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#ForeignersMustGo versus "*in favorem libertatis*": Human rights violations and procedural irregularities in South African immigration detention law

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ABSTRACT

In 2021, an estimated 3.95 million foreign nationals resided in South Africa, with no data available on numbers of displaced persons or undocumented migrants residing without legal or valid immigration status. Surveillance data on immigration detention are scant. We present a socio-legal account of the historical evolution of South African immigration detention regulation in post-apartheid timeframes, with a view to providing a legal realist assessment of the socio- and politico-legal dimensions pertinent to human rights assurances of immigration detainees in South Africa. The realist focus is on scrutinizing South Africa's progress in upholding the rights of immigration detainees and illustrating the contemporary complexities in ensuring due process in the (co)application of the Immigration Act (and Refugees Act) explicitly regarding immigration detention processes and practices. We present the applicable international and regional African human rights treaties, domestic regulations, and relevant jurisprudence to the rights of immigration detainees in South Africa. The generated realist narrative is cognizant of the contextual forces of migration into South Africa, securitization agendas, and violations of basic human rights and due process, and illustrates various gaps in the application of domestic laws, policies, and standards of care regarding immigration detention when evaluated against the rule of law.

Background

Historically, the majority of South Africa's asylum seekers have originated from Zimbabwe, followed by Nigeria, Mozambique, other African countries, and India and Pakistan (Ncube, 2017). Most recent available data indicate that, in January 2020, the Department of Home Affairs reported there were 188,296 asylum seekers and 80,758 registered refugees in South Africa (Parliamentary Monitoring Group, 2020). The social justice and human rights nongovernmental organization Lawyers for Human Rights advised caution at the time regarding the veracity of data, and observed that the figure was much higher (Lawyers for Human Rights, 2020a, 2020b). In 2021, an estimated 3.95 million foreign nationals resided in South Africa, with no data available on the numbers of displaced persons or undocumented migrants residing without legal or valid immigration status (Myeni, 2022a). Routine surveillance data on immigration detention are scant (Global Detention Project, 2021). Available monitoring data indicate that deportation numbers

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reduced from 29,376 in 2019/2020 to 11,787 in 2020/2021 (compared with 15,033 in 2017) (Parliamentary Monitoring Group, 2021), with Zimbabwe, Mozambique, Malawi, and Lesotho accounting for well over 90% of deportations (Chambers, 2021). Detention of children and unaccompanied minors for immigration purposes has reduced in the past decade (Gadisa et al., 2020; Lawyers for Human Rights, 2020a).

Rising anti-immigrant sentiment in South Africa is underpinned by poverty, unemployment, and crime with endemic racism, xenophobia, and social tensions flourishing in townships and low-income communities (Global Detention Project, 2021). The 2016 multidisciplinary and cross-departmental government program known as Operation Fiela was initiated to tackle rising criminality in low-income communities, but was sharply criticized by human rights organizations due to its substantial focus on the arrest and deportation of undocumented foreign nationals (Africa Check, 2016). Migration and cross-border movements are increasingly viewed politically and societally using a "lens of national security, social instability, and criminality" (Global Detention Project, 2021, p. 7). The 2017 government White Paper stated that South Africa "is a destination for illegal immigrants (undocumented migrants, border jumpers, over-stayers, smuggled and trafficked persons) who pose a security threat to the economic stability and sovereignty of the country" (Department of Home Affairs, 2017). It went on to document that "enforcement of compliance, in the form of detentions and the deportations, is not sustainable since detentions and deportations require a substantial amount of funding" (Department of Home Affairs, 2017, p. 35). In 2018 the UN Committee on Economic, Social, and Cultural Rights (2018) expressed concerns about proposed asylum processing centers on South Africa's borders. The Scalabrini Centre (2018), a migrant rights organization, released a press statement indicating substantial reservations around government proposed changes to asylum processing, particularly around the use of border camps and the potential for arbitrary (and lengthy) detention periods in substandard conditions. Global detention organizations have also sharply criticized the content of the government White Paper (Global Detention Project, 2021), with plans for remote detention camps on South African borders attracting the attention of the United Nations Committee against Torture in 2019 (UN Committee against Torture, 2019). At the time of writing, no asylum processing centers have been built, and the asylum processing backlog remains.

More recently, large demonstrations have demanded the deportation of foreigners and displaced persons (Gatticchi & Maseko, 2020), with mass arrests of foreign shop owners and church attendees (Van Lennep, 2019). Xenophobic sentiments and community unrest increased substantially during the COVID-19 state disaster measures, exacerbated by social media initiatives (i.e., #PutSouthAfricaFirst, which later became #PutSouthAfricansFirst; #WeWantOurCountryBack; and #ForeignersMustGo; see Centre for Analytics and Behavioural Change, 2022). According to the Xenowatch monitor developed by the African Center for Migration and Society, Operation Dudula[1] (a faction of #PutSouthAfricansFirst) has left immigrants and refugees fearing for their safety in townships and surrounding suburbs (Myeni, 2022b). The Zimbabwean Exemption Permit regime, which initially expired on December 31, 2021 (Republic of South Africa, 2021), has since been extended by the Department of Home Affairs for another 12 months (Department of Home Affairs, 2021).

In contrast to most African countries, asylum seekers and refugees in South Africa enjoy freedom of movement and most are "urban refugees" (young men from cities and towns in their originating countries; see Jenkins & de la Hunt, 2011). For those seeking to reside in the country, there is a "policy of self-settlement and self-sufficiency for asylum seekers and refugees" (Landau & Segatti, 2009; South African Human Rights Commission, 2017a, Hiropoulos, 2017, p. 3). Social support programs during the COVID-19 public health crisis were initially restricted to those with national identity documents (Amnesty International, 2020; Migration and Coronavirus in Southern Africa co-ordination group (MiCoSA), 2020; Mukumbang et al., 2020; Zanker & Moyo 2020). Eligibility to receive the COVID-19 Social Relief of Distress grant was then widened to

include certain asylum seekers/permit holders in June 2020, following litigation (see *Scalabrini Center and Another v. Minister of Social Development and Others;* Scalabrini Centre, 2020). Those in care of the state awaiting deportation in the country's repatriation facility and prisons were excluded in COVID-19 preventative measures, with the International Detention Coalition (2020) reporting that such "measures were tailored only towards natural citizens of the state … thus amplifying the dehumanisation of migrants" (IDC, 2020, p. 48).

We present here a socio-legal account of the historical evolution of South African immigration detention regulation in post-apartheid timeframes, with a view to providing a focused legal realist assessment of the socio- and politico-legal dimensions pertinent to human rights assurances of immigration detainees in South Africa. The realist focus is on scrutinizing South Africa's progress in upholding the rights of immigration detainees and illustrating the contemporary complexities in ensuring due process in the (co)application of the Immigration Act (and Refugees Act) explicitly regarding immigration detention processes and practices. We present the applicable international and regional African human rights treaties, domestic regulations, and relevant jurisprudence to the rights of immigration detainees in South Africa. The generated realist narrative is cognizant of the contextual forces of migration into South Africa, securitization agendas, and violations of basic human rights and due process, and illustrates various gaps in the application of domestic laws, policies, and standards of care regarding immigration detention when evaluated against the rule of law.

International and regional human rights instruments and normative frameworks applicable to immigration detention

There is a broad range of international and regional human rights instruments and treaty protections applicable to the regulation of immigration and the fundamental rights and freedoms of immigration detainees (UN Human Rights Council, 2011). South Africa has ratified a broad range of international human rights treaties (see Table 1).

South Africa is a party to the UN Refugee Convention (United Nations, 1951) and its Protocol (United Nations, 1967). It has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, 1990) and thereby does not offer the individual complaints procedure under Article 77.

The Global Compact on Refugees (UN High Commissioner for Refugees, 2018); the Global Compact for Safe, Orderly and Regular Migration (United Nations, 2018); and the UN guidelines all provide that administrative detention should be the exception and not the norm, and explicitly prohibit arbitrary detention (UN High Commissioner for Refugees, 2012). General Comment 35 of the UN Human Rights Committee (2014) provides that "detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time." The UN Office of the High Commissioner for Human Rights (2020) and UN Working Group on Arbitrary Detention (2018) both emphasize that "arbitrary detention can never be justified, whether it be for any reason related to national emergency, maintaining public security or health." States are required to prove that detention is not arbitrary under Article 9 of the International Covenant on Civil and Political Rights (see Table 2).

With regard to deportation facilities and standards of immigration detention, state obligations to uphold the rights of those in their custody (including immigration detainees) are explicit in the 1951 Refugee Convention (United Nations, 1951) and its 1967 Protocol, the international human rights treaties including the International Covenant on Civil and Political Rights (Article 10; see United Nations, 1966a); the International Covenant on Economic, Social and Cultural Rights (Article 12(1) and (2); see United Nations, 1966b); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations, 1984).

Table 1. Ratification status of South Africa.

Treaty	Signature date	Ratification date	Acceptance of individual complaints procedures	Acceptance of inquiry procedures
International Covenant on Civil and Political Rights (ICCPR) (UN, 1966a) and the CCPR Optional Protocol	October 3, 1994	December 10, 1998	Yes CCPR OP-1	–
2nd Optional Protocol to the ICCPR Abolition of the death penalty (UN, 1989a)	–	August 28, 2002	–	–
International Convention on the Elimination of all forms of Racial Discrimination (CERD) (UN, 1965)	October 3, 1994	December 10, 1998	Yes CERD Article 14	–
International Covenant on Economic, Social and Cultural Rights (ICESCR) (UN, 1966b)	October 3, 1994	January 12, 2015	No CESCR-OP	No CESCR-OP Article 11
Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (UN, 1979) and the CEDAW Optional Protocol	January 29, 1993	December 15, 1995	Yes CEDAW OP	Yes CEDAW-OP Articles 8–9
Convention against Torture and other cruel or degrading treatment or punishment (CAT) (UN, 1984)	January 29, 1993	December 10, 1998	Yes CAT Article 2	Yes CAT Article 20
Optional Protocol of the Convention on Torture (OPT-CAT) (UN, 2003)	September 20, 2006	June 20, 2019		
Convention on the Rights of the Child (CRC) (UN, 1989b)	January 29, 1993	June 16, 1995	No CRC OP-IC	–
Convention on the Rights of People with Disabilities (UN, 2007)	March 30, 2007	November 30, 2007	Yes CRPD-OP	Yes CRPD-OP Article 6–7

Source: UN Treaty Body Database Treaty Bodies Treaties (ohchr.org).

