



Ref No: GP/2012/0134

MÉDECINS SANS FRONTIÈRES

1st Complainant

SECTION27

2nd Complainant

LAWYERS FOR HUMAN RIGHTS

3rd Complainant

**PEOPLE AGAINST SUFFERING, OPPRESSION AND
POVERTY**

4th Complainant

and

THE DEPARTMENT OF HOME AFFAIRS

1st Respondent

THE NATIONAL DEPARTMENT OF HEALTH

2nd Respondent

BOSASA OPERATIONS (PTY) LTD

3rd Respondent

THE SOUTH AFRICAN POLICE SERVICE

4th Respondent

**THE DEPARTMENT OF INTERNATIONAL RELATIONS
AND COOPERATION**

5th Respondent

BASELINE INVESTIGATIVE REPORT

1. INTRODUCTION

- 1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 1.2. The Commission is specifically mandated to:
- 1.2.1 Promote respect for human rights;
 - 1.2.2 Promote the protection, development and attainment of human rights; and
 - 1.2.3 Monitor and assess the observance of human rights in the South Africa.
- 1.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country and to take steps to secure appropriate redress where human rights have been violated. The Human Rights Commission Act, 54 of 1994 (the HRCA)¹ provides the enabling framework for the exercise of the Commission's powers and imposes a mandatory duty of cooperation on both public bodies and private individuals.

¹ The statutory powers, applicable to this investigation, conferred by the HRCA have not in any material way been altered by the provisions of the South African Human Rights Commission Act No. 40 of 2013.

- 1.4. Section 9(6) of the HRCA determines the procedure to be followed in conducting an investigation regarding an alleged violation of, or threat to, a fundamental right.
- 1.5. Chapter 3 of the South African Human Rights Commission's Complaints Handling Procedures (CHP), provides that the Commission has the jurisdiction, after assessing a complaint for this purpose, to conduct or cause to be conducted, on its own accord or upon receipt of a complaint, an investigation into any alleged violation of or threat to a fundamental right.

2. THE PARTIES

- 2.1. The First Complainant is Médecins Sans Frontières (MSF) an independent, international, medical humanitarian organisation registered in South Africa as a non-profit organisation (NGO) with its principal place of business at 3rd Floor, Orion Building, 49 Jorissen Street, Braamfontein, Johannesburg.
- 2.2. The Second Complainant is SECTION27, a public interest litigation centre registered as a NGO with its principal place of business at 23 Jorissen Street, 5th floor Braamfontein Centre, Braamfontein, Johannesburg.
- 2.3. The Third Complainant is Lawyers for Human Rights (LHR), an independent human rights organisation registered as a NGO with its principal place of business at Kutlwanong Democracy Centre, 357 Visagie Street, Pretoria.
- 2.4. The Fourth Complainant is People against Suffering, Oppression and Poverty (PASSOP), a community-based NGO working to protect the rights of refugees, asylum-seekers and immigrants in South Africa with its principal place of business at 37 Church Street, Wynberg, Cape Town.

- 2.5. The First Respondent is the Department of Home Affairs (DHA), a public body which is accountable to the National Parliament of South Africa. The DHA is mandated *inter alia* to act as the custodian, protector and verifier of the identity and status of persons resident in South Africa; to control, regulate and facilitate immigration and the movement of persons through ports of entry and to determine the status of asylum-seekers and refugees in accordance with international obligations. The DHA is ultimately "legally and administratively responsible for all matters pertaining to the apprehension, holding, processing, repatriation and release"² of detainees at Lindela. The DHA's head office is at 909 Arcadia Street, Pretoria.
- 2.6. The Second Respondent is the National Department of Health (DoH), a public body which is accountable to the National Parliament of South Africa and which has overall responsibility for healthcare in South Africa, with a specific responsibility for public-sector healthcare. The DoH's head office is at the Civitas Building, Corner Thabo Sehume and Struben Streets, Pretoria.
- 2.7. The Third Respondent is Bosasa Operations (Pty) Ltd (Bosasa), a registered private company with its principal place of business at 1 Windsor Road, Luipaardsvlei, Mogale City, Johannesburg. Bosasa is contracted by the first Respondent to run the facilities at the Lindela Repatriation Centre (Lindela).
- 2.8. The Fourth Respondent is the South African Police Service (SAPS), a public body which is accountable to the National Parliament of South Africa and responsible *inter alia* for the upholding and enforcing of the laws of South Africa. The SAPS head office is at the Koedoe Building, 236 Pretorius Street, Pretoria. The SAPS has been included as a Respondent, by virtue of its role in

² <http://www.bosasagroup.com/content/1361/1275/lindela-repatriation-centre>.

the apprehension, administration of and detention of non-nationals presumed to be unlawfully in South Africa.

- 2.9. The Fifth Respondent is the Department of International Relations and Cooperation (DIRCO), a public body which is accountable to the National Parliament of South Africa and responsible for the foreign policy and international relations of South Africa. The DIRCO's head office is at 460 Soutpansberg Road, Pretoria.
- 2.10. The Second, Fourth and Fifth Respondents, although not parties to the investigation, are cited as such on the basis of the respective recommendations directed to them resulting from this investigation.

3. BACKGROUND TO THE COMPLAINT

- 3.1. On 28 May 2012, the Commission received a written complaint from the first to fourth Complainants.
- 3.2. The complaint was premised on various grounds for concern that led to the Complainants' call for an investigation into the the state of health and provision of health care services at Lindela. These grounds are as follows:
- 3.2.1. The first Complainant, on 30 November 2011, requested access to Lindela for the purposes of conducting an independent medical assessment of the state of health care provision at that facility. In denying this request, the Chief Director of the Immigration Directorate for the Department of Home Affairs, Mr Modiri Matthews, indicated that the second Respondent and the Commission were the relevant bodies tasked with oversight over

operations at Lindela in relation to medical standards and human rights respectively;

3.2.2. An alleged lack of oversight at Lindela generally, in light of the lack of access accorded to independent human rights organisations despite reports of human rights violations;

3.2.3. That officials of the third Respondent allegedly indicated to the third Complainant that it is no longer responsible for health care services at Lindela;

3.2.4. Findings reported by various studies relating to conditions at Lindeia that could impact on the state of health of detainees held there. These included:

3.2.4.1. A finding in 2000 by the Commission that many detainees had complained of limited access to medical care at Lindela as well as further findings in the same study indicating that there had been non-compliance by the then service provider at Lindela (Dyambu Holdings), with regard to menu recommendations and that periods between the serving of meals were too lengthy;³

3.2.4.2. A 2010 report by the Forced Migration Studies Programme reporting that detainees on chronic medication, including anti-retroviral (ARV) treatment, reported not being given access to such medication.⁴ This report further found that a large number of detainees who had sought medical care were not satisfied that their condition had been adequately treated and that a large percentage

³ "Lindela at a Crossroads for Detention and Repatriation: An assessment of the conditions of detention by the South African Human Rights Commission" (December 2000) available at <http://www.queensu.ca/samp/migrationresources/xenophobia/reports/sahrc1.pdf>.

⁴ Armit, R. "Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa" (2010) Forced Migration Studies Programme available at http://www.migration.org.za/sites/default/files/reports/2010/Lost_in_the_Vortex-Irregularities_in_the_Detention_and_Deportation_of_Non-Nationals_in_South_Africa_0.pdf.

of reported incidences of violence involved officials of the first and / or third Respondents;⁵

3.2.4.3. A 2012 submission by the third Complainant to the Special Rapporteur on the Human Rights of Migrants in which it reported on common complaints by detainees who were consulted at Lindela. Such complaints included allegations of inadequate medical care and a neglect of the psychological well-being of detainees;⁶ and

3.2.4.4. In a report by Solidarity Peace Trust and the fourth Complainant, based on the results of a 2012 survey, respondents indicated a lack of access to medical services at Lindela (this included ARVs).⁷ This report further indicated that a large number of respondents alleged that they had been held in detention for more than 120 (one hundred and twenty) days.⁸

3.2.5. Reports received about a male whose meningitis infection had allegedly been mistreated by the first Respondent and whose family was reportedly only informed of his hospitalisation approximately two months after his admission to hospital.

4. PRELIMINARY ASSESSMENT

4.1. The Commission confirmed acceptance of the complaint in terms of its CHP on the basis of *prima facie* violations of human rights. On that basis, the Commission instituted an investigation of the complaint.

