**A written contribution on Ending Immigration Detention of Children and Seeking Adequate Reception and Care for them**.

**Submitted by**: Maat for Peace, Development and Human Rights

**Submitted on**: Ending Immigration Detention of Children in South Africa

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**Introduction: Refugee and migrant children in Africa- An Overview**

Maat for Peace, Development and Human Rights submits this written contribution on refugee and migrant children. At a time when the African continent is infested with immigrants who leave their countries with the intent to settle in Africa, or those stuck in transit before entering their countries of desired destination. Regardless of the reason that may be due to economic, social, or security motives, etc., we are dealing with large numbers of refugees and more serious problem, especially when it affects children in any way.

Children are affected by migration in different ways; their migrant parents may leave them, or they may migrate alone without being accompanied by adult parents or guardians. A simple look at the statistics shows that as of 2017, over 19 million Africans lived outside their country of birth but still within the continent. An additional 17 million Africans have migrated from the continent since birth. The bulk of these emigrants have gone to Europe (55 per cent) and to Asia (26 per cent), mostly the Gulf States. The problem is that 1 in 4 international migrants in Africa is a child- 6.5 million in total. The share is particularly large in Western and Eastern Africa, where in countries like Nigeria, Ethiopia, and Kenya children account for more than 40 per cent of the immigrant population.[[1]](#footnote-1) **This contribution focuses mainly on the South African countries.**

**Legislative: the implementation of good laws in South Africa are impeded by gaps**

Although South Africa has one of the strongest and most advanced foreign child protection frameworks in Africa, severe gaps in implementation and interpretation often make long-term care for foreign children difficult.

As a signatory to the 1989 Convention on the Rights of the Child, South Africa is internationally committed to enacting and implementing laws to the pursuit of the best interests of children in general. Section 28 of the South African Constitution also stipulates that the rights of children must be protected, fulfilled and promoted.[[2]](#footnote-2) The Children Act 2005 also enforces these rights and sets principles for the care and protection of children[[3]](#footnote-3) without distinguishing between foreign children and other children, and regardless of their nationality or legal status. The Children's Court can order assistance for a child with a valid refugee application to apply for asylum and documentation.

Legally, detention or arrest of children is only permitted as a 'last resort', and it is subject to certain guarantees, including that:

1) detention must be as short as possible;

2) The child must not be separated from parents or caregivers;

3) Children must be accommodated separately from other adults;

4) Children must be accommodated in facilities appropriate for their ages.

When registering migrant children status, the child status, whether unaccompanied or separated from his parents; must be determined. In the event of being separated from parents or unaccompanied by an adult, he will need care and protection and arrangements must be made to improve his situation. In case of having an asylum application, the relevant officials must assist him applying for refugee status documents.[[4]](#footnote-4) The child's social worker must discover the reason why the child left his country, why he is alone, and whether there are any parents, caregivers, or members of the extended family who are able to care for him and provide for his needs, and, if there any, the child is to be reunited with them. Otherwise, the Children's Court recommends alternative care arrangements for the child throughout this process and beyond (if alternative care is necessary), and the child may be placed in foster care, temporary safe care, a child and youth care center or other forms of care.[[5]](#footnote-5)

Accordingly, unaccompanied or separated foreign children must not be held in detention and cannot be deported. Also, unaccompanied and separated asylum-seeking children must be assisted to apply for asylum as stipulated in Article 32 of the Refugee Law.[[6]](#footnote-6)

**The situation in South Africa: the policies of the top countries receiving migrant children**

South Africa is a major destination for migrant children on the move from countries throughout Eastern and Southern Africa, with over 642,000 migrants or displaced child living in it.[[7]](#footnote-7)

These migrant children face difficulties accessing public services, including public health services and free education. They may often be discriminated against. In South Africa, migrants generally suffer from hostility for being foreigners (xenophobia), including multiple insults, especially for women at birth and children at school. This xenophobia is also very frequent and affects many child migrants, especially those from Nigeria and the Democratic Republic of the Congo.[[8]](#footnote-8)

Many refugee and migrant children, who are travelling alone, suffer from violence and constant exploitation during their journey. And while many arrive in the country without parents or caregivers, others arrive with their parents or relatives and are subsequently separated.

