"Children in an irregular migration situation" refers to children whose lives are affected by an irregular migration status. This is a diverse group. It includes children whose immigration status is irregular - "undocumented children". The parent(s) or other caregiver(s) of these children may also be undocumented, for example, those who have entered irregularly or overstayed residence permits or visas as a family. The parent(s) or other caregiver(s) of these children may also be undocumented, because their parents are themselves undocumented.

Children in an irregular migration status may also be children whose own migration status is regular, but whose parent(s) or caregiver(s) are undocumented migrants. For example, some children gain citizenship through one parent or birthright citizenship laws. In some countries, such as France and Ireland, children are not required any documentation until the ages of 18 and 16 respectively. Therefore, in these countries there is no such thing as an "undocumented child". However, they are still affected by the irregular migration status of their parents.

Undocumented children may also be sent by their families to Europe in search of better conditions, or have run away, and are therefore alone. Some children are trafficked to Europe, either alone or with their families, and so are also undocumented. This project focuses on children who are with their families or other caregivers, and their access to basic social rights. There is a concerning lack of visibility of these children and how they are affected by policies on irregular migration - they frequently live in extremely precarious situations with no access to basic social rights. Because most EU countries have specific systems in place, however flawed, to care for unaccompanied or separated children and victims of trafficking, this project does not address the particular issues these groups of children face. The issues regarding access to basic social rights are nonetheless relevant for those separated children who are outside of the reception circuits for unaccompanied children and are invisible to social services, and victims of trafficking before identification, in so far as they can access basic social rights.
Methodology:

Over the past 10 years of daily monitoring and advocacy for the rights of undocumented migrants, PICUM has noted a dangerous trend towards the erosion of the rights of children in an irregular migration situation.

The project focuses on the rights to education, health care and housing because they are fundamental to a child’s development. Nonetheless, despite legal entitlements, these basic social rights are often denied to children in an irregular migration situation living in Europe, particularly those who are accompanied by their families or other caregivers and so not under the direct care of the State. Only by guaranteeing basic access to education, health care, and housing, are these children allowed sure and solid development.

Through a series of intensive national workshops in seven countries - Belgium, France, Italy, the Netherlands, Poland, Spain, and the UK, project participants will build mutual understanding of the problems children in an irregular migration situation face in exercising their rights to education, health care and housing in each country, and devise concrete strategies to improve on some of the challenges identified.

The seven countries have been selected as they represent the northern, southern and eastern European regions, a mix of old and new European Union (EU) member states and different social welfare models. As well as the specific national recommendations, the findings will be generalised for pan-European application where possible, and customised to fit regional characteristics as needed. An instructional guide will be produced to aid efforts to secure these rights for children in an irregular migration situation in all Member States, and at the European level. It will be presented at a European conference in January 2013, and will be used to shape and support the ongoing advocacy work of PICUM and partner organisations.

What Now?

The “Building Strategies to Improve the Protection of Undocumented Children in Europe” project workshops provide an opportunity for stakeholders to come together to discuss the barriers children in an irregular migration situation face when exercising their rights to education, health care and housing, including those outlined in this brief.

The goal is to build common understanding and begin to develop strategies to overcome them. This is just the beginning. We invite you to pursue these goals outside of the workshops, raise awareness of the issues, and challenge the barriers through your work.

For more information on the project, or to continue your engagement as the project progresses, please contact Sangeetha Iengar, Project Officer, sangeetha.iengar@picum.org or Elena Rozzi (ASGI), elena.rozzi@asgi.it

THE PARTNERS
- PICUM (Coordinator)
- Belgium: Plate-forme Mineurs en Exil
- France: Groupe d’Information et de Soutien des Immigrés - GISTI (Information and Support Group of Immigrants)
- Italy: Associazione per gli Studi Giuridici sull’Immigrazione - A.S.G.I (The Association for Legal Studies on Immigration)
- the Netherlands: Defence for Children International - DCI
- Poland: Polish Migration Forum
- Spain: Red Acoge
- United Kingdom: Praxis Community Projects - Praxis

TERMINOLOGY

In referring to migrants without a valid residence permit, the term 'undocumented migrants' (or alternatively, 'irregular migrants') is more appropriate. The term 'illegal' can be criticised for two main reasons:

1. Its connotation with criminality: being in a country without the required papers is, in most countries, not a criminal offence but an administrative infringement.
2. Defining an individual or group as 'illegal' can be regarded as denying them their humanity and risks violating their innate right to recognition as a person before the law.

While referring to migrants as ‘illegal’ has political and/or societal consequences, it also fails to take into account the varying degrees of compliance which may apply to the situation of any one migrant. For example, a migrant may be legally resident but working in violation of some or all of the conditions of their visa.

This position on terminology is increasingly being taken by a multitude of actors, including the United Nations\(^1\), the Council of Europe\(^2\), the European Parliament\(^3\), and the European Commission, as well as numerous non-governmental organisations, local authorities, professionals from diverse fields, and undocumented migrants themselves.

**WHY REFER TO “UNDOCUMENTED” AND NOT “ILLEGAL” MIGRANTS?**

Following the UN Convention on the Rights of the Child (CRC), ‘a child means every human being below the age of eighteen years.’ However, the age when someone is no longer defined as a “minor” varies from country to country.

- Especially in a climate where undocumented migrants are de-humanised, referring to undocumented children as “minors” rather than “children” has potentially negative connotations and risks their exclusion from the child rights/child protection frameworks.
- In Italy, in any case, the term “fanciullo” è fuori uso, perciò “minore” pare in questo contesto più
Two fundamental legal principles are crucial when protecting the rights of children: non-discrimination and the best interests of the child. They are clearly laid out in the Convention on the Rights of the Child (CRC) as follows:

- **Non-discrimination**: the CRC obligates all states to protect the rights set out in the 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.”

