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Caught in a Gap?
An Examination and Human Rights Assessment of Immigration Detention Laws and Practices in South Africa

By

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Submitted in fulfilment of the requirements for the degree of

MASTERS OF LAWS

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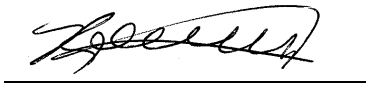
ABSTRACT

This study examines the laws and practices relating to immigration detention in South Africa. It provides an in-depth examination of the legislation, with reference to known state practices and cases where migrants have been subjected to prolonged and repeated periods of immigration detention. The study highlights gaps in South African law that contribute to certain categories of migrants being especially vulnerable to immigration detention. Four categories are identified: (1) asylum seekers; (2) persons with difficulty obtaining travel documents; (3) stateless person; and (4) persons subject to other prohibitions against refoulement. The study offers recommendations for legislative reforms to fill the gaps in the law that contribute to these migrants' vulnerability to immigration detention.

DECLARATION

I declare that this dissertation is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Masters of Law by dissertation at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



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ACMS	African Centre for Migration and Society
AU	African Union
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CORMSA	Consortium for Refugees and Migrants in South Africa
COSS	Centre of Safe Shelter
DHA	Department of Home Affairs
DRC	Democratic Republic of Congo
FMSP	Forced Migration Studies Programme
GDP	Global Detention Project
HRC	Human Rights Committee
HRW	Human Rights Watch
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
IDC	International Detention Coalition
IOM	International Organisation for Migration
LHR	Lawyers for Human Rights
NGO	Non-governmental Organisation
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
PAJA	Promotion of Administrative Justice Act 3 of 2000
SAHRC	South African Human Rights Commission

SMG	Soutpansberg Military Grounds
SMR	Standard Minimum Rules for the Treatment of Prisoners
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
WGAD	Working Group on Arbitrary Detention
ZDP	Zimbabwe Documentation Process

'It is in the national interests of every country that its borders and frontiers are not breached by people scaling or crawling under fences and when arrested for being unlawfully in the country, they lay claim to inviolable rights to be released.'

— Kgomo J, South Gauteng High Court

CHAPTER 1: THE RESEARCH

1.1 INTRODUCTION

South Africa lies at the centre of a human cycle of migration, detention, and expulsion. In that cycle, immigration detention lies at the intersection between state control and individual rights. This thesis examines and identifies the South African state's immigration detention laws and practices, and seeks to assess whether they meet constitutional and legal muster.

Immigration detention as a legal topic involves a balancing between the state's prerogative to control migration and the individual's fundamental rights. On the one hand, states enjoy the sovereignty to control their borders and regulate the entry, residence, and exclusion of persons within their territory for reasons such as protection of economic interests and state security.[1] On the other hand, individuals enjoy a host of rights under international and domestic law that are protected in the context of immigration detention.

In recent years, governments have increasingly sought to clamp down on irregular migration, which they regard as 'a violation of their national laws as well as a threat to their sovereignty, security and economy'.[2] Immigration control has become a central focus of law-making, politics, and policy debates in migrant-receiving states all over the world. The result has been a rise in the numbers and categories of migrants subject to arrest, detention, and deportation.[3]

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[1] See Galina Cornelisse *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers, Leiden 2010).

[2] Katy Long & Jeff Crisp *In harms way: the irregular movements of migrants to Southern Africa from the Horn and Great Lakes regions* (United Nations High Commissioner for Refugees (UNHCR), Research Paper No 200, January 2011) at 2.

[3] Nicholas De Genova & Nathalie Peuts (eds) *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press, Durham 2010) at 1.

In human rights circles, the increasing use of immigration detention has attracted criticism and scrutiny. Although states have the prerogative to control migration within their territory, it is well-established that such prerogative must be limited by certain human rights guarantees. Human rights organisations and advocates, including United Nations (UN) bodies, have voiced increasing concerns about the rising use of immigration detention, as well as the human rights violations that commonly plague states' immigration detention practices.[4] The topic is now 'firmly on the international human rights agenda', with states' immigration detention practices coming under inspection in the global arena.[5]

1.2 RESEARCH PROBLEM

Numerous studies in South Africa have consistently detailed human rights abuses that occur in the policing and arrest of suspected undocumented migrants.[6] Research and case law has also recorded a systemic failure by the state to adhere to requirements of law throughout the period of immigration detention.[7]

However, existing studies have addressed only how the state's immigration detention practices fail to adhere to South African law and its procedural requirements. None of them have critically examined and analysed the existing legislation itself, especially with reference

[4] See International Detention Coalition (IDC) *The issue of immigration detention at the UN level* (IDC, January 2011), <http://idcoalition.org/wp-content/uploads/2011/01/idc-report_id-un-level-24jan2011-1.pdf>.

[5] Alice Edwards *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011) at 5. This paper was presented at UNHCR and the Office of the High Commissioner for Human Rights' (OHCHR) first Global Roundtable on Alternatives to Immigration Detention, held in Geneva on 11-12 May 2011.

[6] See for example: Human Rights Watch (HRW) *'Prohibited Persons': Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (HRW, 1-56432-181-9, New York 1 March 1998); South African Human Rights Commission (SAHRC) *Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act* (SAHRC, Johannesburg 19 March 1999); SAHRC *Lindela: At the Crossroads for Detention and Repatriation* (SAHRC, Johannesburg December 2000); Jonathan Klaaren & Jaya Ramji *'Inside Illegality: Migration Policing in South Africa After Apartheid'* (2001) 48(3) *Africa Today* 35; Working Group on Arbitrary Detention (WGAD) *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Addendum: Visit to South Africa (4-19 September 2005)* (United Nations Commission on Human Rights (UNCHR), E/CN.4/2006/7/Add.3, 29 December 2005); HRW *'Keep Your Head Down': Unprotected Migrants in South Africa* (HRW, Vol 19 No 3(a), New York February 2007).

[7] See for example: Lawyers for Human Rights (LHR) *Monitoring Immigration Detention in South Africa* (LHR, Johannesburg 2008); Roni Amit *Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa* (University of the Witwatersrand, Forced Migration Studies Programme (FMSP), Johannesburg June 2010); LHR *Monitoring Immigration Detention in South Africa* (LHR, Johannesburg September 2010).

to the South African situation. A study is needed to assess how the legislation, in conjunction with the state's practices, contributes to a failure to protect the human rights of migrants and where gaps remain that leave certain categories of migrants vulnerable to immigration detention. The existence of adequate laws is critical to protecting the rights of migrants in relation to South Africa's immigration detention system.

The purpose of the study is therefore to provide an in-depth examination of the legislation and practices relating to immigration detention in South Africa, and an analysis of whether they accord with international and domestic legal standards. The objective is to identify lacunae in South African law that make particular categories of persons vulnerable to immigration detention within the apparatus of the state. It will provide guidance and ideas to the state and stakeholders regarding the need for legal and practical reforms on immigration detention in South Africa.

1.3 JUSTIFICATION FOR THE STUDY

South Africa offers an exceptional opportunity to study state practices and human rights abuses in the realm of immigration detention for a number of reasons.

First, the end of apartheid in the 1990s and the emergence of South Africa as a constitutional democracy created a firm legal basis for the fulfilment and enforcement of human rights. The Constitution of the Republic of South Africa, 1996 proclaimed the desire to establish a new society founded on values of human dignity, equality, and human rights and freedoms.[8] The new government signed and ratified international instruments, passed legislation, and established institutions and bodies to promote and realise a new culture of human rights.

Second, South Africa is one of the world's leading migrant destination countries, particularly in terms of irregular and undocumented migration. While precise numbers of undocumented arrivals are inherently difficult to quantify,[9] the extent of undocumented migration is exemplified, at least in part, through the fact that South Africa receives the largest number of

[8] The Preamble states in part that the people of South Africa "adopt this Constitution as the supreme law of the Republic so as to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". Section 1(1) states that the Republic of South Africa is founded on the values of *inter alia* "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms."

[9] See Long & Crisp above n 2 at 6.

individual asylum applications of any country in the world.[10] This is due in large part to the mixed migratory movements to South Africa from all parts of the globe – including the rest of Africa, as well as countries in Asia such as Bangladesh, India, Pakistan – and especially the influx of Zimbabwean nationals.[11] Many of the migrants involved in these mixed movements do not fit neatly into the category of refugees, but nonetheless find themselves vulnerable and in need of protection.[12] Researchers have noted that to date there has been insufficient scrutiny of issues relating to the irregular and mixed migration flows affecting South Africa.[13]

Third, South Africa is a 'prolific deporter', regularly deporting over 150 000 people per year.[14] These deportations invariably occur after a period of immigration detention, with the state subscribing to the view that '[i]t is inconceivable that a deportation can take place without the physical detaining of an illegal foreigner's person.'[15] Since the nation's transformation into a democracy, a significant change in the government's attitudes and practices towards migrants has been observed, with a specific hostility toward undocumented migrants and increased focus on immigration policing to detect and apprehend such migrants for detention and deportation.[16] Scholars have noted that the government's attitudes and practices towards migrants 'at times seem to contradict its stated and apparent commitment to democracy, inclusivity and human rights'.[17]

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[10] UNHCR *Global Trends 2010* (UNHCR, Geneva 2011) at 3 and 25. South Africa has received the highest number of asylum claims in the world consistently for the past three years with 207 000 claims in 2008, 222 000 claims in 2009, and 180 600 claims in 2010 – over one-fifth of the global total.

[11] UNHCR *Statistical Yearbook 2009: Trends in displacement, protection and solutions* (UNHCR, Geneva 2010) at 40-41 notes that Zimbabweans make the vast majority of asylum applications in South Africa, accounting for 149 500, or two-thirds, of the total number of asylum applications in 2009. See also Long & Crisp above n 2 at 7-9.

[12] Long & Crisp above n 2 at 2; Alexander Betts *Towards a 'soft law' framework for the protection of vulnerable migrants* (UNHCR, Research Paper No 162, August 2008).

[13] Long & Crisp above n 2 at 3.

[14] Darshan Vigneswaran 'Enduring Territoriality: South African Immigration Control' (2008) 27(7) *Political Geography* 783 at 790.

[15] *Phale v Minister of Home Affairs and Others* [2011] ZAGPPHC 71 (NGHC) at para 8, citing the position of the state put forward in the affidavit of immigration officer Mr Jurie De Wet. The Court found that 'in every case where a person is deported the [Department of Home Affairs (DHA)] detain[s] the person' (para 10).

[16] Sally Peberdy *Selecting Immigrants: National Identity and South Africa's Immigration Policies 1910-2008* (Wits University Press, Johannesburg 2009) at 137-69.

[17] Id at 3.

Finally, the discrepancy between the human rights guarantees entrenched in law versus the state's failure and unwillingness to protect the human rights of migrants creates the theoretical basis for the study. Due to its seemingly incongruous use of immigration detention, and the legal background against which this can be examined, South Africa offers an exceptional opportunity to examine immigration detention from a human rights perspective. Further, the significance of the study is emphasised due to the large potential and scope for human rights abuses, given the number of migrants arriving in South Africa and the attitudes and practices of the state.

1.4 METHODOLOGY

The study relies on desk-based legal research of the legal instruments, statutes, jurisprudence and secondary sources relating to the topic. These sources are presented topically in order to present the human rights and legal framework in which immigration detention must be viewed.

Case law and secondary sources are then examined and presented. These describe and establish the practices of the South African state and the challenges experienced by individuals with respect to immigration detention, and provide information about the infringements of human rights in immigration detention.

The study draws upon the knowledge gained from my personal experiences conducting client-based legal work as a consultant in the Immigration Detention Monitoring Programme of Lawyers for Human Rights (LHR) during 2010-2011. LHR is a non-profit organisation that provides free legal assistance to migrants whose rights have been violated in the detention process. During this period, I worked with attorneys of LHR in assisting migrants in detention, interacting with officials of the Department of Home Affairs (DHA), bringing court applications for migrants' release from unlawful detention, and assisting migrants to attain documentation after their release.

However, the study does not rely on anecdotal evidence accessed during my past experiences at LHR. Rather, it relies on the knowledge gained and the data created through the client-based legal work, which both pre- and post-dated my tenure at the organisation. Thus, while it is recognised that an ethical consideration is raised in that objectivity may be difficult to

achieve when the researcher has been directly involved in the area of study, every researcher approaches a topic with a personal background, and past participation confers significant benefits of knowledge and insight into the area of research.[18] It is therefore believed that my past participation creates a benefit, rather than an obstacle, to this study. Further, in relation to this study, immigration detention monitoring and litigation has been systematically documented in the written literature, court records, and case law[19] – thus contributing widely to the available literature on the subject in South Africa. As a result, the study is able to rely upon existing sources of data that are verifiable and recognised as enjoying a level of reliability. Conclusions are based upon principles and standards that are found in legal instruments, jurisprudence, and academic writing, rather than merely on subjective experience and perspective.

1.5 DELIMITATION OF SCOPE: DEFINING IMMIGRATION DETENTION

It is imperative to delineate the scope of this study by first defining immigration detention. In this study, immigration detention is defined as a form of administrative detention for reasons related to an individual's status in the country. Cornelisse describes it as 'deprivations of liberty under administrative law for reasons that are directly linked to the administration of immigration policies', specifically, 'the administrative detention of individuals on account of the lack of state authorisation for their presence on national territory'.[20]

This characterisation of immigration detention has three essential features: (1) it involves the deprivation of liberty; (2) it is a form of administrative detention; and (3) it is related to an individual's status and presence in the country.

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[18] See Jeff Handmaker *Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa* (Intersentia, Antwerp 2009) at 15-16; Maria Florencia Belvedere *Beyond Xenophobia: Contested Identities and the Politics of Refugees in Post-apartheid South Africa* (unpublished PhD thesis, University of Minnesota, 2006) at 25-26.

[19] See especially 'Annexure – Summary of Cases' in LHR 2010 above n 7 at 28-41, which summarises 68 cases finalised in 2009-2010. For examples of cases brought in 2011, see *Fikre v Minister of Home Affairs and Others* [2011] ZAGPJHC 36 (SGHC); *Phale* above n 15; *Harding v Minister of Home Affairs and Others* (SGHC) unreported case no 19063/2011 (24 May 2011); *Fikre v Minister of Home Affairs and Others* [2011] ZAGPJHC 52 (SGHC); *Tsebe and Another v Minister of Home Affairs and Others; Phale v Minister of Home Affairs and Others* [2011] ZAGPJHC 115 (SGHC); 2012 (1) BCLR 77 (SGHC); *Bula and Others v Minister of Home Affairs and Others* [2011] ZASCA 209 (SCA); *Mtegekurora v Minister of Home Affairs and Others* (SGHC) unreported case no 21599/2011 (21 July 2011); *Hamisi v Minister of Home Affairs and Others* (SGHC) unreported case no 32275/2011 (12 September 2011). See also LHR 2008 above n 7.

[20] Cornelisse above n 1 at 4 and 5, respectively.

First, detention is here examined as the deprivation of liberty. A distinction may be drawn between the *deprivation* and the *restriction* of liberty. Some states restrict the liberty and freedom of movement of individuals through measures such as the use of 'open' centres where persons must reside but can leave within reasonable limits.[21] Whether restrictions of liberty go so far as to constitute the deprivation of liberty depends on the degree and intensity of those restrictions and their cumulative impact.[22] Due to the general absence of lesser measures in South Africa, this study will focus on the more extreme form of infringement on personal liberty (i.e. 'closed' centres), adopting the United Nations High Commissioner for Refugees' (UNHCR) definition of detention as—

> 'confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.'[23]

Second, immigration detention is examined as a form of administrative detention, rather than criminal incarceration pursuant to a punitive sentence imposed by a judge. In other words, this study looks at detention as carried out by administrative actors of the state – primarily, immigration or law enforcement officials – for the purpose of implementing and carrying out administrative functions in relation to the state's immigration policies. The detention may have the objective of ensuring that 'another measure, such as deportation or expulsion, can be implemented', or may be authorised on grounds including public security and public order.[24]

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[21] For example, Belgium operates 'return houses' where families subject to removal or seeking asylum are housed with the freedom to come and go subject to a curfew between 22h00 and 08h00: see Edwards above n 5 at 69-73.

[22] UNHCR *UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers* (UNHCR, Geneva February 1999) at 3; *Guzzardi v Italy* ECtHR, A-49 (6 November 1980), discussed in Cornelisse above n 1 at 6. See also Michael Bishop & Stu Woolman 'Freedom and Security of the Person' in Stu Woolman et al (eds) *South African Constitutional Law* (2 ed) (Juta, Cape Town 2008) 40-i at 40-32 to 40-34 for a discussion about the difficulty in distinguishing between 'constraints' on versus the 'deprivation' of liberty.

[23] UNHCR 1999 above n 22 at 3.

[24] Special Rapporteur on the Human Rights of Migrants *Specific Groups and Individuals: Migrant Workers* (UN OHCHR, Report of the Special Rapporteur E/CN.4/2003/85, 30 December 2002), <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2003/85&Lang=E> at para 19.

The detention may occur at the time of a person's entry into the country, pending a decision on the person's status (e.g. determination of an asylum claim), or pending removal.[25]

In this regard, it is important to mention that in addition to administrative immigration detention, a growing tendency towards the criminalisation of migration has been recorded in recent years. Many states, including South Africa, now charge migrants with criminal violations relating to their breach of immigration laws.[26] This criminalisation relates to states' 'broadening use of detention as a means of managing immigration and asylum',[27] and is highly significant to the human rights implications of migration.[28] However, for reasons relating to length and breadth, this study will only deal with immigration detention as a tool of administrative law. The legality of criminal sanctions in immigration law is a topic that will need to be revisited by another study.

Finally, immigration detention in this study is broadly defined as being for reasons related to an individual's status and presence in the country. This definition is broader, for example, than the definition adopted by the Global Detention Project of immigration detention as 'the deprivation of liberty of *non-citizens* because of their status'.[29] The expansive characterisation adopted here allows the study to consider the full range of individuals – potentially including the state's citizens – who may be subject to immigration detention, without limitation based on distinctions including whether a person is an asylum seeker, refugee, irregular migrant, stateless person, or other.

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[25] International Detention Coalition *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (International Detention Coalition, Melbourne 2011) at 10.

[26] Michael Flynn *Immigration Detention and Proportionality* (Global Detention Project (GDP), Working Paper No 4, February 2011), <http://www.globaldetentionproject.org/fileadmin/publications/GDP_detention_and_proportionality_workingpaper.pdf> at 7; Cornelisse above n 1 at 5; Laura S Adams 'Divergence and Dynamic Relationship Between Domestic Immigration Law and International Human Rights' (2002) 51(3) *Emory Law Journal* 983. In South Africa, a number of immigration offences are criminalised with the possibility of imprisonment under the Immigration Act 13 of 2002: see sections 7(3), 10A(5), 10B(3), 34(4), 34(5), 40(3), and 49.

[27] Flynn above n 26 at 10.

[28] See for example Frey & Zhao 'The Criminalization of Immigration and the International Norm of Non-Discrimination' (2011) 29(2) *Law and Inequality: A Journal of Theory and Practice* 279. The UN Special Rapporteur on the Human Rights of Migrants recommends that violations of immigration laws and regulations should not be punished as criminal offences: above n 24 at 3.

[29] Flynn above n 26 at 7 (emphasis added).

1.6 OUTLINE OF CHAPTERS

The remainder of the study will be structured into three chapters.

Chapter two will set out the conceptual background of the study. It will review the international and domestic legal regime that is relevant to the protection of human rights in immigration detention. These will reviewed in order to set out the human rights that are implicated, that are guaranteed protection to individuals, and that states must accordingly respect. The human rights background presented in this chapter will therefore provide the standards against which the state's use of immigration detention must be evaluated.

Chapter three will investigate the use of immigration detention in South Africa. A comprehensive review of the existing data, literature, research, and case law relating to immigration detention in South Africa will be provided, focusing on the post-apartheid period to the present day. These sources will be systematically compiled and presented, in order to provide an in-depth examination of the laws and practices of immigration detention in South Africa.

Chapter four will then assess the immigration detention laws and practices in South Africa, proceeding from the foundation and information set out in the second and third chapters. It will compare the human rights standards set out in the second chapter and the South African situation of immigration detention set out in the third chapter, in order to critically analyse the available information and identify particular categories of migrants that are vulnerable to immigration detention in South Africa. The chapter shall be divided into several sections, each of which will draw upon case examples in order to explore in-depth a particular category of vulnerable migrant. It will extract the lessons learnt from the challenges and human rights violations faced by each category, with reference to the South African legislative scheme. In doing so, the study will seek to identify gaps in the legislation which contribute to the vulnerability of these categories of migrants to immigration detention, and provide recommendations for legislative reforms aimed at better protecting the human rights of migrants.

CHAPTER 2: THE HUMAN RIGHTS TERRAIN

2.1 INTRODUCTION

State sovereignty and territoriality form the organisational foundation of today's global political system. Under this system, political power is linked to a clearly demarcated area, and the state enjoys within its territory a monopoly over the use of political power, legitimised by the consent of its citizens.[1]

However, the power imbalance between individuals and the state creates the need for safeguards to limit the use of power. States are circumscribed in their use of power by guarantees of human rights, which are protected through both the international human rights regime and domestic constitutionalism.[2] The end of the two World Wars led to the establishment of international bodies and the modern human rights instruments. These in turn have contributed greatly to the end of apartheid in South Africa and the establishment of the state as a constitutional democracy founded on human rights. Both international and South African law now recognise that all humans enjoy certain fundamental rights, which are not granted but are inherent and inviolable to all human beings.

These human rights transcend boundaries, nationalities, and status; they are not negated or restricted based on an individual's status in the country. Within the territorial nation-state system, therefore, 'borders become sites of struggle for competing rights claims: those of the state, of its citizens and of universal human rights.'[3] The tension between the state and the individual, and the limitations on the exercise of sovereign power and the obligations upon states that are imposed by human rights, are expressed in the following statement by the United Nations (UN) High Commissioner for Human Rights:

> 'Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns do not trump the

[1] Galina Cornelisse *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers, Leiden 2010) at 33. See Chapter 2 'Sovereignty, People and Territory' (at 33f) for an account of the development of the concept of state sovereignty and territoriality.

[2] Id at 64. See also Maxine Reitzes 'Immigration and Human Rights in South Africa' in Jonathan Crush (ed) *Beyond Control: Immigration and Human Rights in a Democratic South Africa* (Idasa, Cape Town 1998) 37 at 43.

[3] Reitzes above n 2 at 43.

> obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfill the rights necessary for them to enjoy a life of dignity and security.'[4]

This chapter will set out the fundamental human rights guarantees that are relevant in the domain of immigration detention, with reference to international and South African law. It provides the human rights background that is required for the analysis and assessment that follows in subsequent chapters.

2.2 PROTECTIONS OF HUMAN RIGHTS IN INTERNATIONAL AND DOMESTIC LEGAL INSTRUMENTS

Betts has noted that '[i]rregular migrants are entitled to human rights both *qua* human beings (under international human rights law) and *qua* migrants (under the existing treaties designed to guarantee rights to migrants)'.[5] The human rights which are relevant to the topic of immigration detention are protected by international and domestic legal instruments. These instruments include both those that guarantee core human rights, as well as those that are specifically relevant in the context of migration and immigration detention (see Box 2.1).

Internationally, human rights are guaranteed in formal instruments (i.e. treaties and protocols) as well as in a number of documents (i.e. declarations, principles, and guidelines) that may not be formally binding, but provide guidance regarding states' obligations and individuals' rights and may be reflective of international customary law.[6] Regionally, South Africa is a member of the African Union[7] (AU), which has promulgated a number of human rights

[4] Navi Pillay *Address at the Fourth Global Forum on Migration and Development* (UN High Commissioner for Human Rights, Puerto Vallarta 10 November 2010).

[5] Alexander Betts *Towards a 'soft law' framework for the protection of vulnerable migrants* (UNHCR, Research Paper No 162, August 2008) at 7. See also Jonathan Klaaren 'Human Rights Protections of Foreign Nationals' (2009) 30 *Industrial Law Journal* 82 at 83.

[6] GDP *Migration-Related Detention and International Law: Introduction* (GDP, 2011), <http://www.globaldetentionproject.org/law/legal-framework/international/introduction.html>. See also Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Addendum: Mission to South Africa* (UNHRC, A/HRC/6/17/Add.2, 7 November 2007), which notes the international customary law nature of the principle of non-refoulement.

