



HUMAN RIGHTS OF ADOLESCENTS AND  
YOUNG MIGRANTS PARTICULARLY THOSE IN  
IRREGULAR SITUATIONS \*

Chapter 2

International migration is emerging as one of the key issues affecting youth.<sup>1</sup> Whether on their own or with family, adolescents and youth<sup>2</sup> are increasingly migrating in search of survival, security, improved standards of living, education or protection from abuse.<sup>3</sup> Although young migrants have great potential to contribute to the populations they join and migration presents myriad positive opportunities for young migrants, it is crucial for migration policy-makers to recognise that adolescent and young migrants are particularly at risk of human rights violations.<sup>4</sup>

Migration policies and practices that fail to respect human rights leave the door open to a host of ills: marginalisation and discrimination; exploitation of young migrants as cheap, disposable labour; making them scapegoats for xenophobic rhetoric and practices and casualties in an ill-defined war against “illegal migration”. When policies fail to pay attention to the human beings who make up migration flows, they contribute to inequality, injustice and incoherent policy responses.<sup>5</sup>

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 further at risk of 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 those under the age of 18 – adolescents and youth experience numerous human rights violations in the context of migration. Restrictions on regular migration impact the way parents<sup>6</sup> and families migrate, increasing the likelihood that children will: be ‘left behind’<sup>7</sup> in countries of origin, enjoy reduced access to rights and attempt irregular migration.<sup>8</sup> Many migrants – in particular those with irregular migration status<sup>9</sup> – face restricted access to basic rights and services in countries of transit and destination as a result of laws, policies and practices. This paper explores key issues in relation to civil, cultural, economic, political and social rights for undocumented adolescents and youth, using the examples of immigration detention and education by way of illustration.

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### Box 2.1. Definitions of Adolescence and Youth

**'Adolescence'** is generally understood to be the period following the onset of puberty, during which a young person develops from a child into an adult. The transformation to adolescence is very individual, and there is no scientific or legal consensus on a specific definition of age. The United Nations (UN) uses the age cohort 10-19 when referring to adolescence,<sup>10</sup> 'although adolescence' is not usually defined in national legislation. Similarly, there is no agreed global definition of 'youth;' very few countries use the UN definition (age cohort 15-24) when collecting global statistics on youth.<sup>11</sup> In some countries "youth" begins at 12 and in others only ends at 35. In the absence of a universal consensus, in this chapter the term 'adolescent' refers to the age cohort 10-18, and 'youth' to the age cohort 19-29.

In some countries, then, 'adolescents' and even 'youth' may also be "children," as defined by the Convention on the Rights of the Child (CRC), which defines a child as 'every human being below the age of 18 years'.<sup>12</sup> When using the term 'adolescent', this chapter refers to the group of children, aged 10-to-18.

In countries where adolescents enjoy additional legal entitlements and rights because they are under the age of 18 (thus legally 'children'), this rarely extends to resolving their immigration status and can result in prolonged periods of anxiety about the future. Even adolescents or youth with nationality in a country can be severely impacted by migration policies; for example, if a parent or sibling is undocumented. As well as constant fear that a family member will be detained or deported, young nationals may face reduced access to services or be detained or deported because of their parents' migration status.<sup>13</sup> 'Returned' adolescents and youth – those deported to their or their parents' country of origin – also face numerous human rights challenges, particularly if they have spent most of their formative years in the country of destination. Furthermore, by virtue of their age and lack of experience, all adolescents and youth migrating outside formal channels, especially young girls, are particularly vulnerable to abuse, exploitation, trafficking and other rights violations.

Additional protections afforded to adolescents often end abruptly when they reach the age of majority (usually 18 years). For example, in some countries adolescents are protected from immigration detention and deportation,<sup>14</sup> but can be targeted for enforcement as of their 18<sup>th</sup> birthday. Similarly, undocumented adolescents may be entitled to compulsory education (notwithstanding barriers in practice), but not to access higher education or enter the labour market.

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.<sup>15</sup> 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 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 their development, but severely limit the opportunities and benefits of migration enjoyed by individuals and their communities in the long-term as well.

Current migration policies generally fail to consider age, leaving adolescents and youth in a state of near 'invisibility.' The impact of migration policies on these groups, in terms of respect for the principle of non-discrimination and protection of other human rights, merits urgent attention and study. Efforts to do so, through the design and implementation of evidence-based policies, are hampered by the lack of reliable data on the number, age and gender of young migrants,<sup>16</sup> as well as on the specific conditions and treatment they face.

This chapter considers some of the main challenges regarding access to basic human rights for migrants, with particular emphasis on undocumented adolescent and young migrants. The first section offers an overview of relevant human rights and child rights frameworks. The second section looks more closely at a number of challenges facing adolescents and youth in the context of migration: the political and policy context, the 'pathways' that can lead to irregular status, the reality of children of migrant parents unwillingly 'left behind' in countries of origin and gender-related factors. The third section offers an in-depth look at the impacts of immigration-related detention and restricted access to education on the rights, well-being and development of undocumented adolescents. Immigration detention was selected as it exemplifies immigration policy and practice that violate an array of civil, cultural, economic, political and social rights. It is pertinent both due to the extent of the rights violations incurred, its systematic use and widespread acceptance as a legitimate measure to control migration. Education was selected as one of the most fundamental and well-recognised rights globally, both 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.

## INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Under international human rights law all individuals, irrespective of their immigration or administrative status, hold civil, cultural, economic, political and social rights. These rights are formally guaranteed in international legal instruments, including the International Bill of Human Rights – comprising the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR) – and other core instruments.<sup>17</sup>

### **Box 2.2. Guiding Principles for the Realisation of Human Rights**

Certain core principles guide the realisation of human rights. All states must avoid discrimination in access to basic rights (including on the basis of immigration status),<sup>18</sup> and fulfill minimum core civil and political rights as well as economic, social and cultural rights obligations with immediate effect. States must furthermore take progressive steps towards the full realisation of economic, social and cultural rights.<sup>19</sup>

Using the “maximum of its available resources,” every State is obliged to *respect* (refrain from violating); *protect* (prevent third parties from violating); *fulfill* (take positive measures to guarantee enjoyment of, through legislation and adequate funding); *monitor* (measure progress toward); and *promote* (ensure the broadest possible awareness and understanding of) human rights.

