

Migration-related detention of children in Southern Africa: Developments in Angola, Malawi and South Africa

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Abstract: *This article examines the laws and practices in Angola, Malawi and South Africa regarding the migration-related detention of children in light of international human rights standards. Detaining a migrant child is in conflict with article 37(b) of the Convention on the Rights of the Child, namely, that detention of a child should be used as a the measure of last resort and for the shortest appropriate time, the principle of the best interests of the child and the right to development. At the African Union level, the African Charter on the Rights and Welfare of the Child serves as the primary human rights instrument that comprehensively guarantees children's rights. The countries in the case study have ratified both CRC and the African Children's Charter. Nevertheless, children are deprived of liberty in Southern Africa, with Malawi serving as a transit country and South Africa and Angola mostly as destination countries. While Angola and Malawi lack adequate legal and effective protection of migrant children, South Africa has put in place robust legal guarantees, but in practice migrant children are nevertheless detained. Thus, the article suggests that these countries need to adopt and implement comprehensive child protection policies including alternatives to detention with a view to ensuring improved respect for children's rights. Furthermore, it emphasises the need for enhancing regional cooperation to curb the problems that children are facing in relation to migration and beyond. Most importantly, states must show the political will not only to adopt protective laws but also to effectively implement these laws in order to create a safer world for children.*

Key words: children; migration; detention; liberty; Southern Africa

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1 Introduction

It is a reality that millions of children are living behind bars and in different forms of deprivation of liberty. The United Nations Global Study on Children Deprived of Liberty (UN Global Study) indicates that more than seven million children are deprived of liberty per year (Nowak 2019: XI). According to this study, children are deprived of liberty on national security grounds; for migration-related reasons; in the administration of justice context; in the context of armed conflict; in prisons with their incarcerated primary caregivers; and because of their being kept in institutions.

The deprivation of the liberty of children is a serious violation of children's rights as it not only violates the right to liberty but also affects the enjoyment of a multitude of other rights, the reason being the interdependence and indivisible nature of human rights, including children's rights (Vienna Declaration and Programme of Action 1993: paras 5 and 18). Moreover, the enjoyment of civil and political rights cannot be dissociated from economic, social, and cultural rights (African Charter Preamble, para 8). For instance, children deprived of liberty are prominent due to the high prevalence of physical and mental health problems (Kinner et al 2019: 2). If education facilities are not provided in detention centres where a child is detained, it impedes the right to education of the child. Thus, the deprivation of the liberty of children has many negative ramifications, hence requiring special attention from all the duty bearers.

In 2017 there were approximately 258 million migrants globally of which 30 million were below the age of 18 years. While children thus constitute 12 per cent of this figure worldwide, their percentage is higher in Third World countries. In more developed states children make up approximately 9 per cent of the population, but in 'less developed states', of which African states form part, children constitute 21 per cent of international migrants (UNICEF 2018). West and East Africa have the largest share of child migrants. In 2017 Angola hosted 302 000 while South Africa hosted 642 000 migrant children (UNICEF 2019). In the same year it was also recorded that as regards refugees in Africa, more than half of these are children. These numbers illustrate the magnitude of the phenomenon of child migration in the African context. The drivers of migration may be classified into three broad categories, namely, conflict and insecurity; illegal activities; and economic and social drivers (African Committee of Experts on the Rights and Welfare of the Child 2018: 39-40). In a recent survey conducted by the United Nations Children's Fund (UNICEF), children were asked about some of the reasons why they migrate. The most prevalent reasons were related to fleeing violence, persecution and war. Other drivers included the search for economic opportunities, education, and family reunification (UNICEF 2017: 15). As

long as violence, conflict and poverty are prevalent on the continent, it will give rise to causes of child migration.

Most African countries have adopted punitive measures to prevent displaced populations from making asylum claims, including the incarceration of children in immigration detention facilities. Angola is among the top ten countries in the world hosting the highest number of migrants under the age of 18 years (UNICEF 2019: 1). In Malawi, children can be held in prisons for periods that range between three and eight months, and these children are not always held separately from adults. Similarly, despite government denial, there have been reports that children are detained in South Africa. The detention can last for periods of up to one month, in poor living conditions, and together with adults (Global NextGen Index 2018).

The consequences of child migration are vast and drastic. Children who migrate are vulnerable to violations of their rights as they are often detained in inhumane living conditions, impeding their right to health. Furthermore, such children are often deprived of their right to education, adequate housing, food, clean water, and other basic amenities of life. Depriving children of their liberty for immigration-related reasons thus poses a serious threat to their well-being.