  (Article 2)

  The Committee on the Rights of the Child has explicitly stated that this means that the CRC applies regardless of immigration status. ¹⁰

- **The best interests of the child**:  

  “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.”

  (Article 3)

  The Committee on the Rights of the Child has made clear that interests in migration control cannot override considerations of the best interests of the child. ¹¹

Italy has a legal obligation to follow the international and European laws which it has “ratified” (formally consented to and made valid).

This means that any policy or practice which is contrary to these laws can be challenged as unlawful. ⁸

The fundamental rights of children, regardless of immigration status of children or their parents ⁴ are protected in several legally binding international and European laws (see box on next page), most notably:

- The **UN Convention on the Rights of the Child (CRC)**: ⁵ Italy ratified the CRC in 1991, making it directly part of national law.

- The **International Covenant on Economic, Social and Cultural Rights (ICESCR)**: ⁶ Italy ratified the ICESCR in 1978 making it directly part of national law.

- The **European Convention on Human Rights (ECHR)**: ⁷ Italy ratified the ECHR in 1991, making it directly part of national law.

Two fundamental legal principles are crucial when protecting the rights of children: non-discrimination and the best interests of the child. They are clearly laid out in the Convention on the Rights of the Child (CRC) as follows:

There is also the Universal Declaration of Human Rights (UDHR), which though not technically legally binding, is considered customary international law, and so is intended to be binding; and the European Social Charter (ESC), which is usually limited in scope to nationals or regular workers of Contracting State Parties, but for which some of the rights have been established by the case law to apply to irregular migrants, particularly in the case of children.  

What Are the National Laws and Regulations?

The fundamental rights of undocumented migrants are reaffirmed in the Italian Constitution and National Immigration Law:

“Migrants, even not regularly present in the territory, enjoy the fundamental human rights provided by national law, international conventions and by principles of international law.”

Nevertheless, the tension between immigration control and child protection results in children in an irregular migration situation being treated separately and differently from “all” children.

Children in an irregular migration situation are affected by repressive migration control policies and not adequately protected as children, first and foremost, under the systems for protecting children.

- Italian law protects the rights of all children. According to the Immigration Law, children cannot be expelled, except for reasons related to public order and state security.
- Since they cannot be expelled, all children are eligible for a residence permit “per minore età”, valid until the age of 18. Legally, children are protected from having irregular migration status.
- However, in practice, children of undocumented migrants are excluded from this protection.
- Applications for residence permits must be made to the police authorities, and only parents are allowed to make the application since they are the child’s legal representatives.
- Parents risk detention and deportation if they come into contact with the police authorities, so are prevented from accessing their children’s right to regularisation.
So, children of undocumented migrants become undocumented, with limited access to their basic social rights.

Government policy on all levels states its strong commitment to supporting the well-being of every child.

- The National Plan of Action and intervention for the protection of rights and development of children 2010-2011 (PNI) expresses commitment to the rights of all children. 18

- However, the Committee on the Rights of the Child has expressed concern that ‘this Plan is not implemented, that no budget has been allocated and that the process of allocating funds for the Plan at the regional level could further delay its implementation. Furthermore, the Committee is concerned that the Plan of Action lacks a specific monitoring and evaluation system.’ 19

- There is a National Observatory on Children and Adolescents to coordinate institutions and organisations working with children. 20

- However, the Committee on the Rights of the Child has expressed concern that the Observatory ‘may not have the appropriate mandate to effectively coordinate the policies and programs of the many entities relevant to implement the rights of the child.’ 21

- There is an Ombudsman for Childhood and Adolescence - a spokesperson for the rights of the child, to defend rights such as those provided by the Constitution and the CRC. 22
Do Undocumented Children Have a Right to Education in International and European Law?

Yes, their right to education can be found in several laws:23
In particular:
• The Convention on the Rights of the Child (CRC) says:
  ‘States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.’
  (Article 28, see also Article 29)
• The International Covenant on Economic, Social and Cultural Rights (ICESCR):
  ‘The States Parties to the present Covenant recognise the right of everyone to education.’
  (Article 13, see also Article 14)
• The European Convention on Human Rights (ECHR):
  ‘No person shall be denied the right to education.’
  (Protocol 1 Article 2)25
• The Charter of Fundamental Rights says
  ‘Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education.’
  (Article 14)26

What Are the National Laws and Regulations?

• The right to education for all is enshrined in the Italian Constitution
  “Schools are open to all. Elementary education is imparted for at least eight years, [and] is obligatory and free. Capable and deserving pupils, even without financial resources, have the right to attain the highest grades of education.”27
• The law further clarifies that this right to education is applicable regardless of migration status, and that all the laws and obligations regarding education apply equally to all foreign children, in any school grade.28
• It is a legal requirement for all children to attend school for at least 10 years. After these 10 years and up to the age of 18, all children have the right and duty “to education and training” (i.e. they are required to attend secondary school or vocational training or apprenticeship).29
• Kindergarten is not compulsory, but it is part of the school system and it is in strict connection with compulsory school.30 Although nursery is not part of the school system, it is an educational service.31
• Parents have a duty to “support, instruct and educate their children, even those born outside of matrimony.”32
• No documentation is required for registration - if no identity documents are available, the child can be registered based on the personal data declared.33

A child can be registered at any time during the school year and should be placed in the class corresponding to his or her age, except for the cases where the teachers, considering his or her ability etc., decide to place the student in a different class.34

The law is also clear that the right to education includes receiving formal recognition of their education and the final school-leaving qualification, regardless of whether students have a residence permit or identity documents. Diplomas should be issued with the personal data declared at the moment of registration.35

The law does not explicitly state the right of undocumented students, who have started attending secondary school or training as a child and have completed it after the age of 18, to receive the final school-leaving qualification. Nonetheless, it is clear that these students must be ensured the right to receive the final school-leaving qualification.36

The right to education for all children regardless of migration status also includes access to educational services and to support measures such as scholarships, meals, transport etc.37
What is the situation in practice?

