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Internally Displaced Persons and Migrants In Africa  
African Commission on Human and Peoples Rights'  
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## **LAWYERS FOR HUMAN RIGHTS SUBMISSION:**

### **Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants In Africa Study on African responses to Migration and the Guiding Principles on the Human Rights of all Migrants**

#### **Introduction**

1. Lawyers for Human Rights (“LHR”) welcomes the opportunity to make submissions to the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the Study on African responses to Migration and the Guiding Principles on the Human Rights of all Migrants.
2. LHR is an independent human rights organisation with a 42-year history of human rights activism and public interest litigation in South Africa. LHR provides free legal services to vulnerable, marginalised, and indigent individuals and communities who are victims of unlawful infringements on their rights.
3. LHR established its Refugee and Migrant Rights Programme in 1996. This programme is the largest legal service provider to refugees and asylum seekers in South Africa, assisting between 10 000 and 15 000 clients per year in its four law clinics: Pretoria, Johannesburg, Durban, and Musina. The programme also builds networks and is part of the social justice movement to combat xenophobia through engagement and education at the community level. This programme also has projects focused on statelessness, immigration detention, transgender migrant rights, and unaccompanied and separated migrant children. We advocate for the prevention of xenophobia, and work to promote the human rights of migrants in South Africa.
4. Lawyers for Human Rights welcomes the efforts by the Special Rapporteur to identify and meet new challenges for migrants in Africa as well as share good practices. LHR shares the Special Rapporteur’s vision of creating a pathway to African leadership in recognising and protecting the human rights of all migrants.

5. Recognising that South Africa, as the largest host of migrants on the continent, has a key role to play in the African Commission on Human and Peoples Rights' objective to protect and realise the rights of migrants in Africa, LHR presents the following submissions to the Study on African responses to Migration and the Guiding Principles on the Human Rights of all Migrants.

## A. Recent Developments in South Africa

6. After South Africa emerged from apartheid, it looked to create a progressive and open society that respected the human rights of all persons within the country, including migrants. Many of these laws are still in place and provide wide protections for rights of migrants, such as the right to education, the right to healthcare, and the right to legal representation. Many provisions of the South African constitution have been interpreted to apply equally to foreign nationals and South Africans alike.<sup>1</sup> South Africa's migration laws prescribe an open and efficient process of applying for asylum and receiving refugee status. From a human rights perspective, South Africa's Refugee Act 130 of 1998 ("the Refugees Act") is one of the most progressive in the world, as it draws on wide interpretations of the 1951 Convention Relating to the Status of Refugees as well as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.
7. However, resistance to implementation of these rights as well as the rise of xenophobia in recent years has limited the effectiveness of these progressive legal protections and guarantees.<sup>2</sup> In 2022, the xenophobic militant campaign "Operation Dudula" attacked and even killed foreign nationals living in South Africa. There has been both public and governmental support to these actions, spreading a climate of distrust and hate of all migrants.<sup>3</sup> As schools reopen for the 2023 academic year, Operation Dudula members have planned protests outside of schools to prevent foreign national children and teachers from entering.<sup>4</sup> This culture of migrant non-acceptance and scapegoating has resulted in deeply alarming retrogressive political and legal measures related to migrant rights.
8. In recent years, lack of resources, corruption, and institutional xenophobia within the Department of Home Affairs and other government agencies interacting with migrants has created major backlog and delays for services, resulting in widespread systematic human rights violations. Over 95% of asylum applications are initially rejected by the Department of Home Affairs, requiring asylum seekers to institute appeals and deal with a host of access issues in the meantime as they are denied assistance at hospitals, schools, and from social assistance agencies.<sup>5</sup> LHR has seen clients whose asylum applications remain in processing for decades before they even have an

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<sup>1</sup> For example, the right to education was held to apply to non-national children in *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZACGHC 126. The right to access healthcare services was found to include non-nationals and undocumented individuals in *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 325 (SCA).

<sup>2</sup> [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532022000100003](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532022000100003).

<sup>3</sup> The African Commission on Human and People's Rights commented on these xenophobic attacks. For example, see <https://www.achpr.org/pressrelease/detail?id=63>.

<sup>4</sup> <https://www.thesouthafrican.com/news/operation-dudula-camp-outside-schools-11-january-2023/>.