The focus of this article is the situation of children deprived of liberty for migration-related reasons in Southern Africa. It starts by giving an overview of the international and regional legal framework on children's rights to freedom from detention. As case studies, the article focuses on the situation of children in migration-related detention in Angola, Malawi and South Africa. Finally, the article provides some recommendations for stakeholders. The case study region, Southern Africa, and the specific countries in the region (Malawi, Angola and South Africa) are selected based on poor conditions of detention and the high number of children deprived of liberty for migration-related reasons. Malawi and South Africa have a shared English common law legal heritage while the inclusion of Angola represents Lusophone Southern Africa.

The article is the product of desk-based research. The research relies heavily on primary sources of law, including international treaties and soft law, and domestic legislation of the countries selected for the case studies. At this level, the study examines whether states comply with the constitutional and legislative ruling that children may be deprived of their liberty only as a measure of last resort and for the shortest period of time. This research also relies on court judgments and secondary sources such as textbooks. The same applies to General Comments of treaty-monitoring bodies on the general prohibition of the detention of children, which constitute authoritative interpretations of commitments under the respective international and regional human rights instruments. Reports of

non-governmental agencies working in the field of migration are further consulted to augment the findings of the UN Global Study.

2 International legal framework governing migration-related detention of children

This part deals with children's rights to liberty as provided for under United Nations (UN) and African Union (AU) human rights instruments. Some of these instruments are of general application and provide for everyone's right to liberty without specific reference to children, including the Universal Declaration of Human Rights (Universal Declaration), the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR). Other treaties are dedicated to children's rights and therefore contain specific provisions that protect every child's right to liberty, such as the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter).

2.1 Instruments of general application

Everyone has the right to life, liberty, and the security of person (article 4 Universal Declaration; article 9 ICCPR; article 6 African Charter). Thus, the right to liberty guaranteed to everyone is equally applicable to children in the context of migration, especially given that international instruments prohibit discrimination based on many grounds, including age. ICCPR further prohibits arbitrary arrest or detention (Macken 2005: 1). The Human Rights Committee noted that 'children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time' (General Comment 35 para 18). If a state detains a child as a measure of last resort, then it must ensure that the detention takes place in appropriate, sanitary, non-punitive facilities and should not take place in prisons (General Comment 35 para 18). Moreover, in dealing with matters concerning migrant children, it is necessary to take into account the best interests of the child and the extreme vulnerability and need for care of unaccompanied minors (General Comment 35 para 18). Migrant children often spend many days in pre-trial detention. ICCPR specifies that pre-trial detention has to be an exception, not the rule (article 9(3) ICCPR). Pre-trial detention of juveniles should be avoided to the greatest extent possible (General Comment 35 para 18). Furthermore, accused children have to be separated from adults and brought for adjudication as soon as possible, preferably within 24 hours (article 9(2)-(3) ICCPR; General Comment 35 para 33).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention) is another important treaty for the protection of children's

liberty in the migration context. It applies to both documented migrants who have complied with the legal requirements of the state of employment and undocumented or irregular migrants. Article 17(4) of the Migrant Workers Convention provides that 'juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status'. Moreover, the Convention urges state parties to pay attention to the problems that imprisonment or detention of one family member causes to the rest of the migrant family (article 17(6) Migrant Workers Convention). One such instance requiring attention is where the mother of a new-born child is arrested or convicted. In such cases, the authorities are expected to refrain from detaining the mother since it is not in the best interests of the child. Although there is no comprehensive protection under the Migrant Workers Convention, the Convention pays attention to the interests of migrant workers' children in matters that affect their liberty and that of their family members.

2.2 Child-specific instruments

Child-specific instruments are treaties fully devoted to protecting children's rights, such as CRC and the African Children's Charter. With 196 state parties as of December 2020, CRC is one of the human rights instruments that enjoy near-universal ratification (United Nations Treaty Collection). It is the most comprehensive international treaty pertaining to children and is considered a critical milestone in the legal protection of migrant children (Connelly 2015: 55). Similarly, the African Children's Charter is a comprehensive regional instrument in as far as the rights of children in Africa are concerned. It responds to the realities and unique issues of the children on the African continent. CRC and the African Children's Charter contain provisions that protect children's rights in a migratory context.

The CRC Committee has set out four core principles for the interpretation and implementation of the provisions of CRC. These principles are non-discrimination (article 2(1) CRC); the best interests of the child (article 3(1) CRC); the right to survival and development (article 6(2) CRC); and the views of the child (participation in all matters concerning children) (article 12(1) CRC). The African Children's Charter imitates CRC's four basic principles of children's rights and the same is elaborated in General Comment 5 adopted by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) (articles 3, 4, 5 & 7 African Children's Charter). In all matters concerning children, states are required to give effect to these principles.