- Undocumented children are often refused access to kindergarten and nursery and to vocational courses and 16-18 education. 38
  - Restrictive and discriminatory interpretations of the law limit the right to education to compulsory education (or even to the first 10 years of compulsory schooling), although the law is clear that the right and duty to education applies to children of all ages. 39
  - The issue has also been reiterated by a ruling from the Court of Milan in 2008 40 and clarification from the Ministry of Interior 41. However, neither the Ministry of Interior nor the Ministry of Education have issued regulations on this matter, and the correct interpretation of the law is largely ignored.

- Municipalities often condition access to public kindergartens and nurseries upon a registered residence within the Municipality’s territory, or they give priority to residents (the places available are much less than needed). Since undocumented migrants cannot register their residence, their children are often de facto excluded.

- Many vocational courses include traineeships that require insurance for occupational accidents. To take out this kind of insurance policy, a residence permit is required, so vocational training centres often deny undocumented children access to these courses.

- Despite the clear legislation, undocumented children are sometimes still denied their diplomas, even in middle schools. Some secondary schools, applying restrictive interpretation of the law, deny undocumented students that have become of age their diplomas.

- There are concrete barriers to children in an irregular migration situation’s attendance in practice:
  - Discretion at the local level can result in improper demands for paperwork in order to reject undocumented children’s registration. Schools are sometimes reluctant to accept undocumented children due to issues over funding 42, perceived difficulties regarding their integration, or simply discriminate.
  - Precarious living conditions can affect performance and attendance in school.
  - Parents face difficulties meeting school costs, such as books, uniforms and school trips as well as extracurricular expenses, such as meals, transportation etc. Although undocumented children should have access to educational services and support measures to help meet these costs, access is often conditioned upon a registered residence, thus excluding undocumented children.
  - Poor knowledge of the language.
  - Some parents fear that the information provided to schools could lead to detection by State and deportation, or the authorities taking the child into care. This can prevent them from registering their children in schools. Fear of detection is likely to increase now that irregular entry and stay has been criminalised 43.

- The inclusion of undocumented children in school, and their de facto integration, can also cause imbalance within families in an irregular migration situation, where parents have much more restricted access to rights and society as a whole. Children with better knowledge of the language and country’s culture and systems, often assume the role of translator to assist parents. This change in intergenerational relations and responsibilities can put a strain on families and children.

“Undocumented children can attend school, but they have no right to transportation, books, or lunch, which are all a series of measures that make access to education difficult for those who are already poor”

Antonella Inverno, Save the Children Italy
HEALTH CARE

Do Undocumented Children Have a Right to Healthcare in International and European Law?

Yes, their right to healthcare can be found in several laws.  

In particular:

- **The Convention on the Rights of the Child (CRC)** says:  
  "States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."  
  (Article 24(1); see also Articles 25 and 39)

- **The International Covenant on Economic, Social and Cultural Rights (ICESCR):**  
  'The States Parties...recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'  
  (Article 12(1))

- **The European Convention on Human Rights (ECHR) says:**  
  'No person shall be subjected to torture or inhuman or degrading treatment or punishment.'  
  (Article 3)

What are the National Laws and Regulations?

The Italian Constitution “safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent.”

The Immigration Law states that child’s health is especially protected, according to the Convention on the Rights of the Child.

However, only documented migrants are allowed to enrol in the National Health Service (NHS) and no exceptions are provided for children - undocumented children are unable to enrol in the NHS and are not ensured equal access to health care as national children.

All care is provided free of charge to children under the age of 6, on equal terms as nationals.

After this age, undocumented children receive health care under the same conditions as adult undocumented migrants.

- They have the right to access the following care
  - **Urgent care** (cura urgenti): care that cannot be deferred without endangering the patient’s life or damaging their health.
  - **Essential care**, which can be both preventative and curative.

- This care can be continuous, i.e. undocumented migrants in need of “urgent” or “essential” treatment will receive health care until the whole treatment and rehabilitation period has been completed.

- In order to access these NHS services, parents must obtain an **STP code** (Stranieri Temporaneamente Presenti – temporary residing foreigner code) for their child.

- The application for an STP code is free. It identifies the patient to all health care services and is anonymous.

- It is issued by a hospital administration or by the local health administration (ASL) and valid throughout Italy.

- Parents can apply for an STP code at any time, without their child being unwell. No medical certification is required. The code has a validity of six months and can be renewed.

- To obtain it, undocumented migrants must also apply for "Indigence status" (stato di indigenza), by declaring their situation of poverty and filling in an official form. Children are included on their parents STP card.
What is the Situation in Practice?