⁵ Ibid.

⁶ "LHR Submission to the Special Rapporteur on the Human Rights of Migrants" LHR (2012) available at <http://www.lhr.org.za/publications/lhr-submission-special-rapporteur-human-rights-migrants>.

⁷ Solidarity Peace Trust and Passop, "Perils and Pitfalls - Migrants and Deportation in South Africa" (2012), Durban: Solidarity Peace Trust available at <http://www.solidaritypeacetrust.org/1192/perils-and-pitfalls/> for this report.

⁸ Ibid.

5. RIGHTS ALLEGEDLY VIOLATED

From its preliminary assessment of the complaint, the Commission identified *prima facie* violations of the following human rights, as enshrined in the Bill of Rights of the Constitution:

- 5.1. Section 10 (the right to human dignity);
- 5.2. Section 12 (the right to freedom and security of the person);
- 5.3. Section 27 (the right to health care, food, water and social security);
- 5.4. Section 33 (the right to just administrative action); and
- 5.5. Section 35 (the rights of arrested, detained and accused persons)

6. METHODOLOGY

- 6.1. In evaluating this matter, the Commission assessed and considered:
 - 6.1.1. Applicable Constitutional and statutory prescripts;
 - 6.1.2. The particular facts of the complaint;
 - 6.1.3. Information obtained through the conduct of an inspection *in loco* and through interviews with officials of the first Respondent, the doctor and nurses on site;
 - 6.1.4. Information gleaned from the results of a survey in which 109 (one hundred and nine) detainees participated:
 - 6.1.4.1. The survey contained a series of quantitative questions about detainees' experiences both in police detention and at Lindela, as well as a small number of qualitative questions.

- 6.1.4.2. Aside from questions related to access to and quality of health care, a number of questions covered the related issues of basic conditions of detention and issues of procedural and administrative justice insofar as these aspects impact access to and quality of health care.
- 6.1.4.3. In order to ensure anonymity, the participants were randomly selected from weekly detainee lists provided by the third Respondent. As the research manager randomly selected participants from the detainee lists, there was no way of avoiding knowledge of the participants' names. However, this knowledge was limited to the selection process alone as detainees were not requested to identify themselves during interviews and no names were used in the survey itself. The data collected therefore remains anonymous and no information can be linked to any particular individual.
- 6.1.4.4. Participation was voluntary and based on informed consent.
- 6.1.4.5. Not all respondents answered every question.
- 6.1.4.6. The research design set out to interview approximately 10% (ten percent) of the Lindela population in order to obtain a representative sample. The 109 (one hundred and nine) respondents in the study make up approximately 8% (eight percent) of the detainee population at the time of the study, but many questions had fewer respondents. Accordingly, the study did not obtain a representative sample. However, the responses do provide a window into Lindela and suggest issues of concern while pointing to the need for rapid intervention as well as more regular monitoring of detention conditions in order to provide a broader picture of detainee rights, specifically with regard to access to and quality of health care.

- 6.1.4.7. Ethics clearance for the study was received from the University of the Witwatersrand Research Ethics Committee (non-medical) on 7 March 2013 (protocol number: H130222).
- 6.1.5. Information gleaned from six detainee lists provided to the Commission by the third Respondent and covering the period at Lindela between April and May 2013.
- 6.1.6. Information obtained through desktop research.

6.2. The Commission notes that Justice Edwin Cameron⁹ in July 2012 conducted an inspection at Lindela.¹⁰ The Honourable Justice issued a report on his findings entitled "Visit to Lindela Repatriation Centre, Krugersdorp: Justice Edwin Cameron, Constitutional Court of South Africa"¹¹ (Justice Cameron's Lindela Report).¹² An unannounced visit was later also undertaken by Justice Moseneke in April 2014. The report by Justice Moseneke is hereinafter referred to as the Moseneke report.

6.3. This investigation was not intended to be a comprehensive assessment of all health issues and is limited to specific areas of focus. It should therefore be viewed as a baseline study for further investigation and research into access to and quality of health care at Lindela.

⁹ Justice of the Constitutional Court since 1 January 2009.

¹⁰ Justice Cameron was accompanied by his law clerks Nurina Ally and Michael Mbikiwa, and his former law clerk Claire Avidon.

¹¹ Cameron, E. "Visit to Lindela Repatriation Centre, Krugersdorp: Justice Edwin Cameron, Constitutional Court of South Africa" (2012). Online available at <http://www.constitutionalcourt.org.za/site/PrisonVisits/Cameron/Prisons-Lindela-Report-Monday-29-October-2012-FINAL.pdf>.

¹² A similar visit was conducted by Judge Brian Spilg of the South Gauteng High Court; however, his office was, as at the time of issuing of this report, unable to provide the Commission with a copy of the report on his visit.

7. STEPS TAKEN BY THE COMMISSION

- 7.1. The Commission received and reviewed the abovementioned complaint.¹³
- 7.2. In a meeting chaired by the Commission's Chairperson Advocate M.L. Mushwana, on 27 June 2012, the Commission met with representatives of the Complainants to further discuss the particular facts of the complaint and the Commission's intended approach in investigating the complaint. It was agreed at this meeting that the Commission would be supported in this investigation by the Complainants as experts in their relevant fields. In this respect, it was agreed that the Commission would seek permission from the relevant authorities to be accompanied by the first Complainant on its inspection of the health care and related facilities at Lindela.
- 7.3. The Commission proceeded with an investigation consisting of an inspection *in loco* and interviews with management of and employees at Lindela as well as the administration of a research questionnaire with respondents. In respect of the later part of the investigation, the African Centre for Migration and Society (ACMS) was included in the group of experts supporting the Commission in the conduct of this research. The ACMS was instrumental in the design and management of the research process. The ACMS also collated and interpreted data from the questionnaires and provided a report on the research findings to the Commission.
- 7.4. On 4 September 2012, a delegation consisting of representatives of the Gauteng Provincial Office of the Commission together with two representatives from the first Complainant and one representative from the fourth Complainant, conducted an inspection *in loco* of the health care and related facilities at

¹³ See paragraph 3 above.

Lindela. The delegation was escorted on its inspection of the facilities by Lindela administrators (officials of the first Respondent) and the third Respondent's senior managers. The inspection revealed the following:

- 7.4.1. Lindela appeared overall to be clean and ordered.
- 7.4.2. Officials appeared cooperative and approachable.
- 7.4.3. **Inspection of the clinic revealed the following:**
 - 7.4.3.1. The waiting area outside the clinic is a small, open-air area which allows for fresh air and sunlight.
 - 7.4.3.2. The delegation was introduced to Doctor Khota and 4 (four) female nurses, all employed by the third Respondent. **Interviews with medical staff revealed the following:**
 - 7.4.3.2.1. Dr Khota has been employed to provide medical care to detainees at Lindela for the past 15 (fifteen) years; he visits Lindela daily in the mornings and is on call for emergencies.
 - 7.4.3.2.2. Nursing staff are based at Lindela full-time and work on a shift basis.
 - 7.4.3.2.3. The clinic undertakes approximately 300 (three hundred) to 400 (four hundred) primary health consultations (PHC) per day (this number includes attendance by detainees on chronic medication who attend for the purpose of receiving their medication on a "directly observed treatment" (DOT) basis).
 - 7.4.3.2.4. Dr Khota was very positive about the medical services provided at Lindela.
 - 7.4.3.2.5. Dr Khota indicated that pregnant women and women that test positively for pregnancy at the clinic, as well as minors, are not detained at Lindela.
 - 7.4.3.2.6. Once in Lindela, detainees are allowed to visit the clinic during the day, for medical attention.

- 7.4.3.2.7. The clinic is stocked with standard essential drug list (EDL) medication and the clinic is therefore able to treat detainees at a primary health care level.¹⁴ Detainees requiring hospital admission are referred to Leratong Hospital.
- 7.4.3.2.8. Patients who are discharged from the hospital are admitted to the recovery ward at Lindela where they are kept until they are well enough to return to the shared rooms in the detention courtyard.
- 7.4.3.2.9. The clinic staff alleged that tuberculosis (TB) medication and ARVs are provided to patients once they have been initiated through second Respondent's local clinic; and further, that they had, at that time, only 4 (four) patients under their care that were on TB medication and over 40 (forty) on ARVs.
- 7.4.3.2.10. Nurses indicated that tetanus vaccines were available at the clinic.
- 7.4.3.2.11. With regard to **voluntary counselling and testing (VCT)**, clinic staff indicated that only one test is conducted per week and that **no protocols and considerations for counselling are in place.**
- 7.4.3.2.12. Dr Khota indicated that **the most common diagnoses at the clinic are flu and sexually transmitted infections (STIs).**
- 7.4.3.2.13. With regard to emergency treatment, Dr Khota indicated that there is access to a resuscitation trolley in the clinic and an emergency kit / suitcase is available with very basic resuscitation equipment. In the event of an emergency, Dr Khota is notified and he then, depending on the nature of the ailment, either consults with the patient or refers them to Leratong Hospital. An ambulance is available at the premises to transport patients to hospital.