<sup>5</sup> <https://www.groundup.org.za/article/96-refugee-applications-are-refused-say-lawyers/>.

appeal date scheduled. The delays were further exacerbated by the closing of the Refugee Reception Offices (“RROs”) during the COVID-19 lockdown.

## *Path of Retrogression in Violation of International Human Rights Law*

9. LHR is especially concerned about the recent retrogressive political and legal measures taken to limit migrant rights in South Africa. Xenophobic attitudes within both the government and society have fostered a worrying dialogue of pulling back migrant legal protections, even for asylum-seekers and refugees who fled their countries of origin due to fear of persecution and bodily harm.
10. For example, the recent amendments to the Refugees Act removed the automatic right to work for asylum seekers. The amendments also reduced the number of days that asylum applicants who are rejected as “manifestly unfounded” or “fraudulent” have to make written representations for their appeal from 14 working days to only five, resulting in many asylum seekers being unable to get legal assistance for their appeal.
11. Similarly, special permit schemes for economic migrants from Zimbabwe and Lesotho are being rolled back or cancelled<sup>6</sup> due to pressure from political parties with harder policies on immigration. The African National Congress (“ANC”) has now proposed tightening immigration policies such as removing citizenship through marriage and keeping RROs close to the border to discourage migrants moving into the cities.<sup>7</sup> The ANC has also increased the militarisation of the border through the Border Management Authority, which oversees armed patrolling border guards.<sup>8</sup> Just during the month of December 2022, these border guards arrested over 6,600 migrants.<sup>9</sup>
12. Perhaps the most worrying is the political dialogue surrounding plans for South Africa to withdraw from the 1951 Convention Relating to the Status of Refugees. ANC peace and security subcommittee chair David Mahlobo stated that withdrawal will allow South Africa to “manage our own issues and pressure[s].”<sup>10</sup> This proposed withdrawal from the Refugee Convention and the measures described above directly contradict the doctrine of non-retrogression in international human rights law.<sup>11</sup>

## *Systematic Failures despite Progressive Case Law*

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<sup>6</sup> <https://www.timeslive.co.za/news/south-africa/2022-08-25-sa-seeks-to-curb-immigration-plans-policy-revamp/>.

<sup>7</sup> <https://www.bloomberg.com/news/articles/2023-01-05/a-guide-to-the-south-african-governing-party-s-policy-proposals?leadSource=uverify%20wall>.

<sup>8</sup> <https://www.news24.com/news24/africa/news/sa-deploys-200-specialty-trained-border-control-officers-at-beitbridge-20220715>.

<sup>9</sup> <https://www.defenceweb.co.za/featured/soldiers-stop-six-thousand-plus-illegal-immigrants-in-december/>.

<sup>10</sup> <https://www.citizen.co.za/news/south-africa/politics/anc-laxity-on-migration-laws-1-august-2022/>.

<sup>11</sup> The Committee on Economic, Social and Cultural Rights in its general comment No. 3, any deliberately retrogressive measure “would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources” (para. 9). Even armed conflict or other emergency cannot solely justify retrogressive measures.

<https://www.ohchr.org/sites/default/files/Documents/Issues/ESCR/E-2015-59.pdf>.

13. Violations of migrants' human rights outlined in this submission are not simply individual practices or oversights; South Africa's migration system has developed a series of subordinate rules and practices which have created systematic barriers to the realisation of migrant rights. LHR welcomes the Special Rapporteur's conclusion that there is a gap between law and practice in Southern African countries' human rights obligations towards migrants. From LHR's experience, widespread lack of implementation and administrative guidance has led to a systematic failure in migrant protection. These failures have only exacerbated since the COVID-19 pandemic.
14. Courts in South Africa have been progressive leaders in protecting and realising migrant rights. In recent years, the High Courts and Constitutional Court have protected a plethora of migrant rights and processes, such as the right to due process on citizenship decisions,<sup>12</sup> the right to apply for asylum, the right to birth registration,<sup>13</sup> the right to include non-related dependent minors in an asylum application,<sup>14</sup> and the right to education for children without documentation.<sup>15</sup>
15. Unfortunately, the implementation of these progressive decisions has been a major obstacle, and unjust or uninformed administrative decisions continue to harm migrants. In several court cases, the Department of Home Affairs has been tasked with issuing a circular or developing a Standard Operating Procedure to protect a certain right but has completely failed to do so.<sup>16</sup> This inaction reflects the institutional xenophobia and structural barriers in implementation that plague the immigration system in South Africa.