- There are a number of practical barriers which can prevent undocumented children from receiving the care they are entitled to:
  - Implementation of the law varies on the regional and local level
  - The rules are complex and lack clarity
  - There is a lack of awareness on the part of health care providers and health administrators of the entitlements of undocumented children and the STP system, particularly in areas with fewer undocumented migrants. This can result in strict interpretations of “essential care”.
  - Some ASL unlawfully request documents, such as passports or residence permits, in order to issue the STP code.
  - Undocumented migrants are not always informed that they can apply for exemption from cost contributions. Even when cost contributions are nominal, they can be difficult for undocumented parents to meet, and prevent or delay them accessing care for their children.
  - Harsh cuts in funding to health services can result in strict interpretations of “essential care”.
  - Further, without access to a GP or paediatrician, children do not receive continuous care.
  - As for nationals, access to free-of-charge care from dentists can be very difficult. Despite undocumented children’s vulnerability to mental health needs, mental health care is also rarely accessible.
  - All children in an irregular migration situation - both children of undocumented migrants and those who are undocumented themselves - may also also be prevented from accessing health care by several other obstacles:
    - Undocumented parents lack of knowledge of their children’s rights and the administrative structures.
    - Language can be a significant barrier to accessing and receiving appropriate health care, as can cultural differences.
    - Despite the prohibition against reporting, some parents fear detection as a result of accessing services.
    - As a result of moving frequently, children in an irregular migration situation rarely have proper medical records and do not receive continuous care. This can be highly detrimental to children’s health.

- Undocumented migrants with STP can access some health care free of charge, on the same conditions as nationals (as provided by the law, including care for children under the age of 6, care related to chronic diseases, emergency care etc.).

- Except for these cases, a cost contribution (“ticket”) must be paid. If undocumented migrants don’t have resources to pay for the “ticket”, they can apply for exemption or delayed payment.

- The STP code enables the costs for care to be reimbursed to the ASL where the care was provided, by the Ministry of Interior (for urgent and essential treatment) or the NHS (for preventative medicine programmes and care provided for public health reasons).

- They have no access to other national health services that are not considered as urgent or essential care, including General Practitioners or paediatricians.

- Health care providers are prohibited from reporting undocumented migrants to the police authorities.

“The street children we encounter inquire about health care more than anything else, girls especially, but more and more the boys. They are certainly afraid of being checked, and then there is total ignorance of the different illnesses they can contract in the street”

Antonella Inverno, Save the Children Italy
Do Undocumented Children Have a Right to Housing in International and European Law?

Yes, their right to housing can be found in several laws.\(^5\)

In particular:

- **The Convention on the Rights of the Child (CRC):**
  ‘States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’ and ‘in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.’
  (Article 27(1) and (3))

- **The International Covenant on Economic, Social and Cultural Rights (CESCR) says:**
  ‘The States Parties...recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...The States Parties will take appropriate steps to ensure the realization of this right...’
  (Article 11(1))

- **The European Convention on Human Rights (ECHR) has the prohibition of inhuman and degrading treatment (Article 3) and, in Article 8:**
  ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’

Whilst there is no duty to provide housing, European Court of Human Rights jurisprudence indicates that these rights can imply a positive obligation on States to avoid imposing “intolerable living conditions” that would breach these rights.\(^5\)

What Are the National Laws and Regulations?

There is no national legislation which specifies the right to housing for children in an irregular migration situation with their parent(s) or other caregivers.

The Immigration Law provides that only regular migrants can access “centri di accoglienza” provided by Regions, “alloggi sociali” regulated by Regional laws and “edilizia residenziale pubblica”\(^5\). However, access to other forms of social housing such as “comunità” and “centri di accoglienza” provided by Municipalities or associations is not limited to regular migrants.

Even after the entry into force of the “Pacchetto Sicurezza”, the Constitutional Court has ruled that the right to housing (even though temporary) is included in those fundamental human rights that are recognized by the Constitution and the Immigration Law to every person, including undocumented migrants.\(^5\)
What is the Situation in Practice?

- In some cities, children of undocumented migrants are not entitled to access social housing with their family unless a decision by Tribunale per i minorenni provides for it (e.g. in cases where the ability of the mother to take care of the child must be assessed). This sometimes leads to social services treating accompanied undocumented children as separated ones, and separating them from their families, since unaccompanied children are always entitled to housing. This is a breach of the right to family life (Article 8 ECHR/1998 HRA) and often contradicts the best interests of the child.

- Exceptionally, temporary lodging in shelters is offered to single mothers with very young children.

- Undocumented parents’ fear of detection and expulsion, and fear that their child might be separated from them by social services, usually prevents them from accessing even these services for extreme circumstances.

- There is shortage of cheap, decent housing on the private housing market, making it difficult to find.

- A provision introduced in 2008 provided that renting to undocumented migrants can be punished by up to three years imprisonment and the confiscation of property, but in 2009, this punishment was limited to cases where the landlord makes an unjust profit.

- Therefore, renting to undocumented migrants without making an unjust profit is not a crime, and a residence permit is not required to rent on the private market.

- Nonetheless, the provision introduced in 2008 and the related debate in the media may have discouraged some landlords from renting to undocumented migrants.

- Anybody who rents to a migrant or hosts a migrant in any form, irrespective of the migrant’s immigration status, must report the details of their identity document to the Police. As a consequence, undocumented migrants risk expulsion.

- These conditions make it very difficult for undocumented parents to find housing and very vulnerable to exploitation. When accessing the private housing market, undocumented families often:
  - Face racism and discrimination
  - Are forced to live in sub-standard conditions (overcrowded, unsanitary, squats, without heating etc)
  - Have their precarious situation exploited by landlords
  - Cannot report such exploitation to the authorities, as they do not have legal rental agreements, fear being identified, and at best would have to find alternative accommodation.

- Housing arrangements are often insecure, with families having to move frequently and rely at times on friends and family.

- Some families become homeless.

