remittances constitute an important proportion of household income, thereby increasing the family's capacity to invest in education, health, nutrition and providing effective social inclusion. Ultimately, they contribute to the reduction of poverty. However, remittances are not a universal panacea to poverty and other household problems in countries of origin. They consist of private money, often obtained at a high personal cost for the migrant and their family. Further, remittances are not always spent to the benefit and advantage of the child or used to meet basic needs such as food and clothing, nor forthcoming, especially when parents are in an irregular migration situation, with precarious income and outstanding debts.

119 Note, in some countries, there are separate procedures for registering a birth and receiving a birth certificate, and it can be difficult to obtain a certificate even if the birth is registered (Michael Miller, *Birth registration and the rights of the child*, a report prepared for the European Parliament, , pp. 3, 2007).

120 See for example, UNHCR/ Asylum Aid, *Mapping Statelessness in the United Kingdom*, pp.23, 2011.

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hind' households may have no option but to work at the expense of their education and health. Similarly, the need to take on additional household responsibilities and care roles can negatively impact access to education. Such additional responsibilities can reduce adolescents' participation and performance in school, as well as engagement in wider school life and extra-curricular activities, and even lead them to leave school early. Thus, there are short- as well as long-term implications regarding personal and

social development and future career perspectives. Youth may also face limited prospects to follow training and develop careers due to their household responsibilities, particularly when 'left behind' by parents or spouses as heads of households with younger siblings and/ or children to raise.

Some countries of origin have social security systems for migrant workers, enabling social protection and support for families 'left behind'.

Welfare system for migrant workers and their families 'left behind' in the Philippines

The Overseas Workers' Welfare Administration in the Philippines manages a trust fund to support Filipino migrant workers and their families. The fund is generated through membership fees from the Filipino migrants or their employers (\$25), and workers who contribute are eligible for a range of social services, including insurance, healthcare and family-assistance loans. In addition, their children have access to education and training programs. For example, the 'Tuloy-Aral' or 'Continuation of Education' project helps cover the expenses of elementary and high-school students in financial need, by providing them with \$100 a year to pay for books and other supplies, transportation, etc.

Adolescents and youth may also have lower motivation to complete education and training, or pursue careers in the country of origin, due to lack of parental supervision and guidance or intentions to migrate themselves.

While attempting to make their journey, potential young migrants, whether living with their family or alone, partially in their family home or entirely on the streets, may spend long periods with limited access to education, and other services, and be vulnerable to violence and abuse.¹²¹

Some states have developed initiatives to improve access to education and protection for children living on the streets or not attending school, including those whose parents have migrated elsewhere, potential young migrants, and those who have been deported from a destination country. Such programmes not only protect adolescents but ensure they can enjoy the benefits of their or their parents' migration through facilitating their access to education and training.

121 For example, research from the Port of Tanger in Morocco indicates adolescents and youth attempting to make the crossing irregularly to Spain, spend long periods living on the streets in precarious conditions. Even potential young migrants still living periodically with their families spend periods of time on the streets, and are vulnerable to limited access to basic rights and services, and violence and abuse (UNICEF et al., *Les Mineurs en Contexte d'Exclusion autour du Port de Tanger*, Recherche-Action Participative, 20 April 2009).

Programmes to support vulnerable adolescents affected by migration in Morocco

Since 1998, the Moroccan government has been funding a program for informal education of children 'out of school', including adolescent migrants to Morocco, as well as vulnerable groups of Moroccan children affected by migration, among others. The program is run in collaboration with international and local NGOs, including Caritas, Fondation Orient-Occident (FOO), Terre des Hommes, Association Oum El Banine, Association Affak Chaba, and is implemented by NGOs. The objectives of the informal education program include: (i) to take into consideration children in difficult situations, (ii) to offer them access to adaptive/alternative programs, and (iii) to integrate them into the formal education system, vocational training or social life in general. Thus, this informal education program offers children marginalised from the formal education system an opportunity to complete compulsory education in a flexible environment, and tackles the source of the lack of schooling by integrating mechanisms of prevention, accompaniment, and intermediation into the formal educational establishments. Informal education also provides migrants with complementary language training (Arab, English and French). The number of children benefitting from this program has increased from 34,550 in 1998 to 46,119 in 2011.¹²²

However, improvement is needed in the quality and organization of informal education, and in teacher training on the specific needs and challenges of sub-Saharan migrant children, especially those who speak neither French nor Arabic. Further, difficulties in integrating migrant children into the formal education system persist. Undocumented adolescents are often unable to access education in the state school system due to, *inter alia*, administrative requirements for registration, including birth certificates and certificates of residence.¹²³

Personal and social development of adolescents and youth 'left behind' can also be negatively impacted by lack of parental guidance and support, and the emotional and psycho-social challenges that may arise due to parental absence and the need to take on some of the adult roles and responsibilities of the migrant parent. When in the care of much older relatives, effective communication and

emotional support crucial to healthy development can be challenged by generational differences.¹²⁴ Lack of understanding of the challenges facing households 'left behind' and inadequate support for caregivers can strain relationships and leave adolescents and youth in 'left-behind' households more vulnerable to neglect, domestic violence and abuse.¹²⁵

122 The government of Morocco also provides a series of programs and strategies for children living on the streets (<http://www.social.gov.ma/fr/index.aspx?mod=3&rub=14>) including those whose parents have migrated elsewhere, potential young migrants, and those who have been deported back to Morocco. For example, "welcome centers" give shelter and facilitate children's social insertion through education and professional training. There are also NGOs supporting and complementing State interventions, like Bayti, working on protection, rehabilitation, and education (<http://www.bayti.ma/?lang=fr>). For a comprehensive overview of the Moroccan approach to the issue of unaccompanied children see pages 30-67 in *Conférence régionale sur 'La migration des mineurs non accompagnés: agir dans l'intérêt supérieur de l'enfant'* of the Council of Europe, October 2005, http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/MG-R-CONF%282005%2927_Malaga_conference_proceedings_final_fr.pdf

123 Diop. M., *Migration des Enfants Non Accompagnés de l'Afrique de l'Ouest vers l'Afrique du Nord : Etat des lieux*, pp.34-35, January 2013.

124 Remarks by Ms. Kirsi Madi Deputy Regional Director for CEE/CIS, UNICEF on behalf of the Chair of the Global Migration Group, 14-15 February 2011. [hereafter *UNICEF CEE/CIS, 2011*].