## **B. Study on African Responses to Migration: Migrants Rights at Risk**

16. LHR wishes to highlight the obstacles to realising specific migrant rights in South Africa in order to contribute to the Study on African Responses to Migration. Migrants, especially refugees and asylum seekers, are one of the most vulnerable groups in South Africa. As discussed above, xenophobia and systematic failures have led to serious violations of the civil, political, social, economic, and cultural rights of migrants.

### *Access to Documentation*

17. Temporary Nature of Asylum Visas: Migrants who enter South Africa to apply for asylum are given temporary asylum visas which are typically valid for three to six months. At the end of that time period, asylum seekers must apply to renew the visa if they wish to continue the asylum application. This creates a huge financial burden for asylum seekers to travel to the RRO every few months while their asylum claim is pending. Although the system to apply for renewal moved online in May 2021, the online system has been extremely difficult to navigate. These difficulties are exacerbated by the

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<sup>12</sup> Nzama v the Minister of Home Affairs (North Gauteng Division, Pretoria) 7 March 2018.

<sup>13</sup> Centre for Child Law v Director-General: Department of Home Affairs and Others 2020 (6) SA 199 (ECG).

<sup>14</sup> Mubake and Others v Minister of Home Affairs and Others 2016 (2) SA 220 (GP)

<sup>15</sup> Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG).

<sup>16</sup> [https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2022/05/Joint-Submission\\_UPR\\_41\\_South-Africa\\_Full.pdf](https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2022/05/Joint-Submission_UPR_41_South-Africa_Full.pdf), pages 11-13.

fact that the system is only available in English and requires access to internet, printing, and virtual communication services. The RROs remain closed for renewals or queries in person.

18. Lack of Accessibility: Asylum seekers who recently arrived are also required to apply for asylum online, although in LHR's experience most cannot afford internet and data costs to access the online system and do not have the community support systems to understand the process. For both asylum applications and asylum visa renewals, migrants must be in a position to receive emails and correspond with the Department of Home Affairs online.<sup>17</sup> If there is an issue, the asylum seeker is asked to report to the RRO for an appointment. However, asylum seekers wait from morning to evening for days on end in crowded spaces and long lines even when they have an appointment letter. This disproportionately impacts migrants with disabilities and families with young children, as well as poor migrants who do not have the financial resources to report back every day.
19. Identification Document Requirements: LHR has seen an increase in asylum seekers who are being required to produce a passport, ID, or visa before they are permitted to apply for asylum. This is both unlawful and unreasonable as many asylum seekers flee their country of origin without their documents.

## *Birth Registration*

20. Difficulty Obtaining Notice of Birth: In Gauteng province, several hospitals are denying issuing notice of birth documents for children born to undocumented mothers or mothers who have not paid the full fees for their obstetric or pre- and post-natal treatments. A notice of birth form is a prerequisite to registering a child's birth and obtaining a birth certificate. LHR has, on several occasions, had to intervene on behalf of migrant mothers who did not receive the notice of birth, despite the legal obligation of hospitals to issue the notice before the mother and child leave the hospital.
21. Foreign-born children: The Births and Deaths Registration Act 51 of 1992 does not give provision for children born outside of South Africa to access birth registration. This creates difficulties for children born in their country of origin where they were not registered and children born while in their parents were in transit to South Africa and often results in the child's statelessness.
22. DNA Testing Requirements: In 2015, the Department of Home Affairs issued a circular stating that if one parent of a child applying for birth registration is a non-South African citizen, officials may require a DNA test upon "reasonable suspicion" regarding the paternity of the child.<sup>18</sup> The circular does not define what constitutes "reasonable suspicion," allowing for arbitrary and discriminatory practices. Furthermore, the DNA testing requires payment, which places a burden on poor or indigent migrant families.

## *Citizenship*

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<sup>17</sup> <https://www.groundup.org.za/article/refugees-struggle-with-home-affairs-online-system/>.

<sup>18</sup> <http://citizenshiprightsafrika.org/wp-content/uploads/2020/04/SADeptHomeAffairs-DNA-Circular-5-2014.pdf>.