Both the ICESCR and ICCPR include specific provisions related to the treatment of migrants, including undocumented adolescents and youth. For example, *all people* within a state’s jurisdiction are entitled to the right to education, an adequate standard of living (including housing, food, water and sanitation), health and protection of the family unit. Civil and political rights include the right to equality before the law; birth registration; life, liberty and security of person; freedom of expression and association, and freedom from torture and inhumane and degrading treatment and arbitrary deprivation of liberty. Rights related to the prohibition of forced labour, and international human rights and labour standards recognising the right to work, rights

at work and to decent work, as well as freedom of association, are also considered applicable to all migrants in an employment relationship, formal or informal, and regardless of immigration status<sup>20</sup> and are pivotal given undocumented workers' vulnerability to workplace exploitation.<sup>21</sup>

The human rights framework provides additional protections for those under the age of 18, as spelled out in the Convention on the Rights of the Child (CRC). States parties to the CRC must ensure that its provisions and principles are fully reflected and given legal effect in relevant domestic legislation.<sup>22</sup> Policies must be guided by four general principles:

1. Non-discrimination
2. The best interests of the child
3. The right to life, survival and development
4. Children's right to express their views, and be heard, in all matters affecting them.

In addition to these overarching principles, the CRC sets out a number of particular rights of *all* children, including: the rights to access health care and education;<sup>23</sup> to social security;<sup>24</sup> and birth registration;<sup>25</sup> along with the right to protection from: arrest and detention, except as a means of last resort;<sup>26</sup> separation from parents;<sup>27</sup> and to special protection and assistance when deprived from a family environment.<sup>28</sup> Further, the detention of children on the sole basis of migration status is not in accordance with the CRC. The CRC Committee has reiterated that the detention of a child because of their or their parent's migration status constitutes a child rights violation, and always contravenes the best interests of the child.<sup>29</sup>

All children also have a right to be protected from economic exploitation, hazardous labour<sup>30</sup> and violence.<sup>31</sup> The CRC also guarantees the child's right to continuity, which is particularly relevant in situations where children and adolescents settle in a destination county but may be subject to deportation proceedings.

States parties to the CRC are committed to provide the fundamental rights set out in the treaty to all children within their jurisdiction, without discrimination of any kind, not only 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."<sup>32</sup>

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

### **Box 2.3. Regional Treaties Provide Special Protection for the Rights of Youth**

The Ibero-American Convention on Youth Rights<sup>33</sup> and the African Youth Charter recognise young people as a group whose rights deserve special protection. They commit ratifying nations to protecting their human rights, including preventing discrimination, promoting employment, and vocational training.

The African Youth Charter<sup>34</sup> further stipulates that “Every young person has the right to leave any country, including his/her own, and to return to his/her country.” It also calls upon States Parties to “promote and protect the rights of young people living in the diaspora.” (Article 21).

## CHALLENGES FOR ADOLESCENTS AND YOUTH

Despite this comprehensive human rights framework, migrant adolescents and youth face numerous violations of, and barriers to, accessing their human rights. These barriers and violations are often compounded when youth and adolescents lose their regular residence status or have migrated irregularly.

Immigration policies and conditions in countries of transit and destination may subject adolescent and young migrants – especially those without regular migration status-- to enforcement practices (such as identity checks, immigration raids and detention) in circumstances that contravene international human rights standards. Adolescents and youth may also experience restricted (or no) access to rights and certain public services, such as birth registration, education, housing, health and social security – both in law and in practice – with significant negative implications for health and well-being, development and opportunities in both the short and long term. It is also important to consider the disproportionate impact of limited access to services such as sexual and reproductive health care and women’s shelters on young migrant women and girls.

Some states – both countries of origin and destination – have developed laws and policies to protect the rights of undocumented migrants, including adolescents and youth, as can be seen in the examples of Ecuador for its migrants abroad, and Argentina for its migrant residents, in Box 2.4.

#### **Box 2.4. National Legislation Mandates Protection of Migrants, Regardless of Status, in Ecuador and Argentina**

In **Ecuador**, according to the Constitution (2008) migration is a human right. Article 40 explicitly states that no person can be deemed “illegal” because of their migrant status. 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. Provide them and their families, whether they live abroad or in the country, with assistance.
2. Provide care, advisory services and integral protection so that they can freely exercise their rights.
3. Safeguard their rights when, for any reasons, they have been arrested and imprisoned abroad.
4. Promote their ties with Ecuador, facilitate family reunification and encourage their voluntary return.
5. Uphold the confidentiality of personal information located in the files of Ecuadorian institutions abroad.
6. Protect transnational families and the rights of their members.”

In **Argentina**, migrants and their families, regardless of status, are entitled to access to services under the same conditions as nationals, particularly in relation to health and education.<sup>35</sup>

Even when services, are legally required to be made available to migrants by law, adolescent and young migrants may be unable to enjoy their rights in practice, particularly when in irregular situations, due to: administrative obstacles (demands for identity documents, social security numbers and proof of address); complex judicial and other systems; discrimination; lack of information and training (both for service providers and migrant families); financial barriers; linguistic hurdles; fear that accessing services will result in immigration enforcement;<sup>36</sup> and mental health challenges<sup>37</sup> among others.

In addition, although access to employment is a key avenue for social inclusion for migrants, including young migrants, access to the labour market is often highly restricted for migrant youth due to high levels of discrimination in obtaining employment<sup>38</sup> as well as absence of recognition of qualifications and experience. Young migrants in irregular situations generally face the impossibility of obtaining authorized employment. Nevertheless, the majority of migrant youth do need to work to support themselves and their families. Young migrants in irregular situations usually end up in informal, unregulated and unprotected working situations. Therefore, lack of protection of labour rights for all migrant workers, regardless of their migration status, remains a critical issue.

Despite international law which provides that that migrant workers should be primarily treated as workers rather than migrants, with all the guarantees that labour law affords, in practice many migrants are unable to defend their labour rights in many destination countries.<sup>39</sup> This is especially true of young migrants, who often find themselves working in low-wage and informal sectors of labour markets where their rights are inadequately defined, particularly when they are undocumented.<sup>40</sup> These young migrants are often exposed to high levels of exploitation, abuse and violations of labour rights protection with no access to formal social protection and very limited or non-existent coverage by labour standards or their enforcement. Migrant workers in temporary, sponsor contract, or other precarious status situations where their status is dependent on their employment relationship with a particular employer, are frequently dismissed if they challenge labour rights violations, and consequently lose their status. Thus, young undocumented migrants, and those with precarious and dependent statuses, are made 'zero risk victims' for exploitation and abuse, as they are unable to access justice for labour rights violations. On the contrary, they can be threatened with, and are at risk of deportation if they report labour rights violations, often without adequate access to legal resources to challenge such proceedings.