125 See for example, UNICEF DPS, *Policy Initiative on Migration and Children*, Moldova Fact Sheet, July 2012.

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Children of migrants may also face prejudice and negative attitudes from others in the community, for example due to financial inequality, or perceived financial inequality, resulting from remittances, affecting mental health and social integration.¹²⁶ UNICEF's country studies suggest that adolescents 'left behind' may be at greater risk of drug abuse, teenage pregnancy, psychosocial dysfunction and criminal behaviour.¹²⁷ Some research¹²⁸ also indi-

cates that adolescents 'left behind' may receive less preventative care, such as vaccinations, due to parental absence, with impacts in the short term as well as on long-term health.

Some countries of origin are developing policies and action plans to protect children without parental care, including adolescents 'left behind', and to support caregivers.

National action plan for the protection of children 'left behind' in Moldova¹²⁹

The National Action Plan on Children Left Without Parental Care adopted for 2010-2011 addressed the multiple aspects of vulnerability of children 'left behind', including by: the creation of social services for children at the community level; awareness-raising among the general public and potential migrants on the possible negative impacts of migration on children; and capacity-building for professionals working with children (teachers, psychologists, police, health workers, etc.) on the vulnerabilities of children 'left behind' and protection of their rights. The Plan also envisaged the introduction of life-skills education in school curricula (not yet in place) and the establishment of a monitoring and evaluation system of children 'left behind'.

As of May 2012, the Ministry of Labour, Social Protection and Family was carrying out a census of children 'left behind', with the support of partners. The results of this census will be used to further strengthen the social protection system for these children.

Thus, adolescents and youth 'left behind' in countries of origin face numerous restrictions on their access to numerous economic and social rights in the context of irregular migration. Not only do these limitations affect adolescents and youth's enjoyment of their adolescence and youth, they have long-term impacts in terms of personal development, limiting the benefits gained from migration

for individuals and the societies they live in. Positive measures which recognise and address these vulnerabilities caused by the impacts of migration on individuals, households and communities in countries of origin at a critical time of individual development facilitate access to services and protection for adolescents and youth, and enable them to reach their full potential.

126 Cortés, 2008, pp.17-19.

127 UNICEF CEE/CIS, 2011.

128 D. McKenzie, *Beyond Remittances: The Effects of Migration on Mexican Households*; International Migration, Remittances and the Brain Drain, C. Ozden and M. Schiff (eds.) The World Bank: Washington D.C., 2005.

129 *National Action Plan for the Protection of Children Left Behind* [Official Monitor of the Republic of Moldova, 2010, no. 87-90, art. 519].

Access to education for undocumented adolescents and youth

Education is one of the most fundamental and well-recognized rights globally, as a right in itself, and as a driver of individual and societal development. Some countries, particularly countries of destination of South-South migration, have adopted measures aimed at ensuring this right to all migrants, regardless of their status. Yet, in many countries – in all regions – undocumented adolescents and youth face severe limitations on their access to and full enjoyment of their right to education in countries of transit and destination. Even in countries where compulsory education is available regardless of status, it is limited by numerous barriers in practice.

Further, access to non-compulsory education is all the more problematic. The right to education is protected in the international legal framework for youth as well as adolescents.¹³⁰ However, national policy and practice lead to significantly different treatment of these age groups in the context of irregular migration, despite its continued importance during youth. Thus, the issues faced by the two age groups are considered separately. However, lack of education during youth also affects enjoyment of education during adolescence, and raises a number of specific challenges for older undocumented adolescents and youth. Therefore the analysis concludes looking at these issues relating to both groups.

Access to education for undocumented adolescents

With respect to irregular migrant children, including adolescents, a lack of access to education has been determined to be a particularly significant issue. In the 2009 UNDP Human Development Report, a third of developed countries sampled, and over half of developing countries sampled, did not allow access to education for irregular migrant children.¹³¹ While some countries directly prohibit irregular migrant children from attending public schools, in other countries informal or hidden barriers result in a lack of access for undocumented adolescents, even though they are legally entitled to compulsory education. Discretion on the part of school administrations, who may be ill-informed about the rights of undocumented adolescents, as well as administrative requirements for registration, even if not immigration related (identity documents, proof of address), can pose significant barriers to access. For example, in Morocco, birth certificates and residence permits are often required for registration in the school system.¹³² In Poland, although education is formally accessible for undocumented adolescents, a lack of funding for undocumented students may lead individual schools to exclude this population.¹³³ In South Africa, migrant adolescents reportedly face restricted access to education due to informal barriers such as poverty, preventing children from affording the requisite fees, transport, uniforms and books.¹³⁴

130 See e.g. ICESCR Article 13.2 “The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right [education]: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”

131 United Nations Development Programme, *Human Development Report 2009: Overcoming barriers – human mobility and development*, pp.58, Palgrave Macmillan: New York, 2009, [hereafter *UNDP, 2009*].

132 Diop. M., *Migration des Enfants Non Accompagnés de l’Afrique de l’Ouest vers l’Afrique du Nord : Etat des lieux*, pp.34-35, January 2013.

133 *UNDP, 2009*, pp.58; PICUM, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, pp.19, PICUM: Brussels, 2008; PICUM, *Building Strategies to Protect Children in an Irregular Migration Situation. Country Brief: Poland*, 2011.

134 *UNDP, 2009*, pp.58. See also Report of the former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Mission to South Africa, 2 May 2011 (A/HRC/17/33/Add.4).

Access to education can also be limited due to immigration control practices in or near educational institutions, and fear that information provided to schools will lead to detection by the immigration authorities (whether or not it occurs in practice). Xenophobic attitudes, discrimination and violence in schools can also deter undocumented adolescents from attending school and affect academic performance, health and well-being, particularly if the situation would warrant intervention by police and criminal justice systems, which undocumented adolescents are unable to access due to their migration status.

Xenophobia and 'gate-keeping' affect undocumented adolescents' access to education in South Africa

Jonathan Crush highlights key research findings about undocumented adolescents' access to education in his article "Imbizo-My Debate: Children's right to education has no borders".¹³⁵ He cites a survey that shows that school attendance rates vary considerably due to the migration status of the parents and child. Among the school-going age children of permanent residents, the non-attendance rate is 12%. Among refugees it is 21% and among asylum seekers 23%. Finally, 43% of the children of irregular migrants are not in school. Crush explains this wide variation by the practice of "gate-keeping" and discretionary enrolment at the level of individual schools.