- Lack of a fixed address can pose significant barriers to accessing all other rights and services, including health care, and to maintaining regular communication with legal counsel and the foreign office (e.g. if a regularisation is in process).

Common Barriers to Accessing All Social Rights

- National Legislation that is below the standards set out in human rights law, inexplicit or contradicted by other rules and practices

- Lack of clarity in the rules and frequent changes in policy

- Discretion and lack of awareness on the part of local authorities / service providers

- Fear

- Lack of awareness of undocumented families of their rights
Cross-cutting Issues

- **Interdependence of rights**—children’s health, living conditions and access to education are all closely interlinked, and only by guaranteeing basic access to education, health care, and housing, are these children allowed sure and solid development. To deny access of one of these rights affects all the others.\(^5\)

- **The use of child poverty as a tool of immigration control**—migration control tends to take priority over child protection, so much so that repressive policies are often justified by the (flawed) logic that making life as intolerable as possible will motivate “voluntary” return. There is also concern that, in this context, the power to separate children from their families could be used to be ‘tough’ on irregular migrants, rather than only in cases where it is clearly in the best interests of the child. These policies are implemented without consideration of the impact on children.

- **The practice of child detention** is also a major concern. Children’s access to their rights to education and health care is severely limited in detention, and it is a de facto breach of their right to housing as detention centres (or ‘Immigration Removal Centres’) are completely unsuitable accommodation for children. Detention has been found to be highly detrimental to children’s physical and mental health, and in breach of international and European laws.\(^6\)

Italian law does not prohibit the detention of children accompanied by parents in detention centers for migrants (while the detention of separated children in these centers is prohibited by the law). The Directive of Ministry of Interior 30.8.2000 provides that children can be detained with their parents in a CIE (detention center for migrants that must be expelled) only for protecting their right to family unity, and only if this is requested by the parents or is decided by the Juvenile Judge.\(^6\) In practice, very few children are detained in CIE - usually, the parents are detained and the children are separated. No alternatives to detaining the parents are considered on the basis of the best interests of the child.

A change to the law adopted in June 2011 (to implement the Return Directive 115/08) has introduced voluntary return and alternative measures to detention for migrants pending expulsion (regular reporting to the authorities, submission of documents or the obligation to stay at a certain place). But the conditions are quite strict: for example, a third-country national cannot access alternative measures if he or she does not have both a valid passport and accommodation where an obligation to stay may be imposed, or in the case he or she gave a false name in the past. So, in practice very few migrants will have access to alternative measures to detention.

The situation in Lampedusa has also been a subject of major concern over the past year. Numerous reports have emerged about children of all ages being detained (separated and with their families), in highly inappropriate and overcrowded conditions, with other adults, and without access to basic necessities including medicines, education and information about their situation.\(^6\)
Regularisation

There is also a pressing need for durable solutions for undocumented children – pathways into a regular migration status and documentation.

As outlined in this brief, all children are entitled to various rights regardless of immigration status, but the precarious living conditions associated with irregular migration status are highly detrimental to their wellbeing. Further, as children grow older and transition to adulthood, they must face the reality of living as an adult with undocumented status, which is particularly harsh for the many that have spent many years and grown up in Italy.

- A number of legal provisions, if fully applied, would allow the regularisation of children and their parents and reduce the number of children that become undocumented
  - The Immigration Law provides that children of regular migrants are included in the residence permit of one of their parents until the age of 14 and, after that age, are issued a residence permit for family reasons valid until the age of 18.67
    
    However, contrary to the law, the residence permit for family reasons is often issued with the same duration as the parent’s residence permit, rather than until the age of 18. As a consequence, if the parents lose their residence permit, their children also become undocumented. If a residence permit valid until the age of 18 was issued, as provided by the law, the children of these formerly regular migrants would retain their own residence permit.
    
    Further, according to the principle of the best interests of the child,68 these provisions for issuing a residence permit should also be fully applied in cases where children enter Italy irregularly and their parents do not meet the requirements for family reunification
  - Solutions should be sought to ensure that accompanied children are issued a residence permit “per minore età”, even though their parents are not able to submit the application to the Police.
  - Women, and their husbands, are entitled to a residence permit “for health care” during pregnancy and up to 6 months after the child’s birth.69
    - The Tribunale per i minorenni can authorize an irregular migrant to stay in Italy, where there are serious reasons related to the psychological and physical development of their child, taking into consideration the child’s age and health conditions.70 In such cases, the parent is issued a temporary child-care residence permit 71.
      
      Some Tribunali have adopted a restrictive interpretation of this provision, applying it only where the child has serious health problems. In 2010, the Corte di Cassazione clarified that this interpretation is illegitimate.72 This important pathway to regularization is nevertheless still little applied
  - Finally some undocumented migrants are stateless. When these persons are recognized as stateless by the Ministry of Interior or by the Court, they are issued a residence permit. But it is very difficult to access the statelessness determination procedure and most applications are rejected. Legislation and practices on statelessness should be changed in order to ensure that stateless persons are recognized and protected as such.
TERMINOLOGY

1 In 1975, the UN General Assembly requested “The United Nations organs and the specialised agencies concerned to utilise in all official documents the term “non-documented or irregular migrant workers” to define those workers that illegally and/or surreptitiously enter another country to obtain work (General Assembly, Measures to ensure the human rights of all migrant workers, 3449, 2433rd plenary meeting, 9 December 1975, para 2).

2 The Council of Europe adopted a resolution in June 2006 on the human rights of irregular migrants, in which it states that it “prefers to use the term “irregular” migrants.” (Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), Human rights of irregular migrants, at point 7).

