



LAWYERS FOR  
HUMAN RIGHTS

**SOUTH AFRICA**

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ISSUES RELATED TO IMMIGRATION ENFORCEMENT

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## 1. Introduction

1.1 This submission for the 4<sup>th</sup> cycle of the Universal Periodic Review (UPR) of South Africa in March 2022 has been prepared by the Global Detention Project (GDP), a non-profit organisation based in Geneva that promotes the human rights of migration-related detainees, and Lawyers for Human Rights (LHR), a South Africa based non-profit that promotes the rights of migrants and refugees.

1.2 This submission focuses on human rights concerns relating to South Africa's immigration enforcement policies.

## 2. Context

2.1 South Africa is a major transit and destination for mixed-migration flows from Africa and Asia. The number of migrants in South Africa increased from 2 million in 2010 to over 4 million in 2019 and then dropped to approximately 2.9 million around mid-2020.<sup>1</sup>

2.2 In July 2020, South Africa adopted a Border Management Act (BMA 2020) that reiterates many of the securitisation priorities spelled out in the White Paper.<sup>2</sup> Framed as a law that will “remedy the [country’s] fragmented border management model,” the BMA 2020 created a new Border Management Authority, which concentrates various border management responsibilities under one agency operating under the authority of the Department of Home Affairs.

2.3 South Africa’s embrace of restrictive immigration and asylum policies dates back to the early 1990s, when the country adopted the Aliens Control Act No. 96 (later replaced with the Immigration Act 2002), which initially provided for indefinite migration-related detention without judicial review.<sup>3</sup>

2.4 An important enabler of South Africa’s securitised migration regime is the country’s endemic racism and xenophobia—both of which have been exacerbated by social tensions that emerged as a result of the COVID-19 pandemic. As unemployment soared in the months after the onset of the crisis in early 2020, large demonstrations were held in cities including Johannesburg and Pretoria demanding the mass deportation of foreigners.<sup>4</sup>

2.5 Chapter 2 of South Africa’s Constitution guarantees to all persons, including citizens and those documented and undocumented, fundamental protections and expansively outlines the rights of immigrants and provides for their protection from unconstitutional conduct and human rights violations.<sup>5</sup> South Africa is also a signatory to the 1951 UN Refugee Convention and its 1967 Protocol and the 1969 African Union Refugee Convention. The African Charter on Human and People’s Rights, the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa and other international obligations require South Africa to respect and promote the human rights of all persons within its borders, regardless of national origin.<sup>6</sup>

## 3. Arrest, Detention, and Deportation

3.1. South Africa’s legal norms relating to migration-related detention and expulsion are contained in several pieces of legislation: the Immigration Act (13 of 2002), the Regulations to the Immigration Act, the Refugee Act, the Refugees Amendment Act, and the Refugees Regulations. Section 2 of the Immigration Act highlights one of its primary objectives as “detecting and deporting illegal foreigners.” Section 32 provides that any “illegal foreigner” is to be deported, while section 34 establishes the grounds and procedures for detention and deportation. The Refugees Act provides that an

individual with an asylum seeker “permit,” which is given while they await the outcome of their asylum procedure, may be detained until the asylum procedure is concluded (Section 23).