**Community difficulties facing migrant children**

It is extremely difficult for these children to secure documents in South Africa because of the restricted immigration law, as at least 80% of these children are undocumented, meaning that access to education, health and protection is not legally available. These children usually do not have access to the child protection system, which means that the Department of Social Development is not aware of their existence. Furthermore, implementing any policies that advance the rights of these children lacks funding.

Also, there is no specialized center to receive unaccompanied migrant children in border centers[[9]](#footnote-9), such as in places where children or their families are expected to seek refuge or emigrate from neighboring countries bordering South Africa, if any natural or human disasters occurred.

**What about migrant child care centers?**

A number of points regarding the situation of the child who is considered to be in need for care and protection must be highlighted and focused on. It is legal for him to be placed in the Child and Youth Care Center by order of the Children's Court. External social workers must go to the Children's Court to submit a request to renew the court order every two years.

Indeed, 85% of children have been placed in this center according to law orders issued by the Children's Court, for a variety of reasons. One quarter of children were placed in this center because of need and poverty, indicating the remarkable impact of social and economic deprivation on migrant children. Negligence was the key reason behind placing those children in Western Cape, Limpopo and Gauteng centers.[[10]](#footnote-10)

Maat would like to point out some of the deportations that are taking place from the "Lindela" center in Krugersdorp, near Johannesburg. Lindela is a detention facility for migrants that is run by a private security company, African Global Operations. Although the Ministry of Interior is responsible for arresting, detaining, deporting, and releasing undocumented migrants. Detainees (old and young) are often subjected to unlawful periods of detention (including more than 120 days), also conditions of detention are poor, and they have difficulty obtaining health, food and water services, let alone overcrowding problem. There are also reports of illegal detention of asylum-seekers, unaccompanied minors and children in Lindela.[[11]](#footnote-11)

In 2004, there was a popular case in South Africa relating to the detention of more than 100 children in Lindela, when the Supreme Court in Pretoria ruled that this detention of minors was illegal and a shameful violation of children's rights and interests.[[12]](#footnote-12) Therefore, the same judicial approach should be adopted in dealing with alike cases.

**Civil society is a key stakeholder charged with improving the situation of migrant children**

It is fair to point out that stakeholders can play an important role in improving the conditions of these migrant children. The partnership agreement made by the International Committee of the Red Cross in South Africa in January 2020 to improve the protection and care of migrant children, who are unaccompanied or separated from parents, in cooperation with UNICEF to work with the Ministry of Social Development to conduct an in-depth national survey to unaccompanied and separated migrant children, so that they could provide emergency support to children and families who have migrated to South Africa from other countries.[[13]](#footnote-13) It is a model that can be generalized with many organizations working on the rights of children and migrants in the country.

**Challenges Faced by Migrant Children: Towards a Safe Legal Status**

Maat for Peace, Development and Human Rights wishes to point out the challenges faced by migrant children for obtaining reconciliation and legalization of their conditions and enjoying all rights, the most important of which are:

a. Lack of government data in South Africa on the numbers of unaccompanied and separated migrant children, which prevents national authorities from fully planning for their care and protection. There is no official record kept for undocumented and unaccompanied migrant children living in South Africa. Because of the lack of data about these children, they are at risk as they are not discovered by protection agencies in South Africa.

B. Difficulty to access social and economic services, applying for documents, and securing their long-term well-being.

C. Social workers and other officials may not consider refugee children's claims to protect them from risks such as forced service or forced child marriage, while their short-sighted focus is placed on putting children in safe but temporary care centers.

D. Unaccompanied children lack all protection once they reach puberty, as they are prevented from enjoying safety and protection under the Children's Law, thus they suffer from the risks of arrest, detention and deportation as illegal immigrants, and he can only remain in the country if he applies a new asylum application and obtains a new valid permit. This may force them to resort to weak or void legal gaps as soon as they reach adulthood to document their status.