¹⁴ The Declaration of Alma-Ata. International Conference on Primary Health Care, Alma-Ata, USSR, 6-12. September 1978 [online available at http://www.who.int/publications/almaata_declaration_en.pdf] defines "primary health care" as "essential health care... the first level of contact... and... the first element of a continuing health care process."

- 7.4.3.2.14. With regard to psychological care, the delegation was informed that in instances where detainees are diagnosed as needing possible psychiatric care, such patients are referred for care outside Lindela. **There is no counsellor or psychologist available on the premises.**¹⁵
- 7.4.3.2.15. With regard to the management of trauma, Dr Khota indicated that usually only minor injuries (such as cuts and lacerations) are treated at the clinic. Dr Khota alleged that no serious injuries or trauma had been treated at the clinic in the preceding three months at least.
- 7.4.3.2.16. With regard to mediation and translation, the delegation was informed that this is done with the assistance of another detainee from the same country as the person requiring such mediation / translation services.
- 7.4.3.2.17. Dr Khota indicated that his main concern is with regard to the management of patients transferred to Lindela from prisons, as they allegedly often do not receive chronic medication (including ARVs) at prison and therefore, on arrival at Lindela, have not taken ARV medication for periods of up to two weeks. He further **raised concerns about the admission of patients with advanced acquired immune deficiency syndrome (AIDS) but indicated that he had raised this with Lindela management and that they were dealing with these concerns.**
- 7.4.3.3. **Promotional health material was displayed on the walls and detainees appeared to be treated with dignity and a decent measure of privacy.**

¹⁵ Similar allegations are noted in Justice Cameron's Lindela Report, see footnote 6.2 above, at page 17.

- 7.4.3.4. The clinic has two small wards, one for female patients and one for male patients. The female ward has two beds. The male ward has eight beds.
- 7.4.3.5. Upon inspection, the female ward was empty.
- 7.4.3.6. Upon inspection, the male ward had two patients. One patient was in a bed and the other sitting in a chair watching television.
- 7.4.3.7. The rooms were clean and tidy and the barred windows and curtains were open.
- 7.4.3.8. There are two dressing rooms with basic equipment, in a clean environment.
- 7.4.3.9. Single use dressing kits were available.
- 7.4.3.10. Inspection of the fridge revealed that there were no tetanus vaccines inside.
- 7.4.3.11. The investigation raised concerns about whether, upon deportation, deportees are provided with a buffer stock of chronic medication to ensure adherence to medical treatment plans during deportation and in the time immediately thereafter.
- 7.4.3.12. There is an isolation unit next to the clinic that was under construction at the time of inspection. The indication was that these rooms would be used for TB patients, separate from other detainees. There were very few windows and no natural ventilation was present in the room.
- 7.4.4. Inspection of the female detention section revealed the following:
- 7.4.4.1. The section is located in an open courtyard with a clean shower, a toilet block and a room with a television on one side.
- 7.4.4.2. The courtyard is spacious and clean.
- 7.4.4.3. The delegation observed women lying on the floor in the sun and some women drying their clothes on the trees.

- 7.4.4.4. Women spend their daytime sitting outside in this area and return to the rooms at bedtime.
- 7.4.4.5. Each room has 28 (twenty eight) bunk beds, a toilet and a sink. Not all the beds were occupied and **there appeared to be an adequate amount of blankets.** There were only two windows on one side of the wall. However, all rooms have rooftop ventilation.¹⁶
- 7.4.4.6. The delegation observed representatives from a private company arriving to pick up a load of blankets for washing.
- 7.4.5. **Inspection of the male detention section revealed the following:**
- 7.4.5.1. There are two male sections, "Section A" and "Section B".
- 7.4.5.2. Section A is the main section and held approximately 1 200 (one thousand two hundred) men on the day the investigation was conducted.
- 7.4.5.3. The rooms were similar in size to those in the female section, approximately ten by eight meters, however **some rooms held slightly more than 28 (twenty eight) bunk beds.** Section A has at least 50 (fifty) such rooms.
- 7.4.5.4. Each room has a television, shower and one toilet.
- 7.4.5.5. Detainees have unhindered access to the courtyard during the day, but are confined to the rooms from early evening and through the night.
- 7.4.5.6. Detainees in the male section usually congregate in terms of nationality, but rooms are not allocated in line with nationality. The congregation appeared to take place purely on the initiative of the detainees themselves.

¹⁶ Ventilation is provided through the use of whirlybirds.

- 7.4.6. **Inspection of the food preparation areas revealed the following:**
- 7.4.6.1. The delegation was given an extensive tour of the kitchen and food storage areas.
- 7.4.6.2. **The third Respondent appears to provide a well-run service in this regard.¹⁷**
- 7.4.6.3. There were two big walk-in freezers for vegetables, bread and meat, with meat stored separately.
- 7.4.6.4. Food is pre-packed to minimise the use of utensils and delivered in three (3) day cycles.
- 7.4.6.5. Food is moved from general storage areas to day storage areas in preparation for the day's meals.
- 7.4.6.6. There are thawing and washing rooms in the kitchen and the delegation was informed that these are used daily.
- 7.4.6.7. The delegation was further informed that the menu is constant for two weeks. **The menu in use at the time of the inspection was prominently displayed on the walls and included information in relation to approximate nutritional value.**
- 7.4.6.8. **There was visible attention to the need for special medical diets.**
- 7.4.6.9. **With regard to infection control:**
- 7.4.6.9.1. Delegation members were all given hair nets prior to entering the kitchen area;
- 7.4.6.9.2. **Kitchen staff were wearing personal protective equipment (PPE);**
- 7.4.6.9.3. **The storage, preparation and dining area were all clean; and**

¹⁷ Ibid footnote 6.2 at page 7.

- 7.4.6.9.4. **There was active cleaning taking place** by appropriately dressed staff members.
- 7.4.7. **There did not appear to be any condom dispensers at Lindela.**
- 7.4.8. **After the inspection,** during interviews with officials of the first Respondent, Ms Nolwandle Qaba, Director of Deportations, and Mr Job Jackson, the Manager of Lindela, the following was indicated:
- 7.4.8.1. In response to questions raised about reasons for detainees being detained for periods in excess of 30 (thirty) days, officials indicated **that the delays in the deportation process are sometimes caused by the fact that some detainees are brought to Lindela without their status having been checked prior thereto** and the responsibility therefore falls on Lindela to do so, even though it is not within Lindela's mandate. Further, delays are sometimes caused in instances where foreign embassies are required to interview detainees to verify nationality prior to deportation and such embassies do not / are not able to attend at Lindela within a reasonable time period.
- 7.4.8.2. Mr Jackson and Ms Qaba indicated that there were 1 900 (one thousand nine hundred) detainees in total on the day. The figure had decreased by 500 (five hundred) in the preceding 24 (twenty four) hours as a number of Zimbabwean nationals had been deported the day before.
- 7.4.8.3. **Ms Qaba indicated that the lack of formalised screening procedures for the health screening of detainees upon arrival was being revised as part of a general revision of the standard operating procedures at Lindela.**
- 7.5. Over a period of time spanning April, May and September 2013, questionnaires were administered to detainees at Lindela. The following reported survey results

are based on quantitative survey data gathered from 109 (one hundred and nine) respondents:¹⁸

7.5.1. **With regard to demographics:**

7.5.1.1. The respondents were predominantly male – constituting 92 (ninety two) of the total sample, whereas only 17 (seventeen) were female.