23. Decades-long Process: The Study on African Responses to Migration highlights South Africa's Citizenship Act 88 of 1995, which allows application for citizenship if the migrant resides in South Africa for four years. In reality, this process takes decades, especially for asylum seekers and refugees. Once a migrant applies for asylum, it can take between 5-10 years for their application to be finalised, sometimes even more. If they are recognised as a refugee at that point, they must wait another 10 years before applying for permanent residence. Only after 10 years as a permanent resident may they then apply for citizenship.
24. Application for Certification: If a refugee who has been recognised in South Africa for ten years wishes to apply for permanent residence in order to eventually apply for citizenship, they must apply for certification with the Standing Committee for Refugee Affairs that they will remain a refugee indefinitely in South Africa. This essentially re-opens their application for refugee status in South Africa and often results in a withdrawal of their refugee status if the conditions in their country of origin have changed and become safer, regardless of how long the migrant has lived in South Africa, whether their children were born in South Africa, or how well-established they have become in South Africa. Applications for certification are a prerequisite for applying for citizenship and end up endangering the refugee's status within South Africa, thereby discouraging many refugees from doing so.
25. Lack of Clear Pathways for Stateless Migrants: In South Africa, the pathway to acquisition of South African nationality starts with the notice of birth and acquisition of a birth certificate. The obstacles related to acquisition of birth certificates for children born of undocumented foreign nationals has led to an endless cycle of statelessness for children. South Africa does not have a mechanism to identify stateless persons, but it is estimated that over 10,000 people are stateless and over 15 million people are unregistered or undocumented, with 3 million under the age of 18.<sup>19</sup> Citizenship through naturalisation is technically a remedy, although the Department of Home Affairs has not outlined regulations for this process despite the High Court and Supreme Court of Appeal ordering the DHA to do so by 30 November 2019.<sup>20</sup> Applications made by affidavit by LHR in the meantime have had a minimal response rate.

## *Right to Work*

26. No Automatic Right to Work for Asylum Seekers: Under 2017 amendments to the Refugees Act, asylum seekers do not have an automatic right to work. Instead, they must be "endorsed" after an assessment to determine if the applicant can support themselves. If the assessment finds that the asylum seeker is receiving assistance from a charitable organisation or can sustain themselves without work, they are not granted the right to work.<sup>21</sup>
27. Issues Accessing Bank Accounts: Delays in getting a renewed visa often results in migrants being blocked from accessing their bank accounts and salary payments as banks do not understand the

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<sup>19</sup> [https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2022/05/Joint-Submission\\_UPR\\_41\\_South-Africa\\_Full.pdf](https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2022/05/Joint-Submission_UPR_41_South-Africa_Full.pdf), page 3.

<sup>20</sup> Minister of Home Affairs v Miriam Ali (2018) ZASCA 169 SCA.

<sup>21</sup> "Refugees Amendment Act 11 of 2017," § 18.

new online renewal process or the delays at the Department of Home Affairs. Unable to access their funds, many migrants are unable to pay rent and take on huge loans while they wait for their visas to be processed and renewed.

## *Right to Healthcare Services*

28. Medical Xenophobia: In Gauteng province, several hospitals have adopted subordinate rules that allow staff to deny or overcharge foreign nationals who seek medical assistance, including pregnant women and young children.<sup>22</sup> These rules are fuelled by xenophobic protests and public pressure framing migrants as the reason for the strains on the public health system.<sup>23</sup> This medical xenophobia is clearly in violation of both African regional and international human rights obligations and has resulted in catastrophic medical consequences for migrants.<sup>24</sup>
29. Verification of Visas: Many public hospitals have refused to accept asylum visas issued online because they distrust their authenticity. LHR noted that at Steve Biko Academic hospital, asylum seekers and refugees were told to go back to the RRO to get their visa stamped and signed before they could be given medical assistance. This additional step creates an unreasonable burden and limits migrants' right to access healthcare.<sup>25</sup>

## *Right to Social Assistance*

30. Gaps in Assistance: South Africa's Social Assistance Act 13 of 2004 does not cover all migrants; it limits social assistance to refugees and permanent residents despite the fact that asylum seekers and other newly arrived migrants are often the most economically vulnerable. The removal of the automatic right to work for asylum seekers and cancellation of special permits for economic migrants from certain countries further endangers poor migrants in South Africa, as they cannot work or are forced to take on dangerous or exploitative jobs.