Article 37 of CRC prohibits unlawful and arbitrary deprivation of the liberty of the child. Further, it provides that arrest and detention of a child should be used as a measure of last resort and for the shortest appropriate period of time (article 37(b) CRC). Detention as a measure of last resort

requires states to adopt more than one other resort (Smyth 2019: 11). In other words, states are prohibited from detaining children without making efforts to use other measures, such as restorative justice and diversion mechanisms (United Nations Secretary-General 2008: 3). States have to use guidance, supervision orders and community-monitoring mechanisms before resorting to detention (General Comment 24 para 19). Detention is permitted only when the other measures are proven ineffective to ensure the best interests of the child in the given circumstances.

The CRC Committee and the UN Migrant Workers Committee in their joint General Comment have clearly stated that in the migration context, the detention of children 'would conflict with the principle of the best interests of the child and the right to development' (Joint General Comment 4 & 23 para 10). In addition, 'detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status' (Joint General Comment 3 & 22 para 3). Thus, no reason can be used as a justification to detain a migrant child. In cases of family migration, the best interests of the child must be determined on a case-by-case basis (General Comment 14 para 32). When it is in the best interests of the child to keep a family together, the authorities are required to use non-custodial alternatives (Joint General Comment 4 & 23 para 11). Furthermore, in the context of international migration, children's double vulnerability as children and as individuals affected by migration has to be taken into account (General Comment 14 para 32).

The African Children's Charter provides that state parties have the obligation to extend appropriate protection and assistance to refugee children or children who are seeking refuge irrespective of whether or not they are accompanied (article 23(1) African Children's Charter). The protection or assistance should be in line with the four fundamental principles. While the African Children's Charter requires state parties to separate children from adults in detention facilities, this should not be construed to mean that the Charter is encouraging the detention of children (article 17(2)(b) African Children's Charter). Furthermore, the African Children's Committee urges state parties to adopt a system-strengthening approach to protect the most vulnerable children, such as (unaccompanied) migrant children, orphaned children and children with disabilities (General Comment 5 sec 6(1)). System strengthening in child protection refers to 'identifying, establishing and strengthening the (coordinated) response to violations relating to abuse, neglect, maltreatment and exploitation' (General Comment 5 sec 6(1)).

In 2018 the African Children's Committee also conducted a study titled 'Mapping children on the move in Africa'. The Children's Committee found that many African states detain children for migration-related reasons (ACERWC 2018: 77-78) and noted the inadequacy of the legal

framework in responding to problems faced by children on the move (ACERWC 2018: 86). The gap in the legal framework has also resulted in institutional weaknesses and ineffective responses to the needs of migrant children (ACERWC 2018: 86). Further, the study underlines the lack of coordination among security services, child protection services and other government bodies (ACERWC 2018: 87). The lack of regional coordination is another difficulty that is exacerbating the problems of migrant children. The African Children's Committee emphasised the need for transit and destination states to set up institutions, comprehensively document information on children on the move and pay special attention to unaccompanied children (ACERWC 2018: 92).

3 Case studies: Angola, Malawi and South Africa

3.1 Causes of migration-related detention

According to UNICEF, Africa has the largest share of children among its migrant population – more than one in four immigrants in Africa is a child, more than twice the global average (UNICEF 2017). This is aptly reflected in human rights reports, for instance, in Angola where it was reported that in 2017 more than 32 000 Congolese, primarily women and children, fled the Kasai region to the Lunda Norte province in Angola (Human Rights Report 2018: 15). Reports also indicate that South Africa housed 642 000 migrants under the age of 18 in 2017 alone (UNICEF 2017).

Generally, children, whether accompanied or unaccompanied, migrate due to a number of reasons such as the search for better opportunities, reunification with families, while some are escaping violence, a lack of access to health, education and other basic needs, insecurity, natural disasters, or environmental degradation (Nowak 2019: 433). Migration to Angola generally is due to economic reasons as migrants are drawn by natural resources, economic growth, political stability and porous borders (UN Special Rapporteur on the Human Rights of Migrants 2017: 3). In 2018 UNICEF reported that part of the expelled Congolese migrants working in Angola's informal mining sector were children aged 13 and 14 years, an indication of the economic factors that push children to migrate (Schlein 2018).

As far as Malawi is concerned, the route is popular as it reduces the risk of detention compared to a journey through Kenya. The number of persons passing through Malawi has been on the rise because other states such as Mozambique have imposed stricter border control and other regulations governing undocumented immigrants (News 24 2015). Ethiopian immigrants detained in Maua prison testified that they were on their way to South Africa in search of job opportunities (MSF Malawi 2015). Migration to South Africa, on the other hand, is attributed to the

fact that the country is seen as an economic powerhouse in a region that is characterised by high levels of poverty and inequality, thereby becoming a magnet for migrant children (UNICEF 2017). For example, faced by the lack of opportunities in their countries due to protracted conflicts, some children migrate south, mainly to South Africa, in search of a better life or education (ACERWC 2018: 43). Looking at economic and social drivers as key reasons for child migration in Zimbabwe, for instance, the economic crisis, poverty and the lack of basic necessities of life, such as food, have led to a massive influx of children to South Africa, leading UNICEF to equate the situation to a humanitarian emergency (UNICEF 2017).

