



BOTSWANA

JOINT SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

108TH SESSION (14 November-2 December 2022)

ISSUES RELATED TO IMMIGRATION DETENTION

Submitted in October 2022

Joint submission from:

Global Detention Project (GDP)

1-3 rue de Varembe,
1202 Geneva,
Switzerland
W: www.globaldetentionproject.org
E: admin@globaldetentionproject.org

Lawyers for Human Rights (LHR)

87 De Korte Street
Braamfontein, Johannesburg
South Africa
W: www.lhr.org.za
E: nabeelah@lhr.org.za

ABOUT THE GLOBAL DETENTION PROJECT

The Global Detention Project (GDP) is a non-profit organisation based in Geneva that promotes the human rights of people who have been detained for reasons related to their non-citizen status. Our mission is:

- To promote the human rights of detained migrants, refugees, and asylum seekers;
- To ensure transparency in the treatment of immigration detainees;
- To reinforce advocacy aimed at reforming detention systems;
- To nurture policy-relevant scholarship on the causes and consequences of migration control policies.

ABOUT LAWYERS FOR HUMAN RIGHTS

Lawyers for Human Rights (LHR) is an independent, non-profit human rights organization, started by a group of activist lawyers in 1979 and located in South Africa. LHR's programs undertake strategic work in six areas of human rights law, including a key focus on refugee and migrant rights, including immigration detention. LHR employs a holistic approach to social justice and human rights enforcement that includes strategic litigation, advocacy, law reform, human rights education, and community mobilization and support.

BOTSWANA

JOINT SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

108th Session (14 November-2 December 2022)

1. INTRODUCTION

This submission has been prepared by Lawyers for Human Rights (LHR) and the Global Detention Project (GDP) for consideration by the Committee on the Elimination of all Forms of Racial Discrimination (CERD) at its 108th session where it will consider Botswana's state report as part of the 17th-22nd periodic review of Botswana under the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).¹

This submission focuses on human rights concerns relating to Botswana's immigration enforcement policies and practices, with a focus on detention and the treatment of at-risk groups. In particular, it examines the discriminatory treatment and detention of non-citizens (migrants, refugees, and asylum seekers) on the basis of their race, colour, nationality, and/or ethnic origin, in the context of Botswana's obligations under the ICERD and the General Recommendations of the CERD. It is based on research undertaken by LHR and an interview conducted by LHR with a partner organisation in Botswana—the Botswana Network on Ethics, Law and HIV/AIDS (BONELA).²

2. RELEVANT ICERD OBLIGATIONS

Botswana acceded to the ICERD on 20 February 1974.³ Pursuant to Article 5 of the ICERD, State Parties to the ICERD undertake to “prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law” in order to enjoy the rights listed therein, including the “right to freedom of movement and residence within the border of the State”⁴ and “the right to leave any country, including one's own, and to return to one's country.”⁵

¹ UN General Assembly, “International Convention on the Elimination of All Forms of Racial Discrimination,” 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, (ICERD), <https://www.refworld.org/docid/3ae6b3940.html>

² Lawyers for Human Rights, Online interview with Katlego Sechele (Programs Coordinator, BONELA), 19 October 2022.

³ ICERD (note 1).

⁴ Article 5(d)(i).

⁵ Article 5(d)(ii).

CERD “General Recommendation No.22: Article 5 and refugees and displaced persons,”⁶ emphasises that in respect of State Parties’ obligations in terms of Article 5:

“(a) All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety;

(b) State parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of non-refoulement and non-expulsion of refugees;”⁷

CERD General Recommendation No. 30 on Discrimination Against Non-Citizens⁸ also makes certain recommendations to State Parties as they relate to non-citizens, including a recommendation to “ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum seekers meet international standards.”⁹

It must be noted, however, that Botswana has made several reservations to the 1951 Convention on the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees. These include reservations in respect to access to freedom of movement and wage-earning employment, and are given effect to in Botswana’s domestic laws as set out below.¹⁰

3. DOMESTIC LAWS AND REGULATIONS

3.1. The Constitution of Botswana

The Constitution of 1966 (as amended) is the supreme law in Botswana.¹¹ Generally, the rights afforded under the Constitution are afforded to every person in the country. However, it is important to note there are some specific rights that are only afforded to Botswana. These rights include the rights to move freely within Botswana, reside in any part of Botswana, and to leave Botswana.¹² This is contrary to the general non-discrimination principles underscored in the ICERD and specifically to Article 5, which provides for equal rights without discrimination, including rights to freedom of movement.