## *Children's Rights*

31. Unaccompanied and Separated Children: Although South Africa's domestic legal and policy framework recognises an obligation to recognise and protect unaccompanied and separated children, many of these children end up on the street and without documentation.<sup>26</sup> LHR has assisted several unaccompanied or separated children who are denied assistance at the Department

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<sup>22</sup> <https://www.dailymaverick.co.za/article/2022-11-30-no-cash-no-care-gauteng-hospitals-turn-away-undocumented-children-and-pregnant-women/>.

<sup>23</sup> <https://www.iol.co.za/news/politics/foreigners-including-pregnant-women-turned-away-from-gauteng-hospitals-doctors-without-borders-00f8062e-ae8c-49da-a74d-a73aedf376ef>.

<sup>24</sup> See, for example, <https://www.groundup.org.za/article/court-application-aims-to-stop-refugees-from-dying-because-they-are-refused-free-health-care/>.

<sup>25</sup> <https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2022/09/LHR-submission-to-the-PC-Home-Affairs-on-statelessness-2022-09.pdf>, page 10.

<sup>26</sup> <http://www.migration.org.za/wp-content/uploads/2017/08/Border-Justice-Migration-Access-to-Justice-and-the-Experiences-of-Unaccompanied-Minors-and-Survivors-of-Sexual-and-Gender-Based-Violence-in-Musina.pdf>.



of Home Affairs and even arrested or detained.<sup>27</sup> These children are particularly at risk of being stateless when they reach the age of majority as they cannot apply for asylum or be granted refugee status on their own.

32. Limited Access to Education: Although migrant children are guaranteed the right to basic education, schools often deny admission without documentation. Even where they are admitted, migrant children find themselves marginalised within schools, experience overcrowdedness, and under-resourced facilities. In addition to this, they also must overcome or navigate an unfamiliar curriculum and, in some cases, an unfamiliar language of instruction.
33. De-Linking from Family: In recent years, LHR has identified a practice wherein the Department of Home Affairs would “de-link” or remove the child from their parent or guardian’s file and thereafter issue them with a new asylum visa (even if they had previously held refugee status) and re-interview them as a new applicant. These applicants were routinely rejected as “manifestly unfounded” as children do not know why they left their country of origin or are unable to explain exactly what persecution their family faced. Despite LHR’s communications with the Department of Home Affairs to discontinue this practice, it has continued after RROs re-opened in 2019 and also results in extra delays in asylum or refugee visa renewals.<sup>28</sup>

### *Arrest and Detention of Migrants*

34. Unlawful Detention Practices: LHR has noted unlawful detention practices such as prolonged detention periods (including over the legal maximum of 120 days), restricted access to legal representation, a lack of interpreters, corruption and bribery, use of force, limited access to health, food and water, overcrowding, and unsanitary conditions. At Lindela Repatriation Centre, legal practitioners are required to give 48 hours’ notice before conducting a legal visit, and sometimes migrants are deported during those 48 hours.<sup>29</sup>
35. Arrest and Detention of Lawful Asylum-Seekers: During and after the COVID-19 lockdown, LHR has observed a large number of asylum-seekers arrested and detained even when they state their desire to apply for asylum. Where they present online or expired visas while they are waiting for the Department of Home Affairs to renew the visa, arresting officers inform them that their visas are invalid.

### **C. Guiding Principles on the Human Rights of all Migrants**

36. All persons in South Africa share and enjoy the same basic human rights under international law, regardless of their immigration status. Additionally, refugees hold rights based on international refugee law and the principle that persons should not be returned to a country where they fear

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<sup>27</sup> <https://cmr.jur.ru.nl/cmr/docs/South%20Africa.pdf>.

<sup>28</sup> <https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2022/09/LHR-submission-to-the-PC-Home-Affairs-on-statelessness-2022-09.pdf>, page 10.

<sup>29</sup> <https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2022/09/LHR-submission-to-the-PC-Home-Affairs-on-statelessness-2022-09.pdf>, pages 11-12.



persecution on the grounds of race, religion, nationality, membership of a particular social group, or political opinion, or which they were compelled to leave owing to external aggression, occupation, foreign domination or events seriously disturbing public order.