Countries regulate the terms of entry and residence of people in their territories. However, in their responses particularly to irregular migrants, countries adopt a security-based approach which includes criminalising irregular entry and stay, while using detention to punish immigrants and deter irregular migrants (Nowak 2019: 433). As a result, children are detained for their own migration status or their parents' migration status, contrary to international standards (Nowak 2019: 433). As will be fully discussed in the next parts, Angola, Malawi and South Africa, like other countries, carry out immigration detention as a measure for combating irregular migration, for both adults and children. The migration of children to these countries may result in immigration-related detention as these children travel without documentation. Such an increase in the number of undocumented migrants has resulted in countries wanting to control migration, including the use of detention (International Detention Coalition 2012: 12). Children are not spared in the process. In Angola, for instance, irregular or undocumented migrants are detained prior to deportation (Chico 2020: 239) leading to the detention of undocumented children.

The leading cause of the detention of migrant children in Malawi is because Malawi is a transit country for migrants who are migrating to South Africa from other regions (ACERWC 2018: 63). Nevertheless, the route through Malawi does not guarantee arrival in South Africa and often results in the detention of migrant children in Malawi. This may result in the detention of children, despite the fact that Malawi has put in place laws that prohibit the detention of children for any reason, including migration-related detention. The same applies to South Africa where, despite having in place robust legal measures for the protection of migrant children, particularly the prohibition of detention of migrant children, in practice irregular migrant children are still detained in the process of enforcing immigration laws (Nowak 2019: 457). This indicates the impact of restrictive migration practices in Angola, Malawi and South Africa on migrant children whose rights end up being infringed upon due to a deprivation of liberty.

3.2 Legal frameworks relating to migration-related detention

This part assesses the domestic legal framework governing migration-related detention of children and the manner in which said laws are applied to migrant children. It will articulate and point out what guarantees are offered by the Constitution; the Children's Act and the Refugees Act in Angola, Malawi and South Africa.

The Constitutions of both Angola and Malawi contain some provisions that attempt to offer protection to migrant children. This is seen in section 80(3) of the Constitution of Angola which refers to the principle of 'children deserving of attention' and 'special protection' of children who are deprived of a family environment. However, it falls short to provide for the detention of children as a measure of last resort and for the shortest period and or integrating the principle of the best interests of the child. This is in contrast to Malawi's Constitution wherein the rights of children are entrenched in its Bill of Rights (article 23 Malawian Constitution). With regard to the protection of children, article 23(1) of the Malawian Constitution states that 'all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law'. It further provides that legal proceedings should reflect the vulnerability of children while fully respecting human rights and legal safeguards (article 42(2)(g) (vii)). Furthermore, a child may only be detained as a measure of last resort and for the shortest period of time (article 42(2)(g)(iii)) consistent with article 37 of CRC.

Perhaps the most progressive among the two countries with regard to the protection of migrant children is South Africa as most of the rights set out in the Constitution are not exclusively applicable to South African citizens, but extend to all foreign nationals living within its borders, including foreign migrant children (Schreier 2011: 64). Section 9 of the Constitution provides that the state shall not discriminate directly or indirectly against anyone on one or more grounds including social origin or birth. This provision, therefore, prohibits discrimination against migrant children. Section 28(1)(g) offers protection to migrant children by providing that children have a right not to be detained except as a measure of last resort. Thus, if it is necessary for a child to be detained, it should be for the shortest period of time and the conditions under which the child is detained must keep in line with the child's age. It goes a step further by providing alternatives to detention such as finding appropriate alternative care, so that detention should not be undertaken at all. Migrant children are also protected under section 28(1)(b) which provides for every child's right to parental or family care or to alternative care when removed from their parents. Further, they are guaranteed the right to be protected from maltreatment, neglect and degradation (section 28(1)(d) of the Constitution).

The Angolan Children's Act, the Child Care and Protection and Justice Act of Malawi 22 of 2010 (CCPJA) and the Children's Act of South Africa 38 of 2005 all provide for the principle that the detention of children should be used as a measure of last resort. Article 46 of the Angolan Children's Act provides that the detention of children should be a measure of last resort and in line with international standards. However, as it does not specifically make reference to migrant children who might arbitrarily be arrested and detained, one might only infer that this protection extends to migrant children. The CCPJA of Malawi provides that a child shall not be detained prior to a hearing unless certain conditions are fulfilled by the Director of Public Prosecutions and if such detention is authorised, it must be in a safe home (section 95(1)(2) CCPJA). Further, the Act states that following prosecution, children may not be imprisoned for any reason, including migration (section 140 CCPJA). Furthermore, the Act introduces guidelines for the arrest of a child. An arresting officer may not use any physical abuse or harassment and a child in detention must be separated from adults where possible (section 90 CCPJA).