- 3.2. There is no definitive number for the total population of those held in immigration detention, due to a failure of the Department of Home Affairs to publish this information. However, we do know that almost 10,000 people were arrested by the South African Police Services for irregular migration in 2019.<sup>7</sup>
- 3.3. The country’s migration-related detention policies have drawn criticism for many years, in particular the operations and conditions at its only long-standing dedicated immigration detention centre—the privately-operated Lindela Repatriation Centre, its use of police stations and prisons to hold people for immigration purposes, and the endemic corruption in police and immigration bureaucracies that operate detention sites and administer the asylum process
- 3.4. Observers have highlighted allegations of abuses at detention facilities, prolonged detention periods (including over the legal maximum of 120 days), restricted access to legal representation, a lack of interpreters, corruption and bribery, use of force, and repeated accusations of arbitrary detention. Detention conditions are poor, with limited access to health, food and water, overcrowding, and unsanitary conditions.<sup>8</sup>
- 3.5. South Africa’s Immigration Act provides criminal penalties, including fines and imprisonment, for violations of the act or failure to comply with immigration orders.<sup>9</sup> According to Lawyers for Human Rights (LHR), prior to 2017, detention was nearly always part of an administrative procedure aimed at ensuring deportation; only rarely were people brought before a court for immigration violations. However, since a 2018 Constitutional Court ruling that found that detention for immigration violations without judicial oversight was unconstitutional, LHR reports that they are “seeing most immigration violations being processed through the criminal justice system” before eventually being transferred over to administrative deportation procedures.<sup>10</sup>
- 3.6. Although they are generally protected from detention measures, asylum seekers can be detained in specific instances. In particular, they can be detained when authorities deem that they have violated specific criteria, resulting in removal of their asylum seeker “permit,” which they are provided with while their asylum application is processed. Additionally, observers report that police routinely ignore provisions of the Refugee Act that protect “newcomer asylum seekers” from detention and instead apply provisions of the Immigration Act that authorise the initial detention of people by police.<sup>11</sup>
- 3.7. Under the Immigration Act, people detained on suspicion of not having permission to be in the country can be held for an initial period of no more than 48 hours. Once in a deportation procedure, people can be detained for up to 30 days, which can be extended by 90 additional days upon issuance of a court warrant stating there are “good and reasonable grounds” for the extension. However, according to the African Centre for Migration and Society, “Immigration officials have routinely failed to obtain the required warrants to extend detentions beyond 30 days,” and individuals are often detained longer than the legal maximum of 120 days despite past legal rulings stating that these practices are unlawful.<sup>12</sup>
- 3.8. South Africa has long faced criticism for its controversial prison privatisation schemes involving both local and transnational security firms, which date back to the 1990s. South Africa’s sole dedicated immigration detention centre, the Lindela Repatriation Centre, located near Johannesburg, has a long history of management by

controversial private entities. Lindela was operated by Bosasa until December 2019, when it changed its name to African Global Operations. The company has been plagued with allegations of corruption, mismanagement, and abuse of detainees. The U.S. State Department has even highlighted the case in its annual global human rights reports, stating that “allegations of corruption and abuse of detainees by officials at the overcrowded Lindela Repatriation Center. ... Officers from Lindela were among those convicted by the DCS [Department of Correctional Services] of corruption or abuse.”<sup>13</sup>

3.9. As of June 2021, the South African Human Rights Commission (SAHRC) regularly monitored conditions at Lindela and made recommendations on its observations, however there was still no independent oversight body for the facility. Former Bosasa employees have also alleged that the company constantly strove to drive up detainee numbers in order to increase revenue streams from the Department of Home Affairs, and several reports have highlighted instances in which Bosasa guards assaulted, and even killed, detainees.<sup>14</sup>

3.10. After Bosasa went into liquidation in 2019, a new private company, EnviroMongz Projects, took charge of operations at Lindela in 2020. The company soon found itself mired in controversy when, in May 2020, 37 foreign nationals escaped from the facility after security guards left their posts.<sup>15</sup> Seven guards were charged with aiding the escapees, although the National Prosecuting Authority refused to enrol the case, citing insufficient evidence.<sup>16</sup>

#### **4. Asylum Seekers**

4.1 In recent years, the South African asylum system has been dogged by accusations of corruption and criticised for the glacial speed at which it processes applications. According to a 2015 Migration Policy Institute article, backlogs and high demand allowed “systemic corruption to flourish in the asylum system,” with asylum seekers often required to pay bribes to even enter refugee reception offices and acquire the necessary documents for their applications—a process that should be free of charge.<sup>17</sup>

4.2 As of January 2020, the DHA reported that there were 188,296 asylum seekers in the country,<sup>18</sup> and 80,758 registered refugees.<sup>19</sup> It is worth noting, however, that DHA statistics have previously been criticised as “flawed, inaccurate, and sharply contradictory.” LHR also notes that the number of asylum seekers will be much higher, given the barriers that new arrivals face—such as the closure of RROs.<sup>20</sup>

#### **5. Children in Detention**

5.1 The Immigration Act provides that children may be detained as a matter of last resort (Section 34). The Refugee Act (Section 29.2) also contains a provision specifically authorising the detention of a child, which the law says “must be used only as a measure of last resort and for the shortest appropriate period of time.” In practice, according to Lawyers for Human Rights, “the number of minors found in detention over the last few years has notably decreased. While children are at times still identified in Lindela and detained in the holding cells at police stations, the numbers of detained children that LHR has encountered have significantly decreased from those identified ten years ago.”<sup>21</sup>