Crush also refers to a study by Wits University and Khanya College of inner city Johannesburg, where they found refugee children talked about "taunts by teachers in the classroom and by pupils in the playground". Others reported being pestered, asked why they were in South Africa and when they would be going back to their countries of origin.

All children are subjected to various forms of violence, including bullying, physical and psychological punishment, and sexual and gender-based violence, in school settings, in different ways.¹³⁶ In particular, undocumented adolescents may be particularly vulnerable to all forms of school-based violence, due to poverty, inability to participate in extra-curricular activities such as school trips, and difficulties integrating to the linguistic, educational and cultural school environment when recently arrived. A lack of capacity in schools and educational curricula to integrate students with different language and educational backgrounds can also impact educational performance and attendance.

Adolescent girls may experience the barriers outlined more acutely, due to cultural preferences and gender roles (for example, prioritising boys' education over girls'), and their particular vulnerability to violence, or threat of such violence, in or around schools. Thus undocumented girls are made cumulatively vulnerable by being female, migrant, and undocumented.¹³⁷

Many states have begun to take measures to protect migrant children and promote their rights to access public services, particularly with respect to education. For example, Thailand, Argentina, Mexico, Uruguay, the Netherlands, Belgium, Spain, Italy and Greece are among the countries that have expressly recognized the right of migrant children to enrol in public schools free of charge, regardless of migration status.¹³⁸

135 J. Crush, *Imbizo-My Debate: Children's right to education has no borders*, The New Age, 2012.

136 Office of the Special Representative of the Secretary-General on Violence against Children, *Tackling Violence in Schools: Bridging the Gap between Standards and Practice*, pp.5-11, March 2012. [hereafter *Special Rapporteur on Violence, 2012*].

137 See for example *Special Rapporteur on Violence, 2012*, pp.11-12.

138 UNICEF *Access to Civil, Economic and Social Rights*, 2012, pp.20.

The right to education for undocumented children in Thailand

In July 2005, the Cabinet of the Royal Government of Thailand issued a Resolution on the Education of Unregistered Persons requiring that all children be provided with access to all levels of education regardless of their citizenship status or that of their parents or guardians. The government allocates additional funds to the Ministry of Education to defray the costs of providing educational services to migrant children.¹³⁹ There is evidence that implementation of the Resolution has helped to at least ensure that migrant children have access to primary education.¹⁴⁰

Some countries¹⁴¹ have instated measures to allow for families to request deportation proceedings to be postponed if children are attending school, so as not to interrupt their education. Where children are at threat of deportation, there are examples from around the world of school communities and civil society mobilising to support fellow students and their families, and prevent deportation, or campaigning for re-entry if deported.¹⁴²

Civil society campaigns for student to be allowed to return to South Korea

Following the deportation of a 17 year-old Mongolian high-school student due to his irregular status on 5 October 2012, the Joint Committee with Migrants in Korea (JCMK) held a press conference on 31 January 2013 in front of the National Human Rights Commission and brought forward a petition for the reinstatement of the Mongolian student back to Korea. As of 30 January 2013, the petition had collected signatures from 1,943 individuals and gathered support from 112 domestic and international organizations.

The network Migrant Forum in Asia, of which JCMK is a member, is among the signatories and also mobilised its members from around the region to carry out solidarity actions, including sending letters to the Korean Ministry of Justice, to the National Human Rights Commission, and to the Embassies of Korea in the respective countries.¹⁴³

139 IOM Thailand, *Thailand Migration Report*, IOM, 2011.

140 World Bank, *Gaining from Migration: Migration Trends and Policy Lessons in the Greater Mekong Sub-region*, World Bank, 2012.

141 For example, in Belgium, if a family with a child attending school receives an expulsion order in the period from the beginning of the Easter holidays until the end of the school year, they can ask for their deportation to be postponed until the end of the school year (or the end of their examinations) (Centre pour l'égalité des chances et la lutte contre le racisme *Analytical Report on Education*, pp.14, 2004).

142 Another example is the Education Without Borders Network (*Réseau Education Sans Frontières - RESF*) in France. For more information, see PICUM, *Children First and Foremost: A guide to realising the rights of children and families in an irregular migration situation*, pp.73-74, 2013.

143 Information provided to PICUM by Migrant Forum in Asia, 7 February 2013.

In some countries education is only compulsory until the age of 16, creating difficulties for undocumented adolescents to access education from the ages of 16-18. Even when education is compulsory until 18 years, undocumented adolescents are often unable to follow the training component of education, which is common in many countries for this age group. Even when internships are a compulsory part of an educational course, they are considered work in many countries, leading to discriminatory treatment of undocumented adolescents. Undocumented adolescents also sometimes face difficulties in taking official exams and receiving their final school leaving certificate. These issues limit undocumented children's full enjoyment of their right to education, and make it difficult for them to progress through education and to access employment in the future.

TESTIMONY: Adolescent not allowed to graduate from primary school in Poland

An undocumented adolescent boy from Ukraine was prevented from taking the exam to graduate from primary school, because the school required documents. However, his mother requested help from the mayor of the town: "If they don't allow him to finish school, what's next? He can't go to secondary school." As a result, the Mayor intervened, and he was able to continue his studies in lower-secondary school.¹⁴⁴

There are examples of positive policy and legal measures that make it explicit that undocumented adolescents must enjoy their right to education fully, including in terms of protection from immigration enforcement in and around schools, and regarding access to exams, certificates, non-compulsory education, financial assistance, vocational courses and internships.¹⁴⁵

Internships for undocumented adolescents in the Netherlands and Spain

Access to internships for undocumented adolescents has been the subject of a legal battle in the Netherlands, where students were allowed to register for vocational courses but, until recently, not allowed to carry out the compulsory internship components, limiting their access to training and development, and preventing them from completing their courses. On 2 May 2012, the District Court of The Hague ruled that the policy preventing undocumented students from doing internships violated the right to education and must be discontinued.¹⁴⁶ The policy has since been changed to allow undocumented students to carry out an internship when it is a compulsory component of an educational course that the student started before their 18th birthday, it is recognised middle-level vocational training, and it is unpaid¹⁴⁷.

