

Right to health, securitisation of migration and standards of immigration detention in South Africa and Australia.

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1. Background

Several countries employ immigration detention (ID) to deter the influx of asylum seekers, refugees, and irregular migrants and South Africa and Australia are no exception.¹ The result follows that globally, tens of thousands of people are detained due to their immigration status, despite the well-established fact that ID negatively impacts the health and well-being of detainees and should only be used as a last resort.² This study considers the broad range of international³ and African regional⁴ human rights instruments and treaty protections that create the framework for regulating migration and protecting the fundamental human rights (including health) and freedoms of immigration detainees. It further dives into the realities of health rights in ID in South Africa and Australia, measured against the theoretical framework of these governments' duties to 'respect, protect and fulfil' detainees' rights to health and maintain normative immigration detention standards.⁵ Non-compliance with this international legal framework is pointed out, and positive steps towards meeting State obligations are proposed.

2. Methods, approach and intended outcome

This study intersects doctrinal human rights research and socio-legal studies.⁶ It focuses on how the international legal (human rights) framework regarding health rights and immigration detention standards (composition of rights) is placed within the South African and Australian social and legal contexts (attribution of rights). This cross-country perspective is created by considering pre-existing empirical evidence of lived experiences and actual conditions in immigration detention through a triangulated rule of law lens. The work will likely contribute strongly to sensitisation around the rights of immigration detainees and is intended to contribute to immigration detention reforms in both countries through publications, sharing of evidence with respective governments, country-level National Preventative Mechanisms (NPMs) under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT), and humanitarian and human rights advocacy organisations operating in the respective countries.

¹ T Filges, E Bengtsen, E Montgomery & M Wallach Kildemoes, 'The impact of detention on the health of asylum seekers: An updated systematic review: A systematic review' (*onlinelibrary.wiley.com*, 19 February 2024) <<https://doi.org/10.1002/cl2.1420>> accessed 24 October 2024

² Global Detention Project, 'Annual Report: Building Partnerships, Harnessing Data, Ending Arbitrary Immigration Detention' (*globaldetentionproject.org*, 2022) <<https://www.globaldetentionproject.org/2022-annual-report-building-partnerships-harnessing-data-ending-arbitrary-immigration-detention>> accessed 18 August 2023

³ United Nations Human Rights Council, 'Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General' (*documents-dds-ny-un.org*, 2023) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/149/97/PDF/G2314997.pdf?OpenElement>> accessed 01 February 2024

⁴ International Organisation for Migration EMM2.0, 'Regional Systems Relevant to International Migration Law (Africa)' (*emm.iom.int*, No Date) <<https://emm.iom.int/handbooks/international-migration-law/regional-systems-relevant-impl>> accessed 01 February 2024

⁵ United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' E/C.12/2000/4 (*refworld.org*, 11 August 2000) <<https://www.refworld.org/docid/4538838d0.html>> accessed 24 April 2023

⁶ T Peck, 'Interdisciplinary Methodological Approaches to Desk-Based Socio-legal Human Rights Research' (*lawandmethod.nl*, January 2023) <<https://doi.org/10.5553/REM/000069>> accessed 22 October 2024

3. The international legal framework

The Universal Declaration for Human Rights (UDHR) and the World Health Organization's (WHO) Constitution underscore that '[T]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition'.⁷ The United Nations High Commissioner for Refugees (UNHCR) has published a range of immigration detention standards that prohibit arbitrary detention and establish adequate conditions of detention that uphold migrants' rights and dignity.⁸ Regarding the realisation of the right to health, the Committee on Economic, Social and Cultural Rights (UN CESCR) developed General Comment No. 14, of which the specific legal obligations of States to respect, protect, and fulfil the right to health form the core.⁹ Moreover, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is relevant to immigration detention standards. It determines that no person may be subjected to torture and other forms of cruel, inhuman, or degrading treatment or punishment.¹⁰ No Asia-Pacific regional human rights framework exists; however, the African Charter on Human and Peoples' Rights (Banjul Charter) provides for the right to health, non-discrimination, and vulnerable groups (including migrants).¹¹

4. Country narratives: the law versus reality

Despite the South African Bill of Rights¹² guaranteeing every person's right to equality, freedom and the right to health, amongst others, evidence exists of changes in South African refugee and immigration laws with a shift towards stricter, securitised and exclusionary measures indicative of instances of State-driven xenophobia.¹³ Increased criminalisation of migration leads to irregular migrants, refugees and asylum seekers being detained in prisons despite international best practices prescribing administrative detention for migration purposes.¹⁴ Observers have regularly raised concerns regarding violations of international and domestic legal standards, including overcrowding, inadequate access to health care services, poor nutrition, and the detention of migrants, refugees, and asylum seekers alongside criminals.¹⁵ Australia also witnesses a rise in anti-immigrant sentiment and securitisation agendas¹⁶ and

⁷ United Nations (UN) General Assembly, 'Constitution of the World Health Organization' (*who.int*, 7 April 1948) <https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf#page=6> accessed 02 February 2024

⁸ United Nations Refugee Agency (UNHCR), 'Detention Guidelines - Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention', (*unhcr.org*, 2012) <<https://www.unhcr.org/media/unhcr-detention-guidelines>> accessed 08 March 2024

⁹ United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) (n5)

¹⁰ United Nations (UN), 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (CAT), United Nations, Treaty Series, vol. 1465, p. 85, (*treaties.org*, 10 December 1984) <https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf> accessed 26 February 2024

¹¹ African Union (AU), 'African Charter on Human and People's Rights' (*au.int*, 01 June 1981) <<https://au.int/en/treaties/african-charter-human-and-peoples-rights>> accessed 11 September 2024