[7] Formerly called the Organisation of African Unity (OAU).

instruments. In particular, the African Charter on Human and Peoples' Rights[8] (the 'Banjul Charter') provides for fundamental rights generally, and the Convention Governing the Specific Aspects of Refugee Problems in Africa[9] (the 'OAU Refugee Convention') provides for rights that are relevant in the context of migration.

The Constitution of the Republic of South Africa, 1996 affirms the importance of international law. Section 39(1)(c) directs that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law'. This is enhanced by Chapter 14 of the Constitution, entitled 'International law'. Within Chapter 14, section 232 states that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament, and section 233 provides that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

Domestically, human rights are guaranteed by South African law. The Constitution, which is the supreme law of the country,[10] contains a Bill of Rights that enshrines fundamental rights, the vast majority of which are applicable to all human beings irrespective of their status.[11] Section 7(2) of the Constitution requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' Legislation has also been enacted, which must be consistent with the Constitution and fulfil the obligations imposed by the Constitution.[12] The Immigration Act[13] and Refugees Act[14] set out the provisions governing the admission, residence, and departure of various categories of non-nationals. These are the statutes which confer authority on the state to subject individuals to immigration detention in South Africa. In

[8] (1982) 21 ILM 58, adoption 27 June 1981, entry into force 21 October 1986, accession by South Africa 9 July 1996.

[9] (1969) 1001 UNTS 45, adoption 10 September 1969, entry into force 20 June 1974, accession by South Africa 15 December 1995.

[10] Section 2 states: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

[11] Chapter 2 of the Constitution.

[12] See section 2 of the Constitution, above n 10. Various provisions of the Constitution also expressly require the state to pass legislation to give effect to rights enshrined in the Bill of Rights. See for example sections 9(4), 26(2), 27(2), 32(2), and 33(3).

[13] Act 3 of 2002.

[14] Act 130 of 1998.

addition to the requirements imposed by the Constitution, the Immigration Act and Refugees Act contain procedural requirements and standards that apply to immigration detention.

Importantly, human rights are given 'teeth' in South Africa through the guarantee of their enforceability in the courts. The Constitution enshrines the right of access to courts for all persons in section 34, which states that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' Further, the infringement of a right in the Bill of Rights is justiciable on its own. Section 38 of the Constitution provides that anyone listed in the section 'has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.' The persons who may approach a court are listed in the section as being 'anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.'

Through the judicial process of the enforcement of constitutional rights, international human rights come into play. As mentioned above, the Constitution incorporates customary international law into domestic law (section 232), and it also contains directives requiring courts to consider international law when interpreting the Bill of Rights and any legislation (sections 39(1)(c) and 233, respectively). Thus, international human rights play a direct role in the adjudication process as both binding sources of law and interpretive aids. An example is the case of *S v Makwanyane and Another*,[15] where the Constitutional Court relied on international law as both authority and an interpretive tool. Chaskalson P noted that public international law includes non-binding as well as binding law, and that both sources can be used as tools of interpretation.[16]

[15] [1995] ZACC 3 (CC); 1995 (3) SA 391 (CC).

[16] Id at para 35. See also Neville Botha & Michéle Olivier 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' (2004) 29 *South African Yearbook of International Law* 42 for a review of the application of international law by the South African courts.

BOX 2.1: HUMAN RIGHTS INSTRUMENTS

GENERAL INSTRUMENTS

International

Treaties and Protocols

- International Covenant on Civil and Political Rights[17] (ICCPR)
- International Covenant on Economic, Social and Cultural Rights[18] (ICESR)
- International Convention on the Elimination of All Forms of Racial Discrimination[19] (ICERD)
- Convention on the Elimination of All Forms of Discrimination Against Women[20] (CEDAW)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[21] (CAT)
- Convention on the Rights of the Child (1989)[22]

Declarations, Principles, Guidelines

- Universal Declaration of Human Rights[23] (UDHR)
- Standard Minimum Rules for the Treatment of Prisoners[24] (SMR)
- Basic Principles for the Treatment of Prisoners[25]
- Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment[26] ('Body of Principles')
- Rules for the Protection of Juveniles Deprived of their Liberty[27]

[17] (1967) 6 ILM 368, adoption 16 December 1966, entry into force 23 March 1976, signature by South Africa 3 October 1994, ratification 10 December 1998. South Africa has also acceded to the two optional protocols: Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTC 171, entry into force 23 March 1976, accession 28 August 2002; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1990) 29 ILM 1464, adoption 15 December 1989, entry into force 11 July 1991, accession 28 August 2002.

[18] (1967) 6 ILM 360, adoption 16 December 1966, entry into force 3 January 1976, signature by South Africa 3 October 1994. South Africa has not yet ratified the ICESR or signed its optional protocol.

[19] (1966) 5 ILM 32, adoption 21 December 1965, entry into force 4 January 1969, signature by South Africa 3 October 1994, ratification 10 December 1998.

[20] (1980) 19 ILM 33, adoption 18 December 1979, entry into force 3 December 1981, signature by South Africa 29 January 1993, ratification 15 December 1993. South Africa has also acceded to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999) 38 ILM 763, adoption 6 October 1999, entry into force 22 December 2000, accession 18 October 2005.

[21] (1984) 1465 UNTS 85, adoption 10 December 1984, entry into force 26 June 1987, signature by South Africa 29 January 1993, ratification 10 December 1998. South Africa has signed but not ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2003) 42 ILM 26, adoption 18 December 2002, entry into force 22 June 2006, signature 20 September 2006.

[22] (1989) 28 ILM 1456, adoption 10 November 1989, entry into force 2 September 1990, signature by South Africa 29 January 1993, ratification 16 June 1995. South Africa has ratified the two protocols: Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict (2000) 39 ILM 1285, adoption 25 May 2000, entry into force 12 February 2002, signature 8 February 2002, ratification 24 September 2009; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) 39 ILM 1285, adoption 25 May 2000, entry into force 18 January 2002, accession 30 June 2003.

[23] GA Res 217A (III), UN Doc A/810 (1948) 71.

[24] ESC Res 663C, UN Doc A/CONF/611 (1955).

[25] GA Res 45/111, UN Doc A/45/49 (1990).

[26] GA Res 43/173, UN Doc A/43/49 (1988).

[27] GA Res 45/113, UN Doc A/45/49 (1990).

Regional

- African Charter on Human and Peoples' Rights[28] (Banjul Charter)
- African Charter on the Rights and Welfare of the Child[29]

Domestic

- Constitution of the Republic of South Africa, 1996

INSTRUMENTS OR PARTICULAR RELEVANCE TO MIGRANTS

International

Treaties and Protocols

- Convention Relating to the Status of Refugees[30] ('Refugee Convention')
- Convention relating to the Status of Stateless Persons[31] ('Statelessness Convention')
- Convention on the Reduction of Statelessness[32] ('Reduction of Statelessness Convention')
- Vienna Convention on Consular Relations[33]
- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[34]

Declarations, Principles, Guidelines

- Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live[35]
- Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers[36] ('Deliberation No 5')

Regional

- Convention Governing the Specific Aspects of Refugee Problems in Africa[37] ('OAU Refugee Convention')

Domestic

- Immigration Act 3 of 2002
- Refugees Act 30 of 1998

[28] Above n 8.

[29] OAU Doc CAB/LEG/24.9/49 (1990), entry into force 29 November 1999, signature by South Africa 10 October 1997, ratification 7 January 2000.

[30] (1951) 189 UNTS 137, adoption 28 July 1951, entry into force 22 April 1954, accession by South Africa 12 January 1996. South Africa has also acceded to the Protocol Relating to the Status of Refugees (1967) 606 UNTS 267, adoption 31 January 1967, entry into force 4 October 1967, accession 12 January 1996.

[31] (1954) 360 UNTS 117, adoption 28 September 1954, entry into force 6 June 1960, unsigned by South Africa.

[32] (1961) 989 UNTS 175, adoption 30 August 1961, entry into force 13 December 1975, unsigned by South Africa.

[33] (1963) 596 UNTS 261, adoption 24 April 1963, entry into force 19 March 1967, accession by South Africa 21 August 1989.

[34] (1990) 2220 UNTS 3, adoption 18 December 1990, entry into force 1 July 2003, unsigned by South Africa.

[35] GA Res 40/144, UN Doc A/40/53 (1985).

[36] UN Commission on Human Rights Working Group on Arbitrary Detention, UN Doc E/CN.4/2000/4/Annex 2 (1999).

[37] Above n 9.

2.3 HUMAN RIGHTS RELEVANT TO IMMIGRATION DETENTION

The legal instruments referred to above provide guarantees of human rights relevant to immigration detention that can be discussed with reference to two principal characterisations. First, there are those rights that deal directly with the *fact of detention* – that is, the requirements that a state must abide by when depriving an individual of his or her liberty. Second, there are rights relating to the *conditions of detention*, which require the state to act in a certain manner towards an individual during the period that he or she is in detention.

The fundamental nature of these human rights, and their applicability regardless of an individual's status in the country, are affirmed by the right to equality.

With respect to the fact of detention itself, as with any deprivation of liberty, immigration detention engages the core human rights of liberty and security of the person, specifically, the right to be free from arbitrary deprivations of liberty. Freedom of movement also applies – both generally and with respect to territorial boundaries.

During the period of detention, an individual has certain inviolable rights regarding the conditions of detention and his or her treatment therein. These are guaranteed by the right to dignity and the right to be free from torture or cruel, inhuman or degrading treatment or punishment. Any detention must further be subject to rights of administrative justice and procedural protections.

These rights will be examined in more detail in the following discussion. For a list of the relevant human rights referred in this section, see Box 2.2.

BOX 2.2: HUMAN RIGHTS GUARANTEES

Equality
Liberty
Security of the person
Freedom of movement
Human dignity
Freedom from torture or cruel, inhuman, or degrading treatment or punishment
Administrative justice

2.3.1 Equality and the Fundamental Nature of Rights

The right to equality serves as 'the heart of international human rights law' in guaranteeing human rights to citizens and non-citizens alike.[38] Foreign nationals enjoy nearly all of the rights that citizens enjoy, due to their right to equal treatment. The Universal Declaration of Human Rights (UDHR) recognises the 'inherent dignity' and 'equal and inalienable rights of all members of the human family',[39] and guarantees rights and freedoms to all persons irrespective of race, national origin, birth, or other status.[40] This guarantee is echoed in the International Covenant on Civil and Political Rights[41] (ICCPR), which imposes the obligation on each state party to respect and ensure rights to all individuals within its territory and jurisdiction.[42]

Regionally, the Banjul Charter similarly ensures the rights within it to '[e]very individual' without distinction of any kind such as race, national origin, birth, or other status.[43] Article 3 stipulates that '[e]very individual shall be equal before the law' and 'entitled to equal protection of the law.'[44]

In South Africa, the Constitution declares that 'South Africa belongs to all who live in it',[45] and states that the Bill of Rights 'enshrines the rights of all people in our country'.[46] Equality is recognised as one of the founding values of the state.[47] It is also a right recognised on its own in section 9 of the Bill of Rights, which guarantees the right to equality before the law and prohibits the unfair discrimination by the state and any person on grounds including race, ethnic origin, and birth.[48]

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[38] Klaaren 2009 above n 5 at 83.

[39] Preamble.

[40] Article 2.

[41] Preamble.

[42] Article 2.

[43] Article 2.

[44] Articles 3(1) and (2) respectively.

[45] Preamble.

[46] Section 7(1).

[47] Constitution, sections 1(a) and 7(1).

[48] Section 9(3) in respect of the state and section 9(4) in respect of persons.

The South African courts have also clarified that the right to equality extends to and affords protection to the rights of non-citizens. Two early legal challenges under the interim Constitution[49] established that the term 'person' in the Bill of Rights includes non-citizens, and that discrimination against non-citizens is prohibited by the equality provision.[50] The applicability of most provisions of the Bill of Rights to non-citizens has since been affirmed by the Constitutional Court in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another.*[51] In that case, the Court confirmed that the term 'everyone' in the Bill of Rights should be given its ordinary meaning to apply to all persons, noting that '[w]hen the Constitution intends to confines rights to citizens it says so.'[52] The Court held that these rights extend even to foreign nationals at ports of entry, who are within the territory of South Africa but have not been formally permitted to enter the country.[53]

There are a number of rights that non-citizens may not enjoy. For instance, political rights are generally withheld from non-citizens, as exemplified by Article 25 of the ICCPR. In South Africa, the Constitution stipulates that certain specified rights are ascribed to citizens – apart from these, the rights contained in the Constitution extend to non-citizens, including undocumented migrants.[54] The Constitution spells out explicitly that political rights, rights of citizenship, and the right to freedom of trade, occupation, or profession do not apply to non-citizens.[55]

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[49] Constitution of the Republic of South Africa, Act 200 of 1993 ('interim Constitution'), which has been repealed.

[50] *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (BSC) and *Larbi-Odam v Member of the Executive Council for Education* [1997] ZACC 16 (CC); 1998 (1) SA 745 (CC). These two cases are discussed in Jonathan Klaaren 'Immigration and the South African Constitution' in Jonathan Crush (ed) *Beyond Control: Immigration and Human Rights in a Democratic South Africa* ch 3 (Idasa, 1998) 55 at 68-69. See also Jonathan Klaaren 'Freedom of Movement and Residence' in Stu Woolman et al (eds) *South African Constitutional Law* (2 ed) (Juta, Cape Town 2008) 66-i.

[51] [2004] ZACC 12 (CC); 2004 (4) SA 125 (CC).

[52] Id at para 27.

[53] See also *Abdi and Another v Minister of Home Affairs* [2011] ZASCA 2 (SCA); 2011 (3) SA 37 (SCA). The Court held that it had jurisdiction over two Somalis, a recognised refugee and an asylum seeker, who were detained in the international transit zone of the airport and sought admission to the country (see paras 20-29). It stated that the rights of an intended applicant for asylum 'are clearly justiciable, even if the individual is held in an inadmissible facility' (para 23).

[54] *Lawyers for Human Rights* above n 51.

[55] Sections 19, 20, 21(3), 21(4), and 22, respectively.

These 'deviations' from the equality principle are permitted, but only 'where a legitimate state objective is served and where the deviations are proportional to that objective'.[56] In *Minister of Home Affairs and Others v Watchenuka and Others*,[57] the Supreme Court of Appeal acknowledged that the limitation to citizens of the right to occupational choice serves legitimate state objectives. However, the Court held that 'the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment'.[58] The Court found that the disproportionate impact of occupational restrictions on asylum seekers resulted in their 'positive humiliation and degradation'.[59] The restriction therefore also impacted the right to dignity, and was held to be unjustified.

2.3.2 Liberty and Security of the Person

The right to liberty and security of the person is recognised as a fundamental right, as well as a basic element of legal systems that respect the rule of law.[60] It is enshrined in the UDHR at Article 3, which protects the right to liberty and security of the person, and Article 9, which protects all persons from arbitrary arrest, detention, or exile. These rights are found in Article 9 of the ICCPR, which guarantees the right to liberty and security of the person, including protection from arbitrary arrest or detention. Article 9(1) states as follows:

> 'Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

These rights are set out in similar wording in Article 6 of the Banjul Charter.

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[56] Klaaren 2009 above n 5 at 83.

[57] [2003] ZASCA 142 (SCA); [2004] 1 All SA 21 (SCA).

[58] Id at para 32.

[59] Id.

[60] Alice Edwards *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011) at 17, citing Tom Bingham *The Rule of Law* (Allen Lane, London 2010).

The South African Constitution establishes the principle of freedom as a founding value of the country.[61] It also explicitly guarantees in section 12(1) of the Bill of Rights that '[e]veryone has the right to freedom and security of the person'.[62] Section 12(1) contains five subparagraphs, (a) through (e), which outline 'five dimensions' of the right and provide both substantive and procedural protections.[63] These include the rights 'not to be deprived of freedom arbitrarily or without just cause'[64] and 'not to be detained without trial',[65] and the right to freedom from torture or cruel, inhuman or degrading punishment or treatment.[66] Section 35 contains additional procedural assurances to arrested and detained persons.[67]

The constitutional guarantee of liberty in South Africa entrenches a long-standing principle in the common law that any interference with a person's liberty is *prima facie* unlawful.[68] As noted above, the jurisprudence has indisputably affirmed that this right is guaranteed to both citizens and non-citizens, regardless of status.[69] The Constitutional Court has also specifically held that immigration detention infringes the rights of all persons, including migrants, to freedom and security of the person and not to be detained without trial, as protected by section 12(1) of the Constitution.[70]

It is important to note that the right to liberty is not absolute. The law recognises that there are various circumstances where the violation of the right will be legitimate.[71] The burden of justifying the infringement of the right falls upon the detaining body.[72] This justification

[61] Sections 1(a) and 7(1).

[62] Section 12(1)(a).

[63] Michael Bishop & Stu Woolman 'Freedom and Security of the Person' in Stu Woolman et al (eds) *South African Constitutional Law* (2 ed) (Juta, Cape Town 2008) 40-i at 40-22.

[64] Section 12(1)(a).

[65] Section 12(1)(b).

[66] Section 12(1)(d) and (e).

[67] For discussion regarding procedural guarantees in relation to the right of liberty, see 2.3.5 and 2.4.2 below.

[68] See *Arse v Minister of Home Affairs* [2010] ZASCA 9 (SCA); 2012 (4) SA 544 (SCA); *Zealand v Minister of Justice and Constitutional Development* [2008] ZACC 3 (CC); 2008 (4) SA 458 (CC) at para 25.

[69] *Arse* above n 69 at para 10; *Lawyers for Human Rights* above n 51 at para 27; *Jeebhai and Others v Minister of Home Affairs and Another* [2009] ZASCA 35 (SCA); 2009 (5) SA 54 (SCA) at para 26.

[70] *Lawyers for Human Rights* above n 51 at para 33.

[71] See the discussion at 2.4 below regarding the analysis of whether the violation of the right is legitimate.

[72] *Zealand* above n 68 at para 25; *Arse* above n 68 at para 5.

must take place at both an individual and general level.[73] On an individual level, the state must point to lawful authority (i.e. a specific statutory provision)[74] and justification (i.e. the circumstances of the individual case)[75] for the person's detention. On a general level, the law authorising the detention must itself be justifiable. With respect to immigration detention, the South African courts have found the objectives of immigration control to be valid,[76] but have emphasised the importance of 'safeguards and limitations' in the analysis of whether the infringement of liberty is justified. Thus, in *Arse* the Court stated that '[t]he safeguards and limitations contained in section 34(1) of the Immigration Act justify its limitation of the right to freedom and the right not to be detained without trial.'[77] The absence of such safeguards in section 34(8) of the Immigration Act, on the other hand, led the Constitutional Court in *Lawyers for Human Rights* to find the section unconstitutional.[78]

2.3.3 Freedom of Movement

There are two aspects of the right to freedom of movement that are relevant to immigration detention: the first is the right to freedom of movement within the borders of a state; and the second is the right to freedom of movement across states' borders.

First, the right to freedom of movement within a state is found in the UDHR at Article 13(1), which enshrines 'the right of freedom of movement and residence within the borders of each State'. Article 12 of the ICCPR states that '[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.' Similarly, Article 12(1) of the Banjul Charter guarantees the right of an individual to freedom of movement and residence within a state's borders, 'provided he abides by the law.' A primary and significant limitation of this right is that it only applies to persons 'lawfully within the territory' of a state. Thus, while the right continues to

[73] See further 2.4.1 below.

[74] As per *Arse* above n 68, where the Supreme Court of Appeal considered whether the applicant was detained under any statutory provision, specifically section 34 of the Immigration Act.

[75] As per *Ulde v Minister of Home Affairs and Another* [2009] ZASCA 34 (SCA); 2009 (4) SA 522 (SCA), where the Supreme Court of Appeal examined whether the arresting officer had considered the facts relevant to the individual case in exercising his discretion to detain under the Immigration Act.

[76] In *Lawyers for Human Rights* above n 51, the Constitutional Court stated at para 37: 'The purpose of the provision [section 34(8) of the Immigration Act] is plain. It is to prevent people from gaining entry into the country illegally. The importance of the purpose of the provision can also not be gainsaid.'

[77] Above n 68 at para 10.

[78] Above n 51 at para 43.

encompass refugees, registered asylum seekers and stateless persons, and stateless persons in their country of habitual residence, it only provides limited protection to undocumented migrants.[79]

Under South African law, the right to freedom of movement is constitutionally guaranteed to 'everyone', regardless of status.[80] It is only 'the right to enter, to remain in and to reside anywhere' in the Republic that is limited to citizens under section 21(3) of the Constitution. However, scholars consider that the right to free movement also 'likely protects the rights of lawful resident foreign nationals in a similar manner' to section 21(3), given the rights that are conferred upon a person by lawful residence.[81]

Second, freedom of movement across borders is expressed in international law through the right to leave and return. This is characterised as the right to leave any country, including one's own, and the right to return to one's country.[82] It is referred in a number of legal instruments, including Article 13(2) of the UDHR, Article 12(2) of the ICCPR, Article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 3 of the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country In Which They Live, and Article 12(2) of the Banjul Charter. In South Africa, section 21(2) of the Bill of Rights provides that '[e]veryone has the right to leave the Republic.' While the Bill of Rights only explicitly grants the right of entry to South African citizens,[83] other rights may be relevant where a non-citizen seeks entry. Examples include the right to seek refugee protection under international and domestic law[84] and the right to dignity, which might be engaged in circumstances such as when a foreign spouse seeks admission to the country to take up family life.[85]

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[79] Edwards above n 60 at 43.

[80] Section 21(1) of the Constitution. See Klaaren 2008 above n 50 at 66-3.

[81] Klaaren 2008 above n 50 at 66-9.

[82] See Vincent Chetail 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective' in T Alexander Aleinikoff & Vincent Chetail (eds) *Migration and International Legal Norms* ch 3 (TMC Asser, The Hague 2003) 47.

[83] Section 21(3).

[84] Refugee Convention; OAU Refugee Convention; section 2 of the Refugees Act.

[85] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8 (CC); 2000 (3) SA 936 (CC).

Both of these aspects of freedom of movement are circumscribed by a number of enumerated exceptions. The ICCPR and Banjul Charter stipulate that these aspects may be limited where necessary for the protection of national security, public order, public health, or morality – but only where 'provided by law'.[86] The limitations must also be consistent with other core human rights.[87]

2.3.4 Conditions of Detention and Treatment of the Detainee: Human Dignity and Freedom from Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment

Those who are deprived of their liberty retain the inalienable right to dignity. Dignity takes a central role in both international and domestic human rights law. The UDHR is premised upon the 'recognition of the inherent dignity ... of all members of the human family' and declares unequivocally that '[a]ll human beings are born free and equal in dignity and rights.'[88] The ICCPR is also founded on the idea of inherent human dignity, and states expressly that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'[89]

Similarly, under the South African Constitution, human dignity is recognised as one of the founding values of the state.[90] In addition, section 10 of the Bill of Rights provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. Thus, the right to dignity 'is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected.'[91]

In the context of immigration detention, the right to dignity means that detained persons must be subjected to appropriate conditions of detention, taking into account their status and needs, and that they must not be subjected to torture or cruel, inhuman, or degrading treatment or

[86] Article 12(3) of the ICCPR; Article 12(2) of the Banjul Charter.

[87] Id. See also 2.4.1 below.

[88] Preamble and Article 1, respectively.

[89] Preamble and Article 10, respectively.

[90] Sections 1 and 7(1).

[91] *Dawood* above n 85 at para 35 (emphasis in original).

punishment.[92] Should these two requirements not be met, a detention which is otherwise lawful may contravene human rights guarantees and thus become unlawful.