Chapter II Section 15 of the Constitution sets out protection from discrimination. According to sections 15(1) and (2) of the Constitution, “no law shall make any provision that is

⁶ UN Committee on the Elimination of Racial Discrimination (CERD), “General Recommendation No. 22: Article 5 and refugees and displaced persons,” 24 August 1996, available at: <https://www.refworld.org/docid/4a54bc340.html>

⁷ Paragraph 2 of General Recommendation No. 22.

⁸ UN Committee on the Elimination of Racial Discrimination (CERD), “CERD General Recommendation XXX on Discrimination Against Non Citizens, 5 August 2004, available at: <https://www.refworld.org/docid/45139e084.html>

⁹ Article 19 of CERD General Recommendation 30.

¹⁰ United Nations High Commission for Refugees, “State parties, including reservations and declarations, to the 1951 Refugee Convention,” <https://www.unhcr.org/5d9ed32b4>

¹¹ The 1966 Constitution of Botswana, which was amended in 2016, is currently under a constitutional review process. See: ConstitutionNet, “Promise Fulfilled? Botswana’s First Comprehensive Constitutional Review Process Gets Underway,” 25 February 2022, <https://constitutionnet.org/news/promise-fulfilled-botswanas-first-comprehensive-constitutional-review-process-gets-underway>

discriminatory either of itself or in its effect” and “no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.” Section 15(3) defines “discriminatory” as “affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

However, Section 15(4) states that laws related “to persons who are not citizens of Botswana” are not subject to the non-discrimination provisions stipulated in Section 15(1).

3.2. The Immigration Act and the Refugees (Recognition and Control) Act

The key provisions regulating administrative immigration-related detention in Botswana are provided in the Immigration Act [25:04] of 1966 (Immigration Act), the Refugees (Recognition and Control) Act [25:03] of 1968 (Refugees Act),¹³ the Prisons (Centres for Illegal Immigrants) Regulations, and the Prisons (Declaration of Prisons) Order SI 32 of 2002.

- Section 4 of the Immigration Act states that “Any person entering Botswana shall... present himself immediately to the nearest immigration officer,”¹⁴ and the “immigration officer may examine any such person for the purpose of ascertaining whether that person is or is not a prohibited immigrant or liable for removal under section 6.”¹⁵
- Furthermore, Section 7 of the Immigration Act outlines that “the following persons shall be prohibited immigrants and their entry into or presence within Botswana is unlawful—
 - b. any idiot or epileptic, or any person who is insane or mentally deficient, or any person who is deaf and dumb, or deaf and blind, or otherwise physically afflicted, unless in any such case he or a person accompanying him or some other person gives security to the satisfaction of the Minister for his permanent support in Botswana, or for his removal therefrom whenever required by the Minister;”
- Within section 10 of the Immigration Act, “any person suspected of being a prohibited immigrant; or a person liable to be declared to be an undesirable inhabitant of or visitor to Botswana under section 7(f), [and] may be detained by an immigration officer for such reasonable period, not exceeding 14 days, as may be required for the purpose of making inquiries as to such person's identity and antecedents.”