5.2 The “Minimum Standards of Detention” (set out in Annexure B of the Immigration Regulations)<sup>22</sup> provide that detained children should be separated from unrelated adults. However, observers have highlighted instances in which this provision has been violated. In 2014, Lawyers for Human Rights reported discovering a child detained in the same cell as adults in the Benoni Police Station, “without regard for his age or the

fact that children are only to be detained as a last resort.” The child was then transferred to the Lindela facility while the Department of Social Development worked to verify the child's age and find an alternative "placement." LHR stated that the case demonstrated a lack of emphasis on the issue of detention of minors.<sup>23</sup>

- 5.3 Various NGO's have reported that the Department of Home Affairs and South African Police Service detained unaccompanied minors in immigration violations. In 2015, LHR handled six detention of minor cases and expressed concern that some arresting officers appeared to list minors as adults to intentionally detain them.<sup>24</sup>
- 5.4 According to the South African Human Rights Commission, between 2016 and 2017 a Médecins Sans Frontières (MSF) paediatrician working at the Lindela facility identified 50 minors at the centre.<sup>25</sup>
- 5.5 In 2004 the country's High Court issued a decision stating that migrant children can only be detained as a matter of last resort.<sup>26</sup> Although the country reported to the UN Global Study on Children Deprived of Liberty (2019) that it does not detain children for migration-related reasons,<sup>27</sup> migrant rights NGOs have reported that the Department of Home Affairs (DHA) and the South African Police Service continue to detain unaccompanied children for immigration violations in contravention of the High Court rulings.<sup>28</sup> The Immigration Act does not contain any specific provisions allowing or prohibiting the detention of any other vulnerable groups.

## 6. The Impact of COVID-19

- 6.1 As of October 2021, South Africa had 2,906,422 confirmed COVID-19 cases with 87,780 deaths, the highest documented figure across Africa. The government's COVID-19 aid programs overlooked refugees and asylum seekers, including undocumented migrants. While the government committed to include refugee and asylum seekers with documentation in the country's vaccination rollout, undocumented migrants faced barriers to vaccine access.<sup>29</sup>
- 6.2 In March 2020, shortly after the onset of the COVID-19 pandemic, South Africa announced plans to construct a 40-kilometre fence between South Africa and Zimbabwe, which was intended to “ensure that no undocumented or infected persons cross into the country.”<sup>30</sup> However, observers have pointed out that COVID cases have been far higher in South Africa than Zimbabwe, suggesting that authorities utilised the pandemic to justify its wider securitisation agenda.<sup>31</sup>
- 6.3 According to various experts and observers, the COVID-19 pandemic deepened the unequal treatment of non-nationals in South Africa.<sup>32</sup> Indeed, while authorities initially announced that South African-owned and operated small shops (spaza shops) could remain open during the nationwide lockdown, those that were foreign owned and operated could not.<sup>33</sup> This discriminative policy was only corrected on 6 April 2020.<sup>34</sup>
- 6.4 Similarly, while authorities acknowledged the dangers that the virus poses to confined populations and took steps to release 20,000 low-risk prison inmates, they simultaneously stepped up the arrest and detention of migrants for petty crimes, and continued to arrest, detain, and deport undocumented migrants (despite announcing on 25 March that asylum seekers whose visas expired after 16 March would not be penalised or arrested)—justifying such actions as necessary measures to contain the spread of the virus.<sup>35</sup> As the International Detention Coalition (IDC) wrote, “This proves that the preventative measures that were put in place in prisons and detention facilities were tailored only towards natural citizens of the state and further amplifies the dehumanization of migrants in South Africa.”<sup>36</sup>