Along with an absence of formal channels for migration and regularisation, these factors impact broadly on human rights of migrant youth, 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. Further, particularly for undocumented youth, lack of access to employment and decent working conditions and opportunities to pursue careers can be 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.<sup>41</sup>

While exclusion from work is an important factor, alienation and perception of rejection by migrant youth and adolescents often derives from their restricted access to or exclusion from a broad range of spaces – including education, public services, even from communal public spaces (see recent Swiss discussion of exclusion of asylum

seekers/irregular migrants from vicinity of public facilities such as schools and swimming pools) – especially when they are in an irregular situation.

### **Box 2.5. Pathways to Irregular (undocumented) Status**

There are many pathways to irregular migration status, which can reflect a variety of situations. Individuals may enter a country regularly, but move into a situation of irregularity after loss of employment or residence status,<sup>42</sup> arbitrary confiscation of documents by public officials, employers, rejection of a claim for international protection, etc. In such cases, migrants may have already developed personal ties and connections and decide to stay with their families in the destination country. Thus immigration status can be temporary and transient, and many migrants experience different statuses at different times. For example, they may migrate regularly, lose their status, and later have the opportunity to regularise their status.

Adolescents are especially prone to becoming undocumented since, as children, their migration status is linked directly to that of their parents (unless they acquired nationality on the basis of being born in the destination country). When a parent's visa or work permit expires, their children usually lose regular status. Independent consideration of the best interests of the child is rarely given when deciding on parents' applications for residence status, making children particularly vulnerable to inappropriate refusals of regularisation. Children frequently inherit their parents' migration status, even when they are born in the destination country, due to restrictions on access to nationality in destination countries and arbitrary practices that tie birth registration to parents' migration status.

Prior to, and more so in the wake of the global financial crisis, many governments have been limiting the avenues for regular migration (including family reunification), and developing harsher deportation and detention policies. One result is that irregular channels are the only migration alternative for many. Where family reunification is restricted to younger children, adolescents and youth may be excluded as of age 15 or 16.<sup>43</sup> At the same time, regular employment opportunities are increasingly focused on particular work sectors, which often are highly skilled, which therefore can exclude young migrants lacking the specific expertise required. These trends severely limit regular migration opportunities for adolescents and youth, contributing to the increase of migrants ending up in irregular or undocumented situations.

Young migrants, particularly adolescents, may and often will transition between regular and irregular status and different categories during the course of their migratory journey. For example, 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, even when living with parents who enjoy regular status. A family may be able to regularise the young person's 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.<sup>44</sup>

Additionally, in many countries economic and social rights are threatened by the adoption of strict economic approaches to social rights that increase restrictions on

access to essential social services.<sup>45</sup> New political threats – such as the proliferation of xenophobic and criminalising speech about undocumented migrants – appears to encourage further restrictions of migrants’ economic and social rights, including access to education and health for adolescents and youth and freedom of association. Some national governments that formally ‘criminalise’ irregular migration 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. However, these reporting requirements have often been contested by local government authorities, by professional bodies, and by judicial initiatives, given their potential to undermine public health, labour law enforcement, children’s access to schooling and social cohesion.

When migration is managed as a control function of the State utilizing criminal law provisions and relying on police activity for enforcement, undocumented migrants are effectively denied access to justice, as reporting crime or abuse can lead to their deportation. This situation makes undocumented adolescents and youth particularly vulnerable to abuse and exploitation, as young migrants will not report crimes, including hate crimes and hate speech, or seek the assistance of police.<sup>46</sup>

Enforcement practices can make everyday activities – such as travelling by car or crossing the street – fraught with anxiety and fear, since they could lead to arrest, detention and deportation if the police stop a young person for any reason. Criminal prohibitions on providing assistance, services or basic needs to undocumented foreigners further exclude young migrants from realizing basic rights, including to housing, health and work because they are denied vital protections and access to redress. Added 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, as exemplified in the testimony below.<sup>47</sup>

### **Box 2.6. 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. Zetter<sup>48</sup>)

The implications for social cohesion of having a group of disenfranchised and excluded young people must also be considered. Civil society organisations supporting undocumented adolescents and youth have reported concern that due to lack of employment possibilities the youngsters they work with may be forced to turn to petty crime to survive. As many countries deny regularisation and prioritise deportation of migrants with a criminal record, the negative implications for undocumented adolescents and youth cannot be underestimated. This is particularly problematic for undocumented young people who have spent much of their life in a destination country, but face deportation (or perpetual irregular status) due to a misdemeanour during adolescence or youth.

### **CHILDREN AND ADOLESCENTS ‘LEFT BEHIND’**

An important issue bound up in migrant’s rights protection and access to legal status for migrants is the welfare and rights protection of children as well as adolescents ‘left behind’ by migrating parents. When a parent’s migration status is irregular, it is difficult to return home to see their children or attend family events, since a subsequent safe and authorized re-entry into the country of employment is not assured. This leads to long periods of family separation that can undermine young peoples’ well-being. In addition to the emotional impact of parental absence, migration also poses a challenge to the right to family life and can significantly impact access to other rights.

Since families often use all their available funds (or borrow to raise funds) for a family member to migrate, those left behind may be living in poverty for some time. This can force adolescents to drop out of school – either to work or take over household responsibilities – if the migrating parent is not able to provide sufficient funds through remittances. Moreover, the assumption that children of migrant parents are supported

via remittances can lead to their exclusion from programmes to aid disadvantaged children, thereby increasing family members' vulnerability to poverty and social exclusion.

Although children of migrating parents who remain in their country of origin do not usually face legal discrimination, they can face numerous practical obstacles to enjoying basic rights. For example, if a parent has not registered their child's birth or formally declared an adult to serve as legal guardian, children face administrative hurdles for receiving health care, education and other services. Even when a parent's physical presence is not required, their identity documents may be needed to access vital services. Challenges related to lack of a formal birth certificate can affect children well into adolescence and youth, and even lead to statelessness if a young person later migrates and is unable to provide proof of nationality.<sup>49</sup>

Not only do these limitations affect adolescents' enjoyment of their adolescence, they have long-term impacts on personal development, limiting the benefits gained from migration for individuals, families and the societies they live in.