7.5.1.2. The table below shows the most highly represented nationalities in the survey and the proportion of the overall population in Lindela they represented at the time of the investigation, based on the nationality totals in the sample of detainee lists provided by the third Respondent:¹⁹

Country of origin ²⁰	Number of Respondents	Percentage of Lindela population
DRC	21	3%
Nigeria	13	5%
Zimbabwe	9	20%
Zambia	6	Less than 1%
Malawi	5	44%
Tanzania	4	4%
Mozambique	4	11%
Bangladesh	4	1%

7.5.1.3. Although detainees from Malawi, Mozambique and Zimbabwe were the most highly represented populations in Lindela during the investigation, the frequency of transport to these countries means that they are generally detained for shorter periods than nationals

¹⁸ See paragraph 6.1.3 above.

¹⁹ See paragraph 6.1.5 above.

²⁰ Researchers interviewed one respondent who alleged that he was a South African national being detained as an illegal non-national.

from countries such as the DRC and Nigeria. As **health concerns increase with the length of detention, respondents from the latter countries may therefore have heightened health care needs.**

7.5.1.4. The respondents ranged in age from 19 (nineteen) to 59 (fifty nine), averaging 32 (thirty two) years.

7.5.1.5. The most common languages spoken were Swahili, English, French, Lingala, Igbo and Ndebele.

7.5.1.6. Eighteen respondents indicated that they did not speak English comfortably and fluently, but answered the survey questions where possible.

7.5.1.7. Four surveys were conducted in French.

7.5.2. **With regard to procedures around arrest and detention:**

7.5.2.1. **Twenty six respondents alleged that they were arrested with valid immigration status.** This figure includes 16 (sixteen) respondents who alleged they had valid asylum-seeker permits.

7.5.2.2. An additional 27 (twenty seven) respondents alleged that they were arrested with expired asylum permits.

7.5.2.3. Four individuals alleged to be recognised refugees with expired refugee documents.

7.5.3. **With regard to the duty to inform detainees of their right to appeal the deportation decision and to request that their detention be confirmed by a warrant of court:**

7.5.3.1. Almost three-quarters (78 (seventy eight) of the respondents) alleged not to have received notification of their legal rights upon being detained as illegal non-nationals.

7.5.3.2. Only 9 (nine) out of 104 (one hundred and four) respondents reported receiving a notice of deportation.

- 7.5.3.3. Roughly three-quarters (73 (seventy three) respondents) were not informed of their right to appeal the decision classifying them as an illegal non-national.
- 7.5.3.4. More than half (63 (sixty three) respondents) indicated that they did not know that they could ask a court to review their detention.
- 7.5.4. **With regard to detention of detainees, for the purpose of verification of status (at police stations):**
 - 7.5.4.1. Ninety eight respondents indicated that they were held at a police station prior to arriving at Lindela.
 - 7.5.4.2. Seventy one respondents alleged that they were held for over 48 (forty eight) hours.
 - 7.5.4.3. The results indicate that the **average time detained in a police station was 26 (twenty six) days.**
 - 7.5.4.4. Fifty seven respondents alleged that they were not informed within 48 (forty eight) hours that they were being held as illegal non-nationals.
 - 7.5.4.5. Only 15 (fifteen) respondents reported having seen a warrant confirming their detentions, while 89 (eighty nine) had not.
- 7.5.5. **With regard to periods of detention at Lindela:**
 - 7.5.5.1. Forty three respondents alleged that they had been in Lindela for over 30 (thirty) days.
 - 7.5.5.2. Nine respondents alleged to have been held in Lindela longer than 120 (one hundred and twenty) days.
 - 7.5.5.3. The overall indicated **average detention period of detainees detained in Lindela was 46 (forty six) days.**
 - 7.5.5.4. Twenty six respondents alleged that they had been **released from Lindela and immediately re-arrested.**
 - 7.5.5.5. The longest alleged period of detention at Lindela was **377 (three hundred and seventy seven) days.**

- 7.5.6. **Taking into account periods of detention, including time spent by detainees both in police custody and in Lindela:**
- 7.5.6.1. Sixty one respondents alleged to have been detained for over 30 (thirty) days.
- 7.5.6.2. Overall, indicated average detention period was 62 (sixty two) days.
- 7.5.6.3. The longest alleged overall period of detention was 524 (five hundred and twenty four) days.
- 7.5.7. **With regard to experience of conditions of detention in the custody of the fourth Respondent:**
- 7.5.7.1. Seventeen respondents alleged that they **suffered physical injuries during the arrest process**; this in many cases involved the use of pepper spray.
- 7.5.7.2. One respondent alleged that he was **beaten in his cell by other detainees**.
- 7.5.7.3. Among respondents who alleged having been held in police custody for over 48 (forty eight) hours, one alleged that **he had to buy food** while detained at the police station.
- 7.5.7.4. Of the 13 (thirteen) respondents who indicated that they were on medication prior to their arrest, 7 (seven) **indicated that they were unable to access this medication** while being held by the police.
- 7.5.8. **With regard to experience of conditions of detention in Lindela:**
- 7.5.8.1. Nineteen respondents reported **experiencing violence at Lindela**. Most of the violence described was alleged to have been committed by security guards at the facility.
- 7.5.9. **With regard to diet and meal periods:**
- 7.5.9.1. Respondents provided **conflicting information** on the number of meals received per day at Lindela. Eighty six respondents reported

getting two meals a day: breakfast and lunch. Those respondents who did report receiving dinner indicated that this meal consisted of bread, tea and coffee.²¹

- 7.5.9.2. The reported **gap between lunch and breakfast ranged from 15 (fifteen) to 21 (twenty one) hours**, with an average of 17.8 (seventeen point eight) hours.
- 7.5.9.3. Twelve respondents alleged that the food at Lindela did not meet their dietary requirements.
- 7.5.10. **With regard to personal hygiene:**
- 7.5.10.1. Respondents were asked with regard to each of the items below to select among the following choices: (1) given item for free, (2) had to buy item, (3) given some for free but ran out / had to buy more / what I received was insufficient, or (4) no access to item. The results are as follows:
- 7.5.10.2. *Wash basin:* 21 (twenty one) respondents reported no access.
- 7.5.10.3. *Soap for washing clothes:* 11 (eleven) respondents reported having to buy soap, 24 (twenty four) reported insufficient access, and 6 (six) reported no access.
- 7.5.10.4. *Soap for bathing:* 37 (thirty seven) respondents had to buy soap, 19 (nineteen) reported insufficient access, and 22 (twenty two) reported no access.
- 7.5.10.5. *Towels:* 48 (forty eight) respondents had to buy a towel, 47 (forty seven) had no access.
- 7.5.10.6. *Clean clothes:* 33 (thirty three) respondents had to buy clean clothes, 16 (sixteen) had insufficient clean clothes, **35 (thirty five) had no clean clothes.**
- 7.5.10.7. *Tooth brush:* 1 (one) respondent alleged he had been **unable to brush his teeth for 3 (three) months.**

²¹ Justice Cameron's Lindela Report notes similarly that food is served twice a day with lunch and super being served simultaneously. See footnote 6.2 above, at page 8.

- 7.5.11. **With regard to access to health care services:**
- 7.5.11.1. Respondents reported seeking medical care for a variety of issues, including *inter alia* headaches, flu, chest pains, TB, psychological issues, asthma and bloody stools. The 79 (seventy nine) respondents who reported seeking medical care at Lindela alleged as follows:
- 7.5.11.2. Fifteen reported receiving medication from non-medical staff.
- 7.5.11.3. **Twenty five reported receiving standard painkillers without any attempt to assess their medical condition.**²²
- 7.5.11.4. Forty indicated that they did not feel that the medical staff had provided adequate care for their medical condition.²³
- 7.5.11.5. Thirteen respondents reported being on chronic medication prior to their arrest; 10 (ten) of these respondents reported that they were **unable to access their prescribed medication** while held in Lindela.²⁴
- 7.5.11.6. Only 5 (five) respondents indicated that they had been tested for TB.
- 7.5.11.7. **Fifty respondents reported being unaware of their HIV status.**

7.6. Detainee lists provided by the third Respondent revealed the following:²⁵

- 7.6.1. **Fifty two detainees had been held in Lindela for over 120** (one hundred and twenty) days, of those:
- 7.6.1.1. **Twenty three had been held for over 150** (one hundred and fifty) days;
- 7.6.1.2. **Fourteen had been held for over 200** (two hundred) days; and

²² Ibid at page 17.

²³ Ibid at page 17.

²⁴ Ibid at page 17.

²⁵ See paragraph 6.1.5 above.