In Spain, the legislation clearly allows undocumented adolescents to carry out internships. The contract is made between the educational institution and the internship provider. As there is no internship or employment contract between the student and the latter, there is no requirement for the student to have a valid work permit.¹⁴⁸

144 PICUM (2011) "Building Strategies to Protect Children in an Irregular Migration Situation. Country Brief: Poland", pp.6.

145 For examples, see *UNICEF Access to Civil, Economic and Social Rights, 2012*.

146 The court found that the *Aliens Employment Act* (or WAV) is in violation of Article 2 of the 1st Protocol of the ECHR. BW4736, Rechtbank 's-Gravenhage, 403618 / HA ZA 11-2443. A summary of the judgment from Fischer Advocaten is available online at <http://www.fischeradvocaten.nl/index.php?&w=123>.

147 Brief aan de Tweede Kamer van de minister van Sociale Zaken en Werkgelegenheid over stages door illegale jongeren, 8 December 2012 [available at: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2012/12/08/kamerbrief-over-stages-door-illegale-jongeren/kamerbrief-over-stages-door-illegale-jongeren.pdf>].

148 In Spain, *Real Decreto 1147/2011*, de 29 de julio, por el que se establece la ordenación general de la formación profesional del sistema educativo.

Further, undocumented adolescents may be vulnerable to early school leaving, due for example, to the lack of further educational and work opportunities, and to financial reasons. In the United States, for instance, the undocumented population (predominantly low-income Latinos) historically has an extremely low school completion rate. According to the 2000 Census, only 40 per cent of undocumented Latino males between 18 and 24 who arrived in the United States before the age of 16 completed high school or obtained a General Educational Development (GED) certificate (a high-school equivalent degree).¹⁴⁹ This issue highlights the impact of lack of rights and protection after the age of 18, on undocumented adolescents and their enjoyment of rights during adolescence, as well as future development.

There are a number of practical issues around school administration and participation in school life which limit undocumented adolescents' full enjoyment of their right to education and negatively impact their well-being. Research on adolescents' subjective well-being notes the gradual decrease in well-being reported as children grow older, with significant differences between subjective well-being of children aged 8 and adolescents aged 15, particularly regarding key factors such as happiness with school, appearance, level of choice and autonomy, and the future. Learning and development are identified by adolescents as pivotal to their well-being.¹⁵⁰ Therefore, limitations violate adolescents' right to education and enjoyment of adolescence in the short term, with potential long-term implications for their personal and psycho-social development at a critical age in these processes.

Measures which ensure full social inclusion of undocumented adolescents protect their right to development and do not limit the opportunities and benefits of migration to the detriment of individuals and countries of origin, transit and destination. However, restrictions on access to education for undocumented youth do create major limitations, including in adolescence.

Access to education for undocumented youth

Although access to higher education is a human right enshrined in the ICESCR, it is highly problematic for undocumented youth. There have been cases where undocumented youth have been targeted for deportation from their 18th birthday, even when still completing their compulsory education.¹⁵¹ Access to adult education and training may be at the discretion of the institution, or explicitly restricted in law. The International Labour Organisation (ILO) has emphasised the importance of training, particularly training relevant to future employment prospects and workplace training, to tackle youth unemployment, economic marginalisation and social exclusion.¹⁵² Considering the impacts that irregular status can have on undocumented adolescents' educational attendance and performance, and the likelihood of them leaving school early, the importance of access to youth training and skills development programs cannot be underestimated.

In some countries and regions, undocumented youth are able to access adult education courses, or otherwise, civil society is utilising legal, campaign and advocacy strategies in order to gain access.

149 R. Sabates-Wheeler, *The Impact of Irregular Status on Human Development Outcomes for Migrants*, Human Development Research Paper 2009/26, July 2009.

150 The Children's Society, *The Good Childhood Report 2012: A review of our children's well-being*, The Children's Society, 2012.

151 See for example, PICUM Bulletin, 11 April 2011; Réseau Education Sans Frontières call to action, *Soutenez Kevin Kimpécé!*, 31 March 2012.

152 ILO, *A Skilled Workforce for Strong, Sustainable and Balanced Growth: A G20 Training Strategy*. International Labour Office, Geneva, November 2010.

Schools and NGOs challenge constitutionality of restricting access to education for undocumented migrants over 18 in Flemish Community in Belgium

In May 2011, a new decree was announced¹⁵³ restricting access to adult and language education for undocumented adults in the Flemish community in Belgium.¹⁵⁴ Several educational associations opposed the decree and started a petition in protest against the law.¹⁵⁵ Organisations working with undocumented migrants have noted the particular impacts of the restriction on undocumented youth, who were unable to finish their school education in their final year at school.¹⁵⁶ While previously undocumented youth were able to continue their school education in adult educational institutions in order to complete their education and receive their final school-leaving certificate, they are currently prevented from doing so, although they may have spent years in the Belgian education system.

Several NGOs and adult educational institutions jointly took legal action¹⁵⁷ against the Flemish government for this policy, challenging its constitutionality as a restriction of the right to education. However, the Constitutional Court found that restricting access to education for irregularly residing adults does not violate the principle of non-discrimination and equality.¹⁵⁸

There is a blog for the campaign against the ban on education with pictures of protests and news updates.¹⁵⁹ At the same time, access to adult and language education remains possible for undocumented youth with a pending application with the immigration authorities in the French-speaking Community in Belgium.

Similarly, access to higher / tertiary education institutions is blocked in many countries, as they are legally required to verify the migration status of their students. Or, where access is possible, undocumented youth are often expected to pay international or non-resident fees, making higher education impossible in practice.

However, in some countries, the right for undocumented migrants to access all levels of education has been made explicit in law, protecting the right to education of undocumented youth, as well as that of children and adolescents.

Access to higher education for undocumented youth protected in Argentina

In Argentina, the legislation¹⁶⁰ is clear that irregular status should not prevent a foreign student from gaining admission to any educational institution, whether it is public or private, national, provincial or municipal, primary, secondary, tertiary or a university.

Additionally, educational institution authorities should provide guidance and advice on the procedures necessary to regularise residence status.

153 Education Decree XXI (*Decreet betreffende het onderwijs XXI*), 1 July 2011.

154 Details of the documentation requirements for registration are available online here: http://www.ond.vlaanderen.be/volwassenenonderwijs/directies/documenten_cursistenadministratie/2011-10-27-EL-Vademecum_wettig_verblijf.doc.