Unacceptable conditions of detention will violate a detained person's right to humane treatment and dignity. Guidelines regarding minimum standards of detention have been set out in a number of documents. Most notably at the international level, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the 'Body of Principles') and Standard Minimum Rules for the Treatment of Prisoners (SMR) outline guidelines for the treatment of prisoners in accordance with human dignity, setting out what is generally acceptable principle and practice in their treatment.[93] In South Africa, section 35(2)(e) of the Bill of Rights provides for the right 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'. These standards also relate to other rights guaranteed in the Constitution. In particular, section 27 provides for the right to health care, food, and water[94] and section 24 provides for the right to 'an environment that is not harmful to [a person's] health or well-being.' To give effect to these rights in immigration detention, the Immigration Regulations provide for minimum standards of detention, enumerating baseline requirements in respect of accommodation, nutrition, and hygiene.[95]

Moreover, the conditions of detention or the treatment of the detained person may also reach such an unacceptable level that they violate the right to be free from torture or other cruel, inhuman, or degrading treatment or punishment.[96] Not only does this right encompass actual ill-treatment or torture, but it also extends to indefinite detention without the possibility of

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[92] Special Rapporteur on the Human Rights of Migrants *Specific Groups and Individuals: Migrant Workers* (UN OHCHR, Report of the Special Rapporteur E/CN.4/2003/85, 30 December 2002), <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2003/85&Lang=E> at para 54.

[93] Principle 1 of the Body of Principles provides for the humane treatment of all persons in detention 'with respect for the inherent dignity of the human person.' Rule 1 of the SMR states that the purpose of the rules is 'to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.'

[94] Sections 27(1)(a) and (b) state respectively that everyone has the right to have access to 'health care services, including reproductive health care' and 'sufficient food and water', and section 27(3) states that '[n]o one may be refused emergency medical treatment.'

[95] GG 27725, 25 June 2005, Annexure B.

[96] Article 5 of the UDHR; Article 7 of the ICCPR; sections 12(1)(d) and (e) of the Constitution.

release which may cause psychological effects amounting to cruel or unusual punishment.[97] Freedom from torture or cruel, inhuman or degrading punishment is an 'underogable right guaranteed by both customary and conventional law',[98] and is also specifically protected as an underogable right in sections 12(1)(d) and (e) of the Constitution. The law places the obligation upon states to ensure that no torture takes place against persons detained.[99]

2.3.5 Procedural Guarantees and Administrative Justice

The importance of procedural safeguards in circumstances of detention cannot be overstated. Without them, a person's detention is at risk of becoming arbitrary or constituting cruel and unusual treatment or punishment.[100] International law recognises that certain procedural rights are essential for persons in detention. These may be summarised as the right to be informed, the right to legal assistance, and the right to judicial supervision or review of the detention.[101] The ICCPR provides in Article 9 as follows:

> '2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> …
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

[97] See *Charkaoui v Canada (Citizenship and Immigration*) 2007 SCC 9 (SCC); [2007] 1 SCR 350 (SCC) at para 98, where the Court noted that 'it has been recognized that indefinite detention in circumstances where the detainee has no hope of release or recourse to a legal process to procure his or her release may cause psychological stress and therefore constitute cruel and unusual treatment.'

[98] Special Rapporteur above n 92 at fn 18.

[99] Articles 2 and 10 of CAT.

[100] Edwards above n 60 at 37. See also the discussion at 2.3.2 below.

[101] As noted above at 1.5, this study examines immigration detention as a form of administrative detention. Accordingly, the discussion in this section is limited to the procedural rights of all persons detained. Persons detained under criminal law have other specific procedural rights under international and domestic law, such as the right to remain silent and the right to a fair trial: see, for example, articles 9(3) and 14 of the ICCPR; articles 7(1)(b)-(d) and 7(2) of the Banjul Charter; sections 35(1) and (3) of the Constitution.

These rights are spelled out in the UN Body of Principles. They state that any person detained should be informed of the reasons for the arrest[102] and of his or her rights.[103] The detention must be 'ordered by, or subject to the effective control of, a judicial or other authority',[104] and detainees must be given 'an effective opportunity to be heard promptly by a judicial or other authority'.[105] Detainees are further entitled to the assistance of legal counsel.[106]

The Banjul Charter guarantees that '[e]very individual shall have the right to have his cause heard.' This includes 'the right to appeal to competent national organs against acts of violating his fundamental rights' and 'the right to defence, including the right to be defended by counsel of his choice'.[107]

In addition, under the international law governing relations between states, the Vienna Convention on Consular Relations provides at Article 36(1) that any foreign national who is arrested or detained has the right to assistance from his or her consular post. The detaining state must, without delay, inform the consular post of the detention, forward any communication by the detained person to the consular post, and inform the detained person of these rights.

South African law protects the right to procedural guarantees and safeguards in detention through two means. First, the Constitution provides for specific rights to persons in detention. Section 35(2) of the Bill of Rights guarantees the following rights to all persons who are detained:[108]

> '(a) to be informed promptly of the reason for being detained;
> (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

[102] Principle 10.

[103] Principle 13.

[104] Principle 4.

[105] Principle 11; see also Principle 32

[106] Principles 11(1), 17, and 18.

[107] Article 7(1).

[108] Section 35 differentiates between persons arrested for allegedly committing an offence (section 35(1)) versus all persons detained (section 35(2)). See n 101 above.

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released'.

Second, section 33 of the Bill of Rights enshrines the right to just administrative action, stating that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair.' This right has been given effect through the enactment of the Promotion of Administrative Justice Act[109] (PAJA). At a minimum, the right to just administrative action includes the right to notice of any administrative action adversely affecting a person's rights and of any right of review or appeal, as well as the right to make representations.[110] In addition, there is a right to seek judicial review of an administrative action.[111] These rights have clear importance in the context of immigration detention – which, as noted above, is a form of administrative detention – in ensuring that the state's actions in respect of the individual are lawful, reasonable, and procedurally fair.

2.4 A HUMAN RIGHTS ASSESSMENT OF IMMIGRATION DETENTION

A state's practices of immigration detention must be measured against the individual's fundamental human rights which have been outlined above. The assessment of whether the deprivation of an individual's liberty is a violation of the right involves a consideration of whether such deprivation is arbitrary, and whether it accords with the grounds and procedures established by law.[112] This includes both a *substantive* component and a *procedural* component. These have been described, respectively, as follows:

> '[T]he first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom.… [T]he state may not deprive its citizens of liberty for reasons that are not

[109] Act 3 of 2000. Section 33(3) of the Constitution provides that 'national legislation must be enacted to give effect to' the right to just administrative action.

[110] Sections 33(1) and (2) of the Constitution; section 3 of PAJA.

[111] Sections 33(3)(a) and 34 of the Constitution; section 6(1) of PAJA.

[112] As per Article 9(1) of the ICCPR and Article 6 of the Banjul Charter.

> acceptable, nor when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.'[113]

In this section, the human rights-based approach to assessing immigration detention under these two components will be presented. First, the detention must be substantively evaluated in terms of core human rights, especially liberty and security of the person. Second, the procedural soundness of the detention must be tested to ensure that it respects an individual's rights to administrative justice and remains in accordance with law. Both of these components must be satisfied in order for an immigration detention to pass the human rights test under international and domestic law.

2.4.1 The Substantive Assessment: Reasonableness, Necessity, Proportionality

As has been noted, the right to liberty is not absolute. Rather, what the law prescribes is that the deprivation of the right to liberty must be *lawful* and it may not be *arbitrary*.[114] This is the 'core' of the right. Therefore, the assessment of a state's immigration detention laws and practices involves an analysis of whether these two conditions are fulfilled.[115]

The first requirement of lawfulness, in itself, contains both a substantive and procedural component. As defined by the European Court of Human Rights, the 'lawfulness' of detention refers to the 'obligation to conform to the substantive and procedural rules of national law'.[116] (The procedural component will be discussed below.) The substantive component entails that the 'quality of the law' must be scrutinised.[117] This means that the detention must be in accordance with both national law and international human rights law. It further means that the law permitting the detention must be sufficiently clear and precise to be compatible with the rule of law, to allow persons to foresee its consequences, and to avoid

[113] *S v Coetzee* [1997] ZACC 2 (CC); 1997 (3) SA 527 (CC) at para 159. See also the *Gangaram Panday Case* Inter-American Court of Human Rights, Series C No 16, 21 January 1994 at para 47, where the Court stated that assessing whether the right to liberty has been violated involves both a material aspect (i.e. reasons for the deprivation of liberty) and a formal aspect (i.e. procedures followed in the deprivation of liberty).

[114] Article 9(1) of the ICCPR; Article 6 of the Banjul Charter; section 12(a) of the Constitution.

[115] Cornelisse above n 1 at 250.

[116] *Amuur v France* 22 Eur HR Rep 533 (1996) at para 50.

[117] Id.

all risk of arbitrariness.[118] The two conditions of lawfulness and arbitrariness are therefore inextricably linked, in that a primary purpose of the former is to protect the individual from the latter.

The second requirement that no detention must be arbitrary involves an analysis of three components: reasonableness, necessity, and proportionality.[119] The Human Rights Committee (HRC) has explained as follows:

> '"Arbitrariness" is not to be equated [only] with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but *reasonable in all the circumstances*. Further, remand in custody must be *necessary in all the circumstances*, for example, to prevent flight, interference with evidence or the recurrence of crime.'[120]

These two requirements of reasonableness and necessity are measured against the standard of proportionality.[121] The principle of proportionality involves a balancing of the specific ends sought by the law and the means used to achieve those ends.[122] Flynn notes that '[i]n the context of immigration detention, this principle holds that detention should only be used to the limited extent necessary to facilitate the administrative goals provided for in immigration law'.[123]

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[118] Id. In *Dawood* above n 85, the Court emphasised that '[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner' (para 47). The Court further explained that '[l]aws that could limit rights must be clear and unambiguous; otherwise they may be unconstitutional due to their potential to be enforced in an arbitrary manner (paras 52-53). See also *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 (SCC), where the Supreme Court of Canada held that if legislation impinges on a fundamental right and it is unduly vague, it does not satisfy the requirement that any limitation on rights be 'prescribed by law'. The doctrine of vagueness is based on the rule of law, which requires that fair notice be given to citizens and that there be a limitation of discretion in enforcement.

[119] The same principles apply to restrictions on freedom to movement, which is similarly a deprivation of liberty. See Edwards above n 60 at 44.

[120] *Van Alphen v The Netherlands* HRC, Comm No 305/1988 (23 July 1990) at para. 5.8 (emphasis in original).

[121] *A v Australia* HRC, Comm No 560/1993 (3 April 1997) at paras 9.2-9.4.

[122] Edwards above n 60 at 21; Michael Flynn *Immigration Detention and Proportionality* (Global Detention Project, Working Paper No 4, February 2011), <http://www.globaldetentionproject.org/fileadmin/publications/GDP_detention_and_proportionality_workingpaper.pdf> at 1.

[123] Flynn above n 122 at 10.

Proportionality is a useful tool for assessing immigration detention practices and policies.[124] However, in order for the proportionality analysis to succeed, it is not enough to consider only generalised justifications for the detention, such as the policy objectives of immigration control. The HRC has repeatedly held that in addition to general justifications, there must also be individual justifications in view of factors relevant to the person detained.[125] A personalised assessment must be made in each individual case to gauge whether the act of detaining is proportional to the objectives sought to be achieved. The failure to consider the specific circumstances of the person detained may therefore reflect a violation of the right to liberty at both the state and individual level.

In South Africa, the courts have held that a blanket policy by the state to detain is neither prescribed by law, nor is it justifiable. Rather, the decision to detain must be subject to an exercise of discretion in the individual case. In *Jeebhai*, the Supreme Court of Appeal held that the Immigration Act 'confers on an officer a discretion whether or not to effect an arrest or detention of an illegal foreigner. There is no obligation to do so.'[126] This was confirmed in *Ulde*, where the Court further emphasised that '[b]earing in mind that we are dealing here with the deprivation of a person's liberty ..., the immigration officer must still construe the exercise of his discretion *in favorem libertatis* when deciding whether or not to arrest or detain a person under s 34(1) – and be guided by certain minimum standards in making the decision.'[127] The officer must take into account relevant factors, appreciate the nature of the decision and the rights affected, and apply his or her mind to the decision in each individual case. Importantly, the discretion must be exercised in favour of liberty: 'The requirement of necessity (and the concomitant element of proportionality) connotes that an immigration officer must consider whether there are sufficient grounds for the detention and also whether there are other less coercive measures to achieve the objective'.[128]

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[124] Id at 11.

[125] *Jalloh v The Netherlands* HRC, Comm No 794/1998 (26 March 2002); *Saed Shams v Australia* HRC, Comm Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (18 September 2003); *Danyal Shafiq v Australia* HRC, Comm No 1324/2004 (13 November 2006) (all cited in Cornelisse above n 1 at 254).

[126] *Jeebhai* above n 69 at para 25.

[127] *Ulde* above n 75 at para 7.

[128] Id at para 7 and fn 6.

While the Court in *Ulde* observed that the requirement of necessity is prescribed only by section 41(1) of the Immigration Act (which provides for detention for the purposes of investigation) – which was the section under scrutiny in that case – and not by section 34(1) (which provides for detention for the purposes of deportation), the Court specifically refrained from deciding on the constitutionality of the omission of the necessity requirement from section 34(1). However, the requirements of reasonableness, necessity, and proportionality must necessarily apply, by virtue of section 36(1) of the Constitution, which provides as follows:

> 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.'

The appropriateness of this approach has been endorsed by the Constitutional Court. In *Lawyers for Human Rights*, the Court considered the constitutionality of section 34(8) of the Immigration Act which, like section 34(1), authorises immigration detention without specifically mentioning a necessity requirement. Yacoob J, writing for the majority, held that the provision's limitation on the right to freedom necessitated the justification analysis under section 36 of the Constitution. He explained this analysis as follows:

> 'This Court has held that section 36 requires a proportionality analysis. The nature and importance of the right must be measured against the purpose and extent of the limitation taking into account whether a less severe limitation might have been sufficient adequately to serve the government's purpose.'[129]

[129] Above n 51 at para 35.

Further, reasonableness and necessity must be applied to the continuing detention of a person over time. A detention that is initially lawful may become arbitrary over time if it extends beyond the period for which it is justifiable and necessary.[130] The lack of the availability of review within a reasonable time may also render a detention arbitrary.[131]

In South Africa, the legislature has prescribed the maximum period of immigration detention permissible under section 34(1)(d) of the Immigration Act as 120 days. The courts have held that immigration detention may only be deemed reasonable, necessary, and proportional if it falls within this 120-day limit. In *Aruforse v Minister of Home Affairs and Others*,[132] the Court held definitively that the 120-day limit is non-derogable and does not detract from the purposes of the Immigration Act.[133] The Supreme Court of Appeal has noted that it is because of this time limitation that the statute's infringement of personal liberty is justifiable.[134] Beyond the 120-day period, the immigration detention of a person becomes unlawful and arbitrary. The establishment of a maximum period of detention is consistent with international law and the practices of many states. The UN Working Group on Arbitrary Detention (WGAD) has stated that 'a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released.'[135] While a standard maximum period of detention does not exist across the board, the

[130] In *A v Australia* above n 121, it was held that the immigration detention of a Cambodian asylum seeker for over four years had become arbitrary, violating Article 9 of the ICCPR, as it had extended beyond the period for which it was justifiable and necessary. Similarly, in *D & E v Australia* HRC, Comm No 1050/2002 (11 July 2006), it was found that whatever initial justification there may have been, the detention of an Iranian family for over three years had become arbitrary due to failure to demonstrate that the continued detention was justified or that the same ends could have been achieved by less intrusive measures.

[131] See *Charkaoui* above n 97 at paras 88-94.

[132] 2010 (6) SA 579 (SGHC).

[133] Id at para 17. The Court noted that the Immigration Act 'aims at putting in place a new system of immigration control which *inter alia* ensures that: "immigration laws are efficiently and effectively enforced, deploying to this end the significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration"; "immigration control is performed within the highest applicable standards of human rights protection"; "a human rights based culture of enforcement is promoted"; and "civil society is educated on the rights of foreigners and refugees".' This was referred to with approval by the Supreme Court of Appeal in *Arse* above n 68 at para 9.

[134] *Arse* above n 68 at para 10. While in the past there existed a debate about whether section 34(1)(d) allowed for indefinite renewals of the detention, this case put the debate to rest as a matter of statutory interpretation. The Court held that no extension of the detention past 120 days was permissible, noting that '[e]nactments interfering with elementary rights should be construed restrictively' (para 10). See also the discussion in *Consortium of Refugees and Migrants in South Africa v Minister of Home Affairs* (WLD) unreported case no 6709/2008 (7 July 2008).

[135] UN WGAD *Report to the 13th Session of the Human Rights Council* (WGAD, 18 January 2010) at para 61, cited in Edwards above n 60 at 24.

importance of the existence of maximum periods has been noted, in order to guard against arbitrariness.[136]

Further, the Immigration Act requires that detention be subject to judicial oversight. Section 34(1)(d) provides that a person 'may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days.' The importance of this safeguard was stressed by the Constitutional Court in *Lawyers for Human Rights*.[137] Without the availability of review, as the Constitutional Court has held, immigration detention becomes unconstitutional and any law so authorising it is substantively unjustifiable.

2.4.2 The Procedural Assessment: 'Punctilious Observance' of Safeguards

Procedural safeguards must be built into any situation of detention, as a safety measure to ensure that it does not impermissibly violate the human rights guarantees outlined above. The UN WGAD has recognised the importance of procedural safeguards by using them as factors to consider when determining whether a detention is arbitrary. In its Deliberation No 5, the WGAD enumerated a list of procedural guarantees which may be summarised as follows:

- The decision to detain must be taken by a duly empowered authority and must be founded on a criteria of legality established by the law;
- The detainee should be informed, in a language he or she understands, of the nature and grounds for detention;
- The detainee should be brought promptly before a judicial or other authority;
- The detainee should be informed, in a language he or she understands, of the conditions for applying for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the detention and, where appropriate, order his or her release;
- A maximum period of detention should be set by law, and the detention may in no case be unlimited or of excessive length; and

[136] Edwards above n 60 at 23-25 notes, for example, that the maximum period of detention has been established as six months by the European Union (EU), although many EU member states provide for shorter timeframes, such as France, which imposes a limit of 32 days in detention centres and 20 days in waiting zones.

[137] Above n 51 at para 43.

- UNHCR, the International Committee of the Red Cross (ICRC), and, where appropriate, non-governmental organisations (NGOs) must be allowed access to places of custody.[138]

In South Africa, a number of procedural safeguards are built into the law authorising immigration detention. Under the old Aliens Control Act,[139] amendments that came into effect in 1996 brought in the requirements that investigations into detainees' immigration status be completed within 48 hours of arrest,[140] and that any detention exceeding 30 days be reviewed by a judge of the High Court.[141] Since 2002, the Immigration Act has similarly required that investigations be completed within 48 hours of apprehension,[142] that court warrants be obtained for any detention exceeding 30 days, and that the period of detention cannot exceed 120 days.[143]

The courts have highlighted the importance of these safeguards in ensuring that immigration detention is constitutional and lawful. In *Jeebhai*, the Court emphasised that 'immigration laws, often harsh and severe in their operation, contain safeguards to ensure that people who are alleged to fall within their reach are dealt with properly and in a manner that protects their human rights'.[144] As noted, case law has established that it is only '[t]he safeguards and limitations contained in s 34(1) of the Immigration Act [that] justify its limitation of the right to freedom and the right not to be detained without trial'.[145] Consistent with this, the Constitutional Court in the *Lawyers for Human Rights* case read in these procedural safeguards to section 34(8) in order to make the provision constitutional.[146]

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[138] Id.

[139] 96 of 1991. This was repealed by the Immigration Act.

[140] Section 55(3). Section 55 came into effect in 1996 under the Aliens Control Amendment Act 76 of 1995.

[141] Sections 55(3) and 55(5), respectively. Section 55 came into effect in 1996 under the Aliens Control Amendment Act 76 of 1995.

[142] Section 41(1) read together with section 34(2).

[143] Section 34(1)(d). The procedure for obtaining a warrant in terms of this section is set out in Regulation 28(4) of the Immigration Regulations. The maximum period of detention was finally determined as a matter of statutory interpretation in *Arse* above n 68 (see discussion at 2.4.1 above).

[144] Above n 69 at para 21.

[145] *Arse* above n 68 at para 10. See also *Lawyers for Human Rights* above n 51.

[146] Above n 51 at para 45.

The failure to comply with procedural requirements and safeguards will render a detention unlawful. In *Jeebhai*, Cachalia JA stressed 'the duty which lies on officials entrusted with the administration of the immigration laws … of observing strictly and punctiliously the safeguards created by the Act'.[147] This is in accordance with the principle that a 'detained person has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention'.[148]

There are numerous examples in the South African jurisprudence where the court has ordered the release of persons detained because procedural requirements were not followed. For instance, in *Jeebhai,* the Court held that an immigration detention was unlawful because it was 'carried out without compliance with the peremptory procedures prescribed by the Act'.[149] Another example is *AS v Minister of Home Affairs and Others*, where the Court held that warrants of detention obtained outside of the required time period were *ultra vires* and invalid.[150]

2.5 CONCLUSION

As has been set out above, immigration detention must live up to strict standards in order to comply with human rights requirements. Rights guarantees – enshrined in both international and domestic law – limit the authority of the state to hold an individual in immigration detention and place obligations on the state throughout an individual's detention. This is regardless of the individual's status and the legitimacy of the purposes that the state may be attempting to achieve when engaging in immigration detention.

This chapter thus sets the stage for the forthcoming discussion. In the following chapter, the South African situation with respect to migration and immigration detention will be examined and described. A full picture will be presented of the patterns of migration affecting South Africa and the practices of immigration detention by the state, with reference to the legal

[147] Above n 69 at para 21, citing *Kazee v Principal Immigration Officer* 1954 (3) SA 759 (W) at 763A.

[148] *Silva v Minister of Safety and Security* 1997 (4) SA 657 (W) at 661E-H, cited in *Arse* above n 68 at para 10; *Aruforse* above n 132 at para 18.

[149] Above n 69 at para 53.

[150] (SGHC) unreported case no 101/2010 (12 February 2010).

background, in order to determine whether these measure up under a human rights assessment.

CHAPTER 3: IMMIGRATION DETENTION IN SOUTH AFRICA

3.1 INTRODUCTION

An understanding of the context and practices of migration and immigration detention in South Africa is essential to appreciating their interplay with human rights and the law. A wide body of literature and case law exists, from which we can gain insight into the use of immigration detention and its implications for the particular migration patterns affecting South Africa.

In this chapter, these will be presented. First, the patterns of immigration and migration and the relevant legal developments will be traced. Second, the literature and case law regarding immigration detention will be reviewed and particular practices will be identified.

3.2 IMMIGRATION AND MIGRATION TO SOUTH AFRICA: TRENDS AND LEGAL DEVELOPMENTS

This section will provide an overview of the immigration and migration trends to South Africa. It is necessary to first set out certain terminology in order to accurately discuss and understand these patterns. Although there is a lack of consensus amongst researchers about typologies of migration, Oucho suggests a typology that operates as 'a viable scheme for a systematic treatment of current cross-border migration processes in southern Africa' and permits for a discussion that 'move[s] away from the stereotypes that emotive concepts of the past have generally given rise to.'[1]

Oucho proposes categorising current international migration in southern Africa into four types: (1) permanent migration; (2) labour migration; (3) refugees and asylum seekers; (4) undocumented migration; and (5) other movements. Permanent migration refers to foreign nationals who have been granted rights of permanent residence or citizenship, whether through regular legal processes or the various amnesties that have been offered in South

[1] John O Oucho 'Cross-border migration and regional initiatives in managing migration in southern Africa' in Pieter Kok et al *Migration in South and Southern Africa: Dynamics and determinants* (HSRC Press, Cape Town 2006) 47 at 50.

Africa's history.[2] Labour migration comprises persons who come to South Africa to work; it encompasses both skilled and unskilled labour, and also includes a subcategory of undocumented migrants. Undocumented migration consists of persons 'who lack documents authorising their stay or residence in the receiving country; those who have overstayed their authorised duration of residence/stay and who are determined to avoid contact with the law enforcement agencies; defaulters of amnesty or those who failed to exploit that opportunity; and unsuccessful applicants for formal granting of refugee or asylum status who try to avoid discovery in one way or another.'[3] Finally, 'other movements' refers to persons who are not technically immigrants, such as traders with cross-border mobility who may have links in the receiving country.

This proposed typology will be used in the following discussion, in addition to the more general terms of 'migration' and 'immigration' where greater specificity is not required.

