

THE RIGHT TO HEALTH, SECURITISATION OF MIGRATION AND STANDARDS OF IMMIGRATION DETENTION IN SOUTH AFRICA AND AUSTRALIA



South African law on health rights and immigration detention

- Constitution of South Africa – Bill of Rights guarantees the right to health, liberty, security, and equality before the law.
- Immigration Act and Refugees Act provide the foundation for immigration detention.
- Border Management Authority Act strengthens the South African government's securitisation agenda.

The problematic reality on the ground in South Africa:

Increased criminalisation of migration leads to irregular migrants, refugees and asylum seekers being detained in prisons. Overcrowding in prisons and detention centres. Basic needs are not met in relation to sanitation, ventilation, safe spaces, protection from physical and sexual violence, clothing, food and access to medical care.

"I will resign once all foreign 'rascals' are locked up and keys thrown away; Aaron Motsaedi!" - Former South African Minister of Home Affairs

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How is this research conducted?

Doctrinal – What does the letter of the law say?
Socio-legal – The law in action. Is the law working for the society for which it exists? If not, how do we fix this?

What does the international legal framework say?



Everyone (including immigration detainees) has the right to:

- the highest attainable standard of health
- standard of living adequate for health and well-being
- healthcare of similar standard as that available in the community
- liberty and not being arbitrarily detained
- not be subjected to torture or cruel and inhuman treatment



South Africa and Australia are signatories to all the relevant international treaties, so why is there a problem?



- Irregular migrants, refugees and asylum seekers are increasingly framed as a security threat.
- Securitisation of domestic migration legislation and policies.
- Politicised narratives that portray economic migration as a threat.
- Heavily securitised borders can deter movement to a specific location but don't prevent people from moving.



How do we fix this problem?

- Source countries should be encouraged and assisted in promoting stability, education, and employment opportunities and reducing the drivers of forced migration.
- Treaty norms must increasingly integrate into domestic law, policies and practices.
- Use Alternatives to Detention (ATD) and Immigration Detention (ID) as a last resort.
- Conduct individual assessments before determining if ID is to be implemented.
- Utilise a vulnerability screening tool; vulnerable migrants should not be detained.
- Strengthen the right to health and support systems for refugees and migrants in ID, including the provision of psychological health care.
- Strategic public litigation, informing legislative amendments, changes to policies and protocols and standard operating procedures for detention and health rights in detention.



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Australian law on health rights and immigration detention

- Only liberal democracy in the world without a Bill of Rights
- The Migration Act, along with the Maritime Powers Act and Australian Border Force Act, govern mandatory detention in Australia.
- No specific regulations for the provision of healthcare or specialised resources for vulnerable groups in immigration detention.

The problematic reality on the ground in Australia:

Onshore and offshore immigration detention facilities. Offshore detention camps are "prison-like," with regular searches of the vinyl tents, confiscation of "prohibited" items (such as food and sewing needles) two-minute showers, and filthy toilets. Medical equipment is rudimentary, specialist medical attention is not regularly available and no mental health support with many detainees wanting to end their lives. The Subcommittee on Torture (SPT) cancelled the oversight visit to Australia as access was denied to certain facilities.

"Few other countries go to such lengths to deliberately inflict suffering on people seeking safety and freedom." - Anna Neistat, Senior director for research at Amnesty International

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

¹ Trine Filges and others, 'The Impact of Detention on the Health of Asylum Seekers: An Updated Systematic Review: A Systematic Review' (2024) 20(3) Campbell Systematic Reviews <<https://onlinelibrary.wiley.com/doi/10.1002/cl2.1420>> accessed 24 October 2024.

resort.² This study³ considers the broad range of international⁴ and African regional⁵ 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' right to health and maintain normative immigration detention standards.⁶ Non-compliance with this international human rights 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.⁷ It focuses on how the international 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 (NPMM) under the

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

³ This extended abstract was submitted to the 2024 Annual Doctoral Conference organised by the Faculty of Business and Law, Liverpool John Moores University. It summarises the author's doctoral research project.

⁴ 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' (2023) UN Doc A/HRC/54/81.

⁵ International Organisation for Migration (IOM), 'Regional Systems Relevant to International Migration Law (Africa)' in *EMM2.0 Handbook* <<https://emm.iom.int/handbooks/international-migration-law/regional-systems-relevant-imi>> accessed 01 February 2024.

⁶ 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)' (2000) UN Doc E/C.12/2000/4.

⁷ Thomas Peck, 'Interdisciplinary Methodological Approaches to Desk-Based Socio-Legal Human Rights Research' (2023) <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2023/01/lawandmethod-D-22-00001.pdf>> accessed 22 October 2024.