The Children's Act of South Africa in section 9 goes a step further by providing that in all matters concerning a child, the child's interests must be of paramount importance. Section 7 makes provision for a list of factors to be considered when determining the best interests of the child, which include the need for the children to remain in the care of their parents and/or maintain a connection with their family. Furthermore, section 150 of the Children's Act points out that a child is in need of protection if he or she has been abandoned or orphaned and has no visible means of support. However, there is no specific mention of migrant children, who are most in need of care and protection by the state. Fortunately, the Department of Social Development has contended that specific mention of migrant children was not necessary because the legislation applies to all children.

The Law on the Legal Status of Foreigners (Foreigners Law) in Angola provides for immigration control including grounds for immigration-related detention. It makes detention compulsory when foreign nationals are denied entry or when they are subject to judicial expulsion after being found to be undocumented. This is stipulated in articles 30(2) and 33(1) which provide for the detention of foreigners at the detention centre for illegal foreigners pending the enforcement of an expulsion order. The same applies to undocumented foreigners (article 104(3)). In all cases, irregular migrants are detained prior to their removal from Angola to their country of origin or of habitual residence. It is important to note that this law does not protect children from detention. Furthermore, article 29(3) guarantees refugees the most favourable treatment under the law or international agreements to which Angola is a state party. Although this law does not explicitly mention the expulsion and treatment of children, the provisions

can be interpreted to mean that children, as vulnerable groups, should not be expelled from Angola as their lives might be in danger.

In Malawi, the Refugee Act of 1989 of Malawi specifically prohibits the expulsion of refugees from Malawi where their lives or freedom may be threatened. This protects migrant children who may be fleeing from their home country for conflict-related reasons. It also allows migrants to apply for refugee status, which in turn provides for better protection under the law. Further, Malawi is a state party to the 1951 UN Convention Relating to a Refugee's Status (1951 Refugee Convention) and, therefore, has assumed certain obligations towards refugees. This includes that persons identified as refugees are entitled to rights and protections afforded under the 1951 Convention including the right not to be returned to a country where they face threats to their lives or freedom, the right to education, work and housing. In South Africa, the Refugees Act (Act 130 of 1998) provides for the definition of who qualifies to be a refugee under sections 3(b) and (c). Further, section 3(c) of the Refugees Act is relevant to migrant children as it allows these children to obtain refugee status if the person on whom the child is dependent is granted refugee status. This provision gives effect to the principle of family unity and allows for the refugee family to seek protection together in South Africa (Ackermann 2016: 11). More importantly, the decision in *Mubake v Minister of Home Affairs* has extended this definition to include separated children in the care of other asylum seekers such as relatives who are not their parents.

Section 32 of the Refugees Act of South Africa goes further to provide that a child who qualifies to be a refugee as per section 3 and is found in circumstances that indicate that he or she needs care, can be brought before the Children's Court in the district where he or she is found. The Court may then order that the child be assisted in seeking asylum (Refugees Act section 32(2)). Although section 32 does not mention the aspect of unaccompanied children, it draws attention to the care aspect of children seeking asylum. Further, the Refugees Act seeks to ensure that children are not separated from their parents by the mere fact of granting a refugee status to one of them. In other words, it prefers granting a refugee status to the family as a unit rather than granting it to the child alone and separating him or her from parental care.

3.3 The practice in Angola

Angola is among the top ten countries in the world that have the highest number of migrants who are under the age of 18 years (UNICEF 2019). As of 2017, Angola hosted 302 000 migrant children (UNICEF 2019). Angola is among other states that are adopting increasingly punitive measures to prevent displaced populations from making asylum claims, which may include the incarceration of children in immigration detention facilities (Fazel et al 2014: 313).

According to the Angolan Immigration Detention Profile, the country has put in place a policy of deporting undocumented migrants. The justification is that such deportation is done for security reasons as the number of illegal migrants is high and these are part of a silent invasion (Immigration Detention Profile 2016: 1). As a result, Angola has set up several immigration detention facilities where migrants are detained in harsh conditions awaiting deportation. Children form part of the number of detained migrants although there are currently no statistics on the number of children detained in Angola.