Table 2. Relevant United Nations Human Rights Committee judgments.

A v. Australia, Communication No. 560/1993, U.N. Doc.CCPR/C/59/D/560/1993, April 30, 1997.
Nystrom v. Australia, UN Doc CCPR/C/102/D/1557/2007, July 18, 2011.
Samba Jalloh v. Netherlands, CCPR/C/74/D/794/1998, UN Human Rights Committee, April 15, 2002.

General Comment No. 14 of the UN Committee on Economic, Social and Cultural Rights (2000) outlines that states parties are (at the very least) required to meet a threshold of a "core minimum" of social and economic rights, and that people deprived of their liberty (including immigration detainees) are entitled to the same core minimum rights as other citizens. The right not to be detained arbitrarily is intertwined with the right to be detained in humane conditions of detention "with execution of the measure not exceeding unavoidable levels of suffering inherent in detention" (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2017).

Adequate conditions respecting the rights and dignity of the detained are also mandated by the UN High Commissioner for Refugees (2012). General Comment No. 36 of the UN Human Rights Committee (2018) further specifies that state parties to the International Covenant on Civil and Political Rights (United Nations, 1966a) must "respect and protect the right to life of all individuals arrested or detained by them" and are obliged to "take special measures of protection towards persons in situation of vulnerability, a category that includes displaced persons, asylum seekers, refugees, and stateless persons" (see Article 6).

Article 17(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, 1990) explicitly describes:

> [the] heightened duty to protect the right to life which also applies to individuals quartered in liberty-restricting State-run facilities, such as … refugee camps and camps for internally displaced persons" and emphasizes that "states parties may not rely on lack of financial resources or other logistical problems to reduce this responsibility.

The UN Special Rapporteur on the Human Rights of Migrants explicitly states that immigration detention facilities should not have similar conditions to prison facilities (International Organisation for Migration, 2011). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, 1990) also provides that "accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."

The Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) provide a comprehensive, nonbinding framework for the physical conditions of detention (United Nations, 2016) and is applicable to the rights of immigration detainees, particularly regarding humane conditions (see Rules 13, 24, 25, 27, 30, 31, 32, and 35). The rights of female immigration detainees and their children are further supported by the Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules; see United Nations, 2010).

With regard to the situation in Europe, which has experienced mass population movement ("the migrant crisis") since 2015, the European Convention on Human Rights requires the protection of all rights without discrimination based on "national or social origin" (Article 14), similar to the International Covenant on Economic, Social and Cultural Rights (United Nations, 1966b; also see International Commission of Jurists, 2020). At the European Court of Human Rights, judgments generally center on assessment of lawfulness of detention for immigration purposes, vulnerability (e.g., women and minors), and the threshold of severity of detention conditions (Van Hout, 2021). Many European Court of Human Rights judgments have described unlawful immigration detention (including of children and unaccompanied minors), which includes the use of places not suitable for humane detention (i.e., airport transit zones), substandard detention conditions (deportation facilities, camps, police cells), and the deprivation of liberty without provision of a reason for detention on immigration grounds and without access to legal remedies (see Table 3).

Table 3. Relevant European Court of Human Rights cases.

AB and Others v. France, Application No. 11593/12, Council of Europe: European Court of Human Rights, July 12, 2016.
Abdi Mahamud v. Malta, Application no. 56796/13, Council of Europe: European Court of Human Rights, May 3, 2016.
Feilazoo v. Malta, Application No. 6865/19, Council of Europe: European Court of Human Rights, March 11, 2021.
G.B. and Others v. Turkey, Application No. 4633/15, Council of Europe: European Court of Human Rights, October 17, 2019.
Kanagaratnam and Others v. Belgium, Application no. 15297/09, Council of Europe: European Court of Human Rights, December 13, 2011.
M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, January 21, 2011.
Mahamed Jama v. Malta, Application No. 10290/13, Council of Europe: European Court of Human Rights, November 26, 2015.
Mahmundi and Others v. Greece, Application. No. 14902/10, Council of Europe: European Court of Human Rights, July 31, 2012.
Mohamad v. Greece, Application No. 70586/11, Council of Europe: European Court of Human Rights, December 11, 2014.
Moxamed Ismaaciil and Abdirahman Warsame v. Malta, Applications Nos. 52160/13 and 52165/13, Council of Europe: European Court of Human Rights, January 12, 2016.
Sh.D. and Others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia, Application No. 141165/16, Council of Europe: European Court of Human Rights, June 13, 2019.

In terms of relevant African regional level human rights instruments and protection mechanisms, South Africa has ratified the African Charter on Human and Peoples' Rights (Banjul Charter; see Organization of African Unity, 1981), the African Charter on the Rights and Welfare of the Child (Organization of African Unity, 1990), and the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (Organization of African Unity, 1969). These African Charters and the Refugee Convention are supported by the African Commission on Human and Peoples' Rights Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (Luanda Guidelines; see African Commission on Human and Peoples' Rights, 2014) and the African Commission on Human and Peoples' Rights Resolution on Migration and Human Rights (African Commission on Human and Peoples' Rights, 2007). Collectively they require South Africa to respect and promote the human rights of all persons within its borders, regardless of national origin (Edwards & Stone, 2016). Sections 2, 3, 5, 6, 7, and 26 of the Banjul Charter guarantee the fundamental rights to life, dignity, equality, security, a fair trial, and an independent judiciary (see General Comment 5 on the Banjul Charter: Right to Freedom of Movement and Residence, Article 12(1)), which protects mobility into, within, and out of a state; African Commission on Human and Peoples' Rights, 2020).

In particular, the nonbinding Luanda Guidelines specifically refer to the rights and vulnerabilities of refugees, foreign nationals, and stateless persons during arrest, police custody, and detention; standards of detention conditions; and segregation of detainees, and outline the specific protections required regarding access to interpretation and legal representation (Edwards & Stone, 2016). Similarly, with regard to the rights of people deprived of their liberty, the African Commission on Human and Peoples' Rights adopted a series of regional nonbinding resolutions, largely aligned with the UN norms and standards (e.g., the 1995 Resolution on Prisons in Africa; the 1997 Resolution on the Right to Recourse Procedure and Fair Trial; the 1996 Kampala Declaration on Prison Conditions in Africa; the 2002 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa; the 2002 Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa; and the 2003 Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa).

At the African Court on Human and People's Rights level, there are cases that refer to statelessness/withdrawal of nationality and deportation orders. A broad range of cases at the African Commission on Human and Peoples' Rights have also cited unlawful immigration detention, maltreatment and bribery, forced repatriations and statelessness, lack of information provided to the detainee regarding deportation measures and access to legal recourse, severe physical abuses, and harsh conditions of detention. There also have been some submissions to the African Committee of Experts on the Rights and Welfare of the Child regarding immigration detention and child statelessness (see Table 4).

Fundamental rights assurances and regulation of immigration in South Africa over time

During the 1990s, South Africa's immigration policy was based on the 1991 Aliens Control Act, which was subsequently deemed unconstitutional and replaced with the Immigration Act 13 of 2002. First and foremost, the Constitution of South Africa (1996) guarantees fundamental and procedural protections to all persons (including citizens and documented and undocumented immigrants) (specifically in Chapter 2, Bill of Rights; Section 9, right to equality; Section 10, human dignity; Section 12(1)(a), freedom and security of the person; Section 26 right to access of adequate housing; Section 27, access to health care as a basic human right; Section 28, providing for the rights of children, including not to be detained except as a last resort; Section 32, right to access to information; Section 33, providing for the right to just administrative action; and Section 35, referring to rights specific to detention; see Hicks, 1999; Kaziboni, 2018).

Table 4. Relevant African cases and submissions.

African Court on Human and People's Rights	**African Commission on Human and People's Rights**
Statelessness/withdrawal of nationality and deportation orders	Unlawful immigration detention, maltreatment and bribery, forced repatriations and statelessness, lack of information provided to the detainee regarding deportation measures and access to legal recourse, severe physical abuses and harsh conditions of detention.
Anudo v. Tanzania (merit) (2018) [application no. 012/2015] AFCHPR	*Abdel Hadi, Ali Radi & Others v Republic of Sudan* (2009). Communication 368/09.
Penessis v. United Republic of Tanzania (merit) [application no 013/2015] AFCHPR	*African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v. Republic of Guinea* (Communication 249/200) [ACHPR 2004]
By analogy inadequate standards of detention and care in prisons	*Doebbler v. Sudan*, Comm. 235/2000, 27th ACHPR AAR Annex (Jun 2009–Nov 2009)
Abubakari v. Tanzania (merits) (2016) 1AfCLR599	*Good v. Republic of Botswana* (Communication 313/2005) [ACHPR 2010]
Guehi v. Tanzania (merits and reparations) (2018) 2AfCLR477	*Institute for Human Rights and Development in Africa v. Republic of Angola* (Communication 292/2004) [ACHPR 2008]
Konaté v. Burkina Faso (reparations) (2016) 1AfCLR346	*Modise v. Botswana* (Communication 97/93) [ACHPR 2000]
Lohé Issa Konaté v. Burkina Faso (provisional measures) (2013) 1AfCLR310	*Organization Mondiale contre la torture and Others v. Rwanda* (Communication no 27/89) [ACHPR 1996]
Mugesera v. Rwanda (provisional measures) (2017) 2AfCLR 149	*Recontre Africaine our la defence des droits de l'homme v. Zambia* (Communication no 71/92) [ACHPR 1997]
Submissions to the African Committee of Experts on the Rights and Welfare of the Child	*Zimbabwe Lawyer for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v. Republic of Zimbabwe* (Communication 294/2004) [ACHPR 2009]
Immigration detention and child statelessness	By analogy inadequate standards of detention and care in prisons
The African Center of Justice and Peace Studies and Peoples' Legal Aid Center v. The Government of Republic of Sudan (Communication 001/2015) [ACERWC 2018]	*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Témoins de Jehovah v. Zaire* (1996) ACHPR Comm Nos.25/89,47/90,56/ 91,100/93
	International PEN and Others v. Nigeria (1998) ACHPR Nos.137/94,139/94, 154/86,161/97
	Malawi African Association and others v. Mauritania (2000) ACHPR Nos.54/91,61/91,98/93,164/97 a,196/ 97 and 210/98

Essentially the Constitution provides that fundamental rights, which include the right to freedom and security of person, apply to all persons within the Republic's borders, regardless of their nationality or immigration status (Global Detention Project, 2021). Other relevant immigration detention related legislation include the Refugees Act of 1998 (as amended, in particular, by the later 2017 Amendment Act), the South African Human Rights Commission Act 40 of 2013, the Promotion of Administrative Justice Act 3 of 2000, the Correctional Services Act 111 of 1998, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and the Promotion of Access to Information Act 2 of 2000 (Van Lennep, 2019).