3 The European Parliament “Calls on the European institutions and Member States to stop using the term ‘illegal immigrants’, which has very negative connotations, and instead to refer to ‘irregular/undocumented workers/migrants’” (European Parliament, Report on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI), Recommendation 158); and “stresses that the EU institutions should endeavour to use appropriate and neutral terminology in legislative texts when addressing the issue of third country nationals whose presence on the territory of the Member States has not been authorised by the Member States authorities or is not longer authorised. In such cases, EU institutions should not refer to “illegal immigration” or “illegal immigrants” but rather to “irregular immigration” or “irregular migrants” (European Parliament legislative resolution of 13 September 2011 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) (COM(2010)0061 – C7-0045/2010 – 2010/0039(COD), page 41)

4 In this brief, the term “parent” is used for the sake of brevity, but is meant to also refer to other primary caregivers.

PROTECTION OF THE RIGHTS OF THE CHILD IN GENERAL

5 The full text of the CRC is available here.

6 The full text of the ICESCR is available here.

7 The full text of the ECHR is available here.

8 Article 117 of the Constitution requires the State and regions to legislate in accordance with the constraints deriving from Community law and international obligations, as well as with the Constitution. As reaffirmed by the Constitutional Court, if there are several possible interpretations of a provision of legislation, it is necessary to always privilege the interpretation consistent with international and EU obligations. If it can not be interpreted in conformity with these obligations, the constitutionality of the provision can be challenged for violation of Article 117. Policies can be challenged internally, both informally and through official complaints procedures. Complaints can be taken to the National Office Against Racial Discrimination (Ufficio Nazionale Antidiscriminazioni Razziali - UNAR). The regional and international legal instruments have monitoring bodies to which State Parties must report periodically. Alternative reports can be submitted to complement information provided in the government self-assessments, and some bodies accept communication from individuals or collective complaints. Details of the UN monitoring bodies can be found here, of the Committee on the Rights of the Child here, and of the European Committee on Social Rights (European Social Charter) here. Breaches of international and regional human rights laws that have been ratified can also be taken to court. The Immigration Law provides for civil action against discrimination based on racial, ethnic, national or religious grounds (T.U. 286/98, art. 43-44). Violations of the ECHR can also be taken to the European Court of Human Rights if all options in the domestic courts have been exhausted and violations of EU law can be taken directly to the European Court of Justice. Find details of the European Court of Human Rights here and of the European Court of Justice here.

9 “State obligations under the Convention apply to each child within the State’s territory and to all children subject to its jurisdiction (art. 2). […] Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.” (Paragraph 12, General Comment No. 6 (2005), Committee on the Rights of the Child).
“Exceptionally, a return to the home country may be arranged, after careful balancing of the child’s best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.” (Paragraph 86, General Comment No. 6, Committee on the Rights of the Child.) Although this paragraph refers specifically to return, the general principle may apply to every right.

Another relevant legal instrument is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW). Although no EU Member State has ratified the ICRMW, it reiterates international standards. Other relevant EU policies include the EU Strategy on the Rights of the Child and the EU 2020 Strategy; regarding education, the 2000 Lisbon Agenda and Proposed Directive on equal treatment (COM (2008) 426) extending protection against discrimination to education; regarding adequate standard of living/child poverty, Articles 13, 136 and 137 EC, the Lisbon Strategy and Social Inclusion Process, the On-going Work of the Social Protection Committee EU Indicators Sub-group.

Article 2 and Article 10 Italian Constitution, available online here.


Article 19, co. 2 T.U. 286/98, op cit note 13. Children accompanied by undocumented parents or foster persons are entitled to the right to follow the parents/foster persons if they are expelled, but this is a right of the child.


Available online here.


The National Observatory on Children and Adolescents coordinates central government, regional and local authorities, associations, professional bodies and non-governmental organizations dealing with children. It is responsible for preparing official documents relating to childhood and adolescence, including National Plans of Action and the Italian government’s reports to the Committee on the Rights of the Child. It was established in 1997, together with the Parliamentary Commission for Children and Adolescents, by law 451/1997 and is currently governed by Presidential Decree No 103 of 14 May 2007.


Il difensore dell’infanzia website available here.

EDUCATION

Article 28, 29 CRC, Article 26 (1) UDHR, Article 13 (1) (2), 14 ICESCR, Article 5 (e)(v) ICERD, Protocol 1 Article 2 ECHR, and Article 14 of the Charter of Fundamental Rights. It is also in Article 17(2) ESC - the Committee on Social Rights has not stated explicitly that undocumented children must have equal access to education, but it has found that, notwithstanding the general exclusion of undocumented migrants from the scope of the ESC, other basic social rights, such as health care and housing, must be provided to children in an irregular migration situation in certain conditions (see footnotes 31 and 42). Further, it has said that “Particular attention must be paid to ensure that vulnerable groups benefit from the right to education and have equal access” (e.g. Secretariat for ESC, “Children’s Rights under the European Social Charter”). Therefore, it is likely that the Committee would find that Article 17 ESC applies to undocumented children. Though not legally binding, it can also be found in Article 30 ICRMW and Article 3 (1)(e) UNESCO Convention Against Discrimination in Education.
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. (Paragraph 34, General Comment No. 13, Committee on Economic, Social and Cultural Rights)

Protocol 1 was signed and ratified 1952 (Entered into force 1954). In the case Timishev v. Russia, the European Court of Human Rights ruled that the exclusion of two children (aged seven and nine) from school as a result of their Chechen father no longer having a migrant’s card was a violation of the ECHR. (European Court of Human Rights, Timishev v. Russia, judgment of 13 December 2005, Application Nos. 55762/00 and 55974/00, para. 66.