According to a report of the UN Special Rapporteur on the Human Rights of Migrants, undocumented migrants, asylum seekers and refugees, including children, are usually harassed by police officers in Angola. During operations in search of undocumented migrants, violence, intimidation and the destruction of valid identity documents are common. Immigrants and asylum seekers, including pregnant women and children, are regularly arrested and detained in large numbers without access to legal information or assistance (UN Special Rapporteur 2017: 11). It has also been indicated that in some areas such as the Trinta Detention Centre, children are detained in large groups. In some instances, young children are kept with their mothers while older male children are placed with adult males (UN Special Rapporteur 2017: 12).

In 2018 UNICEF reported that more than 80 000 children were among the Congolese migrants expelled by the Angolan government (Schlein 2018) in violation of article 29(4) of the Foreigners Law. These children were sent back to their country where ethnic tensions had led to conflicts. They had to walk for long distances, with little or no access to water and food and were prone to abuse.

The widespread detention and expulsion of migrants were also noted by the African Commission on Human and Peoples' Rights (African Commission) in the case of *Institute for Human Rights and Development in Africa v Angola* ((2008) AHRLR 43 (ACHPR 2008)) brought by Gambians, in which a large number of migrants were arrested and detained before expulsion. The Commission held that Angola had infringed legal provisions of the African Charter by arresting, detaining and expelling the migrants. It is also important to note that in delivering its judgment, the Commission highlighted the fact that this was not the first case in which the Commission found similar human rights violations of foreigners. This is an indication of the continuous detention of migrants before expulsion which also affects migrant children in Angola.

3.4 The practice in Malawi

The UN Global Study found patterns of Malawi detaining children for immigration-related reasons (Nowak 2019: 456). While the number of

children detained in Malawi is relatively low, Malawi has received a low score of 32 (out of 100) on the Global NextGen Index with regard to the protection of the liberty of children (Global NextGen Index 2018: 2). Statistics related to migrant children in Malawi are rarely published and, therefore, it is difficult to measure the extent of the problem (Global NextGen Index 2018: 3). The available data, however, is testimony to horrific living conditions for immigrants, including children, detained in Malawi.

Children detained in Malawi can be held in prisons for periods that range between three and eight months and these children are not always held separately from adults. The country report of Malawi on human rights practices by the United States Department of State showed that 'several hundred irregular migrants as young as 13 were held with the general prison population even after their immigration-related sentences had been served' (US Department of State 2018: 3). There have also been reports that the Malawian government does not have sufficient funds to deport children back to their countries of origin. In 2015, for example, the government was unable to deport some 40 children held in Kachere Juvenile Prison due to financial constraints (*Sunday Times* (2016)). The consequence is that these children are detained indefinitely in centres in inhumane and degrading conditions deprived of their rights to liberty, education, health facilities, and adequate food and housing.

The Child Care, Protection and Justice Act provides that children may not be imprisoned for any offence including migration-related offences. However, there is a lack of implementation in this regard. 'Courts continue to issue orders to transfer children to reformatory centres for the purposes of immigration detention' (Global NextGen Index 2018: 2). Furthermore, the same Act provides for conditional placement of children and families including migrants. There are, however, barriers to the full realisation of this measure. As a result of insufficient infrastructure and a lack of state resources, conditional placement is often limited and cannot accommodate all the cases (Global NextGen Index 2018: 3).

Access to education and health facilities for migrant children in detention is severely limited in Malawi. The juvenile prison of Kachere has an in-house school. However, due to language barriers and large scales of detention, migrant children are denied the right to education. As a result of barriers such as transportation, referrals and language, access to health facilities is limited (Global NextGen Index 2018: 3). Yet, there have been improvements in the treatment of migrants especially for those with medical conditions (US Department of State 2018: 5).

Care plans are an essential element in ensuring that the best interests of children are considered while detained. Every child should have a care plan that caters for their individual needs throughout their placement and

these should include migrant children. Malawi has regulations that require a regular review of care plans. However, this is rarely adhered to with only 9,2 per cent of children having care plans, and only 2,3 per cent of children having their care plan reviewed (Nowak 2019: 534-535).

3.5 The practice in South Africa

According to the UN Global Study questionnaire, South Africa submitted that it has national legislation prohibiting immigration-related detention of children and, as such, they do not detain children for migration-related reasons (Nowak 2019: 457). However, according to a report by Doctors Without Borders (MSF) it was revealed that dozens of children are still being illegally detained at South Africa's repatriation centre in Lindela (South African Human Rights Commission 2017). However, the exact statistics of detained migrant children are unknown. This is attributed to the fact that there is a lack of proper documentation of children who migrate to South Africa. Predominantly, immigrants hail from Zimbabwe, Mozambique, the Democratic Republic of the Congo (DRC), Angola, Somalia, Rwanda and Malawi, many of whom come to South Africa in search of economic opportunities or have fled conflict and persecution in their countries or regions (Alexandra 2017: 1).