- 6.5 Meanwhile, Refugee Reception Offices (RROs) were closed as part of the nationwide lockdown, leaving non-nationals unable to renew permits, register births, or legalise their stay in South Africa and leaving them at an increased risk of arrest and detention given their undocumented status.
- 6.6 Junior Ngoy is one of the many refugees who was arrested during the COVID-19 pandemic for being undocumented. Refugee reception offices have been closed since March 2020 and he has not been able to apply for a visa since. Ngoy was arrested in February 2021 and was sentenced to six month's imprisonment for being 'an illegal immigrant'. Ngoy states that he repeatedly tried to apply for asylum at the Desmond Tutu Refugee Reception Centre in Marabastad, Pretoria, however his efforts were "fruitless".<sup>37</sup>
- 6.7 Prior to the pandemic, access for non-citizens to documentation had become increasingly difficult. Unfortunately, responses to the pandemic have increased these existing challenges. Since the declaration of the National State of Disaster in March 2020, the Department of Home Affairs ("DHA") has issued blanket extensions for those with immigration visas or permits that expired after the declaration of the State of Disaster and closure of refugee reception offices, with the most recent extension running until 30 April 2022.
- 6.8 In addition, the DHA have opened an online service through which asylum seeker visas and refugee permits can be renewed, without having to physically go to a RRO. Refugee and asylum seekers whose documentation expired during the national lockdown are eligible to apply. However, civil society has indicated that this process is slow with many challenges such as increased delays in either receiving a response, or receiving a renewed permit.<sup>38</sup>
- 6.9 During the pandemic, non-nationals were placed in already overcrowded detention facilities where social distancing was impossible (according to the IDC, prisons and detention facilities were already operating at 200 – 300 percent capacity at the start of the pandemic.)<sup>39</sup> Ad hoc facilities also appear to have been used to hold non-nationals. According to media reports, police rounded up hundreds of homeless migrants at the start of the crisis, transferring them to Strandfontein Camp—a tented facility set up by Cape Town authorities in response to the pandemic. Conditions in this camp were quickly flagged by the South African Human Rights Commission, which documented severe movement restrictions, poor quality bedding, insufficient hygiene levels, and the inability to social distance. Although the facility closed on 20 May, a group of 180 who had been confined in the facility were reportedly moved at night to an un-serviced site under a highway overpass in Culemborg, central Cape Town.<sup>40</sup>
- 6.10 In May 2020, authorities also designated correctional facilities as temporary immigration detention sites during the pandemic. The "Immigration Act (13/2002): Determination of Correctional Facilities as Places of Detention of Illegal Foreigners Pending Deportation," provides that "illegal foreigners" may be placed in such facilities prior to their deportation or transfer to the Lindela facility "for the duration of the period of the national state of disaster as declared in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002)."<sup>41</sup>
- 6.11 Although borders were closed, authorities continued to conduct deportations during the pandemic. In May 2020, the country's Minister of Home Affairs ordered deportations to be stepped up following an escape attempt from Lindela Repatriation Centre and several riots. On 7 May 2020, 94 Lesotho nationals were deported, followed by 527 Zimbabwean nationals two days later.<sup>42</sup>

## 7. Xenophobic Attacks

- 7.1 In 2015, South Africa experienced a wave of attacks aimed at non-nationals which resulted in the loss of life and damage to property. These attacks were strongly condemned by the Government. The South African Police Service, among other law enforcement agencies, stepped in and stopped the attacks and the spread to other parts of the country.
- 7.2 In September 2019, unrest in Johannesburg resulted in the looting and burning of foreign-owned shops, several deaths, and the use of teargas and rubber bullets by police to disperse armed protestors shouting anti-immigrant chants.<sup>43</sup> Police were also accused of raiding migrant owned businesses and detaining hundreds of people, many of whom were taken to the Lindela detention centre.<sup>44</sup>
- 7.3 In March 2021, a large-scale and coordinated attack on non-national street-traders and their businesses occurred in Durban's central business district. Members of the Umkhonto we Sizwe Military Veterans Association had led demonstrations calling for the removal of foreign nationals in the city since November 2020, accusing them of stealing economic opportunities from locals.<sup>45</sup>
- 7.4 The South Africa's national human rights institution (SAHRC) condemned the attacks,<sup>46</sup> as did LHR's Durban Legal Clinic, which intervened directly through engagement with the Mayor's office and the SAHRC and denounced the unlawfulness of the attacks. Despite the escalation of attacks, law-enforcement agencies did not intervene to stop them.

## 8. The National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance

- 8.1 The South African government adopted the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) in 2019.<sup>47</sup> The NAP has been developed through a comprehensive consultation process between government, civil society, and other stakeholders, and it is informed by general principles of universality, interdependence and indivisibility of human rights, participation and inclusion, progressive realisation, accountability, equality and non-discrimination. The NAP proposes a five-year plan, signed by the South African government, to combat many forms of discrimination in South Africa, including xenophobia.
- 8.2 Xenophobia is importantly addressed by the NAP from an intersectional perspective. The NAP additionally defines xenophobia as "an unreasonable fear, distrust, or hatred of strangers, foreigners, or anything perceived as foreign or different and is often based on unfounded reasons and stereotypes".<sup>48</sup>