There is evidence of changes in South African refugee and immigration laws, and a shift toward stricter, exclusionary measures indicative of instances of State-driven xenophobia (Kavuro, 2022; Ziegler, 2020). Scholars and human rights advocates have expressed concern that the Department of Home Affairs has moved away from a "a protection-based approach to management of vulnerable foreign nationals toward that of a risk-based approach" (LHR, 2020b). These geopolitical changes are indicative of substantial deviation from the original "urban refugee" policy that was once described as "the inception and cornerstone of refugee protection" in South Africa through the Basic Agreement with the UN High Commissioner for Refugees in 1993 (Lawyers for Human Rights 2016). The Basic Agreement along with the Refugees Act of 1998 was the result of widespread public consultations with stakeholders, government departments, and civil society during the Green and White Paper process of the mid-1990s (Lawyers for Human Rights 2016). At the time, the Refugees Act was progressive and advanced in terms of

incorporating global and regional international refugee law obligations, and with regard to the scope of provisions providing protections for refugees in South Africa (Ziegler, 2020). The Refugees Amendment Act 11 of 2017 which came into force on January 1, 2020, substantively changed South African refugee protections, effectively restricting refugees' access to asylum processes and denying them substantive rights previously available to them under international refugee law and jurisprudence (Ziegler, 2020). Many provisions have been deemed to breach South Africa's Constitution. In particular, the Act introduced new restrictive changes to the South African asylum-seeker policy, many of which related to asylum seekers' right to work, restricted access to services, and resulted in unlawful policies and practices restricting access to protection, with the refugee system becoming the *de facto* immigration option for many to attain legal status, regardless of protection needs (Carciotto, Gastrow, & Johnson, 2018). This geopolitical shift is also explicit in the revised Border Management Act of 2020 (South African Government 2020), which was framed as a law that would "remedy fragmented border" controls and leverages for increased application of criminal procedures to enforce migration laws (Global Detention Project, 2021).

Immigration detention regulation and processes in South Africa

Like citizens, foreign nationals have the right not to be arrested or detained arbitrarily (Van Lennep, 2019). The Refugees Act of 1998 (as amended) operates in parallel with the Immigration Act and provides a separate legal regime for the detention of asylum seekers and refugees and prohibits their detention as illegal foreigners under the Immigration Act (Ncube, 2017). Provisions contained in the Refugees Act regard the detention of asylum seekers, in that the Act provides that an individual with an asylum seeker "permit" (given while a person awaits the outcome of his or her asylum procedure) may be detained until the asylum procedure is concluded (Section 23). The Act provides that the Minister of Home Affairs may withdraw an asylum seeker's permit under Section 23, read in conjunction with Section 22(6), resulting in the subsequent detention as per Section 29. The withdrawal of this permit subjects asylum seekers to Section 23 of the Immigration Act, as they are then considered illegal foreigners. However, the withdrawal of a Section 22 permit does not automatically translate to the detention of an asylum seeker (Mfubu, 2017). This is with exception of when an asylum-seeking status application has been rejected, triggering a right to appeal and review process based on procedural safeguards provided by Chapter 5 of the Refugees Act. Section 28 of the Refugees Act also allows for the detention of an asylum seeker pending his or her removal from the country, yet this section may only be invoked should the Minister of Home Affairs and the Department of Home Affairs deem the individual a threat to public order or national security (Mfubu, 2017). This also falls under Section 33 of The Constitution and in line with international law.

We focus here primarily on the 2002 Immigration Act, which authorizes the Department of Home Affairs to detain undocumented migrants for the purposes of deportation. Section 2 of the Immigration Act highlights one of its primary objectives as "detecting and deporting illegal foreigners," with Section 32 providing that "(1) Any illegal foreigner shall depart, unless authorized by the Department to remain in the Republic pending his or her application for a status. (2) Any illegal foreigner shall be deported." Section 33 provides the procedures for establishing the authorities that are responsible for undertaking enforcement measures, and Section 34 establishes the grounds and procedures for detention and deportation/providing specific detention provisions. Section 34(1) provides that immigration officers may:

> [A]rrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department determined by the Director-General.

Essentially the immigration status of the detained individual must be verified within 48 hours (South African Human Rights Commission, 2017a).

Section 41 regards the steps taken to verify those who warrant detention and establishes the role of the South African Police Service in immigration enforcement, stating:

> [W]hen so requested by an immigration officer or a police officer any person shall identify himself or herself as a citizen, resident or foreigner when so requested by an immigration officer or a police officer, and if on reasonable grounds such immigration officer or a police officer is not satisfied that such person is entitled to be in the Republic, such immigration officer or a police officer may take such person into custody without a warrant and if necessary detain him or her in a prescribed manner and place.

Section 41, read with regulation 37 of the 2014 Immigration Regulations, provides that, prior to any detention in terms of Section 34, an immigration officer is expected to verify a person's identity and status (Amit, 2015). As mentioned, detention for the purposes of verification can be ordered without a warrant, and for no longer 48 hours. If a person is classed as undocumented, a notice of deportation must be served that triggers the lawful detention period under Section 34(1) of the Immigration Act. Once a person is arrested and detained under Section 34, he or she must be notified of the reason for such detention, two exceptions: if the end of the 48 hour period falls on a weekend and if the person is first detained on any other criminal offense. If the person is deemed illegal, he or she is given a court hearing within 48 hours of arrest whereby the person has the right to be charged and informed of the reason for continued detention or released, and, if applicable, a notice of deportation is served, triggering the maximum detention period of 30 days. Finally, Section 37 of the Immigration Act provides for the right of a person to challenge his or her detention by requesting a judicial review and confirmation of detention by a magistrate (South African Human Rights Commission, 2017a). Section 34(3) details that the detained individual covers the cost of his or her detention and removal from the country. Chapter 2 of the Constitution provides that every detainee has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Fundamental rights protections extend to people in detention, including people in immigration detention, as Section 10(1) of the Bill of Rights (right to human dignity, the fundamental rights to respect and protection of dignity) mandates that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." In terms of standards of care in immigration detention facilities, Section 35(2)(e) of the Constitution mandates that all persons deprived of their liberty be detained in conditions consistent with human dignity and provided with adequate accommodation, nutrition, reading material, and medical treatment at state expense. Sections 12(1) (prohibition of torture, inhuman and degrading treatment), 12(2) (right to freedom and security, right to bodily integrity), and 27 (right to food, water, socio security and healthcare) are further applicable. The Constitution provides for the right to be free from all forms of violence from either public or private sources (Section 12(1)(c)), the prohibition of torture (Section 12(1)(d)), and the right not to be treated or punished in a cruel, inhuman, or degrading way (Section 12(1)(e)). Section 27(3) of the Constitution additionally provides that "no one may be refused emergency medical treatment." Section 34(5)(b) empowers the Department of Home Affairs to detain illegal foreigners "in a manner and at a place determined by the Director-General" and "in compliance with minimum prescribed standards." Section 41 of the Immigration Act covers the conditions for immigration detention in Annexure B of regulation 33(5) of the Regulations, which stipulates:

> [D]etainees are to be provided with adequate space, lighting, ventilation, sanitary installations, and access to health facilities; each detainee should be provided with a bed, mattress, and blanket; unrelated male and female detainees are to be detained separately, and detained children are to be separated from unrelated adults; detainees "of a specific age" or who fall into particular health or security categories, are to be confined separately; and each detainee is to be provided with an adequate balanced diet, which takes into account the nutritional requirements of those who require special diets.

With regard to the immigration detention of children and unaccompanied minors, Section 34 provides that children may be detained as a matter of last resort. This is supported by the Section 29(2) of the Refugees Act, which provides for the specific authorization of the detention of a

child, which "must be used only as a measure of last resort and for the shortest appropriate period of time." Annexure B of the Immigration Regulations also provides that detained children should be separated from unrelated adults.

Realities on the ground and irregularities in due process along the South African immigration detention continuum

The immigration deportation regime is operated by three parties: the South African Police Service, the Department of Home Affairs, and the Lindela Repatriation Facility itself (formerly operated by the Bosasa, African Global Operations, and now EnviroMongz Projects). Police stations are generally used for immigration detention purposes pending deportation and transfer to Lindela Repatriation Center (Department of Home Affairs, 2019). The South African Human Rights Commission (2017a) has raised concerns that, in many instances, arresting SAPS officers do not appear to be advising detainees that "reasonable grounds" exist for their detention; nor are they advised of their right to satisfy the arresting officer that they are entitled to be in the country. A letter in 2018 sent to the South African President Cyril Ramaphosa by Lawyers for Human Rights (2018) referred to the vulnerability of those with black and darker skin to arbitrary arrest by police: "[P]eople are wrongfully and unlawfully detained under the current immigration legislation, that the process of arrest and detention of would-be immigrants is arbitrary and, therefore violates the rights of citizens and other residents." Immigrant detainees are routinely denied access to legal representation and interpretation supports in police custody (International Detention Coalition, 2020; Lawyers for Human Rights, 2020b; Van Lennep, 2019). The South African Human Rights Commission (2017b) has also reported on the occurrence of illegal sentencing using Section 23(b) of the Aliens Control Act. A broad range of domestic judgments refer to aspects of unlawful asylum and arbitrary immigration detention processes and practices in South Africa (see Table 5).