155 T. Ysebaert, *Pascal Smet wil geen illegalen in (taal)lessen*, De Standaard, 17 May 2011 (c.f. PICUM Bulletin, 23 May 2011).

156 Information provided to PICUM by Meeting, 16 January 2012.

157 Case number 5324 at the Constitutional Court, introduced in December 2011, heard on 6 January 2013.

158 Constitutional Court, Judgment n. 37/2013 of 14 March 2013 (available at: <http://www.const-court.be/public/f/2013/2013-037f.pdf>).

159 Additional information available at: <http://taalbezwaar.blogspot.be>.

160 Article 7 *Ley de Migraciones*, Law 25.871, 2004.

Further, a few authorities at the national, regional or local level¹⁶¹ consider undocumented adolescents and youth eligible to pay the same fees as residents, not discriminating on residence status. Legislation and policy which allows for undocumented youth to access financial aid further facilitates their access to higher education.

State-level laws assure in-state tuition fees for undocumented migrants to attend university in the United States

Currently, 16 states have instituted laws to allow undocumented students who meet specific requirements to receive in-state tuition rates at public universities.¹⁶² These include California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Mexico, New York, Oregon, Texas, Utah, and Washington. Two states—Oklahoma and Rhode Island—allow in-state tuition rates to undocumented students through Board of Regents decisions.

Each state's laws delineate the eligibility requirements. Generally, students must live in the state, have attended high school for a specified period (1-4 years), and have graduated or received their General Educational Development (GED) certificate. Students must be accepted to a public college or university, and sign an affidavit stating their intention to file for regular migration status.

Although most of the states that allow undocumented students to receive in-state tuition rates do not allow them to receive state-funded financial aid, California, New Mexico and Texas do.¹⁶³

For undocumented youth who are able to enrol in university and overcome administrative barriers and registration fees, the constant threat of arrest and deportation remains, as well as difficulties related to housing, health care, and finances. In some areas, local communities are rallying together to support undocumented youth and their access to education, and to challenge their deportation.

Network to show solidarity with undocumented university students in France

In France, undocumented youth have the right to enrol in university at the same cost as French students if they have achieved their final school-leaving qualification (*baccalauréat*).

Nevertheless, they face administrative and financial barriers, as well as threat of arrest, detention and deportation. The Universities Without Borders Network (*Réseau Universités Sans Frontières - RUSF*) is a network of students' associations, teachers' associations, migrants' rights organisations, trade unions, and concerned individuals, with units in universities throughout France. The local networks fight against the discrimination of foreign students in French universities, and in particular, mobilise to protest when undocumented youth are, or are threatened with, detention or deportation, so that they may continue their education and, where possible, regularise their status in France.¹⁶⁴

161 Education policy is often managed by regional or local authorities. Decisions about fees may also be at the discretion of the educational institution.

162 Rhode Island's Board of Governors for Higher Education passed a policy that permits eligible undocumented students to pay in-state tuition.

163 National Conference of State Legislature, *Undocumented Student Tuition: State Action*, July 2012.

164 Additional Information available at: rusf.org.

It is also important to consider the further implications of restricted access to education for undocumented youth during adolescence and youth. In some countries, such as the United States, many young undocumented migrants do not realise they are undocumented until the age of 16 or so, when they want to learn to drive and look for part-time employment.¹⁶⁵ The period of adolescence and youth and the transition into undocumented adulthood can pose traumatising realisations for undocumented adolescents and youth, who find their access to further education and the labour market highly restricted. The extremely limited future prospects for undocumented adolescents and youth to follow their aspirations for further study, professional training, and future careers can have significant negative impacts on mental health, identity development, and social interaction at a critical time for adolescents and youth.

Whether or not these young people remain in the destination country or migrate elsewhere, restrictions on access to rights for undocumented adolescents and youth and a lack of opportunities for them to regularise their status result in a great waste of potential and can have harmful mental health impacts. Education is both a human right in itself and an indispensable means of achieving the fulfilment of other human rights.

Guaranteeing the right to education for undocumented adolescents and youth has an invaluable development potential. As an empowerment right, education can enable adolescents and youth to reach their full potential and open opportunities – it is the primary vehicle by which economically and socially marginalised adolescents and youth can overcome poverty and obtain the means to participate fully in their communities,¹⁶⁶ whether they be in countries of origin, transit or destination.

165 R. G. Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, *American Sociological Review* 76(4), pp. 602–619, 2011. [hereafter *Gonzales, 2011*].

166 Committee CESCR, General Comment No. 13, *On The right to education (art. 13)*, E/C.12/1999/10, 8 December 1999, para. 1.

Employment and undocumented youth¹⁶⁷

Employment remains the key pillar of social inclusion for young people in countries of origin as well as destination. Labour-market participation enables young people to fully integrate into society and usually implies access to health, social security coverage, and social networking. Youth are a key asset for society, and giving them opportunities to become well-integrated into the labour market contributes not only to their own well-being, but also to the productive potential of the economy, and to social cohesion more generally.¹⁶⁸ For undocu-

mented youth, lack of access to the labour market and opportunities to pursue careers can be hugely demoralizing and exclusionary. Qualitative interviews among young undocumented people describe their feelings of alienation, shame, rejection, and frustration at having skills they are unable to use. The point of completing education and making plans regarding careers is questioned when young people find themselves restricted to working in low-wage sectors of the labour market, alongside their parents.¹⁶⁹

TESTIMONY: Undocumented youth express frustration at missed opportunities

Summarising some of his findings from qualitative interviews with young undocumented migrants in the United States, Roberto Gonzales writes about his respondents,¹⁷⁰ 'day-to-day struggles, stress, and the ever-present ceiling on opportunities... forced them to acknowledge the distance between their prior aspirations and present realities. The realization was especially poignant for those who managed to complete degrees but ultimately recognized that the years of schooling did not offer much advantage in low-wage labour markets—the only labour markets to which they had access. These are young people who grew up believing that because their English mastery and education surpassed those of their parents, they would achieve more. Instead, they came face-to-face with the limits on their opportunities—often a very unsettling experience. Early-exiter Margarita underscored this point:

"I graduated from high school and have taken some college credits. Neither of my parents made it past fourth grade, and they don't speak any English. But I'm right where they are. I mean, I work with my mom. I have the same job. I can't find anything else. It's kinda ridiculous, you know. Why did I even go to school? It should mean something. I mean, that should count, right? You would think. I thought. Well, here I am, cleaning houses."