3.2.1 Historical Background

Although migration to South Africa is often perceived as a new phenomenon, the country has long received migrants from Africa and elsewhere in the world. Black African migration through the region that is now South Africa extends back through the ages.[4] White migration, which began in 1652 with the arrival of the first settlers at the Cape under the auspices of the Dutch East Indian Company, has played a major role in shaping the country. By 1820, the number of white settlers in South Africa exceeded 42 000.[5] These settlers in turn entrenched a system of labour migration, as they relied on migrant labour from the region as well as imported indentured labour.[6]

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[2] These include: a 1995 amnesty for mine workers who had worked on South African mines since before 1986 and voted in the 1994 elections; a 1994 amnesty for Southern African Development Community (SADC) nationals who had lived in South Africa since 1 July 1991, had no criminal record, and were economically active in South Africa or had a South African spouse or children; and a 1996 amnesty (implemented in 1999) for Mozambican refugees who were granted permission to stay in the homelands during the 1980s. See Jonathan Crush & Vincent Williams (eds) *The new South Africans? Immigration Amnesties and Their Aftermath* (Idasa, Cape Town 1999).

[3] Oucho above n 1 at 52.

[4] See Basil Davidson *Africa in History* (Touchstone, New York 1995).

[5] Sally Peberdy *Selecting Immigrants: National Identity and South Africa's Immigration Policies 1910-2008* (Wits University Press, Johannesburg 2009) at 11.

[6] Nicos Trimikliniotis et al 'Globalisation and Migrant Labour in a "Rainbow Nation": a fortress South Africa?' (2008) 29(7) *Third World Quarterly* 1323 at 1324-25; Marie Wentzel & Kholadi Tlabela 'Historical background to South African migration' in Pieter Kok et al *Migration in South and Southern Africa: Dynamics and determinants* (HSRC Press, Cape Town 2006) 71 at 72.

A surge in migration to South Africa, both black and white, followed the discovery of gold and diamonds in the late-nineteenth century. Between 1850 and 1891, the white population tripled to approximately 620 000.[7] The establishment of the Kimberley diamond fields in 1870 and the discovery of the gold reefs in the Witwatersrand in 1886 led to a massive demand for unskilled labour which 'initiated the development of temporary and more permanent black labour migration from neighbouring states to work on the mines, establishing migratory patterns that persist today.'[8]

Thus, while it is commonly believed that the numbers of undocumented migrants rose significantly after the end of apartheid, they have been present in the country since the earliest colonial days. These included women from the region who came to South Africa as 'clandestine workers' and undocumented farm workers from countries such as Lesotho, Mozambique, and Zimbabwe.[9] Another factor to consider is that '[s]ince governments were generally more interested in monitoring movement than in controlling it, passes were relatively easy to obtain. The borders presented no real obstacle to people who wanted to move in the southern African region.'[10] Migrants easily moved in and out of South Africa to seek employment, in both urban and farm areas.

South Africa also received its share of refugees prior to the early 1990s. As de la Hunt notes, since colonial times the country 'has seen the settlement of people who left their homes further north in Africa, Europe and Asia due to religious persecution, political persecution, war, famine and economic hardship.'[11] In the mid-1970s, South Africa granted asylum and rights of citizenship and permanent residence to many white persons of Portuguese descent, who fled Angola and Mozambique after the end of Portuguese colonial rule. In the 1980s and early 1990s, many black Mozambicans also sought asylum in South Africa from the civil war in their country. However, South Africa refused to recognise them as refugees; instead,

[7] Peberdy above n 5 at 12, citing H Watts 'A social and demographic portrait of English-speaking white South Africans' in André de Villiers (ed) *English-speaking South Africa Today* (Oxford University Press, Cape Town 1976) 42.

[8] Peberdy above n 5 at 12.

[9] Wentzel & Tlabela above n 6 at 79-80.

[10] Id at 79.

[11] Lee Anne de la Hunt 'Refugees and Immigration Law in South Africa' in Jonathan Crush (ed) *Beyond Control: Immigration and Human Rights in a Democratic South Africa* (Idasa, Cape Town 1998) 123 at 124-25.

they were granted provisional permission to remain in the former black homelands of Gazankulu and KaNgwane.[12] Such differentiation in treatment towards black and white refugees fleeing from the same country illustrates the racist approaches, draconian responses, and denial of refugee protection that characterised immigration law and policy during the apartheid years.[13]

3.2.2 Legal Developments Post-Apartheid

With the end of apartheid, a major shift was experienced. During the apartheid years, South Africa was not seen as an attractive destination amongst migrants, especially on the African continent. With the advent of democracy, '[t]he iconic figure of Nelson Mandela, and the hope offered by the picture of a utopian new South Africa emerging from a period of political and social isolation, proved to be powerful draw-cards that attracted migrants from throughout the world.'[14]

With the new rights-based regime came a rights-based approach to migration. The government moved to ratify international conventions and implement domestic frameworks. In 1993, South Africa entered into a Memorandum of Understanding (MOU) with UNHCR,[15] agreeing to honour the refugee definitions in the OAU Refugee Convention and the UN Refugee Convention. In 1995 and 1996 respectively, the government became party to these two Conventions. A consultative process took place, aimed towards the development of new laws to replace the outdated Aliens Control Act – which has been referred to by researchers

[12] DHA *Annual Report 1990* (DHA, Pretoria 1991) at 1.3 documents the suspension of action against Mozambican 'illegals', with 19 526 provisional permits being issued in Gazankulu and 42 272 in KaNgwane since 1985. Despite the suspension, Mozambican refugees continued to be regarded as 'illegals' and many – especially those outside Gazankulu and KaNgwane – were arrested and deported. On 15 October 1993, South Africa, Mozambique and UNHCR signed a tripartite agreement for the voluntary repatriation of Mozambican refugees; this ended on 31 April 1995 with 32 010 persons repatriated: DHA *Annual Report 1995* (DHA, Pretoria 1996) at 1.3. See also de la Hunt 1998 above n 11 at 125; Wentzel & Tlabela above n 6 at 81; Tara Polzer *Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa* (University of the Witwatersrand, FMSP, Working Paper Series No 17, Johannesburg May 2005).

[13] See Jonathan Crush & David A McDonald 'Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid' (2001) 48(3) *Africa Today* 1 at 2-4.

[14] Lee Anne de la Hunt 'Refugee Law in South Africa: Making the Road of the Refugee Longer?' in Legal Resources Foundation et al *A Reference Guide to Refugee Law and Issues in Southern Africa* (Legal Resources Foundation, Lusaka 2002) 34 at 34.

[15] Basic agreement between the Government of the Republic of South Africa and UNHCR, 6 September 1993. See also DHA *Annual Report 1993* (DHA, Pretoria 1994) at 1.3.

as legislation passed as 'a dying gasp of apartheid'[16] – and to create legislation governing refugees.

In 1996, DHA appointed a Task Team on International Migration to consider issues of international migration, including forced migration. Over the following several years, this Task Team and its successors, the Refugee Affairs Task Team and the White Paper Task Team, produced the three principal documents that influenced the development of the new legislation: (1) the 1997 Draft Green Paper on International Migration[17] (the 'Green Paper'); (2) the 1998 Draft Refugee White Paper[18] (the 'Refugee White Paper'); and (3) the 1999 White Paper on International Migration[19] (the 'White Paper'). These led to the repeal of the Aliens Control Act and the development of the Immigration Act and Refugees Act, which form the present-day legislative scheme.

The Green Paper was a progressive document that supported a human rights-based and solution-oriented approach to migration. It argued for a shift away from past policies which 'focused primarily on control and expulsion rather than facilitation and management', and sought to refocus immigration policy 'as an issue of growth and development.'[20] It underlined the importance of balancing the state's prerogative 'to determine who will be allowed entry to the country and under what conditions' with the human rights requirements in the Constitution, its Bill of Rights, its international obligations, and, generally, the 'commitment to upholding universal human rights, administrative justice and certain basic rights for all the people who are affected by the South African state.'[21]

The Green Paper distinguished between three categories of persons entering South Africa: immigrants, migrants, and refugees.[22] For the first category, immigrants, the Green Paper proposed a labour market-based point system to open doors to people who would have a

[16] Peberdy above n 5 at 139; Sally Peberdy & Jonathan Crush 'Rooted in Racism: The Origins of the Aliens Control Act' in Jonathan Crush (ed) *Beyond Control: Immigration and Human Rights in a Democratic South Africa* (Idasa, Cape Town 1998) 18.

[17] GG 18033, 30 May 1997.

[18] GG 18988, 18 June 1998.

[19] GG 19920, 31 March 1999.

[20] Id at 1.2.1.

[21] Id at 1.1.3. See also 1.3, entitled 'Rights Orientation'.

[22] Id at 11 ('Executive Summary').

positive economic impact on the country.[23] For the second category of migrants, including unauthorised migrants, the Green Paper recognised the need for regional economic development and a specialised policy for SADC nationals. It advised that the solution lay, at least in part, in 'giving *bona fide* economic migrants from other SADC countries, who have no intention of settling here permanently, increased opportunities for legal participation in our labour market.'[24] It recommended specialised legal avenues for SADC nationals under four categories: '(i) unskilled or semi-skilled workers who are legitimately in demand by South African employers, using an annual, flexible, quota system; (ii) small traders, by issuing a special trade permit; (iii) students, by easing access and administrative convenience; and (iv) cross-border family visitation, by the use of special border passes.'[25]

With respect to unauthorised migrants, the Green Paper acknowledged the importance of immigration enforcement, due to South Africa's status as a destination country,[26] but noted that immigration enforcement must be rights-based. It specifically stated that 'unauthorised migrants should not be treated as criminals and, in the best of worlds, if apprehended [should] be placed in special holding centres and be heard by dedicated immigration courts.'[27] It also took the position that enforcement should be focused on unauthorised immigrants rather than on temporary migrants, stating that 'it does not make much sense to pour large resources into the tracing and "removal" of short-term entry permit overstayers', and argued that other tactics could be used to reduce overstaying, such as a more open policy of temporary entry (especially for SADC nationals), educative visa application materials, a fines system, and more user-friendly facilities for internal permits renewals.[28]

Chapter 4 of the Green Paper was dedicated exclusively to the subject of refugees. It argued for a rights-based approach to refugees in conformity with both international refugee law and international human rights law, through the recognition of refugees and the granting of protection that conforms to 'agreed basic standards of human dignity' such that persons

[23] Id at Chapter 2 'Immigration/Migration Policy'.

[24] Id at 11 ('Executive Summary').

[25] Id at 2.5.

[26] Id at 3.1.1 states that 'the introduction of democracy after the 1994 elections have added further attraction to the scale of economic opportunity we already regionally offer'.

[27] Id at 3.2.2. See generally id at Chapter 3 'Rights-Based Enforcement'.

[28] Id at 3.3.4.

granted protection would be entitled to a broad set of rights during their stay in South Africa.[29] Significantly, the Green Paper acknowledged that broad sets of persons may be entitled to international protection, stating as follows:

> '[B]ecause South Africa has assumed other international legal obligations that impose a situation-specific duty not to return persons at risk of serious human rights abuse (for example, under the Convention Against Torture, and the International Covenant on Civil and Political Rights), we believe that the refugee legislation should establish a *flexible conceptual category* that will ensure the ability of the determination authority to recognise the claims of such persons, and to assimilate them as refugees for the purpose of access to basic human rights and protection against return.'[30]

The Green Paper received a mixed response from stakeholders and state actors. While its core recommendation for two separate White Papers and draft legislations (one dealing with immigration and migration, the other dealing with refugee protection) was followed, both the White Paper and the Refugee White Paper retreated from the Green Paper in considerable respects.

The Refugee White Paper, while recognising the obligation and commitment to provide protection to refugees, also sought to define South Africa's protection obligations strictly in relation to the parameters of the refugee definition. It firmly stated that the government 'does not agree that it is appropriate to consider as refugees, persons fleeing their countries of origin solely for reasons of poverty or other social, economic or environmental hardships.'[31] Notably absent from the Refugee White Paper and its accompanying draft legislation was any 'flexible conceptual category', whose importance had been noted by the Green Paper. Nevertheless, the subsequent passage of the Refugees Act on 5 November 1998 was received

[29] Id at 4.5.

[30] Id at 4.3.4 (emphasis added).

[31] Above n 18 at 7.

with enthusiasm and the legislation's content 'was still sufficiently progressive to warrant praise from all parties'.[32]

The White Paper engendered more controversy, and the document and draft legislation that eventually emerged were significantly different from what was envisioned by the Green Paper. Crush describes the White Paper as 'a deeply contradictory document, on the one hand reflecting the Department's ongoing obsession with the "illegal alien" problem; on the other, proposing mechanisms for a new and more open skills-based immigration policy (as the Draft Green Paper had earlier advocated).'[33] The White Paper and draft Immigration Bill 'essentially dispensed with the rights emphasis of their predecessor',[34] even asserting in relation to constitutionally protected rights that 'there is agreement that alienage is one of the circumstances that triggers the application of the limitation clause as a matter of fact which enables government to legitimately deal with aliens on a different footing than it would with its own citizens.'[35] The White Paper went so far as to declare that the government has an 'absolute right' to choose who is allowed to enter the country, and that 'since aliens outside the country have no right or legitimate expectation in respect of their entry, the constitutional protections set forth in section 33 of the Constitution, such as the right to receive a written justification, could be inapplicable.'[36]

Two aspects that especially concerned several stakeholders and researchers were the White Paper's promotion of community-based enforcement of immigration control, and its interaction with the refugee protection regime.[37] It was feared that community enforcement would be ineffective and further racism and xenophobia. And while the White Paper expressly did not deal with refugees, it was clear that its recommendations and the draft

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[32] Crush & McDonald 2001 above n 13 at 96, referencing Michael Barutciski *The Development of Refugee Law and Policy in South Africa* (1998) 10 *Journal of Refugee Law* 700; Jeff Handmaker et al (eds) *Perspectives on Refugee Protection in South Africa* (LHR, Pretoria 2001).

[33] Jonathan Crush & David A McDonald 'Transnationalism, African Immigration, and New Migrant Spaces in South Africa: An Introduction' in Jonathan Crush & David A McDonald *Transnationalism and New African Immigration to South Africa* (Southern African Migration Project, Cape Town 2002) 1 at 11.

[34] Jonathan Crush 'The Dark Side of Democracy: Migration Xenophobia and Human Rights in South Africa' (2000) 38(6) *International Migration* 103 at 118.

[35] Above n 19 at 2.4.

[36] Id at 2.5-2.6.

[37] See Home Affairs Portfolio Committee *Hearings on White Paper on International Migration* (16-19 May 2000), < http://www.queensu.ca/samp/comments.htm> (see SAHRC's submissions); LHR *Comments on White Paper on International Migration* (LHR, Pretoria 31 March 1999).

legislation would have a large impact on asylum seekers, especially with respect to border control. A major criticism was that the White Paper 'effectively brings refugee protection "back within the ambit of migration control," rather than distinguishing between the two'.[38] The focus was clearly on African migrants, and it was evident that its overall policies would inevitably affect asylum seekers – perhaps even by design, as the White Paper acknowledged that it could do nothing about the 'push factors' driving migrants out of the rest of the continent.[39] A number of inconsistencies with the Refugees Act were also identified, such as the definitions of 'refugee', 'resettlement', and 'repatriation'.

Nevertheless, the new Immigration Act was eventually passed in 2002, followed by an Amendment Act[40] in 2004 to bring it in line with the Constitution prior to its implementation. The Act places an emphasis on skilled migration and immigration, excluding semi-skilled and unskilled workers except with respect to corporate permits that allow companies to employ a specified number of foreign workers. It contains no specialised provisions for many of the historical patterns of labour migration or for SADC nationals. Overall, the requirements and procedures for both temporary and permanent migration to South Africa are onerous, and legal immigration has not experienced a large increase since the end of apartheid (see Table 3.1).[41]

[38] Jeff Handmaker 'No Easy Walk: Advancing Refugee Protection in South Africa' (2001) 48(3) *Africa Today* 91 at 105, citing Jonathan Klaaren 'Refugee Policy and Law in South Africa', Workshop on Forced Migrants in the New Millennium (University of Cape Town, Cape Town 2000).

[39] Above n 19 at 4.2. The White Paper states clearly that 'most illegal migrants are coming from the rest of the African continent', and adopts the following as one of its main policy parameters: 'under present circumstances it is not possible for South Africa to deal with the "push" factors acting in the rest of the continent nor build a migration system predicated on the improvement of these factors.'

[40] Immigration Amendment Act 19 of 2004.

[41] See 'Appendix 1: Total, immigration and emigration, and net gain.loss in migration, by sex, 1924-2004' in Peberdy above n 5 at 247.

TABLE 3.1: Immigration to South Africa, annual (1990-2004)[42]

1990	14 499
1991	12 379
1992	8 686
1993	9 824
1994	6 398
1995	5 064
1996	5 407
1997	4 102
1998	4 371
1999	3 669
2000	3 054
2001	4 832
2002	6 545
2003	10 578
2004	10 714

3.2.3 Contemporary Patterns of Migration

While legal immigration has not experienced a dramatic increase post-apartheid, overall migration to South Africa has increased in other respects. Researchers have observed the increased numbers and diversity of people crossing South Africa's borders since the end of apartheid, noting that '[t]he great post-apartheid change is the massive influx of both permanent and temporary African and Asian migrants.'[43] Migrants have begun arriving from countries further afield in Africa (such as Angola, Somalia, the Democratic Republic of Congo (DRC), Burundi, Rwanda, and countries in West Africa) and Asia (such as Pakistan, India, and Bangladesh).[44] The country has been described as 'increasingly host to a truly pan-African and global constituency of legal and undocumented migrants.'[45]

[42] Source: Statistics South Africa *Tourism and Migration* (StatsSA, December 2004), reported in Peberdy above n 5 at 257-59. No new data is available after 2004.

[43] Loren B Landau & Aurelia Wa Kabwe Segatti *Human Development Impacts Of Migration: South Africa Case Study* (United Nations Development Programme, Human Development Research Paper 2009/05, April 2009), <http://www.migration.org.za/sites/default/files/reports/2009/HDRP_2009_5.pdf> at 19.

[44] De la Hunt above n 14 at 34-35.

[45] Crush & McDonald 2002 above n 33 at 4.

Two categories of migrants deserve special attention in the discussion of contemporary migration to South Africa: (1) undocumented migrants; and (2) asylum seekers. These categories have caused an overall increase in migration, in large part due to the absence of 'regular migration alternatives'.[46] Other factors include South Africa's relatively strong economic position and the ongoing crises in other African nations, especially Zimbabwe.

With respect to undocumented migrants, it is 'commonly assumed' that South Africa plays host to unprecedented numbers.[47] However, researchers agree that no methodology presently exists to provide reliable and accurate figures, in large part because of the inherent difficulties of counting a clandestine population.[48] Figures are often wildly inflated in a political 'numbers game' aimed at laying the blame on foreigners, justifying government shortcomings, and legitimising the use of state power.[49] While not the subject of this study, a body of literature has identified the contribution of this discourse to the rise of xenophobia and xenophobic violence in South Africa, which culminated famously in the xenophobic violence of May 2008.[50]

While precise data is not available, information regarding the numbers and trends relating to undocumented migrants in South Africa can be inferred from two main sources: deportation statistics and asylum applications.

First, deportation statistics (discussed further below at 3.3.2(a)) give an indication of the magnitude of undocumented migrants in the country. Deportation rates have increased

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[46] Katy Long & Jeff Crisp *In harms way: the irregular movements of migrants to Southern Africa from the Horn and Great Lakes regions* (United Nations High Commissioner for Refugees (UNHCR), Research Paper No 200, January 2011) at 14.

[47] Wentzel & Tlabela above n 6 at 80.

[48] See id; Oucho above n 1 at 62; Long & Crisp above n 46 at 6; Maxine Reitzes 'Immigration and Human Rights in South Africa' in Jonathan Crush (ed) *Beyond Control: Immigration and Human Rights in a Democratic South Africa* (Idasa, Cape Town 1998) 37 at 39.

[49] Trimikliniotis above n 6 at 1325-27. See Jonathan Crush 'Making up the numbers: Measuring "illegal immigration" to South Africa' (Southern African Migration Project, Migration Policy Brief No 3, Cape Town 2001); Roni Amit 'Where did all the foreigners go?' *Mail & Guardian* (28 November 2010).

[50] See for example: id; Crush 2000 above n 34; Jonathan Crush *Immigration, Xenophobia and Human Rights in South Africa* (Southern African Migration Project, Cape Town 2001); Loren Landau *Myth and Decision in South African Migration Management and Research* (University of the Witwatersrand, FMSP, Working Paper Series No 11, November 2004); Michael Neocosmos 'The Politics of Fear and the Fear of Politics: Reflections on Xenophobic Violence in South Africa' (2008) 43 *Journal of Asian and African Studies* 586; Nahla Valhi *Creating the Nation: The Rise of Violent Xenophobia in the New South Africa* (unpublished Masters thesis, York University, 2003).

drastically since the end of apartheid, with consistent rates of over 150 000 deportations per year.[51] By far, South Africa deports the largest number of people of any country in the region. However, this method of inference suffers from shortcomings. The increase in deportation numbers can be attributable, at least in part, to higher prioritisation and greater state resources being dedicated to immigration enforcement.[52] In addition, these statistics do not account for repeat deportations, thus they may lead to falsely inflated numbers of the actual numbers of undocumented migrants in the country.[53] Deportation rates nevertheless provide an indication that South Africa hosts a considerable number of migrants that are liable to deportation, and are therefore most likely undocumented.

Second, the number of asylum applications provides insight. Prior to the early 1990s, while South Africa received refugees, it did not have an established framework for granting asylum and was not seen as a desirable destination for seeking asylum. With the end of apartheid, the recognition of refugee rights, and the implementation of domestic frameworks, increasing numbers of migrants began to seek asylum in the country.

Statistical information from DHA and UNHCR shows a clear rise in the number of asylum applications received each year (see Table 3.2). This data shows a quick increase in the recorded number of asylum seekers from 1994 to 1995, after which numbers remained consistently high except for in 2000 and 2001. The Green Paper noted in 1997 that significant numbers of asylum seekers had arrived in recent years from African and Asian countries.[54]

[51] Oucho above n 1 at 62; Darshan Vigneswaran 'Enduring Territoriality: South African Immigration Control' (2008) 27(7) *Political Geography* 783 at 790.

[52] Klaaren 'Post-apartheid citizenship in South Africa' in TA Aleinikoff & D Klusmeyer *From Migrants to Citizens: Membership in a Changing World* (Brookings Institution Press, Washington 2000) 221.

[53] Jonathan Klaaren & Jaya Ramji 'Inside Illegality: Migration Policing in South Africa After Apartheid' (2001) 48(3) *Africa Today* 35.

[54] Above n 17 at 4.1.3.

TABLE 3.2: Asylum applications, annual[55]

1994	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**
1 786	10 545	15 986	15 638	15 035	13 160	3 132	4 294	55 426
2003	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	
35 920	32 565	28 522	53 361	45 637	207 206	222 324	180 637	

As can be seen from Table 3.2, the annual number of asylum applications literally exploded in 2008, with a dramatic increase to 207 206 asylum applications being lodged during that year. Since then, South Africa has been the primary destination for new asylum seekers worldwide. It received the greatest number of individual asylum applications of any nation in the world in 2008, 2009, and 2010, with one-fifth of all individual applications globally in 2010.

The sudden rise in asylum seekers since 2008 is attributable to two underlying causes. These have been identified by UNHCR as: 'the phenomenon of mixed movements from all parts of the globe to South Africa and the continuing influx of Zimbabwean nationals to the country.'[56]

The 'mixed movements' phenomenon arises out a reality of migration where 'refugees and other migrants increasingly move alongside each other, often in an irregular manner, making use of the same routes and means of transport and engaging the services of the same human smugglers.'[57] South Africa is a destination country in mixed migratory movements of people arriving from the Horn of Africa (i.e. Somalia, Eritrea, and Ethiopia), the Great Lakes region (i.e. the DRC), Zimbabwe, and other nations such as the SADC states, Bangladesh, India, and Pakistan. The historical migratory patterns affecting South Africa in which large numbers of labour migrants trickled into the country to work in the mining and commercial farming industries are deeply entrenched and did not disappear with the end of apartheid, although

[55] Sources: DHA *Annual Reports 1994-1995* (DHA, Pretoria 1995-1996) for 1994-1995; UNHCR *Statistical Yearbook Country Data Sheet – South Africa* (UNHCR, Geneva 2005) for 1995-2005; UNHCR *Statistical Yearbooks 2006-2010* (UNHCR, Geneva 2006-2010) for 2006-2010.