Several landmark cases have reformed the immigration landscape in South Africa. In 2004, in the case of *Lawyers for Human Rights and another v. Minister of Home Affairs and Another*, a High Court order declared certain provisions of the Immigration Act unconstitutional with regard to the lack of an upper limit of duration of detention prior to deportation, and underscored the constitutional rights of illegal foreigners irrespective of whether they were in South Africa legally or not.

While Section 34 of the Immigration Act affords discretion to officers who, on reasonable grounds, believe a person is in the country illegally, the scope of discretion was clarified in 2009 (see *Ulde v. Minister of Home Affairs and Another*) when the Court confirmed that an officer who decides that an undocumented migrant is liable to be deported must be guided by minimum standards and construe the exercise of discretion *in favorem libertatis* when deciding whether or not to arrest or detain a person under Section 34(1) of the Immigration Act. In 2014, the Court found that the exercise of the discretion must be consistent with Section 12(1)(b) of the Constitution, which prohibits the Department of Home Affairs from detaining undocumented migrants without trial (*South African Human Rights Commission and Others v. Minister of Home Affairs: Naledi Pandor and Others*).

Also, whilst Section 35(2) of the Constitution provides protections against all forms of arbitrary detention, the right to be brought before a Court within 48 hours of arrest and to contest the reasons for detention has only recently been awarded a right in practice to immigration detainees (Lawyers for Human Rights, 2020b). Foreign nationals in South Africa have the same right as citizens not to be detained arbitrarily (see *Lawyers for Human Rights v. Minister of Home Affairs and Others* 2017). In this judgment the Constitutional Court declared Section 34(1)(b) and (d) of the Immigration Act invalid and inconsistent with Sections 12(1) and 35(2)(d) of the Constitution. It held that:

> Section 34(1)(d) of the Immigration Act had unconstitutionally permitted detention of foreign nationals for a period of 30 days without automatic judicial intervention, and an extension of the initial period of detention without the detainee appearing before the court in person.

The Constitutional Court ruled that any foreign national detained under Section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours of the time of arrest, and that anyone detained for the purposes of deportation cannot be held for longer than 30 days, and "which may be extended for an additional 90 days upon issuance of a court warrant stating 'good and reasonable grounds' for the extension."

Despite the South African Human Rights Commission (1999) and the African Policing Civilian Oversight Forum (2017) indicating that spot checks and police sweeps fail to satisfy the criteria of "reasonable grounds" and contribute to high numbers of arrests, South African police continued to use them to round up and detain foreign nationals during the COVID-19 disaster measures (2020–2022; see Xenowatch, 2022). Problems lie in the Department of Home Affairs' application of the Immigration Act, when "arresting asylum seekers as illegal foreigners and subjecting them to arbitrary, indefinite and unlawful detention pending deportation" (Ncube 2017). There are reports of the arrest of asylum seekers for deportation, often without due process, many of whom who have applications for asylum or renewal of asylum status under review (Ncube, 2017). In 2010, the Supreme Court of Appeal clearly stated that undocumented foreign

Table 5. Relevant South African judgments.

Abdi and Another v. The Minister of Home Affairs and 4 Others (734/2010) [2011] ZASCA 2 [February 15, 2011]	By analogy inadequate standards of detention and care in prisons
Abore v. Minister of Home Affairs and Another [2021] ZACC 50	*EN and Others v. Government of RSA and Others* (2006)006(6)SA575(D);2007(1)BCLR 84.SAHC Durban 2006
Amadi v. Minister of Home Affairs (unreported, no. 101/2010) SGHC (January 12, 2010).	*Goldberg v. Minister of Prisons* 1979 (1) SA 14 (A) par 39 A–C.
Arse v. Minister of Home Affairs 2010(7) BCLR 640 (SCA)	*Lee v. Minister of Correctional Services* (2012) ZACC30
Aruforse v. Minister of Home Affairs, 2010/1189, South Africa: High Court, January 25, 2010.	*McCallum v. South Africa* (2010) UN Doc CCPR/C/100/D/1818/2008 [November 2, 2010]
Bula and others v. Minister of Home Affairs and others 2012 (4) SA 560 (SCA).	*Minister of Justice v. Hofmeyer* 1993 (3) SA 131 (AD) 139H–142C.
Center for Child Law and Another v. Minister of Home Affairs and Others 2005 (6) SA 50 (T)	*Sonke Gender Justice NPC v. President of the Republic of South Africa and Others* [2020] ZACC para 38–40
Dekoba v. Director-General Department of Home Affairs, 26044/11, South Africa: High Court [22 October 2012]	*Sonke Gender Justice v. Government of South Africa* 24087/15 (unreported) WC HC
Fikre v. The Minister of Home Affairs and others, 2012 (4) SA 348 (GSJ) A	
Kumah and Others v. Minister of Home Affairs and Others (22481/2016, 22482/2016, 22393/20016)	
Lawyers for Human Rights and another v. Minister of Home Affairs and another 2004 (7) BCLR 775 (CC).	
Lawyers for Human Rights v. Minister of Home Affairs and Others (CCT 38 of 2016) [2017] ZACC 22 (29 June 2017).	
Lawyers for Human Rights v, Minister of Safety and Security and others [2009] JOL23612 (GNP).	
Okoye v. Minister of Home Affairs and 3 others, Case: 26144/2020.	
Rahim v. The Minister of Home Affairs (965/2013) [2015] ZASCA 92 [29 May 2015]	
Ruta v. Minister of Home Affairs [2018] ZACC 52	
Scalabrini Center and Another v. Minister of Social Development and Others [2021] (1) SA 553 (GP)	
South African Human Rights Commission and Others v. Minister of Home Affairs: Naledi Pandor and Others [2014] ZAGPJHC 198.	
Ulde v. Minister of Home Affairs and Another. 45 2009 (4) SA 522 (SCA).	
Zimbabwe Exiles Forum v. Minister of Home Affairs [2011] JDR 0129 (GNP)	

nationals may not be detained for more than 120 days (see *Arse v. Minister of Home Affairs*). It further stated that, throughout an appeal and review process, the individual remains an asylum seeker. This was further substantiated in 2010 by the High Court in *Amadi v. Minister of Home Affairs*, which confirmed that an asylum seeker could not be detained for the purposes of deportation. The arrest and detention of asylum seekers without verification of their status, pending the outcome of their applications, or facilitating access to the refugee system, delays in issuance of documents under the Refugees Act. The North Gauteng High Court in 2011 (see *Zimbabwe Exiles Forum v. Minister of Home Affairs*; Lawyers for Human Rights 2011) severely criticized the rearrest of detainees on their release, which circumvents the 30-day limit of detention without a warrant under the Immigration Act. In *Ruta v. Minister of Home Affairs*, the Court confirmed that if an arrested foreigner expresses the desire to apply for asylum, he or she must be given the opportunity to do so. The South Gauteng High Court further clarified in *Kumah and Others v. Minister of Home Affairs and Others* that deportation cannot be delayed by reason of administrative incapacity on the part of officials. Although legally the length of time in police custody prior to transfer to the Lindela Repatriation Center must be included in the total 120-day limit, in practice, authorities have been operating with the limit based on time of arrival at the facility (causing protracted detention periods; see Lawyers for Human Rights, 2020b).

The African Center for Migration and Society (Amit, 2015) has observed the routine failure of immigration authorities in securing extension warrants beyond 30 days, with detention periods often much longer than the legal maximum of 120 days (and also being unlawful). In *South African Human Rights Commission and Others v. Minister of Home Affairs (Naledi Pandor and Others)* the South Gauteng High Court in Johannesburg ruled that the protracted detention of migrants at the Lindela Repatriation Center was unconstitutional, and that the Department of Home Affairs had violated the Immigration Act on two counts: by detaining migrants for longer than 30 days without obtaining the necessary warrant permitting extended detention, and by detaining migrants for longer than the maximum statutory limit of 120 days (Human Rights Watch 2015). The US Department of State (2015) in its country reporting has documented that the Department of Home Affairs has generally complied with the 120-day limit, but that compliance with the specific requirement to obtain a warrant to detain migrants for longer than 30 days was poor.

The Supreme Court of Appeal in *Abdi and Another v. The Minister of Home Affairs and Others* illustrated the general lack of respect by the Department of Home Affairs for individual rights and sufficient respect for the judicial process. In 2012, the case of *Bula and Others v. Minister of Home Affairs and Others* reinforced the principle of legality regarding the interpretation and application of provisions of the Refugees Act and of regulations issued thereunder. In reality, immigration detention periods in South Africa are protracted, in some cases in excess of 120 days, in direct contravention of detention laws and constituting illegal deprivation of liberty and violation of the fundamental rights to freedom and security (Kaziboni, 2018). In 2014, the South African Human Rights Commission (2014a) reported on an individual who had been detained for 524 days. Equally important is that when a detainee is not allowed to challenge the legality of his or her detention in court, such detention is unlawful and the detainee must be released (see the 2020 case of *Okoye Johnathan v. Minister of Home Affairs and 3 others*).

Settings and standards of immigration detention

South Africa does not operate refugee camps, and the Lindela Repatriation Center near Krugersdorp West was established by the Department of Home Affairs in 1996 as a holding facility for foreigners awaiting deportation (Africa Check, 2016). Privatization of immigration detention in South Africa preceded efforts to privatize prisons (Flynn and Cannon, 2009). There is longstanding criticism of South Africa's privatization of prisons (e.g., the Mangaung Correctional

Center, operated by G4S, and the Kutama Sinthumule Correctional Center in Limpopo, operated by the GEO Group) and also of the Lindela Repatriation Center itself (Basson, 2018; Berg 2001; Global Detention Project, 2021; Hopkins, 2020). Both GEO and G4S, in addition to their private prison operations, have been heavily involved in running immigration detention centers in other countries (Flynn, 2017).