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.

3. The International Human Rights 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'.⁸ 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.⁹ 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.¹⁰ 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.¹¹ 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).¹²

⁸ UN General Assembly, 'Constitution of the World Health Organization' (signed 22 July 1946, entered into force 7 April 1948).

⁹ United Nations Refugee Agency, 'Detention Guidelines - Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention', (2012) <<https://www.unhcr.org/sites/default/files/legacy-pdf/505b10ee9.pdf>> accessed 08 March 2024.

¹⁰ UN CESCR (n 6).

¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

¹² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

4. Country Narratives: The Law Versus Reality

Despite the South African Bill of Rights¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

Australia also witnesses a rise in anti-immigrant sentiment and securitisation agendas¹⁷ and is the only liberal democracy in the world without a Bill of Rights.¹⁸ 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.¹⁹ 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.²⁰ Refugees are arbitrarily detained in inhumane conditions, lack adequate health care, and experience severe

¹³ Constitution of the Republic of South Africa (promulgated 18 December 1996, commenced 4 February 1997) Act 108 of 1996.

¹⁴ Callixte Kavuro, 'The Disappearance of Refugee Rights in South Africa' (2022) 42(1) *Obiter* 49.

¹⁵ Justice Theron, 'Visit to Lindela Repatriation Centre, Krugersdorp' (*Constitutional Court of South Africa*, 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> accessed 30 August 2024.

¹⁶ GDP, 'Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing Criminal Enforcement of Migration' (2021) <www.globaldetentionproject.org/immigration-detention-in-south-africa-stricter-control-of-administrative-detention-increasing-criminal-enforcement-of-migration> accessed 29 August 2022.

¹⁷ Sixtus Obioma Ibekwe, "'Preventing People from Risking Their Lives at Sea": Forced Migration and the Securitization of Asylum Seekers in Australia' (2021) 7(3) *Asian Journal of Comparative Politics* 625.

¹⁸ Australian Human Rights Commission, 'Ten Common Questions About a Human Rights Act for Australia' (2009) <https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_questions.pdf> accessed 27 February 2024.

¹⁹ GDP, 'Immigration Detention in Australia: Turning Arbitrary Detention into a Global Brand' (2022) <<https://www.globaldetentionproject.org/immigration-detention-in-australia-turning-arbitrary-detention-into-a-global-brand>> accessed 17 April 2023

²⁰ *ibid.*

pain and suffering that rises to the level of cruel, inhuman or degrading treatment or torture.²¹

5. 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.²² Transit and destination states must adopt a rights-based approach to migration governance, with human rights and international law underpinning their national migration policies.²³ States, scholars and non-governmental stakeholders should continue to develop a better understanding of the international legal framework relating to detention, including alternatives to detention (ATD).²⁴ Policy reform that includes using ID as a last resort, considering the need and proportionality of detention, performing individual assessments for ID, utilise a vulnerability screening tool 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.²⁵

6. 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

²¹ Jamal Barnes, 'Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia's Offshore Detention Centres' (2022) 35(4) *Journal of Refugee Studies* 1508.

²² IOM Office for the Americas, 'How to "Solve" Migration: A Practical Guide' <<https://lac.iom.int/en/blogs/how-solve-migration-practical-guide>> accessed 28 October 2024.

²³ IOM, 'State Sovereignty and Human Rights' in *EMM2.0 Handbook* <<https://emm.iom.int/handbooks/human-rights-migrants-overview/state-sovereignty-and-human-rights>> accessed 29 October 2024.

²⁴ IOM, 'Immigration Detention and Alternatives to Detention' (2017) <https://www.iom.int/sites/g/files/tmzbd1486/files/our_work/ODG/GCM/IOM-Thematic-Paper-Immigration-Detention.pdf> accessed 21 January 2025.

²⁵ World Health Organization Regional Office for Europe, 'Addressing the Health Challenges in Immigration Detention, and Alternatives to Detention: A Country Implementation Guide' (2022) <<https://iris.who.int/bitstream/handle/10665/353569/9789289057929-eng.pdf?sequence=2&isAllowed=y>> accessed 20 October 2024.

exercised in full conformity with the obligations of the state under international law.²⁶ Migration can lead to beneficial socioeconomic results for both migrants as well as transit and destination states. Still, 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 rights of individuals within a state's territory without discrimination based on nationality, race, gender, religion or migration status.²⁷

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²⁶ International Organisation for Migration (IOM) (n 23)

²⁷ International Organisation for Migration (IOM) Office for the Americas (n 22)

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