**Recommendations**

Maat for Peace, Development and Human Rights recommends the following:

1. The legal framework for the protection of children in South Africa must focus on protecting all children without discrimination by including the phrase "regardless of nationality" in their current law. Also, unaccompanied foreign children should be mentioned in the Children’s Law.
2. When assessing whether a child needs care or protection, the Social Development Department must be more flexible and systematic in determining whether a child needs legal documents, and it must be emphasized that the lack of documents makes the child more vulnerable to exploitation or illegal detention.
3. The Children's Court should play a more flexible role in determining whether a child needs care and protection and in seeking the assistance of legal experts.
4. According to the precedent of the Children's Court, the status of each child separate from their parents must be documented and legalized as soon as possible, and the Ministry of Internal Affairs must assist the child in his asylum application before the Children's Court issues its findings.
5. Accurate national records and data for the purposes of understanding the nature of migration flows and the number of children migrating to and from South Africa must be provided, to help the country assessing the extent of its duty towards migrant children, and compliance with its obligations under international and national law.
6. Given the limitations that social workers face, they cannot be expected to be experts in immigration law or refugee law. Accordingly, they should be made aware of those laws, as well as service providers they may turn to for advice or technical assistance.
7. A link must be established between the Ministry of Social Affairs (DSD) and the Ministry of the Interior (DHA), so that social workers can reach inquiries about the cases they encounter.
8. It is recommended that the Ministry of Interior provide clear guidance on the application of Articles 2 (2) and 4 (3) of the Nationality Law, as amended, to enable children obtain citizenship in an attempt to reduce statelessness for some children.
9. Rehabilitation of foreign children who are about to reach puberty through reconciling their legal status before reaching that age, in order to avoid the risks of arrest, detention and deportation as illegal immigrants, and to facilitate their submission of a new asylum application and obtain a new valid permit.
10. In light of the general hostility immigrants suffer from in South Africa (xenophobia), more protection should be provided to children in particular, as well as more community awareness to protect them.

1. Data snapshot of migrant and displaced children in Africa, UNICEF, February 2019, available at: <https://bit.ly/34nkQQT> [↑](#footnote-ref-1)
2. South Africa Constitution, available at: <https://bit.ly/2yOxhJz> [↑](#footnote-ref-2)
3. Children Act 38 – 2005, available at: <https://bit.ly/2VibxNU> [↑](#footnote-ref-3)
4. Refugees Act 130 Of 1998”, op.cit. [↑](#footnote-ref-4)
5. Caught In A Catch-22: Child Migrants In South Africa, Scalabrini, 5 July 2018, available at: https://bit.ly/34yT7g8 [↑](#footnote-ref-5)
6. “Refugees Act 130 Of 1998”, Assented To 20 November 1998, available at: <https://bit.ly/39ZTrpl> [↑](#footnote-ref-6)
7. S.Africa becomes major destination for migrant children: UNICEF report, Xinhua, January 15, 2020, available at: <https://on.china.cn/2RoiQm2> [↑](#footnote-ref-7)
8. Refugee Survey Quarterly, Volume 39, Issue 1, March 2020, 20 February 2020Pages 26–55, <https://doi.org/10.1093/rsq/hdz018> [↑](#footnote-ref-8)
9. Study on Unaccompanied Migrant Children in Mozambique, South Africa, Zambia And Zimbabwe 2017”, IOM, Page 32, available at: <https://bit.ly/2RtJZUw> [↑](#footnote-ref-9)
10. FOREIGN CHILDREN IN CARE: SOUTH AFRICA”, SCALABRINI CENTRE OF CAPE TOWN, JULY 2019, available at: <https://bit.ly/39WTTnZ> [↑](#footnote-ref-10)
11. “Detention and Deportation in South Africa’, Scalabrini, 25 September , available at: <https://bit.ly/2Rrpqbx> [↑](#footnote-ref-11)
12. Centre for Child Law and Another v. Minister of Home Affairs and Others (High Court of South Africa, 2005)”. [↑](#footnote-ref-12)
13. UNICEF Report: South Africa now a major destination for migrant children”, CGTN, 16-Jan-2020, available at: <https://bit.ly/3c6tZzO> [↑](#footnote-ref-13)