[56] UNHCR *Statistical Yearbook 2009: Trends in displacement, protection and solutions* (UNHCR, Geneva 2010) at 40.

[57] Jeff Crisp *Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration* (UNHCR, Research Paper No 155, April 2008) at 4.

restructuring and legal developments reduced the opportunities for contract and regularised work.[58]

In these circumstances, applying for asylum has become a valuable tool for migrants who seek to legitimise their presence in South Africa. A temporary asylum permit is generally the only straightforward way in which an undocumented migrant can obtain legal status – including the right to sojourn, work, and study in South Africa[59] – once inside the country, thus 'creating an incentive for persons to submit asylum applications despite their low probability of receiving accreditation or their substantial lack of documentation.'[60] Applying for asylum is also a significantly less restrictive and difficult process than applying for authorisation to work under immigration laws, which require an applicant to meet rigorous requirements and to be in possession of a passport and other documentation. 'In the absence of regular migration alternatives, the asylum channel has become the only way to stay in the country.'[61]

The second major contributing factor is the Zimbabwean situation. The number of Zimbabweans migrating increased progressively over the several years preceding 2008, as a result of the decline of the economy and the implementation of land reform policies. The numbers then spiked in the preface to the disputed 2008 national elections and their aftermath, 'reflecting both an increase in politically-motivated violence and a dramatic deterioration in the economic and humanitarian situation, including unprecedented hyperinflation and the effective collapse of the public health care system in the face of a deadly cholera epidemic.' In 2008, Zimbabweans became the largest population of asylum seekers globally with 118 774 worldwide applications, up from 20 847 in 2007. Of these, 111 968 were lodged in South Africa. This trend continued into 2010, when there were

[58] Long & Crisp above n 46 at 4 and 7-9.

[59] The right to work and study were added to the conditions of the asylum seeker permit after the case of *Minister of Home Affairs and Others v Watchenuka and Another* [2003] ZACSCA 142 (SCA); [2004] 1 All SA 21 (SCA), which found that an absolute prohibition on those rights was unconstitutional. Because a prohibition had the potential of violating the right to dignity, it could only be limited in appropriate circumstances upon due consideration by the Standing Committee for Refugee Affairs. DHA subsequently stated in its *Annual Report 2003-2004* (DHA, Pretoria 2004) at Part II that 'The Cape High Court order on 28 January 2004, which forced the Department to withdraw the endorsement of prohibition of work and study on asylum seeker permits, brought a serious challenge to the Department's efforts to close the door for economic migrants, who have come to seek employment in the RSA.'

[60] Trimikliniotis above n 6 at 1328.

[61] Long & Crisp above n 46 at 14.

149 400 asylum claims filed by Zimbabwean nationals globally (far ahead of the second place Somalia, which had 37 500 claims), the vast majority of which were filed in South Africa (see Table 3.3).[62]

TABLE 3.3: Asylum seekers annually, Zimbabwean origin

Year	Total	Zimbabwean origin	
		Persons applied	Percentage of total
1994	1 786	--	0%
1995	10 545	--	0%
1996	15 986	--	0%
1997	15 638	--	0%
1998	15 035	--	0%
1999	13 160	--	0%
2000	3 132	--	0%
2001	4 294	4	0.09%
2002	55 426	115	0.21%
2003	35 920	2 588	7.20%
2004	32 565	5 789	17.78%
2005	28 522	7 783	27.29%
2006	53 361	18 973	35.56%
2007	45 637	17 667	38.71%
2008	207 206	111 968	54.04%
2009	222 324	149 453	67.22%
2010	180 637	146 566	81.14%

Both of these phenomena (i.e. mixed movements and the Zimbabwean influx) raise important issues of human rights and migration policy. Researchers have begun to recognise that migration is a complex issue that cannot be divided into the traditional 'asylum-migration nexus' that neatly separates refugees from other migrants. In 2007, the UN High Commissioner for Refugees, António Guterres, observed as follows:

> '[H]uman mobility is growing in scale, scope and complexity. New patterns of movement are emerging, including forms of displacement

[62] UNHCR *Global Trends 2010* (UNHCR, Geneva 2011).

> and forced migration that are not addressed by international refugee law.'[63]

This has led UNHCR to acknowledge that 'there are numerous points at which issues of refugee protection and international migration intersect',[64] and that there is a need for a broad approach to migration that departs from the traditional dichotomy of the 'asylum-migration nexus' in favour of the more encompassing notion of 'refugee protection and durable solutions in the context of international migration'. Thus, UNHCR has begun to broaden its mandate to other aspects of migration where protection needs are implicated, and where its traditional refugee–related mandate intersects with other issues of migration.[65] UNHCR has identified a number of aspects of international migration where protection needs are relevant, including mixed movements; mixed motivations; onward or secondary movements; stranded migrants; and human trafficking and smuggling. In particular, mixed movements have 'contributed towards a blurring of the distinction between refugees and migrants in public and political opinion',[66] and led to states acting discriminately towards migrants, treating refugees as irregular migrants and blocking persons from seeking asylum. Mixed motivations create difficulties in international protection (especially refugee status determination) as people 'may be prompted by a combination of fears uncertainties, hopes and aspirations which can be difficult to unravel'[67] – particularly when migrating from countries affected by circumstances such as human rights violations, armed conflict, state collapse, or environmental disaster. Another complication is onward and secondary movements, including refugees granted protection that move on or asylum seekers who transit through a number of countries, which raise questions regarding whether such movements should be considered as part of the flight or as migratory in nature. Overall, there is a clear need for a balanced, reasoned, methodical, and rights-based approach to migration.

[63] Opening Statement by Mr António Guterres, United Nations High Commissioner for Refugees, at the High Commissioner's Dialogue on Protection Challenges: Refugee Protection, Durable Solutions and International Migration (UNHCR, Geneva 11 December 2007), < http://www.unhcr.org/475fb70f4.html>.

[64] Id at 3.

[65] UNHCR *Discussion Paper: Refugee protection and durable solutions in the context of international migration* (UNHCR, High Commissioner's Dialogue on Protection Challanges, UNHCR/DPC/2007/Doc. 02, 19 November 2007) at para 22.

[66] Id at para 24.

[67] Id at para 32.

The acknowledgement of the need to move beyond the nexus reflects 'a longstanding recognition that other categories of vulnerable migrant beyond refugees are also in need of international protection.'[68] Betts develops this argument by identifying two analytical groups of protection needs within the context of irregular migration, beyond refugees, which he terms 'vulnerable migrants' (see Box 3.1).

BOX 3.1: Vulnerable migrants, categories

Irregular migrants whose protection needs arise from non-refugee related conditions in the country of origin ('survival migrants') • Desperate circumstances of economic or social distress • Natural disasters • Environmental degradation or climate change
Irregular migrants whose protection needs arise as a result of migration • Stranded migrants • Trafficked persons • Victims of trauma and violence in transit • Forcibly expelled migrants

The first group may be termed 'survival migrants'.[69] These people have 'protection needs resulting from conditions in the country of origin unrelated to conflict or political persecution ... [such as] climate change, environmental degradation, natural disaster or serious economic and social distress'.[70] Zimbabweans fall under this category, as they often do not fit the refugee definition but are also not strictly voluntary economic migrants as they are 'fleeing an existential threat to which they have no domestic remedy ... [caused by] a combination of state collapse, livelihood failure, and environmental disaster'.[71] Under international law, '[i]n many cases, returning these people to Zimbabwe would be a clear violation of human rights such as the right to life, and would again expose those migrants to extreme levels of economic and social distress.'[72] There are also migrants for whom return could result in torture or cruel, inhuman or degrading treatment or punishment.

[68] Alexander Betts *Towards a 'soft law' framework for the protection of vulnerable migrants* (UNHCR, Research Paper No 162, August 2008) at 2.

[69] Id; Alexander Betts & Esra Kaytaz *National and international responses to the Zimbabwean exodus: implications for the refugee protection regime* (UNHCR, Research Paper No 175, July 2009).

[70] Betts above n 68 at 2.

[71] Betts & Kaytaz above n 69 at 1.

[72] Betts above n 68 at 8.

The second group comprises irregular migrants whose protection needs arise as a result of their movement. These include stranded migrants, trafficked persons, victims of trauma and violence in transit, and forcibly expelled migrants who may face human rights violations in the host country or country of origin.[73] For example, migrants often face situations of extreme vulnerability during transit where they may have been raped, abandoned, or assaulted. A noteworthy example affecting South Africa is victims of violence at the dangerous border area between South Africa and Zimbabwe.[74] This group also encompasses migrants who face legal barriers to return, or migrants whose nationality is unclear.[75]

International and state solutions have not yet been found to address the protection needs of vulnerable migrants. Various approaches have been posited. Betts proposes a 'soft law' framework, which would be non-binding but may eventually become hard law should states decide to adopt it as legislation. This framework would clarify the application of existing human rights norms and state obligations, and help to identify normative and operational gaps.[76] Long suggests moving away from a purely enforcement-oriented approach, and advocates for the more effective use of existing systems of entry, status determination, and removal.[77] In relation specifically to the Zimbabwean situation, it has also been pointed out that the existing legislative framework in South Africa presents legal options. The Refugees Act and Immigration Act provide for group-based recognition which could be applied to address the Zimbabwean influx.[78] The Refugees Act also adopts the OAU Refugee

[73] Id at 2-3.

[74] Long & Crisp above n 46 at 12.

[75] Betts above n 68 at 10.

[76] Betts above n 68.

[77] Long & Crisp above n 46.

[78] Betts & Kaytaz above n 69 at 11-12, referring to section 35 of the Refugees Act and section 31(2)(b) of the Immigration Act. Section 35(1) of the Refugees Act provides:

> 'The Minister may, if he or she considers that any group or category of persons qualify for refugee status as is contemplated in section 3, by notice in the *Gazette*, declare such group or category of persons to be refugees either unconditionally or subject to such conditions as the Minister may impose in conformity with the Constitution and international law and may revoke any such declaration by notice in the *Gazette*.'

Section 31(2)(b) of the Immigration Act provides

> 'Upon application, the Minister may under terms and conditions determined by him or her grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist: Provided that the Minister may—

Convention definition of 'events seriously disrupting the public order' which, it has been argued, should take socio-economic factors into account and be used to characterise the country conditions in Zimbabwe.[79]

Certainly, some solution is needed to ease the asylum backlog, which has grown dramatically each year. By the end of 2008, South Africa had 309 794 pending cases, including approximately 171 700 undecided cases at first instance – the largest number of undecided asylum cases in the world.[80] Updated figures are not available, but the backlog has likely increased given that in 2009, 172 702 of the new asylum applications were added to the backlog of unprocessed cases.[81] The backlog has placed extreme pressure on the asylum system. It has also led to many of the effects that have concerned UNHCR and refugee law experts. These include a hardening of the attitude of the state, indiscriminate treatment of migrants and asylum seekers, an overburdening of the asylum system, poor quality of adjudication and increased rejection of asylum claims, attempts to block applications for asylum, and an increasing vulnerability of migrants to immigration detention.[82]

At present, solutions continue to be discretionary, temporary, and ad hoc. In relation to the Zimbabwean situation, DHA introduced a special dispensation for Zimbabweans in April 2009, to regularise their status and relieve pressure on the asylum system. Zimbabweans were granted visa-free entry valid for three months, and were protected by a moratorium on deportations. A third element of the special dispensation was intended, but only came into effect in 2010. Known as the Zimbabwean Documentation Process (ZDP), it consisted of a temporary period during which amnesty was given to Zimbabweans with no or fraudulent documentation, and relaxed requirements for work, study, and business permits were

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(i) exclude one or more identified foreigners from such categories; and

(ii) for good cause, withdraw such rights from a foreigner or a category of foreigners'.

[79] See Jennifer Klinck 'Recognizing Socio-Economic Refugees in South Africa: A Principled and Rights-Based Approach to Section 3(b) of the Refugees Act' (2009) 21 *International Journal of Refugee Law* 653.

[80] UNHCR *2009 Global Trends: Refugees, asylum seekers, returnees, internally displaced and stateless persons* (UNHCR, Geneva 2010).

[81] UNHCR 2011 above n 62; Tara Polzer *Population Movements in and to South Africa* (University of the Witwatersrand, FMSP, Migration Fact Sheet 1, Johannesburg June 2010) at 2.

[82] See Roni Amit *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Process* (University of the Witwatersrand, FMSP, Johannesburg April 2010); Sandy Johnston et al (eds) *Migration from Zimbabwe: Numbers, needs and policy options* (Centre for Development and Enterprise, Johannesburg 2008); Crisp above n 57; UNHCR November 2007 above n 65.

implemented. The ZDP was announced in early September 2010, and ran from 20 September to 31 December 2010. Despite extreme time pressures and bureaucratic difficulties, including delays in the issuing of passports by Zimbabwean authorities, during the ZDP 275 762 Zimbabweans applied for regularisation, and DHA stated its intention to finish adjudication of the applications in the 2011-2012 financial year.[83]

3.3 IMMIGRATION DETENTION IN SOUTH AFRICA: LAW AND PRACTICE

3.3.1 The Legislative Framework

The Immigration Act and Refugees Act provide the legal authority and framework for immigration detention in South Africa. This section will give a brief summary of each. It must be also be recalled that the legal provisions set out under these two statutes remain subject to the Constitution and its Bill of Rights, including the rights to administrative justice,[84] which are discussed in chapter 2 above.

(a) Immigration Act

The Immigration Act is the statute that deals generally with foreign nationals in South Africa. Its long title states that the purpose of the Act is '[t]o provide for the regulation of admission of persons to, their residence in, and their departure from the Republic; and for matters connected therewith.' The preamble also states that the Act 'aims at setting in place a new system of immigration control', which ensures *inter alia* that 'immigration laws are efficiently and effectively enforced'; 'immigration control is performed within the highest applicable standards of human rights protection'; 'a human rights based culture of enforcement is promoted;' and 'the international obligations of the Republic are complied with'.

The Immigration Act provides for the detention and deportation of persons classified as 'illegal foreigners', a term which is defined in section 1 as 'a foreigner who is in the Republic in contravention of this Act'. Additionally, section 8(1) sets out the procedures by which a

[83] DHA *Annual Report 2010-2011* (DHA, Pretoria 2011); Roni Amit *The Zimbabwean Documentation Process: Lessons Learned* (University of the Witwatersrand, African Centre for Migration and Society (ACMS), Johannesburg January 2011).

[84] Which are guaranteed in section 33 of the Constitution and given effect through the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

person is classified as an 'illegal foreigner'. The person must be informed, on the prescribed form, of the decision classifying him or her as an illegal foreigner and of the right to request a review of the classification.[85] Section 32 then provides:

> '(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.
>
> (2) Any illegal foreigner shall be deported.'

There are two types of immigration detention that are authorised by the Immigration Act. These are: (1) detention for the purpose of deportation; and (2) detention for the purpose of verification and identification.

Detention for the purpose of deportation is governed by section 34. Section 34(1) provides that 'an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and *may, pending his or deportation, detain him or her or cause him or her to be detained* in a manner and at a place determined by the Director-General' (emphasis added).

Importantly, section 34, together with the Immigration Regulations, sets out a number of procedures that must be followed during the detention process. These seek to ensure that the person arrested is aware of the reasons for the detention[86] and of his or her rights, and that there is judicial oversight of the detention. The procedural requirements are as follows:

- The individual must be given written notification, in the prescribed form, of the decision to deport him or her and of the right to appeal such decision.
- The individual may at any time request from any attending officer that his or her detention for the purpose of deportation be confirmed by a warrant of the court which must be issued within 48 hours, failing which the individual must be immediately released.

[85] The prescribed form under the Immigration Regulations is Form 1: Notification Regarding Right to Request Review by Minister.

[86] See also section 35(2) of the Constitution, which protects the right of every detained person to be informed promptly of the reasons for the detention.

- The individual must be informed of the above rights upon arrest or immediately thereafter. When possible, practicable and available, this notification must be given in a language he or she understands.
- The individual may not be detained for more than 30 calendar days without a warrant of the court. The warrant may, on good and reasonable grounds, extend the detention for an adequate period not exceeding 90 days.
- The Regulations contain detailed procedures and prescribed forms that must be used by an immigration officer to apply for a warrant of detention. An immigration officer who intends to apply for the extension of the detention period must:
    - Serve notification on the detainee within 20 days of the arrest;
    - Afford the detainee an opportunity to make representations within three days of the notification; and
    - Submit the application for the extension of the period of detention in the prescribed form to the clerk of the court within 25 days of the arrest.[87]
- The individual must be held in conditions of detention that conform to the minimum standards of detention prescribed in the Regulations.

Detention for the purpose of identification and verification is authorised by section 41 of the Immigration Act, which provides as follows:

> 'When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer *may take such person into custody without a warrant*, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.' (Emphasis added.)

[87] Regulation 28. The relevant forms are Form 31: Notice to foreigner of intention to apply to court for extension of detention and Form 32: Application to court for extension of detention and authorisation by court for that extension.

This section requires that the immigration officer or police officer must take reasonable steps to assist the person to verify his or her identity or status. The required steps are set out in more detail in Regulation 32, which provides that the relevant official must:

- Access relevant documents that may be readily available;
- Contact relatives or other persons who could help prove the individual's identity and status; and
- Access relevant departmental records.

The maximum period that a person may be detained for these purposes is 48 hours. This limitation is found in section 34(2), which states that the detention of a person 'for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.'

(b) Refugees Act

The Refugees Act creates a distinct legal framework to provide for the reception and regulation of asylum seekers and refugees. It contains separate detention provisions for asylum seekers and refugees and provides them with a *sui generis* status. Section 21(4) of the Act states specifically that:

> 'Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if—
>
> (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or
>
> (b) such person has been granted asylum.'

As such, asylum seekers and refugees cannot be detained as 'illegal foreigners' in terms of the Immigration Act. Rather, they must be dealt with in accordance with their dedicated

legislation, the Refugees Act. The Refugees Act contains its own provisions authorising the detention of asylum seekers and refugees.

Section 23 provides for the detention of asylum seekers. It states that an asylum seeker may be detained pending the finalisation of his or her asylum claim, if the Minister has withdrawn his or her asylum seeker permit. According to section 22(6), an asylum seeker permit may be withdrawn if the asylum seeker contravenes the conditions on the permit or if the application for asylum has been rejected or found to be manifestly unfounded, abusive, or fraudulent.[88] It should be noted that such detention still requires that the asylum seeker's claim be finalised.

Section 28 provides for limited circumstances in which a recognised refugee may be detained. It states that 'a refugee may be removed from the Republic on grounds of national security or public order', but only where due regard is given to the rights in section 33 of the Constitution and the rights of the refugee under international law.[89] Section 28(4) authorises the detention of any refugee ordered to be removed under the section, pending his or her removal from the Republic.

The detention of both an asylum seeker and a refugee are subject to the restrictions found in section 29. This section provides that no person may be detained 'for a longer period than is reasonable and justifiable', and requires that 'any detention exceeding 30 days must be reviewed immediately by a judge of the High Court of the provincial division in whose area of jurisdiction the person is detained, designated by the Judge President for that purpose'. The detention must continue to be reviewed in this manner every 30 days.[90] The section also stipulates that '[t]he detention of a child must be used as a measure of last resort and for the shortest appropriate period of time.'[91]

3.3.2 The Law in Practice

In South Africa, immigration detention occurs at a variety of facilities. These include police stations; prisons; detention facilities at the border, such as inadmissible facilities within the

[88] Section 23 read with section 22(6).

[89] Sections 28(1) and (2).

[90] Section 29(1).

[91] Section 29(2).

international zone of airports; ad hoc facilities, most notably the centre known as 'SMG' at the Soutpansberg Military Grounds in Musina near the Zimbabwe border; and one dedicated immigration detention centre, the Lindela Holding Facility ('Lindela') on the outskirts of Johannesburg in Krugersdorp.[92] The bulk of immigration detention occurs at Lindela.

Lindela has been in operation since 19 August 1996.[93] It was created to alleviate the overcrowding in police stations and correctional centres, and regularly admits undocumented migrants who are transferred by police and immigration officials from the rest of the country.[94] It is a detention facility created under section 34 of the Immigration Act, which allows immigration officers to detain illegal foreigners pending deportation in 'a place under the control or administration of the Ministry of Home Affairs'. It is therefore a detention centre intended for the temporary detention of non-nationals while they await deportation.

Official figures about the total numbers of immigration detainees and duration of their detention are not made widely available to the public, and are seldom available at all. However, information can be gleaned from a number of reliable sources that give an indication of the extent and use of immigration detention by the South African government. The first source is information and statistics that are released by DHA into the public domain. Second, there are sources other than DHA. These include literature and reports by independent researchers and organisations, as well as court applications brought on behalf of immigration detainees.

(a) Department of Home Affairs

There are two types of data published by DHA that provide insight into its use of immigration detention. The first is information relating to deportations and immigration enforcement. The second is information specifically regarding immigration detention, a limited amount of which is available.

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[92] Global Detention Project (GDP) *South Africa Detention Profile* (GDP, June 2009), <ttp://www.globaldetentionproject.org/countries/africa/south-africa/introduction.html>.

[93] HRW *'Prohibited Persons': Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (HRW, 1-56432-181-9, 1 March 1998) at 69-70.

[94] Id at 69.

First, information regarding deportations and immigration enforcement is made public by DHA on a regular basis, primarily in its annual reports. This data does not reveal precise information about the number of persons subject to immigration detention as it does not, for example, account for persons deported more than once.[95] Nor does it reveal specifics about the actual use of immigration detention, such as the average length of detentions or the individual circumstances of the persons detained. It nevertheless provides valuable general information about the priority and resources placed on immigration policing and enforcement in DHA's overall policy. To a large extent, it also gives an indication of the number of immigration detentions that have occurred during the year. This is due to the fact that in South Africa, deportations appear generally to be inevitably preceded by a period of immigration detention.[96]

In both narrative and numbers, DHA's annual reports indicate an increasing prioritisation and use of measures to expel undocumented migrants over the years. From 1992 to 1996, the annual reports stated that the number of 'illegal aliens' entering the country increased due to poor socio-economic conditions in nearby and other states, and that DHA was therefore engaged in efforts to trace and remove these 'aliens' from the country.[97] In 1996, DHA entered into discussions with the International Organisation for Migration (IOM) to seek 'to inform citizens of especially the neighbouring countries of the problems that they can expect if they decide to enter the Republic of South Africa illegally.'[98] The following year, a National Interdepartmental Structure (NIDS) – consisting of officials from the South African Police Service, the South African Revenue Services, and DHA – was established to tackle the problem of border control.[99]

[95] It appears that DHA's systems do not provide this information. DHA *Annual Report 2009-2010* (DHA, Pretoria 2010) at 89 states that case management systems must still be integrated to the National Immigration Information System (NIIS) to check if someone has been deported before.

[96] DHA stated on affidavit in 2008 that it has an 'obligation' to detain persons considered illegal foreigners under the Immigration Act: *Ulde v Minister of Home Affairs and Another* [2009] ZASCA 34, 2009 (4) SA 522 at para 5. DHA stated again on affidavit in 2011 that '[i]t is inconceivable that a deportation can take place without the physical detaining of an illegal foreigner's person': *Phale v Minister of Home Affairs and Others* [2011] ZAGPPHC 71 at para 8. See the discussion at 3.3.2(b)(ii) below.

[97] DHA *Annual Reports 1992-1995* at 1.3.

[98] DHA *Annual Report 1996* at 9.2.

[99] DHA *Annual Reports 1996-1997* at 4.1.5.

These patterns reflect a perception and policy position, mirrored in the discussions that formed the backdrop to the development of the present-day legal regime, that migration poses a major threat to the social and economic well-being of South African citizens.[100] It was apparent in the White Paper, which 'noted that illegal aliens have ... [a] negative impact on the provision of services and on our society' and took the stance that 'our migration policy should reflect the notion that further population growth through migration is not desirable.'[101] It has also been reflected in public statements of DHA, including the following by then-Minister Buthelezi in 1996:

> 'The department is confident that the influx of illegal immigrants who pose a threat to the RDP and the prosperity of citizens can be stemmed, but only if the central and regional governments as well as all political parties are willing to support the department in its actions.'[102]

In accordance with this, deportation statistics have escalated during the post-apartheid years, reaching levels above 150 000 in 1995 and remaining consistently high (see Table 3.4). These numbers even hovered around 300 000 deportations annually in 2006-2008, until they abated with the implementation of the moratorium on Zimbabwean deportations in May 2009.[103] This moratorium was lifted in late 2011,[104] and although the effect of this is not yet clear, it seems almost certain that the number of deportations will increase again.