- 7.6.1.3. **Four had been held for over 300** (three hundred) days.
- 7.6.2. The longest period of detention was 402 (four hundred and two) days.
- 7.6.3. On any given day, there was an average of 24 (twenty four) detainees at the facility who had been there for over 120 (one hundred and twenty) days, about 2% (two percent) of the population.
- 7.6.4. Nationals of the DRC made up the highest proportion of those held for over 120 (one hundred and twenty) days.

7.7. Post field investigation meeting with Lindela Manager:

- 7.7.1 On 06 May 2014 the Commission met with the Manager of Lindela, Mr Job Jackson. The purpose of the meeting was to:
 - 7.7.1.1. Establish whether civil society organisations are permitted access to Lindela;
 - 7.7.1.2. Establish the criteria governing such access;
 - 7.7.1.3. Obtain records of such criteria and / or policies governing access by civil society organisations;²⁶ and
 - 7.7.1.4. Obtain information regarding the process through which detainees are, at the various administrative levels of the deportation process, including instances where non-nationals are arrested or detained by the fourth Respondent, made aware of their rights.
- 7.7.2. Mr Jackson responded as follows:
 - 7.7.2.1. Civil society organisations that act as legal counsel for detainees are given "walk-in access" in order to allow for consultation between attorneys and their clients;

²⁶ No such criteria / policies or guidelines are available on either the first or third Respondent's websites.

- 7.7.2.2. All other civil society organisations desiring access to Lindela must direct their request, in writing, to the Chief Director of the Immigration Directorate for the Department of Home Affairs (the Chief Director) for approval by either the Chief Director's Office or, in certain instances, by the Minister of Home Affairs (the Minister);²⁷
- 7.7.2.3. Mr Jackson was unable to provide information about and copies of any other criteria and / or policies governing access by civil society organisations and advised that such request should be directed to the Chief Director. The Commission on 08 May 2014 directed such a request to the Chief Director in formal correspondence. As at the date of this report no response has been received in this regard from the first Respondent.
- 7.7.2.4. When arrested and / or on arrival at a police station, police inform detainees of their rights as detained / accused persons and this is recorded on an "SAPS 14A" form;²⁸
- 7.7.2.5. Detainees are informed, prior to being taken to Lindela, by an Immigration Officer (official of the first Respondent) of their rights in terms of the Immigration Act²⁹ (IA) and Regulations thereto, this is recorded on the "DHA 1724 Notice of Deportation" and the "Notice of Decision Adversely Affecting Rights of a Person" forms;³⁰
- 7.7.2.6. The "DHA 1724 Notice of Deportation" Form makes provision for detainees to indicate whether they elect to:
- 7.7.2.6.1. Await the first reasonable opportunity to be deported;
- 7.7.2.6.2. Appeal the decision to deport; or

²⁷ The Commission notes in this regard that it has not requested that the first Respondent provide statistical data indicating the number and type of civil society organisation which has been granted access over any specific period of time.

²⁸ The Commission was given sight of, but not provided with a copy of the "SAPS 14A" form.

²⁹ Act No. 13 of 2002.

³⁰ The Commission was given sight of, but not provided with copies of the "DHA 1724 Notice of Deportation" and "Notice of Decision Adversely Affecting rights of a Person" forms.

- 7.7.2.6.3. Have their detention for the purposes of deportation confirmed by a warrant of court.
- 7.7.2.7. Officials at Lindela make use of a checklist³¹ to ensure all appropriate forms, including those mentioned in paragraphs 7.7.2.4 and 7.7.2.5, are provided by the relevant authorities. Detainees for whom such forms are not provided are not admitted to be detained at Lindela,³²
- 7.7.2.8. With regard to detainees' right not to be detained for a period exceeding 30 (thirty) calendar days, without a warrant of a Court extending such period,³³ Mr Jackson indicated that, as detainees are made aware of their rights at the arrest stage,³⁴ they are simply informed, should such an extension become necessary, that an application will be made to Court.
- 7.7.3. The Commission noted that the forms described in paragraphs 7.7.2.4 and 7.7.2.5 above recognise the language needs of detained persons and make provision for a translator to be used to communicate its contents and for such interpreter to certify the interpretation and communication.

7.8. Post field investigation comments provided by Complainants:

- 7.8.1. The third Complainant provided the following response to comments made by Mr Jackson in the post field interview above:³⁵

³¹ A copy of which was provided to and accepted by the Commission.

³² The Commission is mindful that it has not tested the veracity of the Respondents responses in this regard by verifying, through the records, that the various notifications had been provided to the detainees participating in the survey (see paragraph 7.5 above). The limitation on the investigative team in this regard was attributable largely to the fact that the interviews were conducted on the basis of guarantees of anonymity provided to respondents (see paragraph 6.1.4.2 above).

³³ Section 34(1)(d) of the IA.

³⁴ See paragraphs 7.7.2.4 and 7.7.2.5 above.

³⁵ See paragraph 7.8.1.2.1 above.

- 7.8.1.1. That the third Complainant does sometimes act as legal counsel for detainees but is not provided with "walk-in access"; and
- 7.8.1.2. That the third Complainant is required by Lindela officials, prior to access being granted to it, to:
 - 7.8.1.2.1. Give 48 (forty eight) hours advance notice of its intention to consult with specific detainees;
 - 7.8.1.2.2. Provide the names of detainees it wishes to consult with; and
 - 7.8.1.2.3. Take proof of submission of prior notice along on the day of consultation.³⁶

8. LEGAL FRAMEWORK

International Legal Framework

- 8.1. The **Charter of the United Nations**³⁷ addresses political and civil rights and calls for international economic and social cooperation. **Article 55** declares that all human beings are entitled to enjoy human rights without discrimination.
- 8.2. The international principle of *non-refoulement* in terms of which a victim of persecution may not be turned over to his or her persecutor is recognised in **Article 14** of the **Universal Declaration of Human Rights**³⁸ (UDHR) which provides as follows:

³⁶ The third Complainant further alleges that Lindela officials do not allow its representatives to take cell phones into consultations with detainees and that this limits access to translators that could otherwise be accessed telephonically. It is further alleged that Lindela officials prohibit the practice of letting one detainee act as a translator for another and that this has forced the third Complainant to take along an interpreter when necessary. It is alleged moreover that, even with prior notice given, translators accompanying the third Complainant have on occasion not been allowed access to Lindela.

³⁷ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, online available at: <http://www.refworld.org/docid/3ae6b3930.html>.

³⁸ Adopted 10 December 1948 UNGA Res 217 A (III).

"1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

Article 25(1) of the **UDHR** provides that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

8.3. The **International Covenant on Civil and Political Rights**³⁹ (**ICCPR**) obliges South Africa as a signatory to provide an effective legal remedy to any violation of the rights it recognises, which include the right to physical integrity, liberty and security of person, procedural fairness, individual liberties and non-discrimination (including on the basis of race or national origin).

8.4. The **International Covenant on Economic, Social and Cultural Rights**⁴⁰ (**ICESCR**) includes a commitment to guarantee non-discrimination, including discrimination on the basis of race or national origin. **Article 12** of the **ICESCR** provides that:

³⁹ Adopted 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171.

⁴⁰ Adopted 16 December 1966 (entered into force 3 January 1976) 993 UNTS 3.

"1. The States Parties to the [ICESCR] recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness." (own emphasis)

8.5. The **Constitution of the World Health Organization**⁴¹ provides that:

"[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition..."

8.6. The United Nations **Declaration of Commitment on HIV/AIDS**⁴² provides as follows:

"Realization of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS"

⁴¹ As adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

⁴² UN General Assembly, *Declaration of Commitment on HIV/AIDS*, 2 August 2001, A/RES/S-26/2, online available at: <http://www.refworld.org/docid/3dda1a037.html>.

Respect for the rights of people living with HIV/AIDS drives an effective response

58. By 2003, enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic;

59. By 2005, bearing in mind the context and character of the epidemic and that, globally, women and girls are disproportionately affected by HIV/AIDS, develop and accelerate the implementation of national strategies that promote the advancement of women and women's full enjoyment of all human rights; promote shared responsibility of men and women to ensure safe sex; and empower women to have control over and decide freely and responsibly on matters related to their sexuality to increase their ability to protect themselves from HIV infection... (own emphasis)

8.7. Principle 1 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care⁴³ provides that "[a]ll

⁴³ UN General Assembly, *The Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, 17 December 1991, A/RES/46/119, online available at: <http://www.un.org/documents/ga/res/46/a46r119.htm>.

persons have the right to the best available mental health care, which shall be part of the health and social care system."