¹² Government of South Africa, 'Constitution of the Republic of South Africa, Act 108 of 1996' (*gov.za*, 04 February 1997) <<https://www.gov.za/sites/default/files/images/a108-96.pdf>> accessed 10 September 2024

¹³ C Kavuro, 'The disappearance of refugee rights in South Africa.' (*scielo.org*, 2022) <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532022000100003> accessed on 05 February 2024

¹⁴ Constitutional Court of South Africa, Justice Theron, 'Visit to Lindela Repatriation Centre, Krugersdorp' (*concourt.org.za*, 30 March 2023) <[https://www.concourt.org.za/images/phocadownload/prison_visits/Justice%20Theron/Judicial Inspection of Lindela Repatriation Centre by Justice Theron March 2023.pdf](https://www.concourt.org.za/images/phocadownload/prison_visits/Justice%20Theron/Judicial%20Inspection%20of%20Lindela%20Repatriation%20Centre%20by%20Justice%20Theron%20March%202023.pdf)> accessed 30 August 2024

¹⁵ Global Detention Project (GDP), 'Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing Criminal Enforcement of Migration'. (*globaldetentionproject.org*, 2021) <www.globaldetentionproject.org/immigration-detention-in-south-africa-stricter-control-of-administrative-detention-increasing-criminal-enforcement-of-migration> accessed 29 August 2022

¹⁶ S O Ibekwe, 'Preventing people from risking their lives at sea': Forced migration and the securitization of asylum seekers in Australia' (*journals.sagepub.com*, 2022) <<https://journals.sagepub.com/doi/10.1177/20578911211032514>> accessed 01 February 2024.

is the only liberal democracy in the world without a Bill of Rights.¹⁷ Immigration detention in Australia, governed by the 1958 Migration Act, amongst others, is infamous for being punitive and arbitrary, with a policy of mandatory, indefinite detention for all unlawful non-citizens.¹⁸ There is no judicial review of decisions to detain, no consideration of necessity, reasonableness, or proportionality, and, thus, no review of a person's needs and vulnerabilities.¹⁹ Refugees are arbitrarily detained in inhumane conditions, lack adequate health care, and experience severe pain and suffering that rises to the level of cruel, inhuman or degrading treatment or torture.²⁰

4. Potential responses to health- and human rights non-compliance

Source countries should be encouraged to promote stability, education and employment opportunities and reduce the drivers of forced migration.²¹ Transit and destination States must adopt a rights-based approach to migration governance, with human rights and international law underpinning their national migration policies.²² States, scholars and non-governmental stakeholders should continue to develop a better understanding of the international legal framework relating to detention (and human rights), including alternatives to detention (ATD).²³ Policy reforms that include using ID as a last resort, considering the need and proportionality of detention, performing individual assessments for ID, utilising vulnerability screening tools to guide authorities on whether ID or ATD is most suitable, and strengthening the right to health and support systems for refugees and migrants in ID, including the provision of psychological health care, are recommended.²⁴

5. Conclusion

As signatories to all the relevant international human rights instruments, South Africa and Australia are duty-bound to respect, protect, and fulfil the health rights of immigration detainees and uphold normative immigration detention standards. However, the created narratives point to gross non-compliance. These States need the political will to effect change, cognisant that State sovereignty should consistently be exercised in full conformity with the obligations of the State under international law.²⁵ Migration can lead to beneficial socioeconomic results for both migrants as well as transit and destination states, but in order to harness these advantages, States must implement policies and practices that promote the socioeconomic welfare of everyone while adhering to international standards that respect, protect and fulfil the human (and health) rights of individuals within a State's territory without discrimination based on nationality, race, gender, religion or migration status.²⁶

¹⁷ Australian Human Rights Commission, 'Ten common questions about a human rights act for Australia', (humanrights.gov.au, 2009) <https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_questions.pdf> accessed 27 February 2024

¹⁸ Global Detention Project (GDP), 'Immigration Detention in Australia: Turning Arbitrary Detention into a Global Brand' (globaldetentionproject.org, February 2022) <<https://www.globaldetentionproject.org/countries/asia-pacific/australia>> accessed 17 April 2023

¹⁹ Global Detention Project (GDP) (2022) (n20)> accessed 17 April 2023

²⁰ J Barnes, 'Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia's Offshore Detention Centres' (watermarksilverchair.com, 20 July 2022) <<https://doi.org/10.1093/jrs/feac041>> accessed 26 February 2024

²¹ International Organisation for Migration (IOM) Office for the Americas 'How to 'solve' migration: A practical guide.' (americas.iom.int, Undated) <<https://americas.iom.int/en/blogs/how-solve-migration-practical-guide>> accessed 28 October 2024

²² International Organisation for Migration (IOM) 'State sovereignty and human rights' (emm.iom.int, Undated) <<https://emm.iom.int/handbooks/human-rights-migrants-overview/state-sovereignty-and-human-rights>> accessed 29 October 2024

²³ International Organisation for Migration (IOM), 'Global Compact Thematic Paper-Detention and Alternatives to Detention' (iom.int, 2017) <https://www.iom.int/sites/g/files/tmzbd1486/files/our_work/ODG/GCM/IOM-Thematic-Paper-Immigration-Detention.pdf>

²⁴ World Health Organization (WHO) Regional Office for Europe, 'Addressing the health challenges in immigration detention, and alternatives to detention: a country implementation guide' (iris.who.int, 2022) <<https://iris.who.int/handle/10665/353569>> accessed 20 October 2024

²⁵ International Organisation for Migration (IOM) (n22)

²⁶ International Organisation for Migration (IOM) Office for the Americas (n21)