Some countries of origin have begun to take steps to address these negative impacts of migration on families 'left behind', such as social security systems for migrant workers that offer protection and support.

### **Gender-Related Factors**

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.<sup>50</sup> Many adolescent girls, in particular, migrate to escape sexual abuse, social stigma or pressure to marry.<sup>51</sup> Yet migration can also contribute to their emancipation, by challenging gender inequalities and promoting equal access to rights. Gender also affects the age at which adolescents and youth choose to migrate, and whether they do so alone, accompanied by adults or as part of a group.<sup>52</sup>

Prevailing gender roles and relations impact the experiences of adolescents and youth 'left behind', their access to social rights and personal and social development. For example, migration of a parent affects the division of household responsibilities. Additional responsibilities may fall to adolescent girls or boys in left-behind households. If the father has migrated, male adolescents and youth may be expected

to obtain employment to help support the household, while in cases where a mother migrates, girls may be assigned extra child care or other household roles,<sup>53</sup> with a corresponding impact on access to rights and development – in particular, education. Such arrangements often limit opportunities for adolescents and youth and may increase the likelihood that they too will choose to migrate.

In many countries gender-based discrimination leaves adolescent girls and young women with inadequate access to information regarding safe migration, work opportunities and rights in destination countries, thereby increasing their vulnerability to abuse, exploitation, forced labour, trafficking and separation from their family (Box 2.7).

#### **Box 2.7 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).<sup>54</sup>

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 start working at a much younger age. The probability of being a victim of trafficking generally increases with age, culminating as the child approaches working age.<sup>55</sup>

At the same time, adolescent boys and young men can be more vulnerable to physical violence and violence involving weapons, including at the hands of smugglers and border guards.<sup>56</sup>

Migration policies often limit regular migration channels for adolescent girls and young women, relegating them to the least safe and stable labour sectors or to dependence on male migrants. Young women often migrate as agricultural workers, domestic workers, carers of the elderly, sex workers, ‘entertainers’ or other under-regulated occupations with poor working conditions; low remuneration, long working hours and few legal protections. In such circumstances, particularly when migration status is dependent on an 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 driver for migration by adolescent girls and young women is to join a spouse or parents.<sup>57</sup> However, dependent spousal visas make them vulnerable to losing their status if the relationship ends. This is a particularly significant concern when violence is involved, forcing young women to choose between keeping themselves and their children in violent situations or losing their regular migration status.<sup>58</sup>

However, several countries have imposed gender and age specific bans on the outmigration of girls and adolescent women, and in some cases adult women. Rather than curbing their movement while restricting their freedom of movement rights, these bans seem to have encouraged more reliance on cross border movement by irregular channels and has enhanced their risks of exploitation by human traffickers. The restrictions on rights are also in some cases further compounded by requirements that young women will need the specific protection and accompaniment of a (often male) guardian.

## RIGHTS UNDER THREAT: SPOTLIGHT ON IMMIGRATION DETENTION AND EDUCATION

This section uses the examples of immigration detention and the right to education to elaborate on some key issues faced by undocumented adolescents and youth. Policies in both areas place restrictions on (or directly violate) their rights, with significant short- and long-term implications for their health, well-being, development and socio-economic integration.

### **Immigration Detention**

Many states currently approach migration governance from an ‘enforcement’, ‘criminalisation’, or ‘border control’ perspective, and have developed policies that lead to the likelihood of administrative or criminal detention of migrants at some point in the immigration process.<sup>59</sup>

Thus despite international protocols and commitments, undocumented adolescents and youth find themselves detained in appalling conditions for considerable periods of time, without access to a lawyer or judicial review. Immigration detention that violates human rights standards is systematically used and widely considered a legitimate means of migration control.

Yet no empirical evidence supports the view that detention deters irregular migration.<sup>60</sup> The Special Rapporteur on the Human Rights of Migrants recently noted that despite the worldwide introduction of increasingly tough detention policies over the past 20 years, the number of irregular arrivals has not decreased.<sup>61</sup> Indeed, the Court of Justice of the European Union has found criminalisation and detention purely due to irregular stay to be contrary to EU law, even when a deportation order has been ignored.<sup>62</sup>

Furthermore, despite the additional protections afforded to adolescents by the CRC, in most countries they are treated under the same rules as adult migrants and subjected to detention in adult facilities.

### **Protections against detention for adolescent migrants**

In the context of criminal justice, the CRC allows the detention of children exclusively as a measure of last resort, and for the shortest appropriate period of time.<sup>63</sup> But this does not apply to immigration-related detention, which is not a criminal offence. The CRC Committee has clearly stated that detention on the sole basis of migration status violates the Convention, affirming 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.’<sup>64</sup> The Committee also underlined the right of undocumented young people to appropriate legal assistance, which is essential to empowering young migrants to defend their rights.

Further, the CRC requires that the *best interests of the child* should be a primary consideration in all decisions affecting them. Some state policies justify detention of young migrants as a means to preserve family unity when their parents are detained; such actions are not consonant with the CRC, since “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.”<sup>65</sup> A policy that respects child rights would provide alternatives to detention for the entire family – to maintain family unity – rather than detaining children with their parents.<sup>66</sup>

## Reality of adolescent detention

Nevertheless, most countries lack special provisions or policies to address the issue of adolescent migrants in this context.<sup>67</sup> Concern is growing over the number of young people in immigration detention<sup>68</sup> and the conditions under which they are held. As well as the *fact* of detention being a breach of children's rights, detention *conditions* can also present numerous rights violations. Adolescents are frequently detained in overcrowded and unsanitary facilities with adults other than their family members, making them highly vulnerable to violence and abuse. The prison authorities or private companies that run detention centres rarely have appropriate training in either child or migrants' human rights.<sup>69</sup>

Access to economic and social rights, including education and health (including psychological and mental health care) – and sometimes even food, drinking water and sanitation – are extremely limited in detention. Additionally, access to due process and legal representation can be highly problematic.