[100] See the discussion at 3.2.1 above.

[101] Above n 19 at 3.1 and 5 'The existing policy framework'.

[102] Minister of Home Affairs Mangosuthu Buthulezi 'Introductory Speech: Policy Debate, National Assembly' (Parliamentary Library, Pretoria 1996), quoted in Reitzes above n 48 at 41.

[103] DHA explains in its *Annual Report 2010-2011* at 42 that deportation numbers did not reach the target of 224 000 due to '[t]he special dispensation introduced for Zimbabweans in terms of the DZP, who previously constituted the bulk of deportations (in excess of 160 000)'. See also Tara Polzer *Regularising Zimbabwean Migration to South Africa* (University of the Witwatersrand, FMSP, Johannesburg 2009).

[104] Child 'Home affairs resumes Zim deportations' *Mail & Guardian* (7 October 2011), <http://mg.co.za/article/2011-10-07-home-affairs-resumes-zim-deportations>.

TABLE 3.4: Persons deported, annual, 1990-2011[105]

1990	53 418
1991	61 435
1992	82 575
1993	96 600
1994	90 692
1995	157 708
1996	180 713
1997	176 351
1998	181 286
1999	183 861
2000	170 317
2001	156 123
2002	115 794
2003	164 294
2004	167 137
2005	209 988
2006	266 067
2007	312 733
2008	280 837
2009	not available[106]
2010	55 825

Second, a limited amount of information is directly available from DHA regarding immigration detention specifically. Several of DHA's annual reports include statistics regarding the numbers of persons detained. However, this data is often incomplete and differs by time period, making it difficult to compare and to fully understand the phenomenon. Further, it does not describe or give insight to specifics such as the conditions of detention, the sufficiency and fairness of administrative procedures used, the factors considered in the decision to arrest and detain the person, or the circumstances of the persons detained. The unavailability of information seems to be, in part, attributable to the lack of

[105] Source: DHA *Annual Reports 1990-2011*.

[106] While the DHA *Annual Report 2009-2010* lists that 1 060 persons were deported, this seems almost certainly incorrect, given the figure's inconsistency with surrounding years and the figure of 55 825 in 2010 when the moratorium continued to be in effect for the majority of the year. See n 103 above.

reliable systems within DHA to record such information, such as the breakdown in internal controls and accounting procedures in the years preceding 2004.[107]

During the 2005-2006 financial year, DHA appointed additional staff and installed IT systems at Lindela for the purposes of the 'real time verification of fingerprints to identify citizens from the undocumented foreigners to be deported.'[108] For the next three years, DHA provided statistics regarding actual numbers of persons detained at Lindela: 70 625 in 2005; 56 111 in 2006; and 75 701 in 2007. However, the provision of these figures was discontinued in the annual reports of subsequent years.

There is an apparent discrepancy between the number of persons detained at Lindela and the number of persons deported. This is explained by the fact that not all persons deported are detained at Lindela; the majority are deported directly from the provinces rather than transferred into detention in Lindela. As recorded by DHA in its *Annual Report 2007-2008*:

> '80% of deportees were transported directly from the provinces, with 84% deported directly from three of those provinces. DHA inspectorate structures in Gauteng (45%) and North West (35%) provinces transport the majority of the deportees to the deportation holding facility.'[109]

Another set of data relating to immigration detention that appears in DHA's reports, to a limited extent, is the length of detention. As has been noted above, the Immigration Act prescribes in section 34(1)(d) that the period of detention may not be 'for longer than 30 days without a warrant of Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days'. A small number of DHA's annual reports record the number of deportations that take place within these legally stipulated timeframes of 30 days, or 120 days with a court warrant. For 2007, DHA reported that it achieved its target of 90% of persons detained being successfully deported within 30 days

[107] DHA states as follows in its *Annual Report 2003-2004* at Part III: 'Certain significant breakdowns in the systems of internal controls and accounting procedures occurred during the year under review, as reported on by the Auditor-General. It is regrettable that the corrective action taken during the year to resolve the internal control weaknesses noted in respect of the Lindela detention centre were not adequate.'

[108] DHA *Annual Report 2004-2005* at 1.2.1.

[109] DHA *Annual Report 2007-2008* at 23.

from the date of arrest, or within 90 days with a court warrant.[110] For 2008, DHA reported that 21 063 persons, equating to 7.5% of the total number of persons detained, were held for longer than the specified period of 30 days.[111]

What the available data does not disclose is what action was taken in relation to those persons not deported within the maximum legal period. Were they released, re-arrested, provided with documentation, or simply held continuously in detention? No explicit explanation is provided; however, DHA has stated in several of its reports that a small percentage of detainees have been released due to 'logistical or legal hindrances to deportation'.[112] It is also noted that in 2010 and 2011, DHA reported contingent liabilities arising out of pending legal claims for the 'unlawful arrests and detention of illegal foreigners'.[113] Thus, in at least a small but regularly occurring percentage of cases, inability to deport and unlawful detention both play a role in the immigration detention process.

Although the information published by DHA is of limited nature, it provides some important data and impressions regarding the scope, approach, and prioritisation of immigration enforcement and immigration detention specifically. It also gives some clues as to the challenges faced in the immigration detention process, including breakdowns in record-keeping, inefficiency of deportations, barriers to deportation, and unlawful detentions.

(b) Other Sources: Literature and Case Law

A fuller picture emerges out of information available from other sources. Research, monitoring, and advocacy activities since the end of apartheid have established a body of documentation and literature that provides greater detail and insight into the South African government's use of immigration detention.

Independent researchers and organisations have on several occasions been able to access persons in immigration detention in order to conduct research or to consult with detainees for the purposes of providing legal advice or representation. On occasion, DHA has also

[110] Id at 18.

[111] DHA *Annual Report 2008-2009* at 27.

[112] DHA *Annual Report 2004-2005* at 36; DHA *Annual Report 2005-2006* at 22; DHA *Annual Report 2006-2007* at 25.

[113] DHA *Annual Report 2009-2010* at 87; DHA *Annual Report 2010-2011* at 55.

provided these researchers with data and statistical information regarding detentions at Lindela. Following a court order in the case of *South African Human Rights Commission and Others v Minister of Home Affairs and Another*,[114] DHA was required to provide bi-weekly statistics of persons detained at Lindela to the South African Human Rights Commission (SAHRC) to facilitate monitoring of the detention centre. Statistics have also been provided in the past to LHR and FMSP, although this has been on an inconsistent basis and has since ceased.[115] The result has been several comprehensive reports, based on extensive on-site research and monitoring at Lindela. These include, most notably, reports authored by the SAHRC, HRW, LHR, and FMSP.[116] The UN WGAD has also visited Lindela in order to conduct monitoring and report its findings.[117]

Several South African civil society organisations, particularly LHR, have also engaged in extensive monitoring through the provision of *pro bono* legal assistance and representation for persons held in immigration detention. The Immigration Detention Monitoring Programme at LHR has been monitoring immigration arrest and detention for over a decade through visits to local detention facilities, including regular visits to Lindela and SMG, as well as occasional visits to police stations, correctional centres, and OR Tambo International Airport. It attends at Lindela weekly for the purpose of consulting with detainees and providing *pro bono* legal representation. Over 100 court applications have been filed by LHR, thus creating a body of court records and case law that gives detailed accounts of

[114] (WLD) unreported case no 28367/99 (November 1999).

[115] At the request of the SAHRC, statistics were handed to LHR attorneys during their weekly visits to Lindela from April 2009 until late 2010, when DHA refused to further provide these statistics citing the reason that 'it doubts that the statistics are ever handed over to SAHRC and that instead LHR is obtaining the statistics for an onslaught of litigation against DHA': SAHRC *Report of familiarization visit to Lindela for chairperson and CEO* (SAHRC, 23 November 2010). Similarly, Roni Amit *Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa* (University of the Witwatersrand, FMSP, Johannesburg June 2010) at 20 reports that the research team's monitoring research 'was arbitrarily halted on 11 February 2010 when Lindela officials refused to allow the team further access.'

[116] See: HRW 1998 above n 93; South African Human Rights Commission (SAHRC) *Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act* (SAHRC, Johannesburg 19 March 1999); SAHRC *Lindela: At the Crossroads for Detention and Repatriation* (SAHRC, Johannesburg December 2000); HRW *'Keep Your Head Down': Unprotected Migrants in South Africa* (HRW, Vol 19 No 3(a), New York February 2007); LHR *Monitoring Immigration Detention in South Africa* (LHR, Johannesburg 2008); LHR *Monitoring Immigration Detention in South Africa* (LHR, Johannesburg September 2010); Amit June 2010 above n 115.

[117] WGAD *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Addendum: Visit to South Africa (4-19 September 2005)* (UNCHR, E/CN.4/2006/7/Add.3, 29 December 2005).

detainees' experiences and provides information regarding DHA's practices of immigration detention.[118]

In addition to the court applications, LHR notes that through its consultations it is 'able to identify immigration trends and legal issues confronting detainees, as well as shifts in the policies of the Department of Home Affairs (DHA) and the South African Police Services (SAPS).' [119] The consultations also enable it to obtain 'information about conditions at the facility and the treatment of detainees – an important window into the detention experience given the lack of any independent monitoring.'[120]

Furthermore, the above reports and case law have been drawn upon by numerous scholars. Academic literature has been created that analyses the state's practices of immigration detention and the related legal and policy implications.

These independent sources provide information that can be classified according to three specific stages of the immigration detention process: (1) migration-related policing; (2) the arrest and initial detention; and (3) during the period of detention. These are discussed in further detail in this section.

(i) Migration-Related Policing: Finding the Foreigners

At the first stage, migration-related policing, information reveals a number of concerns. Researchers have described the use of irrational and unconstitutional measures to 'identify' immigrants. These include characteristics such as physiognomy, appearance, accent, inoculation marks, or knowledge about South Africa and its tribes.[121] For example, it has been reported that police ask certain questions to hear the pronunciation of specific words, or look for a vaccination mark on the lower left forearm to identify Mozambicans, or even consider how a person styles their hair or how they walk.[122]

[118] LHR 2010 above n 116 at 2.

[119] Id.

[120] Id.

[121] See HRW 1998 above n 93 at 49-54; SAHRC 1999 above n 116 at 18-20; WGAD above n 117 at para 49; Peberdy above n 5 at 152.

[122] HRW 1998 above n 93 at 49-51.

The result has been the wrongful identification and arrest of South African citizens as well as the wrongful apprehension of foreigners lawfully in the country. Investigations by HRW at Lindela revealed that as many as one-fifth of persons detained by the police were later released after proving their South African citizenship or lawful residence, either prior or subsequent to their intake at Lindela. Based on a count of persons so released conducted with the assistance of Lindela officials in October 1997, HRW estimated that approximately ten percent of detainees were released prior to their intake to Lindela.[123] Statistics also showed that between August 1996 and October 1997, 11 037 persons out of a total of 79 387 detainees – representing approximately fourteen percent – were released after a period of detention at Lindela.[124] While claiming that HRW's estimates are high, the police have admitted that South African citizens are regularly detained by mistake.[125] Landau has noted the concern that arises from the apparent 'official endorsement or tacit acceptance of systems in which government officials (albeit at different levels of the official hierarchy) legitimise or help create parallel – extra-legal – systems for policing foreigners', which 'not only affect both non-nationals and citizens, but also risk being institutionalised in essential state agencies and departments.'[126]

Another frequently reported practice has been the focus of migration-related policing on certain areas where migrants are likely to be found. These include specific neighbourhoods, places of safety or refuge, border areas, and the areas surrounding refugee reception offices. For example, well-publicised raids such as a crime blitz dubbed 'Operation Crackdown' have 'focused on areas predominately populated by black immigrants, and on whether individuals in these areas had the proper "passes" or immigration papers.'[127] Police have also raided the Central Methodist Church in central Johannesburg, which is well-known for providing shelter and refugee to approximately 1 000 Zimbabweans each night. The raids were carried out under the guise of 'cracking down on crime' and to ensure public safety or restore public order. External sweeps of the church's vicinity have also been conducted with the justification of enforcing loitering laws. A raid conducted during the night of 30 January

[123] Id at 52-53.

[124] Id at 53-54.

[125] Loren Landau 'Immigration and the state of exception: Security and sovereignty in East and Southern Africa' (2005) 34:2 *Millennium Journal of International Studies* 325 at 346.

[126] Id at 338 and 327, respectively.

[127] Klaaren & Ramji above n 53 at 36.

2008 resulted in the arrest of approximately 1 300 people, none of whom were charged with any non-immigration related offence.[128] Another raid on 3 July 2009 resulted in approximately 350 people arrested for 'loitering', the vast majority of whom were detained for more than two days before being ultimately released.[129]

Of particular concern are instances where migration-related policing has appeared to directly target asylum seekers or refugees, or at least has treated them without due regard for their special status under international and domestic law. These cases raise serious concerns in relation to South Africa's obligations and commitment to provide refugee protection. In several cases, immigration policing has taken place directly outside refugee reception offices, where many people begin to queue during the night or early morning hours and there are likely to be migrants without documentation who are seeking access to asylum procedures.[130] The cases of *Musad v Minister of Home Affairs and Others*[131] and *Iqbal v Minister of Home Affairs and Others*,[132] involved Bangladeshi nationals who were arrested in the early morning hours in the immediate vicinity of the Johannesburg refugee reception office at Crown Mines. In ordering DHA to facilitate the applicants' return from Mozambique and their application for asylum in South Africa, Watt Pringle AJ noted that the conclusion was inescapable that the applicants were in the area waiting to apply for asylum.

Immigration policing has even occurred at the temporary refugee camps, known as Centres of Safe Shelter (COSS), which were set up by the government during the May 2008 xenophobic violence. In *Lawyers for Human Rights v Minister of Home Affairs and Others*,[133] a group of approximately 750 foreign nationals were arrested from a COSS. Many were deported with asylum applications still pending, until an urgent court application was launched and DHA agreed to a court order for them to be released and to have their asylum applications

[128] LHR 2008 above n 116 at 5; Roni Amit 'Winning isn't everything: Courts, context, and the barriers to effecting change through public interest litigation' (2011) 27 *SAJHR* 8 at 29.

[129] See *Central Methodist Church and Others v City of Johannesburg and Others* (SGHC) unreported case no 45915/2004, court record.

[130] DHA *Home Affairs arrests 355 illegal immigrants in joint operation* (20 January 2011), <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=15767&tid=27088>.

[131] (SGHC) unreported case no 5216/2011 (11 February 2011).

[132] (SGHC) unreported case no 5546/2011 (11 February 2011).

[133] (NGHC) unreported case nos 41276/2009 and 42685/09 (21 October 2008).

processed in the normal course.[134] In May 2010, a number of asylum seekers and recognised refugees were arrested upon their eviction from the Blue Waters COSS, where they had resided since the May 2008 xenophobic attacks.[135]

(ii) Arrest

At the stage of arrest, a number of problematic practices can be identified from the available information. These can be grouped into three categories: failure to exercise discretion on the part of state officials, failure to comply with the law, and outright unlawfulness.

First, it has been illustrated through a number of cases that DHA exercises a 'blanket policy' to detain rather than conducting an individualised assessment in each case, in *favorem libertatis*, to decide whether a person should be arrested or not. This is made clear by numerous statements made by DHA on affidavit in court proceedings. In the 2008 case of *Ulde*,[136] the arresting immigration officer deposed that he proceeded to detain the applicant 'as is the Department of Home Affairs' obligation when regard is had to s 32 of the Immigration Act.'[137] The arrest was made despite the fact that the applicant had already been granted bail by a Magistrate on precisely the same grounds. The Court noted that 'an officer who decides that an illegal immigrant is liable to be deported has a discretion whether or not to arrest and detain the person pending his deportation. There is no obligation to do so.'[138] The Court found that no discretion had been exercised; rather the applicant was arrested 'pursuant to a blanket policy to detain all persons found to be illegal foreigners',[139] and the arrest was therefore unlawful.

Despite this finding, subsequent court records and decisions reveal that DHA has nevertheless continued to operate under a blanket policy to detain. The 2011 case of *Phale v*

[134] LHR *Lawyers for Human Rights Casebook* (LHR, Pretoria 2009) at 5-6.

[135] See *Hussein v Minister of Home Affairs and Others* (SGHC) unreported case no 36015/2010 (17 September 2010); *Kwizera v Minister of Home Affairs and Others* (SGHC) unreported case no 36014/2010 (17 September 2010); *Ndaishimiye v Minister of Home Affairs and Others* (SGHC) unreported case no 34374/2010 (7 September 2010); *Khalfan v Minister of Home Affairs and Others* (SGHC) unreported case no 33476/2010 (1 September 2010).

[136] Above n 96.

[137] Id at para 5.

[138] Id at para 25, citing *Jeebhai and Others v Minister of Home Affairs and Another* [2009] ZASCA 35 (SCA); 2009 (5) SA 54 (SCA) at para 26.

[139] Id at para 10.

Minister of Home Affairs and Others[140] involved similar facts to *Ulde* in that the applicant was re-arrested immediately after being granted bail for an immigration offence. In its answering affidavit, a DHA official deposed that '[i]t is inconceivable that a deportation can take place without the physical detaining of an illegal foreigner's person.'[141] The Court observed that DHA's stance showed 'that in every case where a person is deported the respondents [DHA] detain the person – the respondents therefore do not properly apply their mind in every case.'[142] These cases have led researchers to conclude that '[i]mmigration officers continue to detain suspected illegal foreigners without exercising their discretion, despite the ruling that a general policy of arrest and detention is illegal.'[143]

Second, it has been repeatedly shown that DHA fails to comply with the legal requirements of notifying arrested persons of the decision affecting them and their rights. In an extensive survey conducted at Lindela during 2009-2010, Amit found that 47% of detainees were not informed that they had been classified as illegal foreigners. Out of those informed, 90% received no written notification and 84% received no information at all about the right to request a review of the decision.[144] The wide majority of detainees were also not given notification of the decision to deport them, and of those who were, most did not understand what they were signing (71%) and were not afforded the opportunity to choose from the options on the form (87%).[145] Detainees often have limited ability to speak or read English, and translators are not provided or forms are not read and explained to them. Numerous cases demonstrate a disregard for the notification and election requirements prescribed by law.[146] There have also been cases where detainees have been intimidated into signing the notifications, without their contents being explained to them.

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[140] *Phale* above n 96.

[141] Id at para 8.

[142] Id at para 10.

[143] Amit 2011 above n 128 at 18. See also LHR 2010 above n 116 at 5, which concludes that immigration officials 'have failed to employ their discretion, and have instead adopted a general policy of detaining all suspected illegal foreigners pending deportation.'

[144] Amit June 2010 above n 115 at 33-34.

[145] Id at 39.

[146] See for example *Matoleo v Minister of Home Affairs and Others* (SGHC) unreported case no 40510/2010 (12 October 2010), where the applicant was instructed to sign the Notification of Deportation without it being explained to him or being given the opportunity to elect.

Another statutory requirement contained in the Immigration Act is the positive duty on state officials to take active steps to verify an individual's identity and status within a maximum of 48 hours. According to Amit, 77% of detainees interviewed reported having valid documentation at the time of their arrest, although 26% of them were not carrying their documents at the time of arrest.[147] This indicates that persons with valid status are frequently arrested, either because it is disregarded by the arresting officer or because the required verification procedures are not carried out.[148] Officials often do not allow people to access to their homes or government offices to retrieve their legally valid documents or to replace lost ones. Otherwise, verification processes may be excruciatingly slow. For example, in one case, a Tanzanian national who was granted permanent residence under the 1996 SADC amnesty was arrested when he lost his South African identity booklet. He was detained for over two months before DHA finally found record of his status in departmental records and released him.[149]

In relation to refugees and asylum seekers, there is little understanding by state officials of the provisions of the Refugees Act and the basic principles of international refugee law. Refugees and asylum seekers are often arrested despite having valid documents, and are told that their permit under the Refugees Act is not acceptable. This is exacerbated by the administrative inefficiencies and overburdened resources that characterise the asylum system, which results often in individuals waiting lengthy periods for their claims to be finalised, being unable to apply, or being unable to renew their permits due to lengthy queues. Amit found that 37% of detainees surveyed held asylum permits at the time of their arrest, with 53% of those permits still valid. Many detainees reported that their permits had expired or that they were unable to apply for asylum because they were unable to access a refugee reception office despite multiple attempts, due to long queues.[150]

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[147] Amit June 2010 above n 115 at 24-25. Valid documents included asylum transit permits, asylum permits, refugee ID books, South African ID books, and temporary residence permits.

[148] Id at 25-26; SAHRC 1999 above n 116 at 21-23; SAHRC 2000 above n 116 at 36; Klaaren & Ramji above n 53 at 43; WGAD above n 117 at para 49. HRW 1998 above n 93 at 54-55 reports that during interviews it conducted at Lindela, one man claimed that his SADC amnesty documents were not respected and destroyed by police; one man (who was still in possession of his DHA receipt) stated that he was arrested despite being on their way to collect his identification at DHA's offices; and another man stated that he was arrested summarily when he went to the police station to report the theft of his wallet which contained his temporary residence permit.

[149] LHR files, May 2010.

[150] Amit June 2010 above n 115 at 28.

The Court has found that DHA engages in an unlawful and unconstitutional 'practice' of failing to issue asylum seekers permits upon application. In a 2011 case, the North Gauteng High Court found that there was clear evidence of a 'practice' of failing to verify and identify the status of detainees who informed officials that they were asylum seekers.[151] The Court noted that despite increased numbers of people seeking asylum, the state had failed to fulfil its duty to use its resources to their maximum capacity to take 'all reasonable steps to ensure maximum compliance with [its] constitutional obligations.'[152] These duties include a 'positive duty' on an arresting officer to take steps to verify the identity and status of any person whose entitlement to be in the country is in question. The Court stated:

> 'Such a practice ... would in most instances have resulted in the summary detention of an individual under circumstances where verification may have established that the person was indeed a *bona fide* asylum seeker and that the expiration of the permit was on account of factors beyond the control of the individual involved but more particularly the result of long queues and administrative and logistical difficulties on the part of the respondents.'[153]

Further, even if a person's asylum permit has expired, this only constitutes potential grounds for the permit to be 'withdrawn' by the Minister of Home Affairs – a process that requires that the affected person be given notice, an opportunity to be heard, and written reasons.[154] 'The withdrawal of the asylum seeker permit is thus a jurisdictional fact for the lawful detention of the asylum seeker.'[155] Despite this, LHR has reported that '[n]one of the more than 200 asylum seekers LHR has consulted with in Lindela over the past year and a half has been notified of any proceedings to withdraw his or her asylum permit.'[156]

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[151] *Zimbabwe Exiles Forum and Others v Minister of Home Affairs and Others* [2011] ZAGPPHC 29.

[152] Id at para 24.

[153] Id at paras 31-32.

[154] Section 23, entitled 'Detention of asylum seeker', provides: 'If the Minister has withdrawn an asylum seeker permit in terms of section 22(6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.

[155] *Arse v Minister of Home Affairs* [2010] ZASCA 9 (SCA); 2012 (4) SA 544 (SCA) at para 21.

[156] LHR 2010 above n 116 at 7.