37. International human rights law such as The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) form the foundation of international human rights law which, generally, places obligations on states in relation to all people and not only citizens.
38. By restating African States’ obligations as they relate to migrants, the Guiding Principles provided for by the African Commission on Human and People’s Rights aims to support African Union Member States in fulfilling their legal obligations to guarantee the rights of all migrants. The rights enshrined in these Guiding Principles apply to all migrants of African descent in the African diaspora and to all migrants in Africa, irrespective of their origin.
39. Lawyers for Human Rights lauds these efforts by the Special Rapporteur and African Commission on Human and People’s Rights to draft guiding principles. LHR wishes to further emphasise specific migrant rights’ issues in South Africa and additional principles for consideration by the Special Rapporteur.

#### *Xenophobia and the right to human dignity*

40. Xenophobia in South Africa often has fatal consequences towards migrants in the country, with South Africans unleashing targeted violence in their search for undocumented migrants, who are consistently used as a scapegoat for the country’s socio-economic grievances such as crime and unemployment. This has led to the formation of a vigilante-style group called “Operation Dudula,” with its supporters demanding that African migrants leave the country. Political analysts have argued that its operations are solely targeted against poor black people who ordinarily live in shacks and townships and there is a clear similarity between Operation Dudula’s actions and previous xenophobic attacks. Poverty is the main driver of these sentiments, and their anger is misdirected at the people who are just as vulnerable and victimised as poor South Africans.
41. Xenophobic attacks and intimidation towards foreign nationals have been a widespread issue in the country since 2008. While the South African government has released public statements strongly condemning the attacks, they have failed to address the long-term issues and solutions towards reintegration and measures to curb xenophobic intolerance.
42. The discrimination faced by foreign nationals has been institutionalised in both government policy and within the attitudes of broader South African society, without regard for government’s failure in upholding an ineffective and corrupt asylum and migration system within the Department of Home Affairs. The immigration and documentation system at the Department of Home Affairs continues to be incapable of managing the affairs of migrants in South Africa and as a result of its inefficiency, many foreign nationals who may have a valid claim for refugee status or otherwise are left undocumented.

43. While non-nationals, including undocumented migrants, have a reciprocal responsibility to respect and abide by the laws of South Africa, they must still be treated with dignity and respect and in a fair and humane manner in keeping with our Constitution regardless of their undocumented migrant status and must be protected against the systemic violence highlighted above which has led to highly publicised violations against their right to life and dignity. Refugees often assess their status as a measure of their safety and ability to live in a dignified manner in the Republic where they feel respected as human beings. The Guiding Principles must be utilised as a tool to call government to order by explicitly identifying those institutional barriers to access documentation and the continued harassment of foreign nationals holds a detrimental effect on the livelihood of refugees and migrants in the country and relegates them to the status of being considered 'second-class citizens' in the country.
44. The *Watchenuka*<sup>30</sup> case is considered seminal with regard to the interpretation of the right to dignity of non-citizens in South Africa. In this case the Supreme Court of Appeal boldly stated that 'human dignity has no nationality' and that the right to dignity may be used to prevent the 'humiliation and degradation' of any person even if it limits the sovereignty of the state.
45. In this case Mrs Watchenuka and her disabled son fled Zimbabwe and sought asylum in South Africa. Without social assistance from the government, Mrs Watchenuka soon found herself destitute due to her temporary asylum seeker status and her inability to access employment. Faced with the decision whether to grant asylum seekers the right to work and study, the Supreme Court of Appeal recognised the power of the state to differentiate between citizens and non-citizens and to decide whom to admit and on what terms. The Court thus recognised the foundational nature of the right to dignity and used it to limit the right to sovereignty. It demonstrated that the right to dignity can challenge notions of sovereignty to protect non-nationals from 'humiliation and degradation'. The Court found that a person who exercises their right to apply for asylum in South Africa and is destitute 'will have no alternative but to turn to crime, or to begging or foraging'. In such cases, the Court held, 'the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely inhibit the realisation of the potential for self-fulfilment'.

### *Labour and the Right to Work*

46. The Constitution contains a Bill of Rights that incorporates all categories of human rights that are ordinarily recognised by the main international human rights instruments. These include civil and political rights as well as socio-economic rights. However, the most relevant to xenophobia and foreign employees in the workplace, are the right to equality (section 9) and the rights pertaining to labour relations (section 23). In the case of the right to equality, section 9(4) provides for the enactment of national legislation to prevent or prohibit unfair discrimination particularly between private individuals. In the case of labour relations, section 23(5) requires the enactment of national legislation to regulate such relations.