The detention of adolescents, with or without family members, is extremely detrimental to their immediate and long-term health and well-being,<sup>70</sup> and constitutes a clear violation of their rights. Box 2.8 describes one country's effort to develop procedural safeguards and suitable alternatives to protect undocumented adolescents and fulfil their rights in situations of immigration enforcement.

### **Box 2.8. 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). **New Zealand's** Immigration Act 2009 explicitly lays out provisions for alternatives to detention,<sup>71</sup> representation by a 'responsible adult',<sup>72</sup> and participation in proceedings (allowing children to express their views on detention and have these views considered at any proceedings affecting them).<sup>73</sup>

These safeguards bring New Zealand's 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.<sup>74</sup>

The *duration* of young migrants' detention is another major concern. Undocumented adolescents and youth may be detained for prolonged periods; up to years in some cases. For some, this means spending a significant proportion of their adolescence or

youth imprisoned, segregated from society and peers, with negative impacts on their personal and social development, as described in Box 2.9.

### **Box 2.9. Impact of Detention**

Morteza Poorvadi arrived on Christmas Island, **Australia** at age 16 and spent four years in detention. Describing his experience, he reported to the *Sydney Morning Herald*:<sup>75</sup>

*"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."*

Finally, serious acts of violence against migrants – including sexual violence, torture and inhumane and degrading treatment – have been increasingly reported in, and during transport to, detention centres and during deportation proceedings.<sup>76</sup> 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 age. Young women and girls who survive sexual violence are often particularly vulnerable to social stigmatisation and exclusion when they re-enter their communities.<sup>77</sup> 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.

Some countries, such as Argentina and Venezuela, recognise that detention is not a suitable measure of immigration enforcement and have enacted laws to prevent it (Box 2.10). Non-custodial measures with minimal impact on the right to liberty are being developed, for use when necessary in the short-term for deportation proceedings.

### **Box 2.10. Presumption Against Detention and Alternatives in Venezuela**

**Venezuela's** Migration Law prohibits detention of all migrants. It provides several alternatives for the purpose of ensuring enforcement of deportation or removal actions. The competent authority may impose on a foreigner who is subject to a deportation action the following precautionary measures for a maximum of 30 days:

- 1) Periodic reporting to the competent authority
- 2) Prohibition from leaving the location in which s/he resides without corresponding authorisation
- 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.<sup>78</sup>

Clearly the detention of young people for infractions of immigration rules violates basic rights of children and adolescents and puts them at risk for long-term physical, emotional and social development problems. Extreme segregation and limited access to rights in detention prevents any positive benefits of migration in the short-term, and can hamper the future social and economic integration of undocumented adolescents and youth. Over the long term, then, the results of policies and practices related to the detention of young people will be felt by countries of origin, transit and destination.

### **Undocumented adolescents and education**

Education is one of the most fundamental and well-recognised rights globally, both in itself and as a key to empowerment and development. Education is pivotal to the opportunities offered by migration, both for individuals and societies. The right of all children, regardless of migration status, to receive an education is clearly spelled out in several international conventions. For example, the International Convention on the Rights of Migrant Workers states in Art. 30 that: "Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned," while the CRC stipulates that States Parties must "make primary education compulsory and available free to all."<sup>79</sup>

Yet migrant adolescents and youth face persistent obstacles to obtaining an education, particularly once beyond primary school. A 2008 UNDP study noted that one-third of developed countries and more than half of developing countries sampled do not provide access to education for undocumented migrant children.<sup>80</sup>

### **Barriers to accessing education**

While some countries directly prohibit irregular migrant children from attending public schools, in others informal, or hidden, obstacles prevent or limit access – even when the undocumented adolescent is legally entitled to education. For example, in Morocco, birth certificates and residence permits are required for school registration.<sup>81</sup> In Poland, although education is formally accessible to undocumented adolescents, lack of funding may lead individual schools to exclude this population.<sup>82</sup> In South Africa, migrant adolescents are often unable to pay required fees, transport, uniforms and books.<sup>83</sup>

Another important factor leading to exclusion from education is fear that school registration will lead to exposure of undocumented status. If parents fail to register children for primary school due to such concerns, the child will become increasingly unprepared to face school at any stage.

Xenophobia, discrimination and violence in schools can also deter undocumented adolescents from attending, as well as affecting academic performance, health and well-being. In a study of undocumented children's access to education undertaken in South Africa – where migrant children report considerable discrimination by teachers and peers – the author found that 88 per cent of children of permanent residents attend school, but only 57 per cent of children of undocumented migrants do so, largely due to 'gate-keeping' or individual schools' refusal to enroll undocumented children.<sup>84</sup>

Additionally, in some countries education is only compulsory until the age of 16, creating difficulties for older undocumented adolescents to access education. Even when education is compulsory until 18 years, undocumented adolescents may be unable to take part in the training component, common in many countries for this age group. Although internships may be a compulsory part of an educational course, they are considered work in many countries, presenting difficulties for undocumented

adolescents. Undocumented adolescents may also face administrative obstacles for taking official exams and receiving their final school-leaving certificate (Box 2.11). These barriers both limit undocumented adolescents' full enjoyment of their right to education, and make it difficult for them to progress from education to employment.

#### **Box 2.11. Barriers to Taking Exams 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.<sup>85</sup>

#### **Proactive measures to promote access**

In light of these challenges, several states have begun to take steps to protect migrant children and promote their rights to access public services, particularly education. For example, Argentina, Belgium, Chile, Italy, Greece, Mexico, the Netherlands, Spain, Thailand and Uruguay have expressly recognised the right of all migrant children to enroll in public schools free of charge.<sup>86</sup> The Thai Government allocates additional funds to the Ministry of Education to defray the costs of providing education services to migrant children.<sup>87</sup>

Other states have implemented policy and legal measures that state explicitly that undocumented adolescents must enjoy their right to education fully, including protection from immigration enforcement in and around schools and access to exams, certificates, non-compulsory education, financial assistance, vocational courses and internships.<sup>88</sup>

### **Box 2.12. 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 permitted to carry out the compulsory internship components, which limited their access to training and prevented them from completing their courses. On 2 May 2012, the District Court of The Hague ruled that a policy preventing undocumented students from taking internships violated the right to education and must be discontinued.<sup>89</sup>

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 18<sup>th</sup> birthday, it is recognised middle-level vocational training, and it is unpaid.<sup>90</sup>