¹³ In the Second Periodic Report submitted by Botswana to the Human Rights Committee, it reported that the Attorney General's Chambers was currently drafting an updated Refugee Recognition and Control Bill. The Human Rights Committee recommended that Botswana ensure that this Bill is fully compliant with all international standards, including the ICCPR; provides for adequate safeguards against arbitrary detention, deportation and refoulement; and that the Botswanan government continued to cooperate and engage with the Office of the UN High Commissioner for Refugees during all stages of the drafting process. See: Human Rights Committee, “Concluding observations on the second periodic report of Botswana,” 24 November 2021, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/352/66/PDF/G2135266.pdf?OpenElement>

¹⁴ Subsection 1 of the Immigration Act.

¹⁵ Subsection 2 of the Immigration Act.

- Section 14 of the Immigration Act states “any person who is liable to be removed from Botswana under this Act may be detained by an immigration officer for such period as may be necessary for the completion of arrangements therefor” and “such person may during such period be detained in the nearest convenient prison, [and] any person so detained and not serving a sentence of imprisonment shall be treated as a person awaiting trial.”
- Section 6 of the Refugees Act states that “where an immigrant who is liable to be removed from Botswana under the provisions of the Immigration Act is summoned to appear before a Committee under section 5 (1) (a), pending such determination he may be detained by an immigration officer for a period not exceeding 28 days; if he is so detained the provisions of section 15 (2) and (3) of the Immigration Act shall apply in relation to him as if he were being detained under subsection (1) of that section.”

Most recently, the Committee against Torture (CAT) noted its concern that the Refugees Act does not provide the right to legal representation during the refugee status application process.¹⁶ Furthermore, the CAT was also concerned by the fact that persons of concern could not participate meaningfully in the Minister of Justice’s decision-making process regarding the recommendations of the Refugee Advisory Committee or to appeal decisions to an independent authority.

Law enforcement must ensure that the recommendations in Section V of CERD’s General Comment No.30 are adhered to within the administration of justice. In particular, detained non-citizens must be properly protected in domestic law, and the state must comply with international human rights, refugee, and humanitarian law. Furthermore, when it comes to the expulsion and deportation of non-citizens, state parties hold an obligation under Section VI, Article 25, to “ensure that laws concerning deportation or other forms of removal of noncitizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.”¹⁷

4. TREATMENT OF REFUGEES, ASYLUM SEEKERS AND MIGRANTS IN BOTSWANA

4.1 Places and Conditions of Detention

Non-citizens are detained at two key sites in Botswana—the [Francistown Centre for Illegal Immigrants \(FCII\)](#) and [Dukwi Refugee Camp](#). The FCII is designated specifically for detaining and processing asylum and immigration claims by individuals who enter the country without authorisation.

¹⁶ Committee against Torture, “Concluding Observations on the initial report of Botswana,” 23 August 2022, CAT/C/BWA/CO/1, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CAT%2fC%2fBWA%2fCO%2f1&Lang=en

¹⁷ General Comment No 30 of ICERD.

Both sites have been subject to repeated criticisms—including from UN Human Rights Committee,¹⁸ the UN Working Group on Arbitrary Detention,¹⁹ and the CAT.²⁰ Key concerns include:

- a. that persons in Dukwi Refugee Camp are obliged to stay within the camp and have limited movement outside of Dukwi (to work, for example) unless they have access to a permit;
- b. that the conditions at FCII are deplorable, with poor security and reports of violence and the detention of children.

The law's unequal application to migrants is best illustrated by the case of *Sefu and Others v The Attorney General of Botswana*.²¹ The petitioners—nationals of the Democratic Republic of Congo—were moved from Dukwi Refugee Camp to FCII on 30 March 2005, and alleged that their detention was due to a suspicion that they had committed a criminal offence. Petitioning the court to be released on bail, they also requested that the court rule that their detention for more than 48 hours without a warrant was unlawful. However, owing to the migrants' undocumented status, the court found their detention to be lawful under section 14 of the Immigration Act.

