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

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**1. Background.** Tens of thousands of people are detained globally for reasons related to their immigration status.[1] Some states view immigration detention as a mechanism deterring irregular migrants seeking refuge or attempting an application for asylum, and respond by routinely, rather than exceptionally, detaining them,[2] ignoring the broad recognition that immigration detention is inherently harmful to the health and general well-being of those detained.[1] This transnational doctoral research concerns the comparative socio-legal assessment of the right to health and humane standards of detention of immigration detainees in two countries which experience an influx of migrants, refugees and asylum seekers; one classed as an upper middle-class country on the Development Assistance Committee List of Official Development Assistance Recipients (South Africa) and the other classed as highly developed (Australia).[3] It further aims to investigate the extent to which these two vastly different jurisdictions uphold the rule of law in the context of international human rights law pertaining to the right to health and standards of immigration detention, and the relative efficacy of international human rights instruments to hold offending jurisdictions accountable.

**2. Focus, aim and approach.** The study is broadly balanced against South African and Australian immigration detention regulations, through an international human rights law lens whilst considering the actual conditions and treatment of immigrant detainees, with an explicit focus on the right to health. A pragmatist account based on a triangulated (across methods and sources) ‘rule of law’ lens will be created, examining the extent to which South Africa and Australia comply with minimum State obligations to respect human rights norms as it relates to right to health (including access to medical care) and provision of normative standards of immigration detention. The generated narrative will be cognizant of the changing contextual forces of migration into South Africa and Australia, securitization agendas and violations of basic human rights and due process, and additionally, will illustrate various gaps in due process, policy and practice in the application of domestic laws, policies and standards of care. It will also highlight various routes to strategic public litigation, advocacy channels and reforms. The study will garner insights into the most effective means of advocating for change, achieving reforms, informing policies, protocols and detention standard operating procedures, ultimately advancing the rights of those in immigration detention.

**3. Country narratives.** South Africa has long been an important destination for migrants from its neighbouring countries and Asia.[4] Migration and cross border movements are increasingly viewed politically and societally using a *‘*lens of national security, social instability, and criminality’[5],with rising anti-immigrant sentiment amongst citizens.[6] Despite South Africa’s domestic legislation providing for specific conditions in detention, observers have regularly raised concerns regarding violations of these provisions including overcrowding, inadequate access to health care services, poor nutrition, and the detention of migrants, refugees, and asylum seekers alongside those on remand or sentenced.[7] Excessive use of force by authorities and limited access to legal representation have repeatedly been noted.[7]

In contrast, Australia experiences migration from as far as Sudan, Afghanistan and Iraq,[8] despite its geographical isolation.[9] It is also experiencing increased anti-immigrant sentiment and securitisation agendas,[10] and maintains an immigration detention system which is infamous for being punitive and arbitrary, with a policy of mandatory, indefinite detention and no judicial review of decisions to detain.[9] The lack of consideration of necessity, reasonableness, proportionality and review of a person’s individual needs and vulnerabilities results in detention of vulnerable groups e.g. children and survivors of torture and trauma. There are few normative regulations in place regarding the provision of healthcare, or other special arrangements for vulnerable groups in places of immigration detention, and no measures to reduce the length of detention for vulnerable persons and persons with disabilities.[9]

 **4. Preliminary results.** Both South Africa’s and Australia’s immigration policies and detention sites, including police cells, proposed border camps [6]and offshore immigration detention facilities [9]have been sharply criticised by various international human rights bodies (e.g. (UN)CESCR, (UN)CAT, UN Working Group on Arbitrary Detention). Various international human rights bodies condemned South Africa’s immigration policies and detention sites, *inter alia* privately operated Lindela Repatriation Centre, police cells and prisons.[4, 6, 7] Conditions are not fit for purpose and continue to fall short of the minimum standards of care.[4] No routine immigration detention surveillance exists in South Africa, and despite having ratified the Optional Protocol to the UN Convention Against Torture (OP-CAT), it is still to implement necessary legislative measures for setting up a National Preventive Mechanism (NPM) (a critical detention monitoring body) to regularly examine closed settings. In comparison, Australia brings together a variety of extreme immigration policies in its immigration detention regime, provides them blanket legal cover and aggressively defends them in the wake of international critique.[9] Refugees are arbitrarily detained in inhumane conditions, lack adequate health care, and experience severe pain and suffering that rises to the level of cruel, inhuman or degrading treatment or torture.[11] As of January 2022, Australia had failed to establish an NPM in each of its territories as required by the OP-CAT, which it ratified in 2017, with the UN’s Subcommittee on Prevention of Torture cancelling their oversight visit to Australia in 2023 due to them being refused entry into some detention centres.[9, 11]

**5. Contribution and implication.** No known study has been conducted in the area of dissecting and analysing these two African- and Asia-Pacific immigration detention systems and standards of detention, triangulated against the three levels of State obligations *i.e*., respect, protect and fulfil.[12] The work will likely contribute strongly to sensitization around the rights of immigration detainees and is intended to contribute to immigration detention reforms in both countries through publications, sharing of evidence with respective governments, country level NPMs under the OP-CAT protocol, and humanitarian and human rights advocacy organisations operating in the respective countries.