Finally, literature and case law have reported entirely unlawful conduct on the part of state officials. There are extremely concerning reports that officials engage in a practice of' actively 'making people illegal' through various means, including administrative inefficiencies, refusal of access to government buildings, or even the destruction or confiscation of valid documents.[157] Several persons interviewed at Lindela by HRW claimed that police officials had destroyed their documents after determining that they were foreigners. Given its systemic and widespread practice, researchers have even questioned whether the destruction of documents is state-sanctioned, perhaps on instructions from above.[158] Corruption during the arrest process has also been consistently documented. Arrests are often accompanied by demands for bribes, with numerous interviewees stating that officials have offered to accompany persons to an automated teller machine (ATM) or contact relatives to obtain the necessary bribe.[159] It is even suggested that 'arrests are sometimes made for the primary purpose of extracting bribes',[160] with state officials seeing foreigners as 'mobile ATMs'.[161] While DHA has acknowledged that corruption is a problem and is seeking to remedy the situation, it has struggled to do so due to the problem's deep-set entrenchment.[162]

Finally, there have been accounts of physical abuse by state officials, including severe beatings and rape, often with no recourse to justice due to the victim's impending deportation.[163] Amit reports that 11% of detainees suffered violence during their arrest and initial detention, 68% of which was inflicted by state officials or security guards.[164] HRW states that its research even suggests that some officials 'feel like they are serving their

[157] HRW 1998 above n 93 at 54-55; SAHRC 1999 above n 116 at 21-22; SAHRC 2000 above n 116 at 36; Klaaren & Ramji above n 53 at 36; WGAD above n 117 at para 75.

[158] See Klaaren & Ramji above n 53 at 36; Landau 2005 above n 125.

[159] HRW 1998 above n 116 at 55-61; SAHRC 1999 above n 116 at 24-27; SAHRC 2000 above n 116 at 36; Amit June 2010 above n 115 at 57-58.

[160] HRW 1998 above n 93 at 57.

[161] Landau 2005 above n 125 at 341.

[162] Id at 346.

[163] HRW 1998 above n 116 at 61-64; SAHRC 1999 above n 116 at 27; SAHRC 2000 above n 116 at 36-37; Amit June 2010 above n 115 at 22 and 31-32.

[164] Amit June 2010 above n 115 at 31. 57% of violence was inflicted by police officers, 8% by immigration officials, 3% by security guards, 28% by other detainees, and 3% by other.

country's interests by abusing undocumented migrants, as this is likely to guarantee that the migrants will not return anytime soon to South Africa.'[165]

(iii) The Period of Detention

The literature and case law disclose a pattern of violations of human rights and the law during the period of detention. Several areas of concern have been repeatedly reported. These can be classified into four groups: (1) failure to comply with the procedures stipulated by law; (2) prolonged detentions in excess of the legal maximum of 120 days; (3) continued detention of persons – including asylum seekers – who are not subject to deportation or who cannot be deported; and (4) concerns regarding the conditions of detention.

The first area concern relates to a failure to comply with the requirements in the Immigration Act that all detentions be subject to judicial review by warrant of court within 30 days, with detailed procedures and timelines for the detainee to receive notification and make representations and for the court application to be made.[166] In every report resulting from monitoring at Lindela, it has been noted that the '30-day' rule is consistently violated in several ways. First, there has been a consistent failure to comply with the requirement for judicial review at all. The primary monitoring reports have all stated that detainees are held for longer than 30 days without the mandatory judicial review.[167] Second, problems with record-keeping and inaccurate calculations of the time spent in detention result in violations of the law. The SAHRC observed that there was no mechanism to record the period of time spent in detention in prisons or police cells prior to a detainee's arrival at Lindela. Despite recommendations to remedy this defect, the pre-Lindela period of detention continues not to be discernible or recorded in DHA's statistics.[168]

Even more concerning has been the attempt by DHA to use extra-legal methods to 'restart' the period of detention, either by re-registering a detainee on the system or by releasing and re-arresting the detainee. The SAHRC observed that any detainees who left Lindela for any

[165] HRW 1998 above n 93 at 64.

[166] Section 34(1)(d). Similarly, section 55(5) of the old Aliens Control Act stated that a prohibited person could not be detained for more than 30 days unless his or her detention was reviewed by a judge of the High Court.

[167] HRW 1998 above n 93 at 98; SAHRC 2000 above n 116 at 51 and 53-54; WGAD 2005 above n 117 at para 47; Amit June 2010 above n 115 at 43.

[168] See SAHRC 2000 above n 116 at 51 and 53-54; Amit June 2010 above n 115 at 43.

reason had their arrest date re-registered upon their return to the facility, even if he or she was not released.[169] FMSP researchers interviewed 18 detainees who reported being released from Lindela and immediately re-arrested. Amit states that '[w]hile the reason for this practice is not clear, it could allow immigration officials to re-start the "detention clock" with a new admission date. This would allow them to circumvent implementation of the procedures that are required after the running of certain time periods.'[170]

DHA's deliberate use of this practice to circumvent the time periods in the Immigration Act became clear in *Zimbabwe Exiles Forum*.[171] The fourteen applicants in that case had all been released and immediately re-arrested in this manner. DHA argued that the practice was 'not inconsistent with the law' and permitted it to bypass the requirements of judicial review. The Court found that '[t]here hardly appears to be any dispute that there has been a practice that has developed where immigration detention is not extended by a warrant of a court but individuals are released from detention and immediately thereafter rearrested,'[172] noting that on the government's interpretation of the law, 'a person could be held virtually indefinitely simply on the authority of an immigration officer'.[173]

Even where warrants are obtained, the procedures followed in obtaining the warrant are often faulty. Detainees are not given adequate notice or an opportunity to make representations, and warrants are sought out of time. The SAHRC found that only two detainees had their detention reviewed by a judge, but both reviews had occurred after the expiry of 30 days and neither detainee was informed of the reasons for the request or given an opportunity to make representations.[174] In *AS and Others v Minister of Home Affairs and Others*,[175] the Court held that purported warrants of detention were invalid as they had been obtained by DHA long after the 30 days had expired. Independent monitoring and case law continues to show that very few detainees are given notification of the intent to apply for an extension of their

[169] SAHRC 2000 above n 116 at 53.

[170] Amit June 2010 above n 115 at 45.

[171] Above n 151.

[172] Id at para 49.

[173] Id at para 50.

[174] SAHRC 2000 above n 116 at 53-54.

[175] (SGHC) unreported case no 101/2010 (17 March 2010). The applicants in that case were arrested on 2 November 2009, and warrants were only obtained on 23 and 30 December 2009 (paras 18-20). See also *Hamisi v Minister of Home Affairs and Others* (SGHC) unreported case no 32275/2011 (12 September 2011).

detention, thus taking away any ability to exercise their right to make representations.[176] The recent case of *Bula and Others v Minister of Home Affairs and Others*[177] describes an instance where the immigration official failed to give written notification of the intention to apply to extend the detention but claimed to have given the detainees 'verbal' notification.[178] The Supreme Court of Appeal held that there could be no such thing as 'substantial compliance' with the requirements in the Regulation, particularly where the statute involves an individual's liberty.[179]

The second area of continued unlawfulness relates to the 120-day maximum period of detention prescribed by the Immigration Act. Statistics from 2009-2010 showed that approximately 6% of detainees were held for over 120 days, with an average of 1.4% detainees being held for over a year. One detainee was even held for approximately 1050 days, or nearly three years.[180] DHA has continued to hold people in excess of 120 days, despite clear legal precedent that it is unlawful. It persists in taking the position that even if not lawful, such prolonged detention is nonetheless 'necessary and justifiable'.[181]

The third area of concern relates to the continued detention of persons not for the purposes of deportation. This includes persons who are entitled to remain in the country, as well as persons who cannot be deported for a variety of reasons. Several cases have involved persons detained for extended periods of time, despite a legal entitlement to be present in South Africa, including South African citizens,[182] permanent residents,[183] and recognised refugees holding valid permits.[184] DHA also persists in detaining asylum seekers, asserting that it has a 'right to continue detaining asylum seekers until a final decision has been made

[176] Amit June 2010 above n 115 at 43; LHR 2010 above n 116 at 17-18.

[177] [2011] ZASCA 209 (SCA); 2012 (4) SA 560 (SCA).

[178] Id at para 49.

[179] Id at para 84.

[180] Amit June 2010 above n 115 at 44.

[181] Amit 2011 above n 128 at 24.

[182] *Sondlo v Minister of Home Affairs* (SGHC) unreported case no 23537/2010 (removed from the roll upon the applicant's release from detention). The applicant was a South African citizen pursuant to section 3(1) of the South African Citizenship Act 44 of 1949 read with section 2(1) of the South African Citizenship Act No 88 of 1995, as he was born in Namibia pre-independence and resided in South Africa as at 21 March 1990.

[183] See above n 149 and accompanying text.

[184] *Ndaishimiye* above n 135.

on their claims, regardless of any efforts to obtain or renew an asylum-seeker permit.'[185] In *Zimbabwe Exiles Forum*, the court record reveals an internal DHA directive which instructs staff at Lindela that 'any practice of releasing foreigners who apply for asylum should be stopped with immediate effect.'[186] In that case, the Court found that DHA has a practice or policy wherein 'asylum seekers who make asylum applications whilst in immigration detention must remain in detention pending the outcome of that application', including the outcome of any appeal lodged with the Refugee Appeal Board.[187]

Detainees who face logistical or legal obstacles to deportation often end up languishing in immigration detention for protracted periods of time. DHA often cites logistical difficulties arising out of foreign embassies' refusal to cooperate with the issuance of travel documents. It also blames detainees themselves, claiming that they engage in 'misrepresentation' or refuse to cooperate, in alleged attempts to evade deportation.[188] The simple logistical difficulty of the lack of a Togolese embassy in South Africa resulted in the immigration detention of a Togolese national for over a year, simply due to slowness by DHA in arranging for his deportation.[189] There have also been several cases where no state will accept a detainee as its national for deportation – a situation that often combines both logistical and legal barriers in that it raises issues regarding the deportation process, measures used to identify the detainee's nationality, and statelessness.[190]

More complicated difficulties arise in cases where there are legal obstacles to deportation. A much-publicised recent case involved two Batswana nationals who were charged with murder and fled to South Africa. Both individuals were held in immigration detention for over one year, the majority of which was unlawful. The High Court has found that their removal to Botswana without an assurance that the death penalty will not be sought is

[185] Amit 2011 above n 128 at 22.

[186] *Zimbabwe Exiles Forum* above n 151 at para 38 (citing a directive issued by DHA official Ronney Marhule).

[187] Id at paras 35-42, 48, and 52.

[188] See *Martin v Minister of Home Affairs and Others* (SGHC) unreported case no 47111/2010 (23 November 2011); *Nibigira v Minister of Home Affairs and Others* [2011] ZAGPJHC 178.

[189] LHR *Brief prepared by Lawyers for Human Rights for DIRCO and OHCR on the detention of Mr Oumarou Ali Bella* (LHR, 16 July 2010).

[190] Above n 188.

unconstitutional.[191] There are no grounds permitting the state to hold them in continued immigration detention, yet DHA has been unwilling to release them, citing concerns of public policy and safety.

Finally, researchers and organisations have raised concerns regarding the conditions of immigration detention. While in-depth information is not available, there have been reports regarding corruption, assaults, ill-treatment, inadequate diet and basic items provided, poor hygiene, and lack of medical treatment – in contravention of the Minimum Standards of Detention set out in Annexure B of the Immigration Regulations. Concerns raised include a gap of over fourteen hours between mealtimes, and insufficient provision of hygiene items such as soap and clean clothing. Medical treatment is a significant issue, especially with regard to detainees with mental health issues or chronic diseases like HIV (anti-retroviral treatments are not available at Lindela).[192] There has also a case dealing with the SMG detention facility in Musina, where the Court held that the conditions of detention at SMG were unlawful and unconstitutional.[193] The Court found that the state failed to provide adequate accommodation, nutrition, and hygiene to detainees and that the conditions at SMG failed to comply with the Minimum Standards of Detention.

3.4 CONCLUSION

As has been discussed in this chapter, various factors and pressures have led to increased emphasis on immigration enforcement and control in South Africa, especially through the use of immigration detention. While the state has the authority to seek to enforce immigration laws, the research and case law detail several areas of concern regarding the violation of human rights in South Africa's practices of immigration detention. The literature, on-the-ground reports, and case law overwhelmingly bear out that immigration detention practices in South Africa fail to measure up to both domestic and international legal standards (see Box 3.2 for a list summarising the concerns discussed above).

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[191] *Tsebe and Another v Minister of Home Affairs and Others; Phale v Minister of Home Affairs and Others* [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (SGHC). The case has been appealed to the Constitutional Court: *Ex part Minister of Home Affairs and Other v Tsebe and Others* (CCT 110/11).

[192] Amit June 2010 above n 115 at 51-56; LHR 2010 above n 116 at 21-22.

[193] *Lawyers for Human Rights v Minister of Safety and Security and Others* [2009] ZAGPPHC 57.

BOX 3.2: Immigration Detention

Migration-related policing

- Measures used to 'identify' migrants
- Focus on migrant-populated areas
- Targeting asylum seekers and refugees

Arrest and initial detention

- Failure to exercise discretion
- Failure to comply with the law
    - Legal requirements of notifications
    - Verify identity and status
        - Take required steps
        - Within 48 hours
    - Arrest of asylum seekers
        - Administrative failures of the asylum system
        - Failure to issue asylum permits upon application
        - Failure to withdraw asylum seeker permits
- Unlawful conduct
    - Destruction or confiscation of valid documents
    - Corruption
    - Abuse

Period of detention

- Failure to comply with the procedures stipulated by law
- Detentions in excess of 120 days
- Detention of persons who cannot be deported
- Conditions of detention

Viewed in the context of the migration patterns affecting South Africa, these human rights violations have a potentially profound effect on certain categories of migrants. In the following chapter, these categories of migrants will be identified, with reference to the legislative scheme, in order to identify gaps in the law that contribute to their vulnerability to immigration detention.

CHAPTER 4: DISCUSSION AND RECOMMENDATIONS

4.1 INTRODUCTION

Although it has been shown that there is often a failure of the South African state to comply with the requirements prescribed by law, in some instances, these failures are contributed to by the legislative scheme itself. The existing literature, discussed in the previous chapter, focuses primarily on DHA's immigration detention practices and their unlawfulness. However, there remains a paucity of discussion addressing the sufficiency of the legislation and enquiring whether it contains any gaps that leave certain categories of migrants vulnerable to immigration detention in South Africa.

Such a discussion is vital, given the quantity and nature of the migration patterns affecting South Africa. Its importance is further heightened by the state's prioritisation of immigration enforcement and its practices of favouring detention and attempting to use illegal – and sometimes extra-legal – means of detaining migrants.[1] And finally, it is also important to address the issue given the thriving history and environment of public interest advocacy and litigation in South Africa, and its usefulness in bringing about political, institutional, legal, and social change in the country. Public interest litigation is an important tool for civil society, particularly in areas such as immigration enforcement where political will is lacking. The existence of adequate laws is thus crucial for challenging practices and policies that violate the human rights of persons in immigration detention.[2]

In this chapter, South Africa's immigration detention practices will be analysed and categories of persons vulnerable to immigration will be identified, with reference to the legislative scheme. The discussion of each category will conclude with concrete recommendations for possible legislative reforms aimed at better protecting the human rights of migrants.

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[1] See especially Loren Landau 'Immigration and the state of exception: Security and sovereignty in East and Southern Africa' (2005) 34(2) *Millennium Journal of International Studies* 325; Rebecca Sutton & Darshan Vigneswaran 'A Kafkaesque state: deportation and detention in South Africa' (2011) 15(5) *Citizenship Studies* 627.

[2] See David Cote & Jacob Van Garderen 'Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest' (2011) 27 *SAJHR* 167; Jeff Handmaker *Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa* (Intersentia, Antwerp 2009).

4.2 PERSONS VULNERABLE TO IMMIGRATION DETENTION: CLOSING THE GAPS

An analysis of the literature and case law relating to immigration detention reveals a number of categories of persons and situations where there is a particular vulnerability to immigration detention. The state's ineffectiveness (and often unwillingness) to assist and find solutions for these persons, its policies of failing to exercise discretion in favour of liberty, and its practices of unlawfully extending the period of detention, all result in these persons being extremely susceptible to immigration detention that is prolonged, repeated, and potentially arbitrary.

This section will present these categories of persons topically. Four categories have been identified: (1) asylum seekers; (2) persons with difficulty obtaining travel documents; (3) stateless persons; and (4) persons subject to other prohibitions against refoulement, including CAT claimants and vulnerable migrants. Each category will be discussed with examples being drawn from the literature and case law, reference to the legislation, and recommendations for relevant legislative reform.

4.2.1 Asylum seekers

In theory, asylum seekers are not subject to immigration detention except under the specific provisions of the Refugees Act.[3] However, it is clear that they are regularly subject to immigration detention. There are numerous cases where asylum seekers have been detained, and where DHA has raised arguments in resistance to their release.

As noted by Amit, the detention of asylum seekers often arises from barriers to access and unfairness in asylum procedures and decision-making.[4] Asylum seekers face lengthy queues at refugee reception offices and, as a result, many are unable to apply for asylum or renew their documents. Pre-screening procedures, both at borders and at refugee reception offices, have resulted in the unlawful turning away of people seeking to apply for asylum. Other barriers have included DHA's attempt to limit the number of asylum applications accepted daily,[5] to issue appointment slips instead of the required asylum seeker permit upon

[3] Section 23, read together with section 22(6).

[4] Roni Amit 'Winning isn't everything: Courts, context, and the barriers to effecting change through public interest litigation' (2011) 27 *SAJHR* 8 at 13.

[5] *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C).

application,[6] and to apply a so-called 'first safe country' principle.[7] DHA has also refused to allow persons to enter the country to apply for asylum[8] or to apply for asylum once apprehended and detained.[9] The courts have found all of these to be unlawful.

There is also a lack of clarity regarding the prerequisite procedures for the detention of an asylum seeker, specifically, where the asylum permit has expired or where the asylum claim has been exhausted (including through a failure to appeal) or rejected. The Refugees Act provides that the permit must be formally 'withdrawn', yet neither the Act nor Regulations sets out a clear procedure or requirements for such withdrawal.[10] Further, legal remedies continue to exist: an asylum seeker who fails to appeal can lodge an application for condonation;[11] or a judicial review application can be lodged under PAJA once all internal remedies are exhausted.[12] While these remedies are pending, the person remains within the scheme of the Refugees Act and cannot be deported or detained for the purpose of deportation. Nevertheless, many asylum seekers are arrested immediately upon being found with an expired permit or having their claim rejected, without going through any procedure for the withdrawal of their permit. Further, where the asylum seeker 'revives' the claim by pursuing the available remedies, it is unclear what procedure should be followed and DHA has consistently argued against release.

There is thus a lack of clarity regarding the interaction between the Refugees Act and the Immigration Act, especially the question of when an asylum seeker will become liable to

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[6] *Tafira and Others v Ngozwane and Others* [2006] ZAGPHC 136 (NGHC).

[7] *Lawyers for Human Rights v Minister of Home Affairs* (TPD) unreported case no 10783/2001 (9 May 2001).

[8] *Abdi and Another v Minister of Home Affairs and Others* [2011] ZACSCA 2 (SCA); 2011 (3) SA 37 (SCA).

[9] *Bula and Others v Minister of Home Affairs and Others* [2011] ZASCA 209 (SCA); 2012 (4) SA 560 (SCA).

[10] Section 22(6) states that the asylum seeker permit may be withdrawn if the applicant contravenes the conditions or the application for asylum has been rejected or found to be manifestly unfounded, abusive or fraudulent. The Refugee Regulations (Forms and Procedure) 2000, GG 21075, GN R366, 6 April 2000 additionally provide in Regulation 8(1) that failure to appear constitutes grounds for withdrawal, and in Regulation 8(2)(c) that the permit may be withdrawn where 'the application for asylum has been rejected and any appeals to the Refugee Appeal Board have been exhausted or the time period to file an appeal has lapsed'.

[11] *Amadi v Minister of Home Affairs and Others* (SGHC) unreported case no 19262/10 (1 June 2010); *Matoleo v Minister of Home Affairs and Others* (SGHC) unreported case no 40510/2010 (12 October 2010); *Bashar v Department of Correctional Services & another* [2010] JOL 26119 (ECP). Rule 4 of the Refugee Appeal Board Rules, GG 25470, GN 1330, 26 September 2003 provides for condonation in the event of the late filing of a notice of appeal.

[12] See the court orders in: *Arse v Minister of Home Affairs and Others* [2010] ZASCA 9 (SCA); 2012 (4) SA 544 (SCA); *Bula* note 9 above.

arrest and detention under the latter. Despite the courts stating on several occasions that the two legislative regimes must be read together and that an asylum seeker cannot be considered an 'illegal foreigner',[13] in reality the interaction is extremely complex as 'a person may well gravitate from one regime to the other.'[14] Reform is therefore recommended, in order to clarify the interaction between the two statutes and to prevent the obstruction of asylum claims.

Recommendations:

- Amend the definition of 'illegal foreigner' in the Immigration Act to clearly exclude asylum seekers.
- Amend section 23(1) of the Immigration Act to require that the Director-General 'shall' or 'must' issue an asylum transit permit to a person at a port of entry who claims to be an asylum seeker.
- Amend section 23(2) of the Immigration Act to provide that a person whose asylum transit permit expires, before he or she reports to a refugee reception office, shall have the opportunity to show good cause for the failure to report.
- Add a provision to the Refugees Act or its regulations that clearly sets out the process and requirements for withdrawing the asylum seeker permit.
- Relieve pressure from the asylum system by enacting appropriate legislative measures to deal with other recognised streams of migration to the country.

4.2.2 Difficulty Obtaining Travel Documents

As mentioned in the previous chapter, logistical difficulties have resulted in extremely prolonged detentions on numerous occasions. This has occurred even in uncomplicated cases, where there is no question about the nationality of a person or the legality of their deportation, and where there is no resistance to deportation on the part of the detainee. DHA has frequently applied for warrants of extension of detention on the basis that travel documents have not yet been issued, or has raised this in arguments before the courts in

[13] See *Arse* above n 12.

[14] *Zimbabwe Exiles Forum and Others v Minister of Home Affairs and Others* [2011] ZAGPPHC 29 (NGHC) at para 4.

habeas corpus applications.[15] The most common complaint is that there is a lack of cooperation or response from authorities of the detainee's country of origin. Particularly egregious cases have arisen where the country of origin does not maintain a diplomatic presence in South Africa. A clear example is the detention of a Togolese man for over one and a half years due to the absence of a Togolese embassy in South Africa and the failure of DHA to liaise with Togolese officials abroad. In that case, the detainee sought to return home to Togo, but lacked identity documents or the means to do so.[16]

In these situations, it is highly likely that the person's continued detention is unlawful when the criteria of reasonableness, necessity, and proportionality are applied – especially in cases where the detainee is cooperative and wishes to be deported. At minimum, the detention becomes clearly unlawful once the 120-day period has been exceeded. However, it has repeatedly been shown that DHA continues to detain the person or, if forced to release, ceases efforts to arrange the deportation once released, instead leaving the person to his or her own devices.[17] This is despite the fact that there will be little chance that the person, who is usually with little means, will be able to arrange for his or her own deportation when the state has already failed. Such a practice is thus likely to result in stranded migrants, who may become vulnerable to a repeated cycle of immigration detention while being unable to return to their home country. In one reported case, an individual was released after six months in detention – during which DHA had failed to arrange for his travel documents – with an order to depart from the Republic within fourteen days. When he failed to depart, DHA attempted to charge him criminally with the related offence and he was re-arrested and spent a further extended period in immigration detention.[18]

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[15] See for example *Fikre v Minister of Home Affairs and Others* [2011] ZAGPJHC 36; *Bula* above n 9; *Mtegekurora v Minister of Home Affairs and Others* (SGHC) unreported case no 21599/2011 (21 July 2011); *Hamisi v Minister of Home Affairs and Others* (SGHC) unreported case no 32275/2011 (12 September 2011).

[16] LHR *Brief prepared by Lawyers for Human Rights for DIRCO and OHCHR on the detention of Mr Oumarou Ali Bella* (LHR, 16 July 2010).

[17] See for example SAHRC *Lindela: At the Crossroads for Detention and Repatriation* (SAHRC, Johannesburg December 2000) at 51, which records that DHA released 150 persons detained unlawfully at Lindela and issued them a permit requiring that they leave the country within seven days.

[18] *Fikre* above n 15. The applicant was issued with a Form 21: Order to Illegal Foreigner to Depart from Republic and charged under section 49(1)(b) of the Immigration Act, which provides that '[a]ny illegal foreigner who fails to depart when so ordered by the Director-General, shall be guilty of an offence and liable to a fine or to imprisonment not exceeding one year.'