In **Spain** legislation clearly permits undocumented adolescents to hold internships through a contract between the educational institution and the internship provider. Since there is no contract between the student and the internship provider, the student is not required to have a valid work permit.<sup>91</sup>

### **Future implications**

It is also important to consider the further implications of restricted access to education for undocumented adolescents. In some countries, such as the United States, many young undocumented migrants do not understand the meaning of their status until the age of 16 or so, when they want to learn to drive or find part-time employment.<sup>92</sup> The period of adolescence and the transition into undocumented adulthood can pose traumatising realisations for undocumented adolescents, who find their access to further education and the labour market to be highly restricted. The extremely limited future prospects for undocumented adolescents to follow their aspirations for further study, professional training and future careers can be demotivating, causing them to leave school early. These limitations can also have significant negative impacts on mental health, identity development and social interaction at a critical time for adolescents.<sup>93</sup>

Policies and practices that violate adolescents' right to education and enjoyment of adolescence in the short-term have potential long-term implications for their personal and psycho-social development. Whether or not these young people remain in the destination country or migrate elsewhere, the restrictions on access to rights for undocumented adolescents and lack of opportunities for them to regularise their status result in a great waste of potential and can have harmful mental health impacts.

## KEY MESSAGES

- All people, regardless of age or migration status, are entitled to protection and enjoyment of their human rights. The special protection granted to children under international law and national law should not automatically disappear when a person turns 18 years old, creating a distinction in treatment between individuals facing common issues. The developmental impact of restricted access to rights remains significant for adolescents and youth over 18 years of age.
- Despite an international framework that protects the human rights of all people, the tendency for migration policies to deny access to certain rights to irregular migrants systematically violates the rights of undocumented adolescents and youth and has negative consequences for those 'left behind'.
- Current restrictions on human rights and punitive measures that have significant harmful effects on migrants – such as immigration detention – severely curtail the benefits of migration, violate human rights and can expose adolescents and youth to violence, abuse and exploitation as well as longer term implications on their mental health and other negative consequences.
- The particular obstacles to fulfilling their rights faced by undocumented adolescents and youth 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 full potential of youth migration be realised.

## POLICY RECOMMENDATIONS

- Countries should develop age- and gender-sensitive approaches to migration that protect, respect, promote and fulfil the human rights of all migrants, and provide special protections for adolescents and youth. This should include a clear separation between immigration enforcement and service provision, access to justice systems across all relevant policy areas, the removal of practical obstacles to migrants obtaining social services and enjoying their human rights, and labour rights protection where relevant.

- Migrant adolescents and youth should be further empowered to access their rights and challenge violations, through, for example, the provision of information on rights and redress mechanisms, and appropriate access to legal representation. Support should also be provided to youth-led and migrant-led organisations.
- Immigration detention policy and practice must comply with international law. This includes ensuring that administrative detention is always a measure of last resort for all migrants, including young migrants. In the specific case of adolescents, immigration-related detention should be prohibited in all cases in law and practice. If there are reasonable, necessary and proportionate grounds to limit liberty for immigration purposes, suitable alternatives to detention that fully respect rights should be provided for adolescents and youth, and for their families.
- Greater efforts should be made to promote regular migration channels, including for work and family reunification, and to 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).
- Efforts to combat xenophobia, racism and discrimination towards migrants should be strengthened. 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. Violence and xenophobic speech and actions should be denounced, and subject to legal proceedings where appropriate.
- The provisions of the core international human rights instruments including the Convention on the Rights of the Child should guide all policy-making in relation to children in the context of migration. In addition to guiding reform of law and policy, the CRC Committee has recommended that the CRC periodic reporting mechanisms be used by States and civil society to evaluate more systematically the implementation of the Convention in relation to all children affected by migration.
- Particular attention should be given to assuring protection of human rights, including the right to social security and general welfare for adolescents and youth remaining 'at home' when parents migrate abroad.

## NOTES

<sup>1</sup> 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). It is important to note that available data on youth migration 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, K. Koser (2005) *Irregular migration, state security and human security*; M. Jandl et al. (2008) 'Report on methodological issues'; Anna Triandafyllidou, '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.

<sup>2</sup> For the purposes of this chapter, an 'adolescent' is anyone between 10 and 18 and a 'youth' is anyone between 19 and 29 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 article 1 of the Convention on the Rights of the Child. The authors note that the term 'youth' can be considered derogatory in some contexts, but is used here to follow UN terminology.

<sup>3</sup> GMG (2008), *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, p. 53.

<sup>4</sup> Human Rights Council (2009), *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*].

<sup>5</sup> Office of the High Commissioner for Human Rights, "Out of the Shadows: a human rights perspective on irregular migration and development."

<sup>6</sup> In this chapter the term 'parents' is used to refer to parent(s) or other primary caregiver(s).

<sup>7</sup> In countries of origin, many parents have no choice but to leave their children behind when they migrate, and regular channels for children to join parents later are limited. 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.

<sup>8</sup> See for example, UNICEF (2012), "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*].

<sup>9</sup> 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.

<sup>10</sup> See UNICEF (2011), *Adolescence: An age of opportunity; State of the World's Children 2011*.

<sup>11</sup> 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 UN statistical services have used as a reference the age cohort of 15-24 years to collect global statistics on youth.

<sup>12</sup> Convention on the Rights of the Child (CRC), Article 1.

<sup>13</sup> As noted by Jacqueline Bhabha "...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. (2007), Un "vide juridique"? – Migrant Children: The Rights and Wrong, in Carol Bellamy and Jean 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 national children of undocumented migrants compared to national 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. (2010) "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)). 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 to or purchase for young children (H. Yoshikawa (2011) *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* (Russell Sage Foundation: New York) pp.135-136).

<sup>14</sup> For examples, see UNICEF (2012) "Children in the Context of Migration and the Right to Family Life", 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*]

<sup>15</sup> 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*].

<sup>16</sup> 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, 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, 1 September 2005, para. 99).

<sup>17</sup> International human rights instruments relevant to migration include: Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Convention on the Rights of the Child and its Optional Protocols, International Convention on the Rights of All Migrant Workers and Members of Their Families (ICRMW), 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, All International Labour Standards – ILO Conventions and Recommendations – are deemed applicable to all migrant workers ; two ILO Conventions and two Recommendations are specifically on migration: 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), and the recent Convention Concerning Decent Work for Domestic Workers, 2012 No.189), significantly addresses migrant domestic workers. 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 (to the International Convention Against Transnational Organized Crime -CATOC). The 1951 Convention and 1967 Protocol on the Status of Refugees are also very relevant. 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 Charter on Human Rights.