167 Labour regulation has traditionally addressed the issue of adolescents and employment from a protective angle, particularly with rules regarding the minimum age of employment and protecting adolescents by avoiding hazardous jobs and occupations that may prevent them from enjoying their right to education. Three main international conventions: the UN Convention on the Rights of the Child (CRC), ILO Convention No. 138 (Minimum Age) and ILO Convention No. 182 (Worst Forms) – provide the main legal standards for child labour and a framework for efforts against it.

168 OECD – ILO (2011). *Giving youth a better start: A policy note for the G20 Meeting of Labour and Employment Ministers*, Paris, 2011.

169 Gonzales, 2011; R. G. Gonzales & L. R. Chavez, *Awakening to a Nightmare: Abjectivity and Illegality in the Lives of Undocumented 1.5-Generation Latino Immigrants in the United States*, *Current Anthropology* Volume 53, Number 3, June 2012.

170 Gonzales, 2011, pp.614; *No right to dream*, 2009, e.g. pp.42-43.

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Further, although undocumented youth are not entitled to access the labour market in most countries, the majority have to work to support themselves and their families and lead productive lives. Therefore, lack of protection of labour rights for all workers, regardless of residence status, is also a key issue. In countries of destination, young migrant workers are entitled to safe and fair working conditions and full respect for their labour rights according national and international standards as set forth by the United Nations as well as International Labour Organisation instruments. These standards establish that young migrant workers should be primarily treated as workers rather than migrants, regardless of their migration status. While migration legislation and regulations still apply and nationals or regularly-residing foreigners may have privileged access to the labour market, once a person is working, there are a set of human rights and basic labour rights which must be respected. This includes, for example, rights

with respect to fair working conditions, unjustified dismissal, and freedom of association, as well as access to justice for violations of these rights.

However, this is not the case in practice in many destination countries, where undocumented workers are often unable to enforce their labour rights. Especially vulnerable are young undocumented migrants, who often find themselves working in low-wage and informal sectors of labour markets, where their rights are inadequately defined. They are often exposed to restrictive legal frameworks with no access to formal social protection and very limited coverage by labour laws regulations. Along with an absence of formal channels for migration and regularisation, these conditions impact on several of their human rights, including the right to an adequate standard of living and the right to development, and can have significant short- and long-term impacts on their health and well-being.

Civic and political empowerment of undocumented young people

Despite the negative environment of laws, policies, practices and attitudes which can exclude, marginalise and disempower undocumented young people, there are some initiatives to support and empower them, as well as migrant and youth-led organisations, to carry out such activities. These initiatives recognise the importance of empowered participation of undocumented youth in civic and political life as would-be 'citizens', in practice if not on paper. A key tool to facilitate participation of undocumented youth is regularisation, but empowerment and support initiatives and education also play pivotal roles.

United Nations launches online platform for young people affected by migration

The United Nations is hosting an online, interactive discussion platform, for 4 weeks from 23 January 2013, aimed at bringing together young migrants and other young people affected by migration to share their stories and experiences, with the UN and each other. The aim is to engage with young people aged between 15 and 35 years of age, around questions such as: Have you or a family member been through a migration experience? How was your journey? What are your thoughts? The stories and experiences shared will help shape the 2013 World Youth Report (WYR) on Youth Migration and Development. The Report will offer a multidimensional account and/or perspective of the life experiences of young migrants and young people affected by migration.¹⁷¹

Migration status of undocumented youth plays role in United States politics

Although undocumented youth are not given the right to vote, recognising the mix of statuses in communities and families, and the long-term integration of many undocumented youth in the United States, President Barak Obama included issues around undocumented youth in his political agenda. In a landmark decision on 15 June 2012, the Obama Administration passed an executive order to provide residence and work permits to young migrants (no more than 30 years old) who entered the US before age 16, have lived there for at least five years, are in school, high-school graduates or military veterans in good standing, and have clean criminal records. The so-called *Deferred Action for Childhood Arrivals* (DACA) does not provide a permanent residence status, but grants a suspension of deportation proceedings and issues renewable temporary permits of residence.¹⁷²

The passing of the executive order is in part thanks to the DREAM movement—named for the perpetually stalled¹⁷³ bill (Development, Relief, and Education for Alien Minors Bill or 'DREAM Act') that would create a roadmap to citizenship for young undocumented migrants. The DREAMers have steadily campaigned, even occupying Obama's campaign offices, and are a prominent example of a growing number of undocumented youth movements in the United States.

171 For additional information and to give input, see: <http://www.unworldyouthreport.org>.

172 Additional information is available at the USCIS website: <http://www.uscis.gov/>. The Migration Policy Institute has estimated that as many as 1.76 million young undocumented migrants could be eligible (Migration Policy Institute, Fact Sheet, *Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible under the Deferred Action Policy*, August 2012).

173 The DREAM Act was first introduced in 2001 by Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL) in the Senate, and by Representatives Howard Berman (D-CA) and Chris Cannon (R-UT) in the House. While the co-sponsors have changed over the years, DREAM has generally enjoyed broad, bipartisan support. In past years, the DREAM Act has come up for a vote several times and has garnered as many as 48 co-sponsors in the Senate and 152 in the House, yet it has failed to become law. It passed the Senate Judiciary Committee twice, by a 16-3 vote in 2003-2004, and by a voice vote without dissent as an amendment to the comprehensive immigration reform (CIR) bill (S. 2611) in 2006. After a similar CIR bill failed in 2007, the DREAM Act was considered as a stand-alone bill (S. 2205), which garnered a bi-partisan majority vote of 52-44 in the Senate, but failed to reach the 60 votes needed to invoke cloture. On December 8, 2010, the DREAM Act was brought up and passed in the House by a vote of 216-198 (H.R. 5281). However, when it reached the Senate on December 18, 2010, it fell five votes short of cloture, receiving 55 yeas and 41 nays.

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TESTIMONY: Undocumented youth finds strength in community organising

Hans, 20, who arrived in the United States from Indonesia at age eleven, tells his story in *Papers: Stories by Undocumented Youth*, a collection of stories about and by undocumented young people and their friends in the United States.¹⁷⁴

Hans speaks of his growing disillusionment after his family's asylum claim was rejected and they lost their temporary status, but the strength he found in community organising.