- 8.8. The **Basic Principles for the Treatment of Prisoners**⁴⁴ provides that "[p]risoners *shall have access to the health services available in the country without discrimination on the grounds of their legal situation.*" Whereas **Principle 1 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**:⁴⁵ provides that:

"Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained." (own emphasis)

- 8.9. The **Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment**⁴⁶ (CAT) holds states responsible for preventing within their territory, acts of cruel, inhuman, or degrading treatment, especially those committed with the consent or acquiescence of public officials.⁴⁷

⁴⁴ UN General Assembly, *Basic Principles for the Treatment of Prisoners*: resolution / adopted by the General Assembly, 28 March 1991, A/RES/45/111, online available at: <http://www.refworld.org/docid/48abd5740.html>.

⁴⁵ UN General Assembly, *Principles of Medical Ethics*: resolution / adopted by the General Assembly, 18 December 1982, Resolution 37/194, online available at: <http://www.un.org/documents/ga/res/37/a37r194.htm>.

⁴⁶ *UN Commission on Human Rights, Torture and other cruel, inhuman or degrading treatment or punishment*, 10 March 1987, E/CN.4/RES/1987/29, online available at: <http://www.refworld.org/docid/3b00f03e4c.html>.

⁴⁷ The Committee against Torture has specified that this responsibility is not mitigated when detention centers are privately owned or run. See Committee against Torture (2007) General Comment No. 2 on the implementation of Article 2, CAT/C/GC/2/CRP.1/Rev.4 23 November 2007, 39th Session, paragraph 17.

Article 1 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁸ (OPCAT) provides that:

*'[t]he objective of [OPCAT] is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'*⁴⁹ (own emphasis)

Article 3 of OPCAT places a duty on State Parties to "...*set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment...*"⁵⁰ (own emphasis)

8.10. **The Declaration on Human Rights Defenders⁵¹**, adopted by consensus by the United Nations General Assembly, on the fiftieth anniversary of the UDHR, is an indication of the commitment of states to guaranteeing not just protection for human rights defenders, but the creation of an enabling environment for the work done by human rights defenders. **Article 1** indicates that human rights defenders are any

⁴⁸ UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199, online available at: <http://www.refworld.org/docid/3de6490b9.html>.

⁴⁹ When South Africa was evaluated by the UN Committee on Torture in 2006, the lack of an effective monitoring system at Lindela was specifically cited as a concern. UN Committee against Torture (2006) Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture – South Africa CAT/C/ZAF/CO/1, 37th session, 6 – 24 November 2006.

⁵⁰ The Commission notes in this regard that there is an inter-departmental process underway considering an implementation plan for a National Preventative mechanism (NMP) as required by the OPCAT.

⁵¹ The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) adopted 8 March 1999 by General Assembly Resolution A/RES/53/144. Online available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/770/69/PDF/N9977089.pdf?OpenElement>.

persons who, individually or in association with others, promote and strive for the protection and realisation of human rights and fundamental freedoms. The Declaration therefore provides for conditions that will ensure human rights defenders are able to determine the state of and advance and protect human rights. Although not a legally binding instrument, the rights, standards and precepts contained in the Declaration on Human Rights Defenders are based on rights, standards and precepts contained in a number of other, legally binding international instruments such as the ICCPR.

8.11. The **Convention Relating to the Status of Refugees**⁵² and the **Protocol Relating to the Status of Refugees**,⁵³ both acceded to by the South Africa, affirm the rights of refugees to status, property, association, access to the courts, employment, and education (among other freedoms). The Convention also protects against refoulement. South Africa's pledges under these instruments are particularly relevant given the substantial number of refugees resident in the country.

8.12. The **United Nations High Commissioner for Refugees' (UNHCR) Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention**⁵⁴ provides as follows:

"Guideline 6. Indefinite detention is arbitrary and maximum limits on detention should be established in law

⁵² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, online available at: <http://www.refworld.org/docid/3be01b964.html>.

⁵³ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, online available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁵⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, online available at: <http://www.refworld.org/docid/503489533b8.html>.

Guideline 7. Decisions to detain or to extend detention must be subject to minimum procedural safeguards

Guideline 8. Conditions of detention must be humane and dignified

Guideline 9. The special circumstances and needs of particular asylum-seekers must be taken into account

Guideline 10. Detention should be subject to independent monitoring and inspection⁵⁵

8.13. Also relevant to broader considerations around persons who are vulnerable to detention at Lindela are the large numbers of migrant persons in South Africa. The **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families**, which has been neither signed nor ratified by South Africa, built upon previous human rights law to apply pre-existing principles directly to migrant workers and their families.⁵⁶ **Article 28** provides that:

"Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned." (own emphasis)

⁵⁵ Ibid at page 11.

⁵⁶ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* 18 December 1990, A/RES/45/1158, available online at www.ohchr.org/Documents/ProfessionalInterests/cmvi.pdf

Article 33 further endows migrant workers with “the right to be informed” and obligates states to make migrants aware of “their rights and obligations under the law and practice of the State concerned.”

Regional Legal Framework

8.14. **Article 16 of the African Charter on Human and Peoples’ Rights⁵⁷** (African Charter) provides that:

“1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

8.15. The **Additional Guidelines for TB and Population Mobility⁵⁸ to the Southern African Development Community (SADC) Policy Framework for Population Mobility and Communicable Diseases in the Region** provide *inter alia* for the following:

“iv. Regional harmonization of treatment policies and clinical management guidelines of patients with TB, including MDR / XDR and TB and HIV co-infection

v. Region-wide adoption and implementation of the three I’s (Intensive case finding, IPT and Infection control) initiative for People Living with HIV and AIDS

...

⁵⁷ Adopted 27 June 1981, entered into force 21 October 1986 (1982) 21 ILM 58.

⁵⁸ Policy Framework for Population Mobility and Communicable Diseases in the SADC Region (2009); online available from http://www.arasa.info/files/6613/7574/3254/SADC_Poicy_Framework_FINAL.pdf at pages 17 – 18.

x. Establishment of SADC regulated cross border notification and referral systems for drug resistant TB cases; and regional TB surveillance system."

8.16. The **Additional Guidelines for HIV and AIDS and Population Mobility⁵⁹ to the SADC Policy Framework for Population Mobility and Communicable Diseases in the Region** provide *inter alia* for the following:

i. Universal implementation of the three I's (Intensive TB case finding, IPT and Infection control) initiative for People Living with HIV and AIDS as part of broader collaborative TB / HIV activities.

ii. Strengthening and capacity building of networks of PLWHA⁶⁰ for cross-border collaboration.

...

iv. Resource mobilisation for IEC⁶¹ material production and ensuring dissemination to targeted populations.

v. Involvement of all key partners at Borders in programming including people living with HIV and AIDS.

vi. Mechanism for effective logistic management for health supplies. E.g. drugs

vii. Review of regulations and laws that discriminate against PLHIV⁶² on entry."

Domestic Legal Framework

The Constitution⁶³ is the benchmark for all legislation in South Africa. Its provisions are **applicable to all persons**, including juristic persons.⁶⁴ The values of equality, human

⁵⁹ Ibid at page 18.

⁶⁰ People Living With HIV / AIDS (PLWHA) / (PLHIV).

⁶¹ Information Education Communication (IEC).

⁶² See footnote 60 above.

dignity and freedom form the basis of any constitutional analysis of the human rights protected in the Bill of Rights.⁶⁵ South African domestic laws and interpretation of rights therefore find form through the primary principles as contained in the Constitution of the country. These principals are however not interpreted in isolation but, as per the provision of section 39 of the Constitution, international law is considered when interpreting the Bill of Rights.⁶⁶

8.17. The Constitution

The following provisions of the Consitution are relevant to the matter under consideration:

8.17.1. Section 10 (The right to human dignity):

"(1) Everyone has inherent dignity and the right to have their dignity respected and protected"

8.17.2. Section 12 (The right to freedom and security of the person):

"(1) Everyone has the right to freedom and security of the person, which includes the right-
(a) not to be deprived of freedom arbitrarily or without just cause;

⁶³ The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).

⁶⁴ Section 8 of the Constitution.

⁶⁵ Section 7 of the Constitution.