Despite the comprehensive legal protection of migrant children, South Africa has continued to use detention as the primary tool of enforcing immigration law, including the detention of migrant children (Lawyers for Human Rights 2008). The South African Human Rights Commission found the persistent occurrence of arrest and detention of unaccompanied minors at police stations (whether or not classified as places of detention) and at Lindela (South African Human Rights Commission 2017). Further, the police do not exercise caution when arresting and detaining persons who may appear to be minors, although they are classified as children in terms of South African law (South African Human Rights Commission 2017).

In practice, the detention of children normally occurs at a military base near Musina, commonly known as SMG, and the infamous Lindela repatriation centre. The Lindela detention facility was established in 1996 as an immigration detention facility and is administered on behalf of the Department of Home Affairs (DHA) by a private company, Bosasa (Pty) Ltd (Alexandra 2017). Doctors Without Borders (MSF) found that unaccompanied minors are being illegally detained at Lindela in terms of current age-determination practices, which are insufficient and inappropriate (Alexandra 2017: 8). Further, arresting and immigration officers only request the Department of Social Development to conduct age assessments when civil society organisations or the South African Human Rights Commission intervenes (Alexandra 2017: 8). This situation of children at Lindela centre was further elucidated in the case of *Centre*

for *Child Law v Minister of Home Affairs & Others* as a result of several unaccompanied foreign children being detained together with adults for lengthy periods of time at the facility facing deportation. On the recommendation of the curator *ad litem*, who was appointed on behalf of the children, the children were transferred to a place of safety pending finalisation of their Children's Courts inquiries. The Court firmly held that South Africa has a direct responsibility to protect unaccompanied foreign children. The Court further stated that a crisis existed in the handling of unaccompanied foreign children in South Africa since they were treated in a horrific manner, exacerbated by insufficiency of resources, inadequate administrative systems and procedural oversights (*Centre for Child Law v Minister of Home Affairs* 2005).

In addition, there are no regular, systemic monitoring and oversight mechanisms in place to ensure that authorities actually comply with the regulatory framework on the protection of migrant children. The South African police further experience institutional challenges such as lack of training, knowledge and understanding of the relevant regulatory framework on how they should deal with migrant children. This hinders their efforts to comply with human rights standards when it comes to dealing with migrant children. Moreover, the Lindela detention centre has no complaints mechanism by which detained children can lodge complaints for being detained for long periods or with adults not related to them (Alexandra 2017: 12).

4 Alternatives to detention

An alternative to detention is a principle that applies not only to children but generally to all people in migration contexts. It refers to 'any law, policy or practice that allows people to live freely in a community setting while waiting for their immigration status to be resolved' (International Detention Coalition 2015: 7). Alternatives to detention provide children with non-custodial measures which include 'a range of options such as supported community placement, including placement with host families, bail schemes to ensure compliance with immigration proceedings or reporting requirements or schemes whereby guarantors or sponsors agree to support the care and supervision of a migrant family in the community' (UNICEF 2019: 1).

The importance of alternatives to detention is heightened in the context of migration-related detention of children because of the principle of last resort. In accordance with this principle, the detention of children can never be justified. As indicated in the previous part, despite the legal frameworks that provide for alternatives to detention in all three jurisdictions, the detention of children persists. In Malawi, for example, courts continue to transfer children to reformatory centres for the purpose

of migration-related detention (Global NextGen Index 'Malawi' 2018: 2). Sending children to reformatory centres is based on the assumption that they need to be reformed, when the reality is that children on the move are victims of the system that need utmost protection.

Implementing alternatives to immigration detention requires, among other things, diverting resources dedicated to detention to non-custodial measures and institutions so that the latter are capacitated for engaging with children and responding to the needs of children on the move (Joint General Comment 4 & 23 para 12). Moreover, in the process of placing children in non-custodial settings, it is imperative to take into consideration 'the vulnerabilities and needs of the child, including those based on their gender, disability, age, mental health, pregnancy or other conditions' (Joint General Comment 4 & 23 para 12). Therefore, it is necessary for Angola, Malawi and South Africa to invest more in alternatives to detention for a better realisation of the rights of children on the move.

5 Conclusion

There are several similarities and differences in the way in which Angola, Malawi and South Africa have responded to the detention of children for migrated-related reasons. To begin with, the countries are all state parties to child-specific UN and AU human rights instruments such as CRC and the African Children's Charter, and are thus required to protect the rights of migrant children. Therefore, all three states are bound by identical obligations under international law. These instruments provide for the four core principles that must guide the treatment of children in all circumstances, including detention.