In terms of legitimate settings for immigration related detention, Lawyers for Human Rights (2020b) reported on inconsistency in application of the law in that detainees are (at times) placed in facilities that were not been officially designated as immigration detention sites. The 2015 Supreme Court judgment of *Rahim v. The Minister of Home Affairs* (and the 2009 case of *Lawyers for Human Rights v. Minister of Safety and Security and others*, regarding designation of facilities for deportation purposes) awarded damages to illegal immigrants who were unlawfully detained by the Department of Home Affairs, due to its failure in designating a proper holding facility for noncitizens in South Africa (*contra* Section 34).

On April 7, 2020, during COVID-19 state disaster measures, the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment advised state parties (Office of the High Commissioner for Human Rights, 2020) with regard to the Optional Protocol to the Convention against Torture (United Nations, 2003) to decongest immigration detention centers and closed refugee camps. South Africa turned a deaf ear. The list of immigration detention facilities was, however, updated again, with an additional 15 correctional facilities to be used as temporary sites for immigration detention purposes as per Section 34(1) of the Immigration Act (Department of Home Affairs, 2020). Foreign nationals were subsequently detained in prisons for immigration purposes (Department of Justice and Correctional Services, 2020). Contrary to all normative guidance, they were not kept separate from sentenced criminals (Van Hout & Wessels, 2021).

While the South African prison release schemes were implemented in line with United Nations calls for prison decongestion, these were countered by increased pretrial detention and custodial sentencing for breaches of COVID-19 regulations, with more than 230,000 new arrests during that time (Gear & Gaura, 2020). As a direct consequence, severe delays in the deportation of foreign nationals (more than 500 individuals) occurred (Gasa, 2020; Van Hout & Wessels, 2021). In contrast to the situation of prisoners, no detention orders ceased or were restricted, no immigration detainees were released (as was the case in South African prison amnesty schemes), and no legal alternatives to immigration detention were employed by the South African government (Van Hout & Wessels, 2021).

In 2021, both Westville Prison in Durban and Pollsmoor Prison in Cape Town were regularly used to detain unauthorized immigrants on warrant from the Department of Home Affairs (Global Detention Project, 2021), as:

> [D]etention at police stations and border posts is not considered ad hoc when a person is detained under warrant from the Department of Home Affairs, or when the length of detention for suspected immigration violations (without warrant from the Department of Home Affairs) is less than 48 hours—the amount of time given authorities to investigate allegations under the Criminal Procedures Act.

Several *ad hoc* detention sites were observed: For example, the Soutpansberg Military Grounds Detention Center was classified by the Global Detention Project as an *ad hoc* detention site where police detained immigrants without proper authorization from immigration authorities. The Strandfontein Camp was also operationalized as *ad hoc* detention facility in Cape Town to hold foreign nationals rounded up by South African police during COVID-19 lockdowns, with the South African Human Rights Commission documenting congested and unhygienic conditions.

In terms of immigration detention facility standards, there have been historical failures in providing adequate conditions and care of detainees (Amit, 2010; Amit & Zelada-Aprili, 2012; Kaziboni, 2018; Sutton & Vigneswaran, 2011; Van Lennep, 2019). Deeply engrained

institutionalized xenophobia has been observed at the Lindela Repatriation Center (Kaziboni, 2018). Even after 21 fatalities were reported in eight months in 2005, and after allegations of misappropriation of funds, the Bosasa contract was renewed several times (Van Lennep, 2019). In 2009, the US Department of State (2009) mentioned the Lindela Repatriation Center in its annual human rights report, noting "allegations of corruption and abuse of detainees by officials at the overcrowded Lindela Repatriation Center." Extant human rights assessments center on standards at the Lindela Repatriation Center, with little detail available on the *ad hoc* sites, prisons, or police cells. There are conflicting reports around capacity of the Lindela Repatriation Center. For instance, a 2019 inspection of the Lindela Repatriation Center reported that "the facility is underutilized as only 800 irregular immigrants are currently being detained at the facility, which has the capacity of accommodating 5,000 people," whereas the South African Police Service is overburdened with detention of arrested immigrants (Van Lennep, 2019). There were allegations of falsification of detainee numbers to drive Lindela's revenue, hunger strikes, detainee escapes, and appalling treatment of detainees including deaths (Bornman, 2019).

With regard to particularly vulnerable immigration detainees, the Lindela Repatriation Center is not deemed fit for the detention of women and children (see the 2005 case of *Center for Child Law and Another v. Minister of Home Affairs and Others*). There have been reports of the unlawful detention of children on migration related reasons in police holding cells and at the Lindela Repatriation Center (Lawyers for Human Rights, 2014; South African Human Rights Commission, 2017a; US Department of State, 2015).

In 2020, there were reports of congestion: for example, 30 male detainees sharing one toilet, sink, and shower, and up to 60 people in a cell (Lawyers for Human Rights, 2020b). There are further concerning reports of the use of solitary confinement in the Lindela Repatriation Center, despite the fact that the minimum standards of detention in the Immigration Act Regulations do not make any provision for isolation measures or any method to regulate conflict (South African Human Rights Commission, 2017b).

Since 1997, a broad range of human rights violations have been observed at the Lindela Repatriation Center, not limited to reports of physical and sexual abuse; suspicious deaths, including of children; abuse and sexual exploitation by guards; inadequate nutrition; low-quality health care; denial of life-saving medical care; lack of communicable disease screening on entry (e.g., tuberculosis, HIV) and poor outbreak management; the illegal detention of children; and mixing of children with adults (International Detention Coalition, 2016; Kaziboni, 2018; Lawyers for Human Rights, 2020b; South African Human Rights Commission, 2017a, 2017b; Van Lennep, 2019). Conditions have been reported to be conducive to ill health and spread of disease due to overcrowding, lack of ventilation, and sanitation (South African Human Rights Commission, 2017a; Kaziboni, 2018).

Health-care provision remains inadequate at the Lindela Repatriation Center, with conditions constituting a "grave threat" to detainees' health (Lawyers for Human Rights, 2020b). Investigations by human rights organizations have revealed poor medical oversight and insufficient medical supplies, particularly relating to tuberculosis testing and tetanus vaccines (Kaziboni, 2018; South African Human Rights Commission, 2014b, 2017a). In 2018, Médecins Sans Frontières submitted a complaint to the Office of Health Standards Compliance which stated, "the Lindela health services do not prioritize access to HIV and tuberculosis care. Communicable diseases are treated outside of national protocol, and main health needs of those detained are largely neglected" (Bornman 2019). More recently, the International Detention Coalition (2022) reported on the general substandard immigration detention conditions (lack of sufficient water, food, and medical care) during and after COVID-19 state disaster measures.

Immigration detention oversight mechanisms

In 2005, the UN Working Group on Arbitrary Detention visited the Lindela Repatriation Center and documented a range of concerns based on arbitrary detention, ill-treatment, and the inability of detainees to contest the validity of their detention (UN Working Group on Arbitrary Detention, 2005). In contrast to prisons, which are routinely monitored and inspected by the Judicial Inspectorate for Correctional Services, historically, the Lindela Repatriation Center appeared to fall between two stools, with the Department of Home Affairs appearing to dodge accountability through this privatization. Lawyers for Human Rights (2008) stated at the time:

> By pointing to Bosasa as the entity responsible for the treatment of detainees, the Department of Home Affairs seeks to avoid accountability under the provisions of the Constitution and the Bill of Rights, South African administrative law, and international human rights instruments. At the same time, enforcement of these provisions against Bosasa is hindered by the status of Bosasa as a private entity that is not eager to cooperate in human rights monitoring and oversight efforts.

Little change was observed in 2011 by the UN Special Rapporteur on the human rights of migrants, a visit underpinned by concerns around minimum standards, lack of due process, lack of sufficient ability of detainees to claim asylum or protection under the Refugee Act, and the privatization itself of the Lindela operations (United Nations, 2011).

In 2016, the UN Human Rights Committee urged South Africa to commit to ensuring that immigration detention is only used only as a measure of last resort; that nonnationals are only detained in dedicated immigration detention facilities; and that adequate living conditions in immigration detention settings are provided (UN Human Rights Committee, 2017). It documented that jurisdictional oversight of Lindela Repatriation Center was to be provided by the South African Human Rights Commission, the Parliamentary Portfolio Committee on Home Affairs, and the International Committee of the Red Cross (United Nations High Commissioner for Human Rights, 2016). The 2017 Report of the Working Group on the Universal Periodic Review–South Africa outlined a range of recommendations to improve conditions in immigration detention facilities, with specific directives to ensure access to health care, psychological assistance, "appropriate physical infrastructure and sanitation," and broader recommendations to tackle xenophobia and racism in South Africa (United Nations, 2017).