While the courts have stated that DHA must exercise its discretion in favour of using measures less restrictive than detention, it is clear that in practice DHA is of the view that '[i]t is inconceivable that a deportation can take place without the physical detaining of an illegal foreigner's person.'[19] There have been no cases reported where DHA employed measures less than detention while taking active steps to arrange for a person's deportation. Even if there is common law authority that lesser measures should be used, it is not clear exactly what those would be. There is moreover no provision in the Act or Regulations for the person to be issued with documentation to protect them from further harassment, arrest, or detention.[20] In the absence of clear legislative provision, it would be extremely difficult to approach a court for such relief and for a court to craft such an order.

Further, where a detainee is released and fails to comply with an order to depart, he or she becomes subject to detention under section 34(5) of the Immigration Act.[21] It is crucial to note that section 34(5) does not contain the same requirements for judicial review and the obtaining of warrants that are found in section 34(1)(d) of the Act. DHA has attempted to argue that a detention under this provision is not subject to any procedural protections at all.[22] While the argument was not accepted or addressed by the Court in that case (due to a finding that the applicant was covered by the Refugees Act), the statutory provision is unclear and remains open to interpretation – both governmental and judicial. In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*,[23] the Constitutional Court held that the absence of such requirements rendered section 34(8) of the Immigration Act unconstitutional. Their absence from section 34(5) thus makes the provision highly problematic and likely unconstitutional, even if a judicial reading-down is possible.

Legislative amendments are therefore proposed. First, it is recommended that measures lesser than detention during the deportation process be provided for within the Immigration

[19] *Phale v Minister of Home Affairs and Others* [2011] ZAGPPHC 71 (NGHC) at para 8.

[20] The existing Form 20: Authorisation for illegal foreigner to remain in Republic pending application for status only applies where the person has applied for a status. It does not apply pending deportation or departure.

[21] Section 34(5)(a) states that any person who 'while being subject to an order issued under a law to leave the Republic … fails to comply with such order … shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and, *pending his or her removal, be detained in the manner and at the place determined by the Director-General*' (emphasis added).

[22] *Fikre* above n 15.

[23] [2004] ZACC 12 (CC); 2004 (4) SA 125 (CC).

Act or its Regulations. A large number of countries now operate alternative to detention programmes, such as release on a person's own recognisance or on conditions; release on bail; community-based supervision; designated residence accommodation centres; electronic tagging; or home curfews.[24] Further, it is proposed that the Act should continue to provide for active steps to be taken by immigration officials to cause a person's deportation, where appropriate, even if measures lesser than detention are utilised. A non-exhaustive enumeration of steps that the immigration officer must take, such as in Regulation 32, could be helpful to clarify the obligations of the official. During the period pending deportation, the person should be afforded with documentation providing for their temporary lawful stay. For example, Australia's 'Removal Pending Bridging Visa' was introduced in 2005 'to enable the release pending removal of people in immigration detention who have been cooperating with efforts to remove them from Australia, but whose removal is not reasonably practicable at that time.'[25] It is a discretionary visa which is granted until the person is granted a regular type of visa or arrangements can be made for their removal. It provides the person with basic rights, subject to reporting requirements and an agreement to be deported at the earliest opportunity.

Second, it is strongly urged that section 34(5) of the Immigration Act be amended such that it explicitly contains procedural safeguards for detention, similar to those found in section 34(1)(d). Without them, the section is very likely unconstitutional.

Recommendations:

- Amend the Immigration Act to include measures lesser than detention.
- Include specific procedures in the Immigration Act that the immigration officer must follow to carry out the deportation of an illegal foreigner. Such procedures should apply wherever the foreigner is in the deportation process, whether the foreigner is in detention or subject to less restrictive measures under the Act.

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[24] Alice Edwards *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011) at 51-81. Edwards notes that approximately two-thirds of European Union states provide for alternatives to detention, and provides an overview of programmes that exist in *inter alia* Canada (the Toronto Bail Program), Australia (temporary lawful stay visas with community-based supervision and support), Hong Kong (release on own recognisance with community support), and Belgium (return houses).

[25] Australia Government *Fact Sheet 85 – Removal Pending Bridging Visa* (Department of Immigration and Citizenship, 28 February 2011), <http://www.immi.gov.au/media/fact-sheets/85removalpending.htm>. See also id at 61-63 for a discussion.

- Provide for the issuance of a prescribed form in the Immigration Act and Immigration Regulations in order to provide temporary legal status to persons, which shall remain valid until they are granted a substantive status or their removal can be arranged.
- Amend section 34(5) of the Immigration Act to provide for procedural protections and judicial review requirements.

4.2.3 Stateless Persons

Related to the preceding discussion is the category of stateless persons. Quite a number of cases have arisen where no foreign state has been willing to accept a detainee for deportation. An excellent example is *Nibigira*, where the applicant was born in Burundi, fled to the DRC with his parents at age ten, and then fled with his brother at age thirteen to Tanzania where they lived at the Kigoma refugee camp. The applicant had no identity documents and was unable to speak the language of his native country, and was rejected for deportation by both the Burundian and Tanzanian embassies. Even if he might have legally qualified for citizenship of some country, he was *de facto* stateless because he lacked the ability to prove his nationality.[26] The Court noted that the applicant 'was stateless for all practical purposes' and '[a]s South African can only deport him to a specific country the fact that no country "*knew*" him meant that South Africa could not deport him.'[27]

The issue of statelessness is by now sufficiently recognised as a prevailing problem for many people and communities throughout the world, which requires a human rights solution. Stateless individuals are particularly vulnerable to immigration detention due to their irregular status and difficulties in effecting their deportation.[28] Due to the difficulty of removal, 'what should be short-term detention in preparation for removal may become long-

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[26] Indira Goris et al 'Statelessness: what it is and why it matters' (2009) 32 *Forced Migration Review* 4 at 4 explains as follows:

> 'There is general agreement that people who are *de jure* (legally) stateless – those who are not considered as nationals by any state under its laws – should be counted. However, there are many millions of people who have not been formally denied or deprived of nationality but who lack the ability to prove their nationality or, despite documentation, are denied access to many human rights that other citizens enjoy. These people may be *de facto* stateless – that is, stateless in practice, if not in law – or cannot rely on the state of which they are citizens for protection.

[27] *Nibigira v Minister of Home Affairs and Others* [2011] ZAGPJHC 178 (SGHC) at para 20 (emphasis in original).

[28] Equal Rights Trust *Unravelling Anomaly: Detention, Discrimination, and the Protection Needs of Stateless Persons* (19 July 2010), <http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING ANOMALY small file.pdf>.

term or even indefinite, as officials try to convince another country to accept a stateless person.'[29] Researchers have found that there is a 'clear connection between immigration detention and statelessness … [which] has not been fully understood, either by national immigration regimes or by non-governmental organisations (NGOs) and lawyers working on behalf of the rights of detainees.'[30] Although statelessness is a worldwide issue, it has received little attention and recognition – particularly in domestic legal schemes – thus resulting in protection gaps for non-refugee stateless persons.

Although South Africa has not yet become party to the Statelessness Conventions, the right to a nationality is protected in other instruments such as the UDHR, ICCPR, Convention on the Rights of the Child, and CEDAW. It is also protected under the South African Constitution as a right of children under section 28(1)(a) and, arguably, by the right to equality guaranteed in section 9. Further, there is a strong case to be made that the effects of statelessness impinge on the right to human dignity. The consequences and stigma of statelessness infringe on nearly all of an individual's human rights. The right to a nationality has been described as 'man's basic right for it is nothing less than the right to have rights.'[31] Researchers and practitioners have recognised that '[b]ecause recognition of nationality serves as a key to a host of other rights, such as education, health care, employment, and equality before the law, people without citizenship – those who are 'stateless' – are some of the most vulnerable in the world.[32] The reasoning of the Supreme Court of Appeal in *Minister of Home Affairs and Others v Watchenuka and Others*[33] is relevant in this regard, in that the effects of statelessness – such as the lack of any freedom to work – often threaten to positively degrade and therefore violate the right to human dignity. As stated by the Court, '[h]uman dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights.'[34]

[29] Katherine Perks & Jarlath Clifford 'The legal limbo of detention' (2009) 32 *Forced Migration Review* 42 at 42.

[30] Equal Rights Trust above n 28 at xviii.

[31] *Perez v Brownell* (1958) 356 US 44 at 64, cited in David Weissbrodt & Clay Collins 'The Human Rights of Stateless Persons' (2006) 28 *Human Rights Quarterly* 245 at 248.

[32] Goris et al above n 26.

[33] [2003] ZACSCA 142 (SCA); [2004] 1 All SA 21 (SCA).

[34] Id at para 25.

There is therefore a strong argument that there is an obligation on the state to provide protection to stateless persons.

In *Nibigira*, it was clear that the applicant neither was an asylum seeker nor did he qualify for any permanent or temporary status prescribed by the Immigration Act. The situation that he faced is certainly not unimaginable, particularly when one considers the history of difficulties and forced migrations on the African continent. Yet there currently exist no mechanisms under South African law to assess, prevent, and reduce statelessness. In the circumstances, the only option for Mr Nibigira was to apply for an exemption under section 31(2)(b) of the Immigration Act, which provides that '[u]pon application, the Minister may under terms and conditions determined by him or her ... grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision'. Mr Nibigira was ultimately released, after his legal representatives launched a fresh court application based on the expiry of the 120-day period, and the Court further ordered that he be granted an opportunity to approach DHA in order to obtain a Form 20 authorising his presence in the country pending the outcome of his application under section 31(2)(b).[35]

Section 31(2)(b) presents the only possibility for legal status under the current legislative regime for those persons who do not meet any of the stringent requirements for temporary residence, permanent residence, or refugee status. There is very limited literature or case law that has referred to the section; there is only one known case where it has been successfully used. In a case brought on behalf of an applicant whose refugee status was refused, the Court ordered that the exemption be granted, taking into account the length of time it had taken for the process to be finalised, in view of the applicant's right to just administrative action.[36] Section 31(2)(b) is certainly a unique section that can be used by legal practitioners creatively to carve out a case for clients with exceptional circumstances. However, it is also very difficult to use, as the legislation contains no guidance as to what 'special circumstances' might qualify, what procedures should be followed, or what form the application should take.

[35] *Nibigira v Minister of Home Affairs* (SGHC) unreported case no 47091/2011 (13 December 2011).

[36] *Tcherveniakova v Minister of Home Affairs and Others* (NGHC) unreported case (March 2008), discussed in Consortium for Refugees and Migrants in South Africa (CORMSA) *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* (CORMSA, Johannesburg 18 June 2008) at 22.

The Constitutional Court has found immigration legislation to be unconstitutional because it failed to include guidelines or criteria for the refusal to grant or extend spousal temporary residence permits.[37] The Court held that the omission of criteria and guidelines introduced an element of arbitrariness that was inconsistent with the constitutional right to family life, noting that officials are often untrained in the law and require guidance to exercise their discretion in a manner consistent with the Bill of Rights. Moreover, without guidelines, 'those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.'[38] The Court observed that the '[t]he absence of any guidance as to the factors relevant to the refusal of the grant[ing] or extension of such permits, therefore considerably undermines the effect of the limited privilege afforded by section 25(9)(b).'[39]

Section 31(2)(b) is similarly undermined because it contains no criteria or guidelines beyond the vague directive that 'special circumstances' are required. Further, without prescribed forms or procedures, it seems unlikely that a layperson, without legal counsel, would be aware of or able to make an application under the section. This is especially the case where section 31(2)(b) is seldom used and DHA officials, who generally work exclusively with the prescribed categories of permits, are unlikely to know about the provision and be able to inform potential applicants about the procedures or requirements for submitting an application. Moreover, even where a person has legal counsel and does submit an application, it would be difficult to assess whether an eventual decision is subject to challenge.

In relation to statelessness, a possible model for appropriate criteria could be that proposed by Equal Rights Trust in its report on the detention and protection needs of stateless persons. The report recommends the following five-prong legal test for determining whether or not a person has an effective nationality:

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[37] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8 (CC); 2000 (3) SA 936 (CC).

[38] Id at para 47.

[39] Id at para 52.

> ‘(i) Recognition as a national: Does the person concerned enjoy a legal nationality, i.e. is he or she *de jure* stateless?
>
> (ii) Protection of the state: Does the person enjoy the protection of his/her state, particularly when outside his or her country?
>
> (iii) Ability to establish nationality: Does the person concerned have access to documentation (either held by the state, or which is issued by the state) to establish nationality? This access may be through a consulate, or through state officials within the country of presumed nationality.
>
> (iv) Guarantee of safe return: Is there a guarantee of safe return to the country of nationality or habitual residence – or is there a risk of “irreparable harm”? Is return practicable?
>
> (v) Enjoyment of human rights: Does an individual’s lack of documentation, nationality or recognition as a national have a significant negative impact on the enjoyment of his or her human rights?’[40]

It is therefore recommended that the legislation be amended to include procedures for assessing and providing protection to stateless persons. National statelessness determination procedures are needed. Guidelines could be drawn from the model proposed by Equal Rights Trust, in order to assess whether a person has an ineffective nationality and is accordingly in need of protection. This could be effected through amendments to either the Immigration Act or Refugees Act. The Immigration Act could be amended, possibly through a clarification of the criteria and procedures relevant to an application under section 31(2)(b). Should this course be followed, it is emphasised that the section should remain flexible enough that other exceptional and unforeseen ‘special circumstances’ can continue to be accommodated. Another possibility is to amend the Refugees Act such that a statelessness assessment process is carried out alongside the refugee status determination process, and similar protection measures are provided to successful applicants.[41]

[40] Equal Rights Trust above n 28 at xvi. Equal Rights Trust uses the notion of ‘ineffective nationality’ to encompass both *de jure* and *de facto* statelessness because both categories are in need of protection.

[41] This proposal was discussed at LHR’s Statelessness and Nationality: Stakeholder Workshop (26 May 2011).

Recommendations:

- Amend the legislation to include statelessness determination procedures and protection solutions for stateless persons.
- Amend section 31(2)(b) of the Immigration Act to provide for criteria, guidelines, and procedures.

4.2.4 Other Prohibitions Against Refoulement

It is well recognised that South Africa has legal obligations of non-refoulement beyond the refugee-specific context, under both international and domestic law. As was acknowledged by the Green Paper, South Africa 'has assumed other international legal obligations that impose a situation-specific duty not to return persons at risk of serious human rights abuse (for example, under the Convention Against Torture, and the International Covenant on Civil and Political Rights)'.[42] These legal obligations were recognised by the Constitutional Court in *Mohamed and Another v President of the Republic of South Africa and Others*,[43] where the Court held that it is unconstitutional for the state the remove a person to another state where he or she faces a real possibility of the death penalty. The cornerstone of this decision was the Court's previous finding in *S v Makwanyane and Another*[44] that capital punishment is inconsistent with the constitutional rights to life, dignity, and not to be subjected to cruel, inhuman, or degrading punishment. The Court thus held that the state may not effect the removal of a person – whether by deportation or extradition – to a country where he or she may face a threat to life or dignity, or the possibility of torture or cruel, inhuman, or degrading treatment or punishment.

Although the duty of non-refoulement extends beyond the refugee context, under South African law, the Refugees Act is the sole statute that provides for the conferral of any type of legal status where international protection is needed. The obligation of non-refoulement is found in section 2 of the Refugees Act, which provides:

> 'Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled,

[42] GG 18033, 30 May 1997 at 4.3.4.

[43] [2001] ZACC 18 (CC); 2001 (3) SA 893 (CC).

[44] [1995] ZACC 3 (CC); 1995 (3) SA 391 (CC).

extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.'

Section 2 links and limits the principle of non-refoulement directly to the 'refugee' definition.[45] The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, has noted that there is consequently a lack of clarity within the South African government regarding the scope and nature of the obligation of non-refoulement.[46] The result has been situations where the state has returned or attempted to return persons to a country where they face the possibility of capital punishment or torture.[47]

[45] The ''refugee' definition is found in section 3, which provides that a person qualifies for refugee status if that person—

'(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere: or

(c) is a dependant of a person contemplated in paragraph (a) or (b).'

Note the correspondence between this wording and the wording found in section 2 of the Refugees Act.

[46] Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Addendum: Mission to South Africa* (UNHRC, A/HRC/6/17/Add.2, 7 November 2007) at paras 45-47.

[47] *Mohamed* above n 43; *Jeebhai and Others v Minister of Home Affairs and Another* [2009] ZASCA 35 (SCA); 2009 (5) SA 54 (SCA).

The lack of clarity has also resulted in cases where persons have been held in extended periods of immigration detention. This has arisen in the situation where a person cannot be removed from South Africa due to a grave threat to their human rights, yet he or she is unable to obtain any sort of status permitting them to lawfully remain in the country. Such persons are vulnerable to lengthy and repeated periods of immigration detention.

A recent example is the case of *Tsebe and Another v Minister of Home Affairs and Others.*[48] Both applicants were sought on charges of murder in Botswana. The first applicant had gone through extradition proceedings, and the Minister of Justice had issued an order of non-surrender due to the Botswana government's refusal to provide an assurance that he would not be subject to the death penalty.[49] The second applicant's extradition had not been formally sought, but it was clear that he was subject to criminal proceedings in Botswana for which capital punishment was the sentence. Despite the fact that neither applicant could be removed, DHA nevertheless held them in immigration detention for over one year and sought to deport them.

The High Court held that the deportation and/or extradition and/or removal of the applicants to Botswana was unlawful and unconstitutional without a written assurance that they would not face the death penalty. It also prohibited the state 'from taking any action whatsoever to cause the applicant[s] to be deported, extradited or removed from South Africa to Botswana until and unless the Government of the Republic of Botswana provides a written assurance to the respondents that the applicant[s] will not be subject to the death penalty in Botswana under any circumstances'.[50] The Court affirmed *Mohamed*, noting that the 'integral factor' to consider must be 'the right to life in the face of the death penalty.'[51] While the case has been appealed to the Constitutional Court,[52] the judgment of the High Court seems consistent with the existing law and South Africa's international obligations. It seems clear that persons who face a threat to their life, dignity, or right not to be subjected to torture or cruel, inhuman, or

[48] *Tsebe and Another v Minister of Home Affairs and Others, Phale v Minister of Home Affairs and Others* [2011] ZAGPJHC 115 (SGHC); 2012 (1) BCLR 77 (SGHC).

[49] Under section 11(b)(iii) of the Extradition Act 67 of 1962, which provides that the Minister may refuse an extradition if he or she is of the opinion that it would be 'too severe a punishment to surrender the person concerned'.

[50] Id at para 130 (order).

[51] Id at para 79.

[52] *Ex part Minister of Home Affairs and Other v Tsebe and Others* (CCT 110/11).

degrading treatment or punishment may not be removed from South Africa. The consequence of this must also be that they may not be held in detention for the purpose of deportation.

However, the fact that a person may not be removed does not necessarily mean that they will be granted some form of permission to remain in the country. The factual background to *Tsebe*, especially the applicants' lengthy periods of immigration detention, shows quite clearly that such individuals are vulnerable to unlawful and arbitrary immigration detention. It further shows that the present legislative scheme provides inadequate protection, as protection from non-refoulement is only found in section 2 of the Refugees Act, which limits the principle to persons who fit the 'refugee' definition. The UN Special Rapporteur has noted that the 'placing and wording of this provision appears problematic' for the following reasons:

> 'First, the wording of the provision appears to limit the scope of the protection of the principle of non-refoulement to persons covered by the refugee definition in the Refugees Act. This is not in congruence with the principle set out by article 7 of ICCPR and article 3 of CAT, which is universal in its application, inclusive of all individuals. Secondly, the provision does not mention the types of ill-treatment which hinder removal, although it may be deduced from the wording related to "persecution" that capital punishment, torture and all forms of ill-treatment would be included. Finally, while the provision is a general one, referring to all types of removal, its being placed in the Refugees Act may contribute to the apparent confusion as to the binding nature of the prohibition in relation to all individuals, be they asylum-seekers or not.'[53]

These legal obligations are not provided for at all within the current legislative scheme. Yet the state has acknowledged that such situations are not uncommon: DHA has indicated that there are 'at least five other fugitives from justice who have fled to South Africa' from Botswana alone.[54] Further, issues of non-refoulement may arise in relation to vulnerable

[53] Above n 46 at para 50.

[54] Above n 52. See DHA's Founding Affidavit at para 53.

migrants. For example, it has been noted that the duty of non-refoulement may arise in relation to Zimbabwean migrants, because '[i]n many cases, returning these people to Zimbabwe would be a clear violation of human rights such as the right to life, and would again expose those migrants to extreme levels of economic and social distress.'[55]

It is thus crucial that some form of recognition and documentation be provided to persons for whom there are other prohibitions against refoulement. Further, assessment procedures and recognition criteria are required to determine whether a person cannot be removed, and consequently cannot be detained for the purpose of deportation. While the state may be reluctant to grant such persons full rights of citizenship or residence, they should be provided with some form of documentation to recognise their non-removability. The precise terms of such documentation can be worked out by Parliament in conjunction with stakeholders; it may be discretionary, temporary, or impose conditions and terms on the person. What is important is that some form of recognition and documentation is granted, so that the cycle of immigration detention is ended and the person is not at continued risk of removal.

It is therefore recommended that the legislation be amended to provide for other protection needs under international law. This could be done through creating a 'flexible conceptual category', as was suggested by the Green Paper, or by extending and clarifying the situations of non-refoulement recognised in the Refugees Act. For example, several countries' legislation provides for a broad and flexible category of 'persons in need of protection', in order to determine whether any alternative protection needs arise.[56] These protection needs

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[55] Alexander Betts *Towards a 'soft law' framework for the protection of vulnerable migrants* (UNHCR, Research Paper No 162, August 2008) at 7.

[56] For example, Canada's Immigration and Refugee Protection Act, SC 2001, c 27 provides in section 97:

> 'A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
>
> (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
>
> (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
>
> (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
>
> (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
>
> (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

may result from a possibility of capital punishment, torture, or environmental disaster if the person is returned to their home country.[57] Further or alternative procedures might also be required in order to assess these protection needs.

Recommendations:

- Amend the legislation to provide protection to a flexible category of persons who may not be removed from South Africa for non-refugee related reasons, such as the possibility of capital punishment; torture; cruel, inhuman, or degrading treatment or punishment; or other risk to the life, human dignity, or security of the person.
- Alternatively, amend the Refugees Act to extend and clarify the meaning of non-refoulement to include situations where there is a possibility of capital punishment; torture; cruel, inhuman, or degrading treatment or punishment; or other risk to the life, human dignity, or security of the person.

4.3 CONCLUSION

It has been seen that the situation of immigration detention in South Africa is in need of improvement, both in terms of law and practice. Due to the pressures that the country faces as a destination country for migrants, the South African state has placed high priority on immigration enforcement, especially through the use of immigration detention. While immigration laws often serve a legitimate purpose and the state enjoys the authority to enforce them, immigration detention must always take place with respect for fundamental human rights. This study is therefore significant, in light of the number of migrants arriving in South Africa, the resulting challenges to the South African state and society, and the increasing tendency of the government to engage in coercive immigration control through immigration detention.

This thesis has examined the phenomenon of immigration detention in South Africa in relation to human rights. By exploring the practices of immigration detention, several

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(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.'

See also Sweden's Aliens Act of 1982, section 3 of which recognises '*skyddsbehövande*', persons who have good reason to fear capital punishment or torture, need protection due to war (internal/external), or face an environmental disaster in their home country.

[57] See LHR *Lawyers for Human Rights Submissions on the Refugee Amendment Bill B30-2010* (LHR, 22 October 2010), <http://www.lhr.org.za/policy/lhr-submission-refugee-amendment-bill-b30-2010>.

categories of migrants have been identified who suffer heightened vulnerability to immigration detention. Importantly, the legislative framework has been scrutinised to find gaps in the law which contribute to these migrants' vulnerability to immigration detention that is often lengthy, arbitrary, and recurring.

Much of the hope for the enforcement of migrants' rights in South Africa lies in the country's active civil society and its sound and independent judicial system. This has been demonstrated through the numerous court challenges brought against DHA that have been successful in enforcing the state's obligations and vindicating migrants' rights. The existence of adequate laws is therefore critical to protecting the rights of migrants, whether documented or undocumented, in relation to South Africa's immigration detention system. It is hoped that this thesis will help provide guidance and ideas to the South African government, as well as to researchers and practitioners working on related issues, regarding the need for legal and practical reform on immigration detention in South Africa.

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