## 9. RECOMMENDATIONS DURING THE 3rd CYCLE OF UPR

The following recommendations were made during the 3rd cycle of the Universal Periodic Review (UPR) of South Africa (27<sup>th</sup> Session) relating to the human rights of refugees, asylum seekers, and migrants:

### 9.1 *On International Standards and Human Rights Mechanisms:*

South Africa *accepted* the following:

- Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Spain) (Denmark) (Italy) (Lebanon) (Montenegro) (Senegal) (Burkina Faso) (Portugal) (Philippines) (Germany) [139.7]; Guatemala [139.8]; Austria [139.9]; Albania [139.10]; Brazil [139.11];

- Continue to take measures to prevent torture and other forms of ill-treatment, including steps towards the ratification of the Optional Protocol to the Convention against Torture (Georgia) [139.12];
- Intensify its efforts to ratify the Optional Protocol to the Convention against Torture, including by holding multi-stakeholder consultations on a possible national preventive mechanism model most suitable for South Africa (Rwanda) [139.13];
- Ratify the Optional Protocol to the Convention against Torture with a view to establishing a national preventive mechanism against torture (Chile) [139.14];
- Ratify the Optional Protocol to the Convention against Torture and establish a national preventive mechanism (Hungary) [139.15];
- Take all necessary measures to ensure that all reports of ill-treatment and torture in prisons and centres of detention are adequately investigated and ratify the Optional Protocol to the Convention against Torture (Estonia) [139.17];
- Ratify the Optional Protocol to the Convention against Torture, to open up for international inspection its places of detention (Norway) [139.18];
- 139.38 Establish an effective and independent national mechanism for the prevention of torture according to the criteria of the Optional Protocol to the Convention against Torture (Switzerland).

South Africa *noted* the following recommendations:

- Ratify the International Convention on the Protection of the Rights of All Migrant Workers and “Members of Their Families (Burkina Faso) (Niger) (Uganda) (Philippines) (Sierra Leone) [139.1];
- Promptly ratify the International Convention on the Rights of All Migrant Workers and Members of Their Families (Guatemala) [139.2];
- Consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Sri Lanka) (Sudan) [139.3];
- Ratify, before the next cycle of the universal periodic review, the Optional Protocol to the Convention against Torture and adopt measures to improve access to justice, redress and rehabilitation for victims of torture (Czechia) [139.16];
- Ratify the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness (Belgium) (Germany) [139.21];
- Accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness (Australia) [139.23]; (Kenya) [139.22];
- Facilitate the visit of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (Congo) [139.31];

## **9.2 On combatting racism, racial discrimination, xenophobia, and hate speech**



South Africa *accepted* the following recommendations:

- Expedite the approval of the draft national action plan to combat racism, racial discrimination, xenophobia and related intolerance, by the relevant organ, and allocate proper resources for its implementation (Ethiopia) [139.53]; (Togo) [139.54]; (Bolivarian Republic of Venezuela) [139.55]; Turkey [139.47];
- Continue efforts to finalize the draft national action plan to combat racism, racial discrimination, xenophobia and related intolerance (Namibia) [139.56];
- Take all necessary steps to address xenophobia through legislation, appropriate public awareness programmes and promotion of tolerance and cultural diversity, and adopt a national action plan to combat racism, racial discrimination, xenophobia and related intolerance (Sweden) [139.57];
- Strengthen measures to prevent violence against foreigners. These include comprehensive education and awareness programmes regarding xenophobia and the rights of migrants, including refugees and asylum seekers, as well as programmes that promote inclusion (Canada) [139.60];
- Heed the recommendation of the Human Rights Committee to redouble efforts to prevent and eliminate all manifestations of racism and xenophobia, as well as to improve the policing action in its response to violence against non-citizens (Honduras) [139.63];
- Improve police responses to violence against foreigners (Central African Republic) [139.64];
- Redouble efforts to prevent and eradicate all manifestations of racism and xenophobia and improve the policing action in its response to violence against refugees, asylum seekers and migrants, among others (Guatemala) [139.65]; State of Palestine [139.66];
- Continue efforts to combat all forms of racial discrimination, xenophobia and racism, in particular with respect to refugees, asylum seekers and migrants (Senegal) [139.73]; Greece [139.79]; France [139.80];
- Continue its efforts to combat discrimination, xenophobia and racism against non-citizens (Bangladesh) [139.74]; Congo [139.77];
- Fight all forms of xenophobia and reject discrimination against migrants (Chad) [139.76];
- Take all required measures to halt the exploitation of migrants, asylum seekers and refugees and facilitate their integration into society (Turkey) [139.81];
- Prevent racial discrimination and other forms of expression with xenophobic overtones against foreigners (Kenya) [139.82];
- Strengthen measures to prevent and eradicate all manifestations of discrimination, xenophobia and violence against foreign nationals (Rwanda) [139.83];
- Step up measures aimed at addressing the systematic attacks on immigrants (Mozambique) [139.87];