The Department of Public Works and Infrastructure later purchased the Lindela Repatriation Center for 60 million *rand* (approximately $4.1 million; see Shange, 2019). The 2019 second periodic review of South Africa by the UN Committee against Torture, however, expressed continued concerns with regard to immigration regulations and processes—whereby the Immigration Act provided for the holding of an "illegal foreigner" in custody for prolonged periods without a court hearing, the refusal by immigration authorities to provide asylum seekers with asylum transit visas at ports of entry, and the prolonged detention of nonnationals at the Lindela Repatriation Facility without warrant. The Second Periodic Review urged South Africa to ensure adequate space, sanitation, hygiene, and adequate living conditions with sufficient medical care in all detention facilities and to apply alternatives to detention (United Nations Committee against Torture, 2019). The South African Human Rights Commission was reappointed in 2019 as the coordinator of the National Preventive Mechanism, in conjunction with the Judicial Inspectorate for Correctional Services and the Independent Police Investigative Directorate (South African Human Rights Commission, 2019). In partnership with the South African Human Rights Commission, Lawyers for Human Rights, *Médecins Sans Frontières*, and People against Suffering Oppression and Poverty also routinely inspect the Lindela Repatriation Center (Van Lennep, 2019). This mechanism became known as the Lindela Monitoring Framework, whereby the Department of Home Affairs must permit access to the facility and provide weekly detail on detainee detention periods. This is not without challenges, and there are longstanding difficulties

in monitoring standards of immigration detention due to the limited access permitted by the Department of Home Affairs to both Lawyers for Human Rights and *Médecins Sans Frontières*, and the due notice requiring eliminating spot check assessments. In 2020, a new private company, EnviroMongz Projects, assumed responsibility for operations at the Lindela Repatriation Facility (Mahamba, 2020). Despite operating an intense advocacy and detention monitoring program, providing training of legal practitioners, monitoring immigration hearings, and engaging in strategic litigation, Lawyers for Human Rights (2020b) found "a high incidence of unlawful detention, including a high frequency of the detention of minors, repeated disregard for statutory limits of detention, a high frequency of detention of asylum seekers with pending asylum claims and a disregard for court orders" (Global Detention Project, 2021, p. 26).

As of June 2021, although the South African Human Rights Commission regularly monitors conditions at Lindela and has made recommendations on its observations, there was still no independent oversight body for the facility (Global Detention Project, 2021). This is in contrast to the prison system, in which substandard detention conditions (see the 2016 case of *Sonke Gender Justice v. Government of South Africa*) and the level of independence of the Judiciary Inspectorate of Correctional Services have been successfully challenged and have stimulated further actions to provide independent inspections and access to prisons by human rights and UN Committee against Torture monitors (see judgment of *Sonke Gender Justice NPC v. President of the Republic of South Africa and Others*, 2020).

Conclusion

Immigration detention as a form of administrative detention continues to be routinely employed to facilitate deportation (UN Nations Working Group on Arbitrary Detention, 2018; Office of the High Commissioner for Human Rights, 2020). This realist assessment reveals that the situation of migrants, asylum seekers, and refugees in South Africa is tainted by neglect and abuse of fundamental human rights and marked by authorities' failure to abide by their constitutional and international legal obligations toward refugees, asylum seekers, and undocumented migrants. The Refugees Amendment Act of January 2020 expands the grounds for exclusion and cessation of refugee status, with many of the new provisions denying asylum seekers substantive rights and violating both the Constitution of South Africa and South Africa's international treaty obligations (Ziegler, 2020). There are ongoing discussions between South Africa and other African states (Kenya, Nigeria, Mozambique, Botswana, Lesotho, and Zimbabwe) regarding migration agreements, immigration, and deportation cooperation agreements (South African Government, 2022). Human rights activists deplore the concerning shift away from the basic protection of human rights and cognizance of human vulnerabilities, toward that of intensified xenophobia and securitized agendas by the South African authorities (Kavuro, 2022; Lawyers for Human Rights, 2016, 2018, 2020a, 2020b; Ziegler, 2020). However, lessons can be learned from other African states—for example, Kenya, where the Court confirmed that nonrefoulement cannot be jeopardized by alleging a security risk posed by refugee influx into a country (see the 2014 case of *Attorney General v. Kituo Cha Sheria;* United Nations High Commissioner for Refugees, 2013).

A broad range of human rights violations of immigration detainees in South Africa has been documented, perpetrated by the South African Police Service and the Departments of Justice, Health, Home Affairs, and others; these include noncompliance with respect to procedures for arrest of foreigners; procedural rights, sentencing, and deportation procedures; unlawful and arbitrary detention; lack of access to legal representation and medical care; and safe, adequate accommodation while awaiting deportation (Hiropoulos 2017). Courts are integral to the affirmation of the rights and freedoms of migrants, refugees, and asylum seekers via Constitutional, regional, and international principles (Lenaola, 2019). Intensified human rights advocacy and strategic litigation have stimulated increased compliance of the Department of Home Affairs with

immigration laws in recent years (Global Detention Project, 2021; Lawyers for Human Rights, 2020b). Although we could not locate any jurisprudence in which conditions of immigration detention were central to a claim of inhumane treatment, by analogy, the observed congested and unsafe immigration detention conditions, restrictions, and insufficient actions to prevent disease and provide routine medical care potentially breach the fundamental rights of immigration detainees. And parallels can be drawn with extant domestic jurisprudence regarding prison overcrowding, prisoner exposure to communicable disease, and lack of access to health care. Detention can be rendered unlawful in cases in which conditions of detention breach fundamental rights (see *Goldberg v. Minister of Prisons*; *Minister of Justice v. Hofmeyer*; see also Table 5). Alternatives to detention aligned with the Global Compact on Refugees (UN High Commissioner for Refugees, 2018) and the Global Compact for Safe, Orderly, and Regular Migration (United Nations, 2018) must also be employed in South Africa with immediate effect, leveraging existing civil society presence in communities to support safe housing during all stages of migration status determination (International Detention Coalition, 2018). There is a still a long way to go in South Africa in terms of protecting the rights of all of its citizens, including the unwelcome.

Note

1. Translated as "force out" or "knock down" in the Zulu language.

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References

Africa Check (2016). *Detention and deportation of undocumented migrants in South Africa at the Lindela Repatriation Centre*. Africa Check. https://africacheck.org/factsheets/lindela-repatriation-centre-migrants/

African Commission on Human and Peoples' Rights (2007). *Resolution on Migration and Human Rights - ACHPR/Res.114(XXXXII)07.* 2nd Ordinary Session held in Brazzaville, Republic of Congo, The Gambia. www.achpr.org/sessions/resolutions?id=166

African Commission on Human and Peoples' Rights (2014). *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines).* 53rd Ordinary Session. Luanda, Angola, The Gambia. http://www.achpr.org/files/special-mechanisms/prisonsand-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf

African Commission on Human and Peoples' Rights (2020). *General Comment No. 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1)).* The Gambia. www.achpr.org/public/Document/file/English/general_comment__on_the_right_to_freedom_of_movement_and_residence_article_121.pdf

Amit, R. (2010). *Lost in the vortex: irregularities in the detention and deportation of non-nationals in South Africa.* FMSP Research Report. African Centre for Migration and Society: South Africa. https://ssrn.com/abstract=3274019

Amit, R. (2015). *Understanding Immigration Detention and Deportation in South Africa: A Summary of Law, Practice and Human Rights Violations at the Lindela Detention Centre*. African Centre for Migration and Society. http://www.migration.org.za/uploads/docs/acms-issue-brief-11--understanding-immigrationdetention.pdf

Amit, R., & Zelada-Aprili, R. (2012). *Breaking the law, breaking the bank: the cost of Home Affairs' illegal detention practices*. African Centre for Migration and Society. Breaking-the-Law-Breaking-the-Bank-The-Cost-of-Home-Affairs'-Illegal-Detention-Practices.pdf (migration.org.za)

Amnesty International (2020). *South Africa 2020*. Amnesty International. https://www.amnesty.org/en/countries/africa/south-africa/report-south-africa/

Basson, A. (2018). State capture is much bigger than the Guptas, *News 24*, September 11. https://www.news24.com/Columnists/AdriaanBasson/state-capture-is-much-biggerthan-the-guptas-20180911

Berg, J. (2001). Accountability in private corrections: monitoring the performance of private prisons in South Africa. *South African Journal of Criminal Justice*, *14*, 327.

Bornman, J. (2019). How Lindela Became Bosasa's Meal Ticket. *Mail and Guardian*. December 11. https://mg.co.za/article/2019-12-11-00-how-lindela-became-bosasas-meal-ticket/

Carciotto, S., Gastrow, V., Johnson, C. (2018). *Manufacturing illegality: The impact of curtailing asylum seekers' right to work in South Africa*. Scalabrini Institute for Human Mobility: South Africa. manufacturingillegality.pdf (sihma.org.za).

Centre for Analytics and Behavioural Change (2022). Putting xenophobia first: Analysing the hashtags behind the Twitter campaigns *Daily Maverick*. February 20. www.dailymaverick.co.za/article/2022-02-20-putting-xenophobia-first-analysing-the-hashtags-behind-the-twitter-campaigns/

Chambers, D. (2021). Covid-19 halves deportations from SA, but usual culprits head list. *Sowetan Live*. June 26. www.sowetanlive.co.za/news/south-africa/2021-06-26-covid-19-halves-deportations-from-sa-but-usual-culprits-head-list/

Constitution of the Republic of South Africa (1996). *Chapter 2, Bill of Rights, Section 35: Arrested, Detained and Accused Persons*. South African Government. https://www.saps.gov.za/faqdetail.php?fid=8

Department of Home Affairs (2017). *White Paper on International Migration for South Africa*. South African Government. http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf

Department of Home Affairs (2019). Immigration Act 2002, Section 34(1), Determination of Places of Detention of Illegal Foreigners Pending Deportation. *Government Gazette*. August 8. www.gov.za/sites/default/files/gcis_document/201908/42622gon1046.pdf

Department of Home Affairs (2020). Immigration Act 2002, Section 34(1), Determination of Correctional Facilities as Places of Detention of Illegal Foreigners Pending Deportation. *Government Gazette*, May 7. https://www.gov.za/sites/default/files/gcis_document/202005/43292gon512.pdf

Department of Home Affairs (2021). *Minister's Immigration Directive No 01 of 2021 - Extension of ZEP for a period of 12 months*. South African Government. Department of Home Affairs - Minister's Immigration Directive No 01 of 2021 - Extension of ZEP for a period of 12 months (dha.gov.za).