**6. Conclusion.** A country’s socio-economic status is not determinant of immigration detention conditions and State parties’ ability / willingness to ‘respect, protect and fulfil’ immigration detainees’ health (and basic human) rights. In the context of right to health and immigration detention, both countries may be in breach of international human rights law, and both Australia and South Africa need policy and legislative reform, as well as the political will to effect implementation. The study will progress to include qualitative data collection (in-depth interviews) and analysis of stakeholders’ socio-cultural understanding of migration forces into South Africa and Australia, gaps in laws, policies, due process and rights assurances, standards of care (including access to and quality of healthcare) and the health profile of people in immigration detention. If possible, a convenience sample of former immigration detainees are to be interviewed about their experiences of immigration detention and their health. This socio- legal assessment will subsequently triangulate and evaluate the indeterminate nature of South African and Australian immigration and refugee regulations, policies and operating procedures in relation to human rights, obligations of the State to uphold the right to health of immigration detainees and normative standards of detention.

**7. References.**[1] Global Detention Project (2022) Annual Report: Building Partnerships, Harnessing Data, EndingArbitrary Immigration Detention [online] Available at: <https://www.globaldetentionproject.org/2022-annual-report-building-partnerships-harnessing-data-ending-arbitrary-immigration-detention> [Accessed: 18 August 2023][2] United Nations High Commissioner for Refugees (2014) 2014-2019 Beyond Detention - A GlobalStrategy to support governments to end the detention of asylum-seekers and refugees [online]Available at: <https://www.unhcr.org/media/beyond-detention-global-strategy-support-governmentsend-detention-asylum-seekers-and> [Accessed 18: October 2023][3] Organisation for Economic Co-operation and Development (2023) DAC List of ODA Recipients |Effective for reporting on 2022 and 2023 flows [online] Available at [DAC-List-of-ODA-Recipients-for-reporting-2022-23-flows.pdf (oecd.org)](https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC-List-of-ODA-Recipients-for-reporting-2022-23-flows.pdf) [Accessed: 02 November 2023][4] Van Hout, M.C. & Wessels, J. (2023) #ForeignersMustGo versus “in favorem libertatis”: Humanrights violations and procedural irregularities in South African immigration detention law. Journal ofHuman Rights [online] Available at: <https://doi.org/10.1080/14754835.2023.2170709> [Accessed: 24April 2023].[5] Ncube, M. (2017) South Africa Steps up Deportation of Asylum Seekers. News Deeply [online]Available at: <https://www.newsdeeply.com/refugees/articles/2017/10/17/south-africa-stepsupdeportation-of-asylum-seekers> [Accessed: 29 August 2022].[6] Global Detention Project (2021). Immigration Detention in South Africa: Stricter Control ofAdministrative Detention, Increasing Criminal Enforcement of Migration [online] Available at:[www.globaldetentionproject.org/immigration-detention-in-south-africa-stricter-control-of-administrative-detention-increasing-criminal-enforcement-of-migration](http://www.globaldetentionproject.org/immigration-detention-in-south-africa-stricter-control-of-administrative-detention-increasing-criminal-enforcement-of-migration) [Accessed: 29 August 2022].[7] Lawyers for Human Rights (2020) Monitoring Policy, Litigious and Legislative Shifts inImmigration Detention in South Africa [online] Available at: <https://www.lhr.org.za/wp-content/uploads/2020/06/Detention-Report-Final-Final-Digital-1.pdf> [Accessed: 31 October 2023][8] Australian Home Affairs (2023) Immigration detention statistics [online] Available at:<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-28-february-2023.pdf> [Accessed: 17 April 2023].[9] Global Detention Project (2022) Immigration Detention in Australia: Turning Arbitrary Detentioninto a Global Brand [online] Available at: <https://www.globaldetentionproject.org/countries/asiapacific/australia> [Accessed: 17 April 2023].[10] Ibekwe, S. O. (2022) Preventing people from risking their lives at sea’: Forced migration and thesecuritization of asylum seekers in Australia. Asian Journal of Comparative Politics [online]Available at: <https://doi.org/10.1177/20578911211032514> [Accessed: 02 November 2023][11] Barnes, J. (2022) Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement inAustralia’s Offshore Detention Centres [online] Available at: <https://doi.org/10.1093/jrs/feac041> [Accessed 30 October 2023][12] United Nations Committee on Economic, Social and Cultural Rights (2000) General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August2000, E/C.12/2000/4 [online] Available at: <https://www.refworld.org/docid/4538838d0.html> [Accessed: 24 April 2023]