- Continue to improve socioeconomic development strategies and plans in order to avoid xenophobia and other forms of intolerance towards foreigners in South Africa (Ukraine) [139.88].

South Africa *noted* the following recommendations:

- Take proper legal measures, including compensations on the attacks on foreign nationals resulting in loss of life and damage to property in parts of the country (Ethiopia) [139.72];

### **9.3 On Law Enforcement and Conditions of Detention:**

South Africa *accepted* the following recommendations:

- Take further action regarding oversight of and training for security forces in human rights, including to address violence related to hatred against foreigners, and make sure security forces carrying out law enforcement duties comply with United Nations standards (Austria) [139.110];
- Improve conditions in detention centres and avoid overcrowding, as well as the detention of migrants (Mexico) [139.113];

## **10. RECOMMENDATIONS FROM OTHER HUMAN RIGHTS BODIES**

10.1 South Africa has ratified several important UN treaties relevant to immigration detention, including the Convention against Torture, the Convention on the Rights of the Child, and the Convention on the Elimination of all Forms of Racial Discrimination. Critically however, South Africa has not ratified the Convention on the Protection of the Rights of all Migrant Workers—despite several states urging ratification during the third cycle of the Universal Periodic Review in 2017 (see above).

10.2 Following its second periodic review of South Africa, in 2019 the UN Committee against Torture (CAT) raised several concerns regarding the country’s detention of non-nationals. Issues raised included: allegations that some immigration officers refuse to provide asylum seekers with asylum transit visas at ports of entry, exposing them to immediate risk of detention and deportation; the fact that the 2002 Immigration Act provides for the holding of an “illegal foreigner” in custody for prolonged periods without a court hearing; the prolonged detention of asylum seekers at the Lindela Repatriation Centre, “in inadequate conditions that include overcrowding and a lack of hygiene and medical services”; and a proposal in the 2017 Department of Home Affairs (DHA) White Paper on International Migration to create detention facilities at the country’s borders that would confine asylum seekers while their applications are processed. CAT urged South Africa to cease the prolonged detention of non-nationals at Lindela without warrant, to apply alternatives to detention, and to ensure adequate living conditions in all detention facilities.<sup>49</sup>

10.3 In 2016, the UN Human Rights Committee noted its concerns regarding the use of police stations and prisons for immigration detention purposes; lengthy detention periods at Lindela without warrants; the protracted detention of stateless persons and their deportation to countries where they are not recognised as citizens; and poor detention conditions at Lindela. The committee thus urged South African authorities to ensure that detention pending deportation is used only as a measure of last resort; that they only detain non-nationals in dedicated immigration detention facilities; and that efforts are made to ensure adequate living conditions.<sup>50</sup>

10.4 In 2005, the UN Working Group on Arbitrary Detention (WGAD) visited South Africa, during which it visited the Lindela Repatriation Centre. Amongst various concerns identified by the delegation was their observation that some immigration detainees had been arbitrarily detained, ill-treated, and unable to contest the validity of their detention—leaving them vulnerable to deportation without recourse or review.<sup>51</sup>

10.5 During a visit to the country in 2011, the UN Special Rapporteur on the human rights of migrants also visited Lindela facility and noted that six years on from the WGAD's report, similar concerns remained. The rapporteur also raised his concerns regarding the privatisation of Lindela facility, questioning the ability of detainees to claim asylum or protection under the Refugee Act given that interactions are with a private company rather than the Department of Home Affairs. The rapporteur also heard complaints regarding access to health care and culturally appropriate diets.<sup>52</sup>

## **11. RECOMMENDATIONS from Global Detention Project and Lawyers for Human Rights**

Based on the information provided above, South Africa should implement the following measures to bring its policies and practices in line with its international human rights obligations and to improve its treatment of vulnerable migrants, refugees, and asylum seekers:

11.1 Fully implement all the recommendations South Africa accepted during the previous UPR cycles with respect to protecting the rights of refugees, asylum seekers, and migrants

11.2 In line with recommendations from South Africa's 3<sup>rd</sup> UPR review, take immediate steps to ratify the Optional Protocol to the Convention against Torture and establish a national preventive mechanism

11.3 As recommended during the 3<sup>rd</sup> UPR review, take immediate steps to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

11.4 As recommended during the 3<sup>rd</sup> UPR review, ratify the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness

11.5 Ratify all other international human rights treaties without delay including the Convention for the Protection of All Persons from Enforced Disappearance and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>53</sup>

11.6 Reform criminal law to decriminalise migration violations, as stipulated by the UN Working Group on Arbitrary Detention, Revised Deliberation No. 5 on Deprivation of Liberty of Migrants (A/HRC/39/45, 2018, para. 10.): "The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows. Migrants must not be qualified or treated as criminals, or viewed only from the perspective of national or public security and/or health."<sup>54</sup>

11.7 In accordance with "Joint General Comment No, 4 (2017) of the UN Committee on the Protection of the Rights of all Migrant Workers and Members of their Families and No. 23 (2017) of the Committee on the Rights of the Child, on State obligations

regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return,” unaccompanied and accompanied children and their families should never be detained.<sup>55</sup> Children should never be detained because of their parents’ migration status and the practice of child immigration detention should be eradicated and prohibited by law [para 5]. According to the Committee on the Rights of the Child, the detention of any child because of their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interest of the child. Similarly, the detention of children with their family is never justified and requires authorities to identify non-custodial solutions for the whole family [para 11]. The possibility of detaining children as a measure of last resort, which may apply in contexts such as juvenile criminal justice, is not applicable in immigration settings and would contravene the principle of the best interests of the child [para 10].

- 11.8 Provide public access to regularly updated statistics concerning migration-related detention procedures and deportations, including disaggregated information broken down according to gender, age, and reason for detention and/or removal.
- 11.9 Provide detailed information on where—and in what conditions—refugees and migrants are detained for reasons related to their nationality, or asylum, refugee or residence status.
- 11.10 Ensure that asylum seekers have full and unimpeded access to asylum determination procedures and that all migrants can access civil documentation, such as renewal of permits and visas, birth registration etc., efficiently and without delays to avoid arbitrary arrest and detention.
- 11.11 Urgently address accusations of corruption and extortion in the asylum system, including reports that asylum seekers have to pay money to submit applications, renew and issue documents, have access to an interpreter and a refugee status determination (RSD) officer – services which should all be free.
- 11.12 Put in place an independent oversight body for Lindela Repatriation Centre and urgently address reports of corruption, mismanagement, and abuse in the centre
- 11.13 Address reports of poor conditions, overcrowding, ill-treatment, corruption, and abuse of detainees in all detention facilities, including in police stations and prisons where immigration detainees are routinely held. Ensure that all detainees have access to legal representation, information, and interpreters as necessary
- 11.14 Investigate and remedy all reports that individuals are being detained for longer than the legal maximum of 120 days despite past legal rulings stating that these practices are illegal.
- 11.15 Reconsider plans in the 2017 White Paper on International Immigration to construct “Asylum Seeker Processing Centres” along the country’s northern border and to build more “Immigration Repatriation Facilities” at the provincial level, which could result in the detention of tens of thousands of migrants and asylum seekers.
- 11.16 Ensure that policies to exclude asylum seekers who fail to apply for asylum in “safe third countries” before arriving in South Africa and to encourage visa-free travel in the region in exchange for more return agreements with countries in Africa (2017 White Paper) do not result in the refoulement of refugees to countries where their lives, freedom, and safety could be threatened.

- 11.17 Ensure that sites used to accommodate refugees, asylum seekers, migrants, and stateless persons are adequately equipped with sanitation supplies and have implemented other measures to prevent the spread of COVID-19.
- 11.18 Disclose information about measures being taken to protect immigration detainees during the pandemic, including access to vaccinations and treatments.
- 11.19 Urgently address all reports of xenophobic and racist violence, abuse, and discrimination against non-nationals, migrants, refugees, and asylum seekers in South Africa. Implement public awareness raising and training programmes, in particular aimed at law enforcement agencies, to combat racism and xenophobia.
- 11.20 Fully implement the 2019 National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP).

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