"Luckily around this time I got involved with community organising. I realised that other members of the community, regardless of documents, suffer from the same systemic injustice. I learned about the world as it is now, and the world as I want it to be, as it ought to be. As members of the community, we all possess the political power to stand against injustice for the betterment of our communities and our lives. This was a novel idea for me as an undocumented youth who is not able to vote. This brought me back not only the power to dream and imagine but also the power to take pride in my community and my country. It gave me great strength knowing that people are with me in my struggles and knowing that the struggles of all marginalised people in the US are my struggles as well."

174 J. Manuel, C. Pineda, A. Galisky & R. Shine (eds.), *Papers: Stories by Undocumented Youth*, Graham Street Productions: Portland, Oregon, p.55-57, 2012. *Papers* the book came out of a documentary film project of the same name. Additional information available at: www.papersthemovie.com. [hereafter *Papers*, 2012].

Supporting and empowering undocumented youth in the United Kingdom

The Paul Hamlyn Foundation (PHF) launched a funding programme in 2012 called the *Supported Options Initiative*, aiming to provide support and advice to young people (up to 30 years of age) and children in the UK without regular migration status. The initiative was established by the PHF Social Justice programme with support from the US-based organisation Unbound Philanthropy, with the hope that, through innovative approaches, it may be able to help bring about the creation of trusted and reliable means through which these young people can seek help.

As part of the initiative, the foundations organised 'Undoc Camp', an innovative two-day workshop bringing together migrants, activists, lawyers, designers, web developers, journalists, photographers, engineers and musicians to join their expertise to develop ways to use social media and digital technologies to get information and advice to young people with irregular migration status in the UK. Three of the project ideas coming out of the workshop are currently being developed and include: a secure online referral system that will help young people up to the age of 21 to access last-resort funding for legal support;¹⁷⁵ a mobile application and website that provides fast, easy, anonymous, confidential and secure support and advice from professionals from organisations that are registered with the service; and a website and text messaging service for young migrants recently arrived in the UK for the first time, providing information and videos in their own language with advice on money, clothes/shopping, support services and community networks in their area, as well as useful contacts for other services.¹⁷⁶

Six pilot projects being undertaken by community organisations, law centres, and national children's organisations are also being supported. These include an initiative from Praxis Community Projects to develop a youth group for undocumented young people, empowering through providing peer-to-peer support and community activities, as well as direct case work and advice. Possibilities to engage the youth group in advocacy work will also be explored.¹⁷⁷

175 Following restrictions on legal aid for immigration cases introduced in April 2013, the government has proposed an exceptional funding scheme for last-resort funding for legal support. The young person will seek help from a referrer who will input information into a secure database. With one single log-in, referrers can input case information directly into the website, referring the individual directly to the scheme and matching them with specialist volunteers who will determine if the funding decision can be challenged (N. McDermott, "Digital Undoc: Report on the creative phase of the Supported Options Initiative", On the Road Media, March 2013).

176 Additional information available at Paul Hamlyn Foundation's website: www.phf.org.uk. See also a blog, commissioned by the Paul Hamlyn Foundation and Unbound Philanthropies, to tell the stories of undocumented families and young people, highlighting their daily struggles and vulnerabilities, but also their strength and resilience. lifewithoutpapers.co.uk.

177 The other grantees are: The Children's Society, providing one-to-one support to young people in London, reducing the number of young people at risk by improving access to advice and support; Coram Children's Legal Centre, reaching families and children through outreach in children's centres in west London, with access to legal advice; Coventry Law Centre in partnership with Grapevine and Community Based Champions, piloting a community based advocacy scheme, with legal representation, for young people in the Coventry area; Islington Law Centre, providing advice, representation, strategic policy work and testing out new models of providing legal support to young people and families; and Refugee and Migrant Centre, providing advice to young people in Wolverhampton and the Black Country and testing out new ways of reaching them through outreach work and social media.

Conclusion

Migration presents numerous positive opportunities for adolescents and youth, including those who remain in countries of origin when their parents migrate. However, policies must be in place to ensure that young migrants are able to adjust and contribute to new environments and to realise their full potential, and that transnational families are able to enjoy their right to family life and the benefits of parental migration. This chapter has shown that current restrictions on even basic economic, social and cultural rights and punitive measures which have significant harmful effects on migrants, such as immigration detention, severely curtail the benefits of migration, violate basic rights, and make adolescents and youth vulnerable to violence, abuse and exploitation.

Despite an international framework for the protection of the rights of all people, the tendency for migration policies to deny access to certain rights to undocumented migrants, regardless of age, systematically violates the rights of undocumented adolescents and youth, and has negative consequences for adolescents and youth 'left behind'. Where restrictions have a disproportionate impact on women and girls, or on men and boys, it leads to multiple discriminations and violations. Adolescents and youth may also be disproportionately impacted by restrictions on rights, or subjected to rights violations, due to their race, ethnicity, sexual orientation, religion or belief, or if they have a chronic or serious illness or disability.

The example of immigration detention is pertinent, for its near ubiquitous and systematic use, despite the widespread and far-reaching rights

violations it presents for undocumented adolescents and youth. Current policies and practices of immigration detention frequently violate rights in terms of its procedural use, its length and its conditions – affecting an array of civil, economic, social and cultural rights, and often exposing adolescents and youth to violence. Adolescents and youth may be more vulnerable to such rights violations, and also face negative consequences in the longer term in terms of impact on education, health, development, and future integration. The narrow, security-focused approach to irregular migration prioritised by most states that allows the detention of adolescent and young migrants ignores the multidimensional nature of irregular migration, making it ineffective, and more importantly, violating a number of basic rights.

Further, in the case of adolescents, restrictions on rights clearly oppose the CRC provisions that prohibit restrictions to children's rights based on their nationality or status, or on any condition of their parents, and significantly impact adolescents' enjoyment of their right to development, to develop their full potential, and to an adequate standard of living, with significant short- and long-term implications.

For example, restricted access to education during adolescence will also significantly impact adolescents' full enjoyment of adolescence, cognitive and social development, and future economic prospects. Indeed, the costs of denying education to undocumented children are clearly described by the United States Supreme Court in its judgement in the case *Plyler vs. Doe*.