⁶⁶ Section 39 of the Constitution (Interpretation of the Bill of Rights) provides that:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(e) may consider foreign law."

(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way....”

8.17.3. Section 27 (The rights to health care, food, water and social security)

“(1) Everyone has the right to have access to –
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
(2) The State must take reasonable and other legislative measures, within its available resources, to achieve the progressive realization of these rights.
(3) No one may be refused emergency medical treatment.”

8.17.4. Section 32 (The right of access to information)

“(1) Everyone has the right of access to-
...
(b) any information that is held by another person and that is required for the exercise or protection of any rights.

8.17.5. Section 33 (The right to just administrative action)

"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

8.17.6. Section 35(2) (The rights of detained persons)

"(2) Everyone who is detained, including every sentenced prisoner, has the right-

(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;

(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;

(e) 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; and
(f) to communicate with, and be visited by, that person's-
(i) spouse or partner;
(ii) next of kin;
(iii) chosen religious counsellor; and
(iv) chosen medical practitioner."

8.17.7. Section 36(1) (The Limitation Clause)

"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."

Fundamental rights provided for in the Bill of Rights⁶⁷ may be limited either in terms of the provisions of section 36 of the Constitution or where a limitation is created internally by the wording of the right itself.

⁶⁷ Chapter 2 of the Constitution.

The rights contained in section 27 of the Constitution have such internal limitations as is evidenced by the use of the word “progressive”.

8.17.8. Section 41 (The principles of co-operative government and intergovernmental relations)

“(1) All spheres of government and all organs of state within each sphere must-

...

(h) co-operate with one another in mutual trust and good faith by-

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.”

8.18. The **National Health Act**⁶⁸ (NHA) provides a framework for a structured uniform health system within South Africa and for matters connected therewith. **Section 5** of the NHA provides that **no person may be denied emergency medical treatment**. This means that irrespective of nationality, all persons are entitled to emergency medical treatment.

8.19. The **Immigration Act**⁶⁹ (IA) provides for the regulation of admission of persons to, the residence of persons in, and the departure of persons from South

⁶⁸ Act No. 61 of 2003.

⁶⁹ Act No, 13 of 2002.

Africa; and for matters connected therewith. **Section 32** of the **IA** provides for the deportation of any "illegal foreigner." "Illegal foreigner" is defined in **section 1** as "a foreigner who is in the Republic in contravention of" the **IA**.

8.19.1. The decision to arrest, detain or deport an "illegal foreigner," as defined, is an administrative one and as such, means that there is no requirement for the issuance of a warrant.⁷⁰ The **IA** does however provide procedural and substantive protections to the detainee in **section 34(1)**, including that the detainee:

"a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

d) 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

⁷⁰ See section 34 of the **IA**.

detention for an adequate period not exceeding 90 calendar days,⁷¹ and

e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."(own emphasis)

8.19.2. Section 34(2) of the IA further provides that:

"(2) The detention of a person in terms of this Act elsewhere than on a ship and 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."
(own emphasis)

8.19.3. The Minister of Home Affairs, in terms of the provisions of section 7 of the IA and after consultation with the Immigration Advisory Board, developed the Immigration Regulations, 2005. Regulation 32 provides as follows:

"An immigration officer or police officer shall take the following steps in order to verify the identity and status of the person contemplated in section 41(1) of the Act:
a) Access relevant documents that may be readily available in this regard; or

⁷¹ The court in *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) held that "the maximum period of detention permitted under s 34(1)(d) is 120 days, i.e. an initial period of 30 days, followed by an extended period or periods not exceeding 90 days."

- b) contact relatives or other persons who could prove such identity and status; and*
- c) access departmental records in this regard." (own emphasis)*

- 8.19.4. **Annexure B of the Regulations to the IA sets out the Minimum Standards of Detention.** These include that:
 - 8.19.4.1. Every detainee:
 - 8.19.4.1.1. Shall be provided accommodation with adequate space, lighting, ventilation, sanitary installations and **general health conditions and access to basic health facilities** (Section 1(a));
 - 8.19.4.1.2. Shall be provided with a bed, mattress and at least one blanket (Section 1(b));
 - 8.19.4.1.3. Shall be provided with an adequate balanced diet (Section 2(a)).
 - 8.19.4.2. Special provision is to be made for detainees with special dietary requirements related to a physical condition (Section 2(b)).
 - 8.19.4.3. Food should be **served at intervals of not less than four and a half hours**, barring the period between the evening meal and breakfast, which shall not exceed 14 (fourteen) hours (Section 2(d)).
 - 8.19.4.4. The Department shall **provide the means** for every detainee to **keep his or her person, clothing, bedding and room clean and tidy** (Section 3).

The above standards regulate immigration detentions and places boundaries on the actions of the detaining officials beyond which such action becomes impermissible. Thus, while decisions relating to the detention and deportation of "illegal foreigners," as defined, are administrative in nature, the abovementioned legal provisions accord detainees a range of rights meant to protect their liberty and dignity.

8.20. The **Refugees Act**⁷² is the domestic legislation giving effect, within South Africa, to the relevant international legal instruments, principles and standards relating to refugees and asylum-seekers and providing for matters connected therewith. **Section 2** of the **Refugees Act** gives effect to the international principle of non-refoulement, and provides as follows:

"(2) Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, 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." (own emphasis)

8.21. The **Promotion of Access to Information Act (PAIA)** is a legislative measure enacted to enable full protection of all rights, through the protection of the right of access to information. Although the Act specifically makes provision for the process of requesting information, the preamble of the Act provides more generally for the fostering of a culture

⁷² Act No. 30 of 1998.

among public and private bodies of automatic information sharing to give effect to this right.

National Jurisprudence

8.22. In *Lee v Minister of Correctional Services*,⁷³ the Constitutional Court considered the conditions of detention that led to Mr Lee, a detainee, contracting TB. The Court quoted the Supreme Court of Appeal (SCA) in *Minister of Correctional Services v Lee*.⁷⁴

*"...a civilised and human society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation... inherent in the right ... to conditions of detention that are consistent with human dignity."*⁷⁵

The Court in that decision described "poorly ventilated and overcrowded environments" as the "ideal conditions for transmission" of TB, indicating that detention even in terms of the Correctional Services Act must meet certain basic standards in so far as health is concerned.⁷⁶

8.23. The SCA in *Arse v Minister of Home Affairs*⁷⁷ held as follows:

"An 'illegal foreigner' may in terms of this paragraph [section 34(1)(d) of the IA] not be detained for a period longer than 30 calendar days 'without a warrant of a Court

⁷³ 2013 (2) SA 144 (CC).

⁷⁴ 2012 (3) SA 617 (SCA).

⁷⁵ Ibid at paragraph 65.

⁷⁶ Ibid at paragraph 8.

⁷⁷ 2012 (4) SA 544 (SCA).

which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days'. The respondents were not able to produce such a warrant justifying the appellant's continued detention. It seems to me that the maximum period of detention permitted under s 34(1)(d) is 120 days, ie an initial period of 30 days, followed by an extended period or periods not exceeding 90 days." (own emphasis)

Key National Policies

8.24. The **National Strategic Plan on HIV, STIs and TB, 2012-2016 (NSP)**,⁷⁸ sets out the country's comprehensive strategy in relation to HIV and TB. The following key provisions in the NSP are of particular importance in the matter under consideration:

8.24.1. **Paragraph 2.5.** defines "key populations" as:

"...those most likely to be exposed to, or to transmit, HIV and/or TB. As a result, their engagement is critical to a successful HIV and TB response. Key populations include those who lack access to services, and for whom the risk of HIV infection and TB infection is also driven by inadequate protection of human rights, and by prejudice"⁷⁹ (own emphasis)

⁷⁸ Online available at <http://aylacassim.co.za/pdf/National%20Strategic%20Plan%20on%20HIV,%20STIs%20and%20TB.pdf>.

⁷⁹ Ibid at page 25.

It goes on to specifically identify "migrant populations" as a key population for the purposes of the strategy.⁸⁰

- 8.24.2. The NSP provides further, with regard to "actions that will mitigate the impact of the epidemic,"⁸¹ as follows:

"RECOMMENDED ACTION ON BEHAVIOURAL AND SOCIAL DETERMINANTS

...