<sup>18</sup> For example, the Committee on Economic, Social and Cultural rights has stated that 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), E/C.12/GC/20, 2 July 2009, para. 30. Note that the ICCPR contains a few articles that refer specifically to rights of nationals (Article 25) and those lawfully residing in the State (Articles 12.1 and 13).

<sup>19</sup> ICESCR, Article 2. For an 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, May 24, 2004.

<sup>20</sup> As the Inter-American Court on Human Rights ruled unanimously in an advisory opinion: "The Court decides unanimously, that...the migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his human rights, among them those of labor character. A migrant, by taking up a work relation, acquires rights by being a worker, that must be recognized and guaranteed, independent of his regular or irregular situation in the State of employment. These rights are a consequence of the labor relationship." (Inter-American Court on Human Rights: *Judicial Condition and Rights of Undocumented Migrants*, Consultative Opinion OC-18/03 of September 17, 2003, solicited by the United Mexican States. Full text at: [http://www1.umn.edu/humanrts/iachr/series\\_A\\_OC-18.html](http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html))

<sup>21</sup> See also Article 6 of the International Covenant on Economic, Social and Cultural rights (ICESCR) and ILO Instruments *Forced Labour Convention*, 1930 (No. 29), *Abolition of Forced Labour Convention*, 1957 (No. 105), *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87) *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98).

<sup>22</sup> CRC, Article 4.

<sup>23</sup> Article 28.

<sup>24</sup> Article 26.

<sup>25</sup> Article 7.

<sup>26</sup> Article 37(b).

<sup>27</sup> 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, *supra* note 11.

<sup>28</sup> Article 20.

<sup>29</sup> 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, 2013, para 78.

<sup>30</sup> Article 32.

<sup>31</sup> Article 19.

<sup>32</sup> Committee on the Rights of the Child, General Comment No.6.

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> Article 6 Ley de Migraciones No. 25.871/04 and Decreto No. 1602/09.

<sup>36</sup> In relation to fundamental rights considerations when 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 service providers and immigration authorities and lack of enforcement actions near essential services. See Fundamental Rights Agency (2012) "Apprehension of migrants in an irregular situation – fundamental rights considerations", 9 October 2012.

<sup>37</sup> 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 (T. Bean, et. al., 2007, "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..

<sup>38</sup> See discussion on discrimination in employment faced by youth migrants in Chapter 6 of this report.

<sup>39</sup> As the UN Special Rapporteur on the Human Rights of Migrants put it: "The Special Rapporteur also notes that the demand within EUMSs for temporary, unskilled labour in several sectors, including agriculture, hospitality, construction and domestic work, remains high, although generally unrecognized. This kind of work is offered by local employers and participates in the informal economy, often at exploitative wages and conditions. The Special Rapporteur notes however that, while programmes do exist to encourage skilled migration to the European Union, the rise of the European Union migration framework has not yet been accompanied by a parallel development of possibilities for unskilled migrants to seek regular channels for temporary unskilled work opportunities in EUMSs. Such unrecognized labour needs create a major pull factor for unskilled migration. In the public debate, irregular migrants are often accused of "stealing jobs" or of contributing to lowering wages for regular workers, but States seem to invest very few resources in trying to reduce the informal sector and sanction "irregular employers", who profit from the exploitative conditions of work to boost their competitiveness." *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*. Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau. [A/HRC/23/46](#) Geneva. 2013.

<sup>40</sup> See: 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. 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. These two qualitative works include interviews with undocumented youth in the US talking about how frustrated they are that they can only work in the same low-wage sectors and conditions as their parents, although they have been schooled in the US.

<sup>41</sup> *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.

<sup>42</sup> Permits may not be renewed for a number of reasons, such as: loss of employment, changes in rules and requirements, administrative barriers (including high fees), discretion and lack of information. See e.g. F. Düvell F. (2011), "Paths into Irregularity: The Legal and Political Construction of Irregular Migration," *European Journal of Migration and Law* 13, p. 275–295.

<sup>43</sup> For example, Denmark will only grant family reunification to dependent children over the age of 15 in specific circumstances, such as if the child has no appropriate caregiver in the country of origin. For more information, see [http://www.nyidanmark.dk/en-us/coming\\_to\\_dk/familyreunification/children/children-between-15-and-18.htm](http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/children/children-between-15-and-18.htm).

<sup>44</sup> For examples, see UNICEF *Migration and the Right to Family Life, 2012, supra* note 9.

<sup>45</sup> 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*.

<sup>46</sup> See for example Human Rights Watch video report "Don't Call 911" posted May 2014 at <http://multimedia.hrw.org/distribute/lkupbatohw>

<sup>47</sup> 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, supra* note 11: 615; *Crone, various, supra* note 10). 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.

<sup>48</sup> *No right to dream, 2009, supra* note 111, p.33.

<sup>49</sup> See for example, UNHCR/ Asylum Aid (2011) *Mapping Statelessness in the United Kingdom*, p.23.

<sup>50</sup> OHCHR (2012) *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, August 2012, p.7. [hereafter *CRC DGD Background Paper, 2012*].

<sup>51</sup> For an overview of cases of abuse-related migration, see: S. Jolly, *Gender and Migration*, Overview Report. BRIDGE, UK c.f. *CRC DGD Background paper, 2012, supra* note 15, p.7.

<sup>52</sup> *Cortes, 2011, supra* note 28, p.5

<sup>53</sup> UNICEF / UNDP Background Paper for the 2007 Global Forum on Migration and Development, pp. 5-6; R. Cortés (2008), *Children and Women Left Behind in Labour Sending Countries: An Appraisal of the Social Risks*, UNICEF Division of Policy and Practice Working Paper, August 2008 [hereafter *Cortés, 2008*]; R. Cortés (2011) *Adolescents' Rights, Gender and Migration: Challenges for Policy-Makers*, ADAP Learning Series, UNICEF April 2011 [hereafter *Cortés, 2011*].

<sup>54</sup> ILO-IPEC (2000) *Trafficking in Children in Asia: Regional Review*.