Department of Justice and Correctional Services (2020). *Staatskoerant no 43225,government notice no. 460 of 09 April 2020. Directions issues in terms of regulation 10(2)(a) of the regulations under the Disaster Management Act, 2002*. South African Government. www.gov.za/sites/default/files/gcis_document/202004/43225fon460.pdf

Edwards, L., Stone, K. (2016). *Implementation of the Luanda Guidelines: Review of arrest, police custody, and remand detention in South Africa*. African Policing Civilian Oversight Forum (APCOF) Policy Paper # 14, December 2016. APCOF: South Africa.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2017). *Immigration detention*. Council of Europe (CoE): France. 09000016806fbf12 (coe.int)

Flynn, M. (2017). *Statement to the Working Group on the Use of Mercenaries Panel on "PMSCs in places of deprivation of liberty and their impact on human rights*." Global Detention Project. https://www.globaldetentionproject.org/statement-to-the-working-group-on-the-use-of-mercenaries-panel-onpmscs-in-places-of-deprivation-of-liberty-and-their-impact-on-human-rightsinmates, its mistreatment of prison staff, and the lack of accountability or proper enforcement by government agencies

Flynn, M., Cannon, C. (2009). *The privatization of immigration detention: Towards a global view*. Global Detention Project. Available from https://www.globaldetentionproject.org/the-privatization-of-immigrationdetention-towards-a-global-view-2

Gadisa, G., Sibanda, O., Vries, K., & Rono, C. (2020). Migration-related detention of children in Southern Africa: Developments in Angola, Malawi and South Africa. *Global Campus Human Rights Journal*, *4*(2), 403–423.

Gasa, S. (2020). Anxious wait for non-South African prisoners as Home Affairs take first step to ease parolee backlog. *News 24*, October 26. https://www.news24.com/news24/southafrica/news/anxious-wait-for-non-south-african-prisoners-as-home-affairs-take-first-step-to-ease-parolee-backlog-20201026#:~:text=Lotto-,Anxious%20wait%20for%20non%2DSouth%20African%20prisoners%20as%20Home%20Affairs,step%20to%20ease%20parolee%20backlog&text=Following%20the%20move%20to%20Level,their%20long%20overdue%20release%20dates

Gatticchi, G., Maseko, L. (2020). Xenophobia surges as Covid-19 slams South African economy. *Bloomberg*, December 20. https://www.bloomberg.com/news/articles/2020-12-20/xenophobia-surges-as-covid-19-slams-southafrican-economy

Gear, S., Gaura, D. (2020). Covid-19: Whatever unfolds in our prisons will affect all of us. *Ground Up*. May 26. https://southafrica.justdetention.org/covid-19-whatever-unfolds-in-our-prisons-will-affect-all-of-us/

Global Detention Project (2021). *Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing Criminal Enforcement of Migration*. Global Detention Project Online. www.globaldetentionproject.org/immigration-detention-in-south-africa-stricter-control-of-administrative-detention-increasing-criminal-enforcement-of-migration

Hicks, T. F. (1999). The constitution, Aliens Control Act, and xenophobia: The struggle to protect South Africa's pariah – the undocumented immigrant. *Indiana Journal of Global Legal Studies*, *7*(1), 393–417.

Hiropoulos, A. (2017). *Migration and detention in South Africa A review of the applicability and impact of the legislative framework on foreign nationals*. African Policing Civilian Oversight Forum (APCOF) Policy Brief. APCOF: South Africa. 018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf (apcof.org).

Hopkins, R. (2020). The misery merchants: life and death in a private South African prison. *Jacana Media*, September 02. https://jacana.co.za/product/the-misery-merchants-life-and-death-in-a-private-south-african-prison/

Human Rights Watch (2015). *World Report 2015: South Africa, Events of 2014*. Human Rights. https://www.hrw.org/worldreport/2015/country-chapters/south-africa#4cd794

International Commission of Jurists (2020). *Draft Briefing Note: Non-citizens rights to work in South Africa* International Commission of Jurists. www.ohchr.org/sites/default/files/Documents/Issues/Migration/GA76thSession/CSO/ICJ.pdf

International Detention Coalition (2016). *Alternatives to immigration detention in Africa*. International Detention Coalition. https://www.refworld.org/pdfid/5a5f55e04.pdf

International Detention Coalition (2018). *There are alternatives: Africa.* International Detention Coalition: Australia. There-are-alternatives-Africa-2018.pdf (idcoalition.org)

International Organisation for Migration (2011). *International Standards on Immigration Detention and non-custodial Measures*. Submission to the Working Group on Arbitrary Detention. International Organisation for Migration: Switzerland. www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/IOM3.pdf

International Detention Coalition (IDC) (2020). "COVID-19 impacts on immigration detention: Global responses." Available at https://idcoalition.org/wp-content/uploads/2020/10/COVID-19-Impacts-on-Immigration-Detention-Global-Responses-2020.pdf

Jenkins, F., & de la Hunt, L. (2011). Detaining asylum-seekers: Perspectives on proposed reception centres for asylum-seekers in South Africa. In J. Handmaker, L. A. de la Hunt, and J. Klaaren, (Eds.), *Advancing Refugee Protection in South Africa* (pp. 167–185). Berghahn Books.

Kavuro, C. (2022). The disappearance of refugee rights in South Africa. *Obiter*, *43*(1), 49–78.

Kaziboni, A. (2018). The Lindela Repatriation Centre, 1996–2014: Applying theory to the practice of human rights violations. *South African Crime Quarterly*, *66*, 41–52. https://doi.org/10.17159/2413-3108/2018/v0n66a5623

Landau, L. B., & Segatti, A. K. (2009). *Human Development Impacts of Migration: South Africa Case Study*. United Nations Development Programme Human Development Reports, Research Paper 2009/05. Human Development Impacts of Migration: South Africa Case Study Munich Personal RePEc Archive (uni-muenchen.de)

Lawyers for Human Rights (2008). *Monitoring Immigration Detention in South Africa*. Lawyers for Human Rights.

Lawyers for Human Rights (2011). *Court Criticizes Home Affairs Unlawful Detention Practices*. Lawyers for Human Rights: South Africa. www.lhr.org.za/news/2011/court-criticizes-home-affairs-unlawful-detention-practices

Lawyers for Human Rights (2014). *Press Statement: LHR Responds to Detention of Immigrants at Police Stations and SAPS. Incorrect Interpretation of Immigration Laws*. Lawyers for Human Rights: South Africa. http://www.lhr.org.za/news/year/2014

Lawyers for Human Rights (2016). *Submission on the Refugees Amendment Bill, 2016*. Lawyers for Human Rights: South Africa. 170124Lawyers_for_Human_Rights.pdf (pmg.org.za)

Lawyers for Human Rights (2018). *Open Letter to President Ramaphosa*. Lawyers for Human Rights.

Lawyers for Human Rights (2020a). *Costly Protection: Corruption in South Africa's Asylum System*. Lawyers for Human Rights: South Africa. https://www.lhr.org.za/wp-content/uploads/2020/09/Corruption-Report-V4-Digital.pdf

Lawyers for Human Rights (2020b). *Monitoring Policy, Litigious and Legislative Shifts in Immigration Detention in South Africa*. Lawyers for Human Rights: South Africa. https://www.lhr.org.za/wp-content/uploads/2020/06/Detention-Report-Final-Final-Digital1.pdf

Lenaola, I. (2019). The role of African courts in promoting refugee rights. *International Journal of Refugee Law Civil Appeal*, *108*(31), 343–348.

Mahamba, C. (2020). Negligent' Guards Blamed for Escape of 27 Undocumented Migrants at Lindela. *IOL News*, May 8. https://www.iol.co.za/the-star/news/negligent-guards-blamed-for-escape-of-37-undocumentedmigrants-at-lindela-47711783

Mfubu, P. (2017). *Alternatives to detention. University of Cape Town Refugee Rights Unit report to the UNHCR*. University of Cape Town: South Africa.
Migration and Coronavirus in Southern Africa Co-ordination group (2020). *Migration and Covid-19: A review of South Africa's policy response to the pandemic Summary of issue brief #2: Key concerns and recommendations*. Migration and Coronavirus in Southern Africa Co-ordination group: South Africa. www.mahpsa.org/wp-content/uploads/2020/07/Summary-of-MiCoSA-Issue-Brief-2.pdf
Mukumbang, F., Ambe, A., & Adebiyi, B. (2020). Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa. *International Journal for Equity in Health*, *19*(141), 1–7. https://doi.org/10.1186/s12939-020-01259-4
Myeni, T. (2022a). South African anti-immigration vigilante leader granted bail. *Al Jazeera,* March 28. www.aljazeera.com/news/2022/3/28/south-african-anti-immigration-militia-leader-granted-bail
Myeni, T. (2022b). *What is Operation Dudula, South Africas anti-migration vigilante? Al Jazeera,* April 8. www.aljazeera.com/features/2022/4/8/what-is-operation-dudula-s-africas-anti-immigration-vigilante
Ncube, M. (2017). South Africa Steps up Deportation of Asylum Seekers. *News Deeply*, October 17. https://www.newsdeeply.com/refugees/articles/2017/10/17/south-africa-steps-updeportation-of-asylum-seekers
Office of the High Commissioner for Human Rights (2020). *COVID-19: Measures needed to protect people deprived of liberty, UN torture prevention body says*. Office of the High Commissioner for Human Rights: Switzerland. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25756&LangID=E
Organization of African Unity (1969). *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*. 1001 U.N.T.S. 45. Organization of African Unity: Ethiopia. https://www.refworld.org/docid/3ae6b36018.html
Organization of African Unity (1981). *African Charter on Human and Peoples' Rights ("Banjul Charter")*. Organization of African Unity: Ethiopia. https://www.refworld.org/docid/3ae6b3630.html
Organization of African Unity (1990). *African Charter on the Rights and Welfare of the Child*. Organization of African Unity: Ethiopia. https://www.refworld.org/docid/3ae6b38c18.html
Parliamentary Monitoring Group (2020). *Question NW811 to the Minister of Home Affairs*. Parliamentary Monitoring Group: South Africa. https://pmg.org.za/committee-question/13510/
Parliamentary Monitoring Group (2021). *Question NW417 to the Minister of Home Affairs*. Parliamentary Monitoring Group: South Africa. https://pmg.org.za/committee-question/15619/
Republic of South Africa (2014). Annexure B: Minimum Standards of Detention. *Government Gazette*, May 22. https://www.vfsglobal.com/dha/southafrica/pdf/final-Immigration-Regulations-2014-1.pdf
Republic of South Africa (2021). Cabinet ends Special Zimbabwean Exemption Permit. *Government Gazette,* November 25. Available at Cabinet ends Special Zimbabwean Exemption Permit | SAnews.
Scalabrini Centre (2018). *What is the White Paper on International Migration?* Scalabrini Centre: South Africa. https://www.scalabrini.org.za/news/what-is-the-white-paper-on-international-migration/
Scalabrini Centre (2020). *Scalabrini Centre Wins Court Order to Ensure Asylum-Seekers and Special Permit Holders are able to receive the COVID-19 Social Relief of Distress Grant*. Scalabrini Centre: South Africa. www.sihma.org.za/Blog-on-the-move/scalabrini-centre-wins-court-order-to-ensure-asylum-seekers-and-special-permit-holders-are-able-to-receive-the-covid-19-social-relief-of-distress-grant
Shange, N. (2019). Government to cease leasing Lindela Repatriation Centre after buying the former Bosasa owned property. *Times Live,* December 20. https://www.timeslive.co.za/politics/2019-12-20-government-to-ceaseleasing-lindela-repatriation-centre-after-buying-the-former-bosasa-owned-property/
Sonke Gender Justice NPC v. President of the Republic of South Africa and Others. (2020). ZACC para 38–40.
South African Government (2020). *Parliament welcomes signing into law of Border Management Authority Bill*. South African Government. https://www.gov.za/speeches/parliament-welcomes-signing-law-border-management-authority-bill-22-jul-2020-0000
South African Government (2022). Government is dealing with illegal migration. *South African Government News Agency,* August 30. www.sanews.gov.za/south-africa/government-dealing-illegal-migration
South African Human Rights Commission (1999). *Report into the Arrest and Detention of Suspected Undocumented Migrants*. South African Human Rights Commission. https://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf
South African Human Rights Commission (2014a). *Rights to Health of Lindela Detainees Violated* – South African Human Rights Commission. http://www.gov.za/rights-health-lindela-detainees-violated-sahrc
South African Human Rights Commission (2014b). *Investigative Reports – Volume 4," 2014*. South African Human Rights Commission. https://www.sahrc.org.za/home/21/files/4%20SAHRC%20Investigative%20Reports%20VOLUME%20FOUR%2025062015%20to%20print.pdf
South African Human Rights Commission (2017a). *Report on Lindela Monitoring and Oversight Project*. South African Human Rights Commission.