Article 14 Charter of Fundamental Rights of the European Union, available online here

Article 34 Italian Constitution of 1948, available online here


Article 1, co. 2 D.lgs. n. 76/2005, Decreto Legislativo 15 aprile 2005, n. 76 “Definizione delle norme generali sul diritto dovere all’istruzione e alla formazione, a norma dell’articolo 2, comma 1, lettera c), della legge 28 marzo 2003, n. 53” (available online here); Article 1, co. 622 Legge 296/2006, Legge 27 dicembre 2006, n. 296 "Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)” (available online here); Article 1, co. 1 D.lgs. 226/2005, Decreto Legislativo 17 ottobre 2005, n. 226 "Norme generali e livelli essenziali delle prestazioni relativi al secondo ciclo del sistema educativo di istruzione e formazione, a norma dell’articolo 2 della legge 28 marzo 2003, n. 53” (available online here); Decreto del Ministero della pubblica istruzione n. 139/2007 “Regolamento recante norme in materia di adempimento dell’obbligo di istruzione” (available online here).

Article 1, co. 1 and Article 4, co. 6 D.lgs. 59/04, Decreto Legislativo 19 febbraio 2004, n. 59 “Definizione delle norme generali relative alla scuola dell’infanzia e al primo ciclo dell’istruzione, a norma dell’articolo 1 della legge 28 marzo 2003, n. 53” (available online here)

Article 70 Legge 448/2001, Legge 28 dicembre 2001, n. 448 “Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2002)” (available online here); Corte Costituzionale sentenza n. 467/2002 (available online here) and n. 370/2003 (available online here).

Article 30 Italian Constitution of 1948, op cit note 12


Article 45 D.P.R. 394/1999, op cit note 14

Article 45 D.P.R. 394/1999, op cit note 14

In accordance with the Constitutional, international and European provisions recognizing the right to education to everyone, and taking into consideration some decisions of the European Court on Human Rights and Consiglio di Stato as well as instructions from the Ministry of Education (even though dealing with different issues). La Corte europea dei diritti dell’uomo ha affermato che il diritto all’istruzione che spetta ad ogni individuo non si esaurisce nell’accesso agli stabilimenti scolastici, ma deve necessariamente concretarsi anche nella possibilità di trarre vantaggio dall’istruzione ricevuta, vedendosi riconoscere ufficialmente gli studi compiuti (Decisione della Corte europea dei diritti dell’uomo Affaire Régime linguistique belge, 23.7.1968). Consiglio di Stato ruled that denying a foreign student the right to complete secondary school just because he or she has become of age is unreasonable (sentenza 1734 del 27.2.2007). The Ministry of Education clarified that a foreign student that was irregularly staying could not be denied access to the final exam of secondary school because she lacked the tax code (Nota del Ministero dell’Istruzione del 7.6.2009)


Transition to 16-18 education is particular problematic when children change schools

These restrictive interpretations do not take into consideration that a) the right to education applies to all children of any age, including also pre-school education; b) the duty to education and training applies to any child from the age of 6 up to the age of 18.

Debate over non-compulsory education in Italy was provoked by the Municipality of Milan introducing a measure preventing undocumented children from being registered in pre-schools. The Court of First Instance (Milan) decision of 11.02.2008 held that it was discriminatory and contrary to the right to education enshrined in the CRC and domestic legislation, which it interpreted to include all school grades
In 2009, the changes to Immigration Law introduced by the “Pacchetto sicurezza” caused some doubt about undocumented children’s access to education before or after the 10 years of compulsory schooling. The Ministry of Interior clarified to those authorities that had submitted requests for clarification that a residence permit is not required to access any school grade, including kindergarten and nursery. Comunicato della Prefettura di Torino 30.4.2010 (available online here), Nota del Ministero dell’Interno del 13.4.2010 in risposta al Comune di Bologna (available online here).

Public financing for the “Fund for the Social Inclusion of Immigrants” was cut in 2008 and 2009.

HEALTH CARE

Article 24 (1), 25, 39 CRC, Article 25 UDHR, Article 12 (1) ICESCR, Article 5 (e)(iv) ICERD, Article 14 (2b) CEDAW, Article 3 ECHR, and Article 24 and Article 35 of the Charter of Fundamental Rights. It is also in Article 11 and Article 13 ESC, which the European Committee of Social Rights has extended to apply to irregular migrants. Further, the Committee found that limiting care of children to emergency situations was a violation of Article 17 (International Federation of Human Rights Leagues (FIDH) v. France, complaint n° 14/2003, decision on the merits of 8 September 2004, §§ 26-32; Council of Europe (2008) "Digest of the Case Law of the European Committee of Social Rights", page 183-184. Though not legally binding, it can also be found in Article 28 ICRMW. As a WHO Member State, France also “has a duty to ensure that national and regional healthcare systems and, in particular, hospitals and health services, address migrant children’s right to healthcare; and hospitals and health services have a duty to empower migrant children and their families, by promoting knowledge and awareness on migrant children’s rights” (IOM (2009) Ensuring the Right of Migrant Children to Health Care: The Response of Hospitals and Health Services, page 9-10).

In the case Pretty v. United Kingdom, the European Court of Human Rights ruled that treatment which risks exacerbating suffering from illness can fall under Article 3, where the authorities can be held responsible (e.g. detention, expulsion).

Article 32 Italian Constitution, op cit note 12.