<sup>55</sup> UNICEF and ILO (2007) *Child trafficking in the Philippines. A situational analysis*

<sup>56</sup> K. Boland (2010) *Children on the Move: A Report of Children of Afghan Origin Moving to Western Countries*, UNICEF, February 2010.

<sup>57</sup> *Cortes, 2011, supra* note 28, p.5.

<sup>58</sup> PICUM (2012) *Strategies to End Double Violence Against Undocumented Women - Protecting Rights and Ensuring Justice* (PICUM: Brussels).

<sup>59</sup> Victor Abramovich, et.al. (2010), 'Migration, Children and Human Rights: Challenges and Opportunities' (UNICEF: Geneva, 2010), p.30 [hereafter *Migration, Children and Human Rights, 2010*].

<sup>60</sup> UNHCR (2012) *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, p.7.

<sup>61</sup> *Special Rapporteur Report, 2012, supra* note 92, para.8.

<sup>62</sup> In its recent case law, the Court of Justice of the European Union has clarified that in the EU, undocumented migrants 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 (*El Dridi v. Italy*, Judgment of the Court (First Chamber), 28 April 2011, in Case C-61/11 PPU). EU law, in the 'Return Directive', allows undocumented migrants to be temporarily detained pre-deportation, when certain procedural safeguards and conditions are met, including the measures being necessary and proportionate (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). 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. See full version of this chapter for more information.

<sup>63</sup> CRC, Article 37(b). See also *CRC DGD Background Paper, 2012, supra* note 15, p.23.

<sup>64</sup> Committee CRC, General Comment No. 6, On *Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, 1 September 2005, para. 6.1

<sup>65</sup> 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. 32. See also: *Special Rapporteur Report, 2009, supra* note 7. 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.

<sup>66</sup> See *Special Rapporteur Report, 2009, supra* note 7, para.62.

<sup>67</sup> *Migration, Children and Human Rights, 2010, supra* note 79, p.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 (2009) *Estudio sobre los estándares jurídicos básicos aplicables a niños y niñas migrantes en situación migratoria irregular en América Latina y el Caribe*, Lanús).

<sup>68</sup> See generally *Special Rapporteur Report, 2009, supra* note 7.

<sup>69</sup> See: Study of the Office of the UN High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration, A/HRC/15/29, July 2010, paras. 50- 56, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/151/41/PDF/G1015141.pdf?OpenElement>

<sup>70</sup> See for example UNICEF & Children's Legal Centre (2011) "Administrative detention of children: a global report," Discussion Paper, February 2011; International Detention Coalition (2012) *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; Medical Association for Prevention of War (MAPW) (Australia, 2002) "Children in detention: The Effect Of Detention Centres On The Health Of Children", MAPW Position Paper adopted May 2002; Australian Human Rights Commission (2004) 'A last resort? National Inquiry into Children in Immigration Detention', 13 May 2004; J. Burnett et al. (2010) 'State Sponsored Cruelty' *Children in immigration detention* (Medical Justice: London).

<sup>71</sup> New Zealand *Immigration Act 2009*, s.331.

<sup>72</sup> New Zealand *Immigration Act 2009*, s.375.

<sup>73</sup> New Zealand *Immigration Act 2009*, s.377.

<sup>74</sup> J. Ngatai (2010), *Study on Children and Migration*, Human Rights Commission, 14 May 2010.

<sup>75</sup> "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.

<sup>76</sup> See generally Birnberg Peirce & Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns (2008) *Outsourcing Abuse*, July 2008; ACLU (2012) "ACLU Demands Federal Investigation Into Charges of Abuse by Border Agents" American Civil Liberties Union Press release, 10 May 2012; Human Rights Watch (2012) "*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*].

<sup>77</sup> *Human Rights Watch, 2012, supra* note 107, p.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 effective oversight. However, Human Rights Watch notes the failure by the Angolan government to credibly investigate past abuses and prosecute perpetrators (*Human Rights Watch 2012, supra* note 107, p.3).

<sup>78</sup> Migration Law No. 37.944, 24 May, 2004, Article 46 c.f. UNICEF (2010), *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).

<sup>79</sup> CESCR, General Comment No. 13, para. 34: "The Committee takes note of article 2 of the Convention on the Rights of the Child and article 3 (e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status." Art. 3 of the UNESCO convention includes giving foreign nationals the same access to education as given to nationals. Also note guidance of CESCR in relation to non-discrimination under the Covenant (GC No. 20) in relation to irregular migrant children.

<sup>80</sup> United Nations Development Programme (2009), *Human Development Report 2009: Overcoming barriers – human mobility and development* (Palgrave Macmillan: New York), p.58 [hereafter *UNDP, 2009*].

- <sup>81</sup> M. Diop. (2013), « Migration des Enfants Non Accompagnés de l'Afrique de l'Ouest vers l'Afrique du Nord: Etat des lieux», January 2013, p.34-35
- <sup>82</sup> UNDP, 2009, *supra* note 48, p.58; PICUM (2008), *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (Brussels), p.19; PICUM (2011), "Building Strategies to Protect Children in an Irregular Migration Situation. Country Brief: Poland".
- <sup>83</sup> UNDP, 2009, *supra* note 48, p.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).
- <sup>84</sup> J. Crush (2012), "Imbizo–My Debate: Children's right to education has no borders", *The New Age*.
- <sup>85</sup> PICUM (2011), "Building Strategies to Protect Children in an Irregular Migration Situation, Country Brief: Poland", p.6
- <sup>86</sup> UNICEF *Access to Civil, Economic and Social Rights, 2012, supra* note 13, p.20. Report of the Secretary General on the Promotion and protection of human rights, including ways and means to promote the human rights of migrants, 4/68/292, August, 2013, para. 65
- <sup>87</sup> IOM Thailand (2011), *Thailand Migration Report*, IOM
- <sup>88</sup> For examples, see UNICEF *Access to Civil, Economic and Social Rights, 2012, supra* note 13.
- <sup>89</sup> The court found that the *Aliens Employment Act* 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>
- <sup>90</sup> 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>).
- <sup>91</sup> 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*.
- <sup>92</sup> R. G. Gonzales (2011), "Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood", *American Sociological Review* 76(4) 602-19.
- <sup>93</sup> Research on adolescents' subjective well-being has found significant differences between reported well-being of children aged eight 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. See: Children's Society (2012) *The Good Childhood Report 2012: A review of our children's well-being*.