The extent to which Angola, Malawi and South Africa comply with their obligations differ due to the circumstances that prevail in the respective countries. Notably, a high number of migrant children are detained in Angola and this can be attributed to the non-implementation of laws that protect children from detention, and the lack of alternatives to detention of children. Further, there is no law specifically protecting migrant children and prohibiting their detention. Although national laws make reference to the protection of children, in practice, authorities exploit and oppress migrant children by placing them in detention. There is, therefore, a need for Angola to enact laws that explicitly prohibit the detention of migrant children and protect their rights. Such laws must be effectively implemented to ensure the protection of migrant children.

Malawi has ratified many of the international treaties that protect migrant children (see Table 1 for case study countries' ratification status of some of the relevant human rights instruments). The country should further look towards ratifying the Migrant Workers Convention. As seen

with the treaties Malawi has already ratified, however, mere ratification is unlikely to be enough. Malawi must adopt strong mechanisms that ensure the proper implementation of international obligations and domestic law relating to the prevention of migrant child detention. This can be achieved through the greater investment of resources into the child welfare system as well as the child justice system. Malawi has specifically undermined the importance of the Child Care, Protection and Justice Act, which prohibits the detention of all children under the age of 18 years for any reason, including migration-related reasons. Migrant children still find themselves detained and the state should take all measures to ensure that children are not detained arbitrarily. The country can achieve this by implementing alternatives to detention, including community placement and foster care as well as prioritising children in budget allocations (Global NextGen Index 2018: 3). The government can further formulate national development plans that clearly aim to significantly reduce the number of children deprived of liberty.

South Africa has an adequate constitutional and legislative framework for the protection of migrant children. However, the Children's Act does not explicitly mention migrant children as being in need of care and protection owing to the vulnerabilities that accompany migration. The lack of implementation of national and international laws that bind South Africa is one of the gaps that have to be addressed if children deprived of liberty for migration-related reasons are to enjoy their rights. As demonstrated above, migrant children continue to be detained together with adults for lengthy periods of time and in deplorable conditions. Consequently, South Africa needs to ensure that law enforcement officials comply to the maximum extent possible with the laws that are meant to protect migrant children.

As is evident from the article, the reasons for detention differ in each country. In Malawi the primary cause for detention is its status as a transit country, while in South Africa and Angola detention is used as a tool for enforcing immigration laws. Furthermore, the principle of detention of children as a measure of last resort has been domesticated in the Constitutions of Malawi and South Africa, and through legislation in Angola. Ordinarily, constitutional inclusion of a particular right provides better protection because of the principle of constitutional supremacy. The evidence in this article suggests that the detention of children for migration-related reasons in Angola is far more prevalent than in Malawi and South Africa. While there is a range of explanations for this, one such reason can be tied to the lack of constitutional protection of children against detention. Although all three countries have substantive legislation on the protection of children against detention in general and migration-related reasons in particular, the lack of implementation mechanisms acts as a nullifier.

6 Recommendations

Against this background the article suggests the following recommendations for Angola, Malawi and South Africa to realise their state obligations concerning children deprived of liberty in the context of migration.

Angola should draw on experiences from Malawi and South Africa and expressly provide for the prohibition of detention of children in its Constitution. Malawi should intensify efforts to protect, respect and fulfil the rights of all children, including the rights of migrant children as provided for in the Malawian Constitution. It should develop strong mechanisms to ensure compliance with international obligations, domestic law and the policies that protect the rights of children, specifically those deprived of liberty. South Africa should enforce compliance with the rights that are entrenched in its Constitution as well as international and regional instruments that protect migrant children. South Africa should further ensure proper documentation of migrant children who enter the country. This would be more useful for record-keeping purposes and also to ensure better protection of migrant children by providing more resources and facilities for their alternative care.

As state parties to CRC, Angola, Malawi and South Africa should take steps to ensure that the detention of children is used only as a measure of last resort. They should also ratify the Migrant Workers Convention to protect migrant children from immigration-related detention. All three states must provide alternatives to detention such as foster care and community placement. They should also formulate national development plans that aim to reduce the number of children deprived of liberty. All three states should invest more in alternatives to immigration detention of children.

Table 1: Case study countries' ratification status of some of the relevant human rights instruments

| International Treaty | Malawi | South Africa | Angola |
|---|-----------|--------------|-----------|
| Convention on the Rights of the Child | Ratified | Ratified | Ratified |
| International Covenant on Civil and Political Rights | Ratified | Ratified | Ratified |
| International Covenant on Economic, Social and Cultural Rights | Ratified | Ratified | Ratified |
| Convention relating to the status of Refugees (1951 Refugee Convention) | Ratified | Ratified | Ratified |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families | No Action | No Action | No Action |
| African Charter on Human and Peoples' Rights | Ratified | Ratified | Ratified |
| African Charter on the Rights and Welfare of the Child | Ratified | Ratified | Ratified |
| Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa | Ratified | Ratified | Ratified |

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