The concept of “essential medical care”, as defined by law, is both diagnostic and therapeutic, related to pathologies which are not dangerous in the immediate or short-term, but which could subsequently lead to serious damages and risks for the patient’s health (complicanze, cronicizzazioni, o aggravamenti). So, it includes all kinds of essential care provided by hospitals or clinics (including maternity care and the treatment of contagious diseases such as tuberculosis and chronic diseases such as HIV/AIDS) and medicine that may be defined as “essential” (Section II B of the Circular of the Ministry of Health No. 5 of 24 March 2000, available online here; T.U. 286/98, op cit note 13).


Formerly USL


The hospital or the district health center administration where undocumented migrants have been treated inform the local health administration (A.S.L.) which is in turn reimbursed by the Ministry of Interior. To this aim, they provide the anonymous code correspondent to the patient (assuring non-traceability), the diagnosis, and the care provided as well as the sum to be reimbursed.
In 2009, the Italian government attempted to remove this prohibition on reporting. The original proposal in the Law on Public Security (Law No. 94/2009, op cit note 31) introduced a duty to denounce, which was later amended to give health providers the freedom of choice. Several civil society organizations involved in the provision of health care condemned the proposals, stating that the duty to denounce would create an insurmountable barrier to health care provision for undocumented migrants, and launched the campaign “Forbidden to denounce: We are doctors and nurses, not spies!” (“Divieto di segnalazione. Siamo medici ed infermieri, non siamo spie!”). The organizations involved in this initiative include SIMM (Italian Society for Migrants’ Health/Societa` italiana di Medicina delle Migrazioni), MSF (Medici senza Frontiere/Doctors Without Borders), ASGI (Associazione Studi Giuridici sull’Immigrazione/Association for Legal Studies on Immigration), and the OISG (Osservatorio italiano sulla salute globale/Italian Observatory on Global Health). The proposals were rejected by the Italian parliament in March 2009. (HUMA Network (2009), op cit note 34, page 82; Rights of Accompanied Children in an Irregular Situation, paper prepared by PICUM for UNICEF Brussels Office, November 2011, page 18; Médecins du Monde European Observatory on Access to Healthcare (2009), op cit note 33, page 32). The legal force of the prohibition has been clarified since the Law on Public Security (Law No. 94/2009, op cit note 31) came into force, with the Regulation of the Ministry of Interior (Administrative Circular No. 12/2009, 27 November 2009).

Long waiting lists for dental and mental health care are a structural problem, affecting more than undocumented children (HUMA Network (2009), op cit note 37).

Housing

Cholewinski (2005) Study on obstacles to effective access of irregular migrants to minimum social rights, page 32-33; See also e.g. Gillow v. UK, judgement of 24 November 1986 (Application no. 9063/80), Buckley v. UK, 15 September 1996 (20348/92), Connors v. UK, 27 May 2004 (66746/01).

However, when families do not have legal representation or know their rights, they are sometimes threatened with separation nonetheless, in order to scare them away, or otherwise, as some are desperate enough to agree, since it is easier to accommodate separated children than whole families. [E.g.s of relevant case law include: Wallová and Walla v. Czech Republic, judgment of 26 October 2006 (Application no. 23848/04, para.74-75), Saviny v. the Ukraine, 18 December 2008 (39948/06, para. 57), Havelka and others v. Czech Republic, 21 June 2007 (23499/06, para. 61), Moser v. Austria, 21 September 2006 (12643/02, para. 70, 73)].

Some landlords that rented to undocumented migrants making unjust profit have been sentenced for “favoreggiamento della permanenza illegale”.

There is sufficient case law establishing that this is a breach of the right to family life (Article 8 ECHR). However, when families do not have legal representation or know their rights, they are sometimes threatened with separation nonetheless, in order to scare them away, or otherwise, as some are desperate enough to agree, since it is easier to accommodate separated children than whole families. [E.g.s of relevant case law include: Wallová and Walla v. Czech Republic, judgment of 26 October 2006 (Application no. 23848/04, para.74-75), Saviny v. the Ukraine, 18 December 2008 (39948/06, para. 57), Havelka and others v. Czech Republic, 21 June 2007 (23499/06, para. 61), Moser v. Austria, 21 September 2006 (12643/02, para. 70, 73)].

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CROSS-CUTTING ISSUES


64 For more information, see the Jesuit Refugee Service – Europe website; see also e.g. Hammarberg, T (2009) "It is wrong to criminalise immigration" - Viewpoints by T. Hammarberg, Commissioner for Human Rights, Council of Europe; PICUM (2009) PICUM’s Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe.

65 “La permanenza di un minore nel centro è consentita solo a tutela dell’unità familiare e comunque su esplicita richiesta di uno dei genitori. Può essere altresì consentita su decisione del competente Tribunale per i minorenni. In questi casi al minore deve comunque essere garantito un trattamento adeguato alle sue specifiche esigenze. Nelle altre situazioni, il minore deve essere affidato ad una struttura protetta, sempre su indicazione del Tribunale dei Minorenni”.

66 E.g. “Lampedusa, la prigione dei bambini”, L’Espresso, 9 September 2011; “Il grido dei ragazzi clandestini”, Carta.org, 22 June 2011; “Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo”, Amnesty International, 21 April 2011

REGULARISATION


68 The best interest of child principle is specifically referred to by the Immigration Law with regards to family unity (Art. 28, co. 3 T.U. 286/98, op cit note 13).


70 Article 31 co. 3 T.U. 286/98, op cit note 13.

71 Both the residence permits for health care and for child care are temporary and cannot be converted in a residence permit for employment reasons; nonetheless they can be converted in a residence permit for family reasons, in cases where the husband or wife is regularly staying.

72 Corte di Cassazione Sentenza no N. 21799, 25/10/2010, available online here.
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