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<sup>30</sup> Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 325 (SCA).

47. The draft National Labour Migration Policy (NLMP) was introduced to facilitate and regulate the flow of labour to and from South Africa. It is aimed at addressing the country's demand for keeping skilled workers in the country. Similarly, the Employment Services Amendment Bill (ESAB) was created to amend the Employment Services Act (2014) to regulate the employment of non-South African nationals. The South African government states that, overall, the draft policy and Bill are aimed at retaining skilled labour, growing the economy, creating opportunities for South Africans and combatting unemployment. While the introduction of laws to protect workers' rights is welcomed, the NLMP and ESAB fall short in this regard.
48. However, the draft policy and bill fall short in a number of ways. The provisions of the draft policy and Bill place restrictions on the right to work which are inconsistent with South Africa's constitutional and international human rights law obligations. The NLMP and ESAB seem to disregard the valuable contributions that migrant workers make to the economy and seem to be based on the (debunked) myth that restricting non-nationals' access to the labour market will solve unemployment. The Bill gives labour inspectors excessive power to enforce immigration rules. This goes against the purpose of their role which is to protect workers' rights and contradicts the ILO Labour Inspection Convention (1947) which South Africa has ratified. The quota system the policy and Bill introduce will not remedy most (or any) of the challenges it is aimed at addressing, like the high unemployment rate. Many of the provisions are problematic for refugees and asylum seekers, disregarding their right to work, as well as failing to consider the often lengthy or cumbersome asylum-seeking and refugee status determination processes.
49. LHR and the broader civil society sector have proposed for a complete overhaul of the NLMP and ESAB to ensure that their provisions don't restrict the right to work and don't go against South Africa's obligations in terms of the Constitution and commitments under international human rights law. The draft policy and Bill cannot adequately tackle sector-specific challenges and/or consider the circumstances of refugees, asylum seekers and other migrant workers because their scope is too wide. Rather than creating opportunities for locals in an exclusionary way, it is recommended that the authorities enforce existing labour laws to protect workers' rights irrespective of their nationality and furthermore, that international human rights mechanisms hold states accountable in implementing this. Accordingly it is recommended that the Guiding Principles go further than is currently provided in Principle 25 to state this.

### *Protection of migrant children*

50. As a signatory of the 1989 Convention on the Rights of the Child, South Africa is internationally obligated to pass and implement laws for the realization of children's interests. At the same time, Section 28 of the South African constitution establishes the duty to protect, fulfill, and promote children's rights, and the 2005 Children's Act gives effect to those rights and sets principles for children's care and protection. As neither document distinguishes between foreign and South African children, South Africa is duty-bound to protect all children regardless of nationality or status.
51. While the Guiding Principles make provision for child migrants in the broader sense e.g., the liberty and security of migrant persons and ensuring that child migrants are never detained, an explicit focus on the practical reality of child migrants, particularly unaccompanied and separated child,

entering South Africa in their attempt to access documentation and socio-economic services is necessary in ensuring their protection.

52. The lack of long-term focus or flexibility in the current system especially hurts unaccompanied and separated foreign children, forcing them into a vulnerable “legal void” as soon as they reach majority age. It should be noted that a separated child may have a non-parent adult accompanying her, but an unaccompanied child has no adult with her. Across all foreign child categories – including accompanied foreign minors with refugee claims, as well as unaccompanied or separated children without them – it is concluded that children’s situations are approached in a narrow and short-sighted way that is crippled by poor understanding of the relevant laws among involved officials.<sup>31</sup> The detention of former minors who reach the age of majority without valid documentation, or who have been de-linked from their parents’ files at the Department of Home Affairs, underlines the need to address the adversity that they face upon entering South Africa, especially given that civil conflicts and trans-border migration have brought more and more child migrants into the country in recent years. Though South Africa has accepted international obligations to act in children’s best interests and arguably possesses one of the strongest and most progressive foreign child protection frameworks in Africa, severe gaps in implementation and interpretation often make foreign children’s long-term welfare an unattainable ideal rather than a reality.<sup>32</sup>

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<sup>31</sup> <https://sihma.org.za/Blog-on-the-move/caught-in-a-catch-22-child-migrants-in-south-africa-are-short-term-plans-and-implementation-gaps-putting-foreign-children-at-risk>.

<sup>32</sup> Ibid.