US Supreme Court considers costs of denying education

Supreme Court of the United States in the case *Plyler vs. Doe* (1982):

“In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”¹⁷⁸

Restrictions on education and training for youth can have similarly negative impacts on young people’s health, well-being, development and socio-economic integration. In its review of *Global Employment Trends 2013*,¹⁷⁹ the International Labour Organisation (ILO) found that global unemployment increased by 4.2 million in 2012, to over 197 million, a 5.9 per cent global unemployment rate. For youth, the rate of unemployment is even more elevated, with almost 74 million people in the 15 to 24 age group unemployed around the world –12.6 per cent of this age group was unemployed in 2012. Furthermore, this rate is expected to rise.¹⁸⁰

The ILO highlights the increase in youth experiencing long-term unemployment as a particular concern, emphasising the impact this can have on long-term prospects by eroding professional and social skills and by preventing young people from gaining on-the-job experience. In order to tackle this growing global issue, the ILO recommends:

- i) enhancing young people’s employability;
- ii) encouraging youth entrepreneurship; and
- iii) ensuring that young people are afforded rights at work, including the right to organise and bargain collectively, and adequate social protection.¹⁸¹

This chapter has shown how restrictions on access to rights for undocumented adolescents and youth clearly contradict each of these essential drivers for social and economic growth. Thus, it is clear that restrictions violate rights, inflict harm, and severely curtail the opportunities and benefits of migration for adolescents and youth, as well as the communities and societies they live in and will live in the future.

Excerpt from poem

“There Can Be No Compromise On Education”

by Khadim, undocumented youth, 23:¹⁸²

*“Free the paths to knowledge
Education is an inalienable treasure
To obstruct it is to sow ignorance
Break man destroy future
Man is nothing without school.”*

The negative impact of such restrictive policies on benefits for States is particularly evident for economic alliances such as the European Union and the Southern African Development Community, which restrict rights and opportunities for young migrants from neighbouring countries, despite their potential for driving economic growth and being

178 *Plyler v. Doe*, 457 U.S. 202. Appeal from the United States Court of Appeals for the Fifth Circuit No. 80-1538, Argued: December 1, 1981, Decided: June 15, 1982. The Supreme Court ruled that it was a violation of the Constitution to deny undocumented children free compulsory education under the same conditions as citizen and regular migrant children.

179 ILO, *Global Employment Trends 2013: Recovering from a second jobs dip*, International Labour Office: Geneva, 2013. [hereafter *ILO Global Employment Trends, 2013*].

180 *ILO Global Employment Trends, 2013*, pp. 13-14, pp. 65.

181 *ILO Global Employment Trends, 2013*, pp. 14, pp. 17.

182 *Papers, 2012*, pp. 43-44.

incorporated into the alliances as the workforce of the future. Indeed, countries of origin, transit and destination are increasingly recognising the links between migration and development - the developmental potential of migration for countries of origin, transit and destination, as well as the imperative for increased opportunities in countries of origin to ensure that young people are not pushed to migrate by lack of alternatives. Programs addressing poverty reduction, social development and the achievement of sustained economic growth in countries of origin are essential in this regard.¹⁸³ In this context, restricting access to rights for adolescents and youth in the context of migration in countries of origin, transit and destination leads to a great waste of potential for development.¹⁸⁴

Further, while the 2011 Global Forum on International Migration and Development (GFMD) recognised the contribution of irregular migrants to development, both of countries of origin and countries of destination, it concluded that the costs of irregular migration fall disproportionately on the migrants themselves, due to their increased vulnerability.¹⁸⁵ Therefore, efforts to promote regular migration and protect access to economic, social and cultural rights of irregular migrants, particularly adolescents and youth, are imperative for the opportunities and benefits of migration to be enjoyed by individuals, communities and countries of origin and destination.

This chapter has sought to highlight the need for an age-sensitive approach to migration to consider not only children, but also the situation of youth. Two points are critical. First, states must ensure that the internationally codified human rights of all people, regardless of age or status, are guaranteed in the context of migration. The need to protect the human rights of adults, both in the context of child rights as

parents of children, and as individual rights-holders, must be recognised.

Secondly, the special protection granted to children under international law (and domestic law) should not automatically disappear when a person turns 18 years old, creating a distinction in treatment between individuals facing common issues. Instead, these should be treated comprehensively. The developmental impact of restricted access to rights remains significant for adolescents and youth over 18 years of age. Further, there are a number of issues which are particular to the situation of undocumented adolescents and youth during their transition between childhood and adulthood which can make them more vulnerable to exploitation and abuse and pose significant psycho-social challenges.

Legislation and policy reform is required in order to conform to international human rights law and to respect, protect, fulfil, monitor, and promote the rights of adolescents and youth in the context of irregular migration, as well as for individuals and societies to enjoy the full benefits of international migration. These reforms must be based on an expanded evidence-base of concrete positive measures, which can be developed through increased international and intersectoral dialogue, exchange and research, including through forums such as the Global Forum on International Migration and Development and the 2013 High-Level Dialogue on Migration and Development, as well as at the national level. Promising examples and developments are available from states in every world region that proactively reinforce rights, tackle practical obstacles, ensure minimum standards, and empower adolescents and youth to be politically, civically and economically engaged citizens of their communities. Such good practices can serve as a basis for progressive reform.

183 The 1994 International Conference on Population and Development (ICPD) Programme of Action and the 1999 Bangkok Declaration on Irregular Migration both draw conceptual connections between migration and development, urging states that face problems of irregular migration to aid developing countries and countries facing economic transition in order to reduce irregular migration through programs addressing poverty reduction, social development, and the achievement of sustained economic growth. Since poverty alleviation is one of migration's strongest nexus with the Millennium Development Goals, poverty reduction strategies would seem an obvious vehicle for integrating migration reform into human development strategies.

184 For example the ACP Observatory on Migration has developed indicators of the impact of migration on human development and vice versa, including several educational impacts on individual, household, community and national levels (S. Melde *Indicators of the impact of migration on human development and vice versa*, Indicators ACPOBS/2012/PUB02, ACP Observatory on Migration, 2012).

185 GFMD, *Concluding Debate: Taking Action on Migration and Development – Coherence, capacity and cooperation*, Report of the Proceedings, Fifth Meeting of the Global Forum on Migration and Development (GFMD), pp.29, Geneva, Switzerland, 1 – 2 December 2011.