South African Human Rights Commission (2017b). *Children Illegally Detained Under Bosasa's Watch at Lindela as Healthcare Crumbles*. South African Human Rights Commission. https://www.sahrc.org.za/index.php/sahrc-media/news/item/1075-children-illegally-detained-under-bosasa-s-watch-at-lindela-as-healthcare-crumbles
South African Human Rights Commission (2019). *Media Statement: Launch of the National Torture Preventive Mechanism (NPM)*. South African Human Rights Commission. https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2009-mediastatement-launch-of-the-national-torture-preventive-mechanism-np
Sutton, R., & Vigneswaran, D. (2011). A Kafkaesque state: deportation and detention in South Africa. *Citizenship Studies*, *15*(5), 627–642.
United Nations (1951). *Convention Relating to the Status of Refugees*. United Nations, Treaty Series, vol. 189, p. 137. https://www.refworld.org/docid/3be01b964.html
United Nations (1965). *International Convention on the Elimination of All Forms of Racial Discrimination*. United Nations, Treaty Series, vol. 660, p. 195. https://www.refworld.org/docid/3ae6b3940.html
United Nations (1966a). *International Covenant on Civil and Political Rights*. United Nations, Treaty Series, vol. 999, p. 171. https://www.refworld.org/docid/3ae6b3aa0.html
United Nations (1966b). *International Covenant on Economic, Social and Cultural Rights*. United Nations, Treaty Series, vol. 993, p. 3. https://www.refworld.org/docid/3ae6b36c0.html
United Nations (1967). *Protocol Relating to the Status of Refugees*. United Nations, Treaty Series, vol. 606, p. 267. https://www.refworld.org/docid/3ae6b3ae4.html
United Nations (1979). *Convention on the Elimination of All Forms of Discrimination Against Women*. United Nations, Treaty Series, vol. 1249, p. 13. https://www.refworld.org/docid/3ae6b3970.html
United Nations (1984). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. United Nations, Treaty Series, vol. 1465, p. 85. https://www.refworld.org/docid/3ae6b3a94.html
United Nations (1989a). *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*. A/RES/44/128. https://www.refworld.org/docid/3ae6b3a70.html
United Nations (1989b). *Convention on the Rights of the Child*. United Nations, Treaty Series, vol. 1577, p. 3. https://www.refworld.org/docid/3ae6b38f0.html
United Nations (1990). *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. A/RES/45/158. https://www.refworld.org/docid/3ae6b3980.html
United Nations (2003). *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. A/RES/57/199. https://www.refworld.org/docid/3de6490b9.html
United Nations (2007). *Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly*. A/RES/61/106. https://www.refworld.org/docid/45f973632.html
United Nations (2010). *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*. note/by the Secretariat. A/RES/65/229
United Nations (2011). *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante – Addendum – Mission to South Africa*. A/HRC/17/33/Add.4. https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-33-Add4.pdf
United Nations High Commissioner for Refugees. (2013, 12 March). *UNHCR intervention before the High Court of Kenya in the case of Kituo Cha Sheria and others v. The Attorney General*, Petition No. 115 of 2013. UN High Commissioner for Refugees. A/73/12. New York, US: United Nations. Available at: https://www.refworld.org/docid/5151b5962.html
United Nations (2016). *Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)(8 January 2016) A/RES/70/175*. United Nations General Assembly.
United Nations (2017). *Report of the Working Group on the Universal Periodic Review–South Africa*. A/HRC/36/16. https://documents-ddsny.un.org/doc/UNDOC/GEN/G17/216/43/PDF/G1721643.pdf?OpenElement
United Nations (2018). *Global Compact for Safe, Orderly and Regular Migration. A/RES/73/195*. United Nations.
United Nations Committee against Torture (2019). *Concluding Observations on the Second Periodic Report of South Africa.* CAT/C/ZAF/CO/2. https://bit.ly/2Pqfd0Z
United Nations Committee on Economic, Social and Cultural Rights (2000). *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the* Covenant), E/C.12/2000/4. United Nations Committee on Economic, Social and Cultural Rights: Switzerland.
United Nations Committee on Economic, Social, and Cultural Rights (2018). *Concluding Observations on the Initial Report of South Africa*. para 25. United Nations Committee on Economic, Social and Cultural Rights: Switzerland.
United Nations High Commissioner for Human Rights (2016). *Human Rights Committee Reviews the Report of South Africa*. http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17175&LangID=E
United Nations High Commissioner for Refugees (2012). *Detention guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*. United Nations High Commissioner for Refugees (UNHCR). https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html

United Nations High Commissioner for Refugees (2013). *UNHCR intervention before the High Court of Kenya in the case of Kituo Cha Sheria and others v. The Attorney General*, 12 March 2013, Petition No. 115 of 2013. UN High Commissioner for Refugees. A/73/12. New York, US: United Nations. https://www.refworld.org/docid/5151b5962.html

United Nations High Commissioner for Refugees (2018). *Report of the United Nations High Commissioner for Refugees Part II Global Compact on Refugees*. UN High Commissioner for Refugees.

United Nations Human Rights Committee (2014). *General Comment No. 35 Article 9 (Liberty and security of person)*. CCPR/C/GC/35.

United Nations Human Rights Committee (2017). *Concluding Observations on the Initial Report of South Africa*. CCPR/C/ZAF/CO/1.

United Nations Human Rights Committee (2018). *General Comment No 36 on the Right to Life. on article 6 of the International Covenant on Civil and Political Rights, on the right to life.* CCPR/C/GC/36. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf

United Nations Human Rights Council (2011). *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante*. A/HRC/17/33/Add.4. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/130/36/PDF/G1113036.pdf

United Nations Office of the High Commissioner for Human Rights (2020). *Working Group on Arbitrary Detention Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies*. https://www.ohchr.org/Documents/Issues/Detention/DeliberationNo11.pdf

United Nations Working Group on Arbitrary Detention (2005). *Civil and Political Rights, Including the Question of Torture and Detention - Report of the Working Group on Arbitrary Detention, Addendum* Visit To South Africa* (4-19 September 2005)," E/CN.4/2006/7/Add.3. https://undocs.org/E/CN.4/2006/7/Add.3

United Nations Working Group on Arbitrary Detention (2018). *Revised Deliberation No.5 on Deprivation of Liberty of Migrants. A/HRC/39/45*. United Nations General Assembly.

United States Department of State (2009). *Country Reports on Human Rights Practices South Africa.* U.S. State Department.

United States Department of State (2015). *Country Reports on Human Rights Practices for 2015: South Africa*. http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252729

Van Hout, M. C. (2021). Human rights violations, detention conditions and the invisible nature of women in European immigration detention: A legal realist account. *International Journal of Prisoner Health*, advance online publication. https://doi.org/10.1108/IJPH-03-2021-0023

Van Hout, M. C., & Wessels, J. (2021). "Ubuntu" I am because we are: COVID-19 and the legal framework for addressing communicable disease in the South African prison system. *International Journal of Prisoner Health*, *18*(4), 350–370. https://doi.org/10.1108/IJPH-05-2021-0046

Van Lennep, T. (2019). *Lindela And South Africa's Defective Deportation Regime*. Helen Suzman Foundation. Available at Lindela And South Africa's Defective Deportation Regime — Helen Suzman Foundation (hsf.org.za)

Xenowatch (2022). *African Centre for Migration & Society*, University of the Witwatersrand. www.xenowatch.ac.za

Zanker, F., & Moyo, K. (2020). The Corona virus and migration governance in South Africa: business as usual? *Africa Spectrum*, *55*(1), 100–112.

Ziegler, R. (2020). Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications? *Constitutional Court Review*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623049