Treatment during COVID-19: Law enforcement officials are reported to have been particularly harsh in their arrest, detention, and treatment of refugees and migrants. This was particularly exacerbated during the COVID-19 lockdown period in 2020/2021. In one case, the Bazezuru—a tribe of Shona-speaking individuals who reside in both Zimbabwe and Botswana—were attacked in an episode of police brutality. The group were in their home when police entered and attacked them under the guise of attempting to ensure they follow COVID-19 protocols.²² They were housed in a cell for the night and were not provided with adequate medication, a direct contravention of CERD's General Recommendation No. 30 on Discrimination Against Non-Citizens to "ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum seekers meet international standards." Migrants were also often placed under harsher scrutiny, illustrating further discriminatory practices and stigma of law enforcement based on the ethnic and national origin of non-nationals in Botswana.²³

Generally, access to socio-economic relief was inadequate for migrants, refugees, and other marginalised groups during COVID-19 with food hampers being limited to citizens. Sex

¹⁸ See: Human Rights Committee, "Concluding observations on the second periodic report of Botswana," 24 November 2021, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/352/66/PDF/G2135266.pdf?OpenElement>

¹⁹ Working Group on Arbitrary Detention, "Preliminary Findings from its visit to Botswana (4 to 15 July 2022)," https://www.ohchr.org/sites/default/files/documents/issues/detention/wg/country-visit/2022-07-15/PreliminaryFindings_Botswana_15_June.docx

²⁰ Committee against Torture, "Concluding Observations on the initial report of Botswana," 23 August 2022, CAT/C/BWA/CO/1, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fBWA%2fCO%2f1&Lang=en

²¹ *Sefu and Others v The Attorney General of Botswana*, F46 of 2005, Botswana: High Court, 10 June 2005, <https://www.refworld.org/cases,HCB,4c9880d52.html>

²² Lawyers for Human Rights, Online interview with Katlego Sechele (Programs Coordinator, BONELA), 19 October 2022.

²³ Lawyers for Human Rights, Online interview with Katlego Sechele (Programs Coordinator, BONELA), 19 October 2022.

workers and migrants detained in Francistown could not sustain themselves and local civil society organisations, such as BONELA, had to assist in distributing food hampers to non-citizens that were not supported by the government.²⁴

In relation to health care, COVID-19 vaccinations were not accessible to undocumented migrants in Botswana, even though it was stated that vaccinations would be available for all persons.²⁵ This discrimination based on nationality is in contradiction to Article 5 (d) of ICERD which provides the right to public health, medical care, social security and social services.

4.2 Treatment of Vulnerable Groups

Stigma and discrimination between service and health care providers is also prevalent in detention centres. There have been reports of discriminatory treatment of non-citizen sex workers detained at the FCII, who were mostly Zimbabwean nationals. It was reported that this group was not provided with assistance for their personal hygiene needs i.e., menstrual support or adequate access to justice, as they were often detained without any formal charges.²⁶ The safety and security of refugee women is a further matter of concern as sexual abuses and coercion has also been reported at FCII. Migrant, refugee, and stateless women waiting to be deported at FCII are often abused by police officials who request sexual favours in exchange for food. It has been noted that non-citizen women in detention are more likely to be the targets of sexual abuse than citizens of Botswana.²⁷ Migrant and refugee women's access to adequate justice and reform in detention centres is both lacklustre and harmful towards their bodily autonomy and need to be placed in line with the safety recommendations in Section V of General Comment No 30 of CERD, whereby state parties must ensure that non-citizens who are detained are properly protected in domestic law and that it complies with international human rights, refugee, and humanitarian law.

5. PREVIOUS CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

The CERD considered the combined fifteenth and sixteenth periodic reports of Botswana, held on 20 February – 10 March 2006 and made certain concluding observations following this.²⁸ The following recommendations and concerns are still pertinent today:

- The Botswana Court of Appeal, in the case *Unity Dow v. the Attorney General* (1992), interpreted Section 3 of the Constitution as a guarantee of the equal protection of the law for all. It remains concerned, however, that the definition of

²⁴ Lawyers for Human Rights, Online interview with Katlego Sechele (Programs Coordinator, BONELA), 19 October 2022.

²⁵ Lawyers for Human Rights, Online interview with Katlego Sechele (Programs Coordinator, BONELA), 19 October 2022.

²⁶ Lawyers for Human Rights, Online interview with Katlego Sechele (Programs Coordinator, BONELA), 19 October 2022.

²⁷ Lawyers for Human Rights, Online interview with Katlego Sechele (Programs Coordinator, BONELA), 19 October 2022.

²⁸ UN Committee on the Elimination of Racial Discrimination (CERD), "UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Botswana," 4 April 2006, CERD/C/BWA/CO/16, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/411/70/PDF/G0641170.pdf?OpenElement>

discrimination provided under this provision does not explicitly prohibit discrimination based on descent and national or ethnic origin, nor indirect discrimination.

- Some exceptions to the prohibition of discrimination provided under section 15 of the Constitution cannot be justified under the ICERD. In particular, subsection 4(b) authorises exceptions in relation to non-citizens to an extent that is incompatible with the Committee's General Recommendation 30 (2004) on non-citizens.
- In practice, asylum seekers are automatically detained in prison-like conditions until their status is determined, a process which in some cases can last up to three to four years, and they cannot appeal the decision denying them refugee status before a judicial body.
- There is a growing hostility towards undocumented immigrants in Botswana, in particular Zimbabweans, and some undocumented immigrants have been ill-treated by police officers. Insufficient information was provided by the State party on the inquiries made into the allegations of such ill-treatment by police officers.
- The Committee notes that the State party has not yet established an independent institution with the mandate to monitor and promote human rights, including on issues relating to the prohibition of racial discrimination and the promotion of tolerance amongst ethnic groups (Articles 2, 6 and 7).

6. RECOMMENDATIONS

Based on the above, the following issues have been highlighted as areas for concern that the CERD should consider when making recommendations to Botswana:

- Ratify the following human rights treaties that have important provisions concerning the rights of detained non-citizens:
 - The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
 - The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
 - The International Convention for the Protection of All Persons from Enforced Disappearance.
- Implement the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) and without delay address complaints about overcrowding and poor conditions in places of detention, including pretrial detention centres and in facilities where migrants are detained.
- Provide human rights training for all law enforcement officials, police officers, and prison officials to ensure that instances of violence or ill-treatment towards migrants is prevented, and that perpetrators of such violence are investigated.
- 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.
- 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.
- Provide annual statistics on the numbers of non-citizens who have been prosecuted for immigration-related offences and the grounds for criminal prosecution.
- Release detainees whose detention is unlawful or unnecessary.

- Ensure that child migrants, refugees, and asylum seekers are not placed in detention and instead provide proper care and assistance, in line with the recommendations of the joint recommendations of the Committee on the Protection Migrant Workers and Members of their Families and the Committee on the Rights of the Child.²⁹
- Ensure that all detention sites and sites used to accommodate refugees, asylum seekers, migrants, and stateless persons are adequately equipped with food and sanitation supplies.
- Ensure that the practice of arbitrary detention is ended and furthermore, that the conditions of detention facilities that asylum seekers and refugees are placed in meet international standards, including with respect to the provision of health care.
- Ensure that migrants and asylum seekers that have not committed a criminal offence or crime are held separately from convicted criminals in carceral detention. Provide information about whether vulnerability assessments are made in advance of placing an individual, especially women and children, in migration-related detention.
- Ensure that there is an end to discrimination against migrant women, including in immigration detention, and take measures to protect migrant women against sexual violence, abuse, and ill-treatment; bring perpetrators of such violence, including police, prison, and other law enforcement officials to justice.
- Ensure effective repeal/ reform of national legislation that is discriminatory in content, language, and application (e.g. Section 7 of the Immigration Act; Section 15 (4) of the Constitution).
- Ensure that there is equal access to basic rights for all non-citizens in Botswana, including those held in immigration detention, including access to health care and vaccinations, food, and other basic needs.

²⁹ Committee on the Protection Migrant Workers and Members of their Families and the Committee on the Rights of the Child Joint General Comments (2017) No 3 & 4.