*Condom use – Increase consistent use, especially among key populations, including those involved in sex work.*⁸²

- 8.24.3. **Sub-Objective 2.1.** with regard to voluntary counselling and testing provides as follows:

"Maximising opportunities to ensure everyone in South Africa tests voluntarily for HIV and is screened for TB at least annually, and is subsequently enrolled in relevant wellness and treatment, care and support programmes.

Universal access to HIV counselling and testing and TB screening, as an entry point for diagnosis and HIV and TB treatment, care and support is a key intervention required to achieve the goals of the NSP. Special attention will be required to ensure that people from key

⁸⁰ Ibid at page 26.

⁸¹ Ibid at page 22.

⁸² Ibid at page 23.

populations know their HIV and TB status. This is to ensure early access to treatment and to reduce transmission...

The full package of screening, to be available in all clinical settings, will include: HCT,⁸³ TB symptomatic screening, linked to TB testing for those with symptoms; as well as screening for diabetes, blood pressure, anaemia, mental illness and alcohol abuse, with referral to psychological and social support. STI management is an important entry point for HCT. Screening for acute STIs in certain situations (e.g. urethral discharge in men) and enhancing the uptake of HIV testing will improve case detection.⁸⁴ (own emphasis)

8.24.4. **Intervention 3.1.2** specifically makes provision for implementing targeted programmes of HIV, STI and TB screening and support for key populations and provides as follows:

"The KYE⁸⁵ report provides good evidence for special attention to be given to populations at risk for HIV infection that require specific efforts to screen, diagnose and provide treatment services. This includes:

...

⁸³ HCT is the abbreviation for the term HIV Counselling and Testing.

⁸⁴ Ibid at page 40.

⁸⁵ The *Know Your Epidemic* (KYE) Report is a situation analysis of TB in the country.

*Correctional and detention facilities: These facilities have high rates of TB and high rates of HIV. The Department of Correctional Services must ensure the provision of appropriate prevention and treatment services, including HIV, STI and TB screening, prompt treatment of all inmates and correctional services staff, ensuring a continuum of care through proper referrals, and the enforcement of laws and policies to prevent sexual violence in prison settings, including the use of newly developed screening guidelines to identify inmates who are vulnerable to sexual violence.*⁸⁶ (own emphasis)

- 8.25. South Africa has not implemented any standardised treatment protocols around deportation. However, the Southern African HIV Clinicians Society, in association with other organisations, has developed guidelines on HIV / AIDS and TB services in prisons that are relevant for immigration detention settings.⁸⁷ The guidelines include **health screening upon admission** to the facility (assessing medication requirements, checking for medication or medical records, and determining future medication needs), and taking the necessary steps to ensure **continuity of treatment with respect to chronic medication**, particularly HIV and TB treatment. Further, detention facilities should regularly provide TB and HIV tests and those infected with TB should be held in a separate area with adequate ventilation and sunlight or **ultraviolet germicidal light**.

⁸⁶ NSP above at pages 47 – 48.

⁸⁷ Bulbulia et al. (2008). Guidelines for the Prevention and Treatment of HIV in Arrested, Detained and Sentenced Persons. Southern African Journal of HIV Medicine.

9. ANALYSIS AND FINDINGS

- 9.1. The Commission is guided in its consideration of the measures which must be put in place to protect the rights of persons detained as illegal non-nationals by the existing broad international framework and the Constitutional principles. In addition the Commission is mindful of the need to ensure that in strengthening protections for detained persons, negative impact on the administration of such facilities are not unfair and unduly burdensome on the state. However, negative administrative impacts are not always automatically permissible justifications for violations of basic rights.
- 9.2. The Commission notes that international best practice provides a valuable point of reference but is not a conclusive means through which to determine best practise in the South African context. Comparative practice remains an exercise which **in its broadest, most positive sense, is informed by international legal instruments and the obligations of states in terms of these instruments, regional obligations, domestic statutory frameworks, and indeed the political and socio-economic considerations prevalent in that particular state.** In the circumstances, comparative models with best practice that is consonant with the South African Constitution are perhaps more readily adapted and adopted for integration in South Africa. There remains however a duty on the state to be vigilant and to take special precautions to avoid a duplication of certain manifest deficiencies into the South African context. **The South African model must first and foremost always be benchmarked against the spirit and letter of the South African Constitution.** In this regard, our model must, at a minimum, place a premium on dignity, recognition of the humanity of people, fair administrative practice and **the strongest possible commitment to the realisation of basic rights,** such as access to quality health care.

9.3. Lindela is a temporary holding facility for illegal non-nationals pending deportation. The Commission notes in this regard the unique difficulties in monitoring deportation detentions, as is succinctly captured by Justice Cameron. Specifically, the fact that **the short term nature of such detentions "make[s] detainees vulnerable to abuse (since they will soon leave and will not be able to testify)"** but also because this means that there are **"no long-term institutional or social disincentive[s] against fabricating complaints."**⁸⁸ These challenges have been noted elsewhere, internationally.⁸⁹ The Commission further notes the limitations of this investigation in that not all possible health related issues were canvassed.⁹⁰

9.4. Since 1996, Lindela has served as the country's only designated facility for the detention of illegal non-nationals for the purposes of deportation. Located approximately 40 (forty) kilometres outside of Johannesburg, the facility falls under the first Respondent's mandate to enforce the IA. It has the capacity to hold 4000 (four thousand) detainees.⁹¹

⁸⁸ Justice Cameron's Lindela Report, page 3.

⁸⁹ Justice Cameron quoting Mary Bosworth, "Subjectivity and identity in detention: Punishment and society in a global age", *Theoretical Criminology* 16(2) 123–140 (2012) at 124 notes that "Because of their population and their institutional make-up, removal centres defy simple taxonomy". Referring to the United Kingdom, she says –

"Ostensibly a destination for people en route to an airport, they increasingly house women and men for upwards of six months. Though deportation and the detention that precedes it are matters of administrative law, foreign offenders are now routinely given deportation orders by judges and magistrates as part of their criminal sentence. Detention centres likewise pose multiple methodological demands. Most fundamentally, it is extremely difficult to gain research access to such places as governments have refused to allow rigorous academic study of these institutions or those who stay or work in them. Many detainees speak only limited English. They hail from countries with an array of cultural, religious and traditional norms and practices that may be difficult for researchers to understand. Some are held overnight, others for several years; it is not always clear how to capture the range of experiences under these circumstances."

⁹⁰ For example the allegations, disputed by officials of the first Respondent, that female detainees were physically "inspected" prior being provided with sanitary towels, and further that only two sanitary towels were provided per detainee per month, were not tested by the Commission in this investigation. Similarly issues relating to special needs of persons with disabilities, and issues relating to dental health, etcetera were not tested in this study.

⁹¹ Justice Cameron's Lindela Report, page 4.

9.5. The third Respondent's website states that the first Respondent remains *'legally and administratively responsible for all matters pertaining to the apprehension, holding, processing, repatriation and release of illegal aliens at the Lindela repatriation centre.'*⁹² Although it has contracted out specific duties to the third Respondent, the first Respondent retains ultimate responsibility for Lindela, and remains accountable together with the second Respondent, for the conditions at Lindela, including the legislated provision of basic healthcare.

9.5.1. In terms of the provisions of the IA, Lindela is only authorised to detain "illegal foreigners" as defined. The IA specifically provides for the identification of someone as an "illegal foreigner." Two elements of this process are central:

9.5.1.1. The categorisation must be done by an immigration officer; and

9.5.1.2. The categorisation must take place within 48 (forty eight) hours of the initial detention.

9.5.2. Lindela's legal status as a holding facility for illegal non-nationals means that this process must take place prior to the detention at Lindela.

9.5.3. The Chief Director of the Immigration Inspectorate has confirmed that only those individuals whose status as "illegal foreigners" has been confirmed are detained at Lindela.⁹³ He explained that immigration status is confirmed at the screening section of the facility upon arrival; individuals with a legal status that authorises their entry into and presence in South Africa are not admitted to Lindela for detention.⁹⁴ However, the third Respondent on its website characterises detainees held at Lindela as individuals

⁹² <http://www.bosasagroup.com/content/1361/1275/lindela-repatriation-centre>.

⁹³ Chief Director: Inspectorate, Mr Modiri Matthews, cited in Justice Cameron's Lindela Report, footnote 16 on page 5.

⁹⁴ Ibid.

*"awaiting determination of their legal status in South Africa."*⁹⁵ The status of detainees inside Lindela thus remains unclear.

9.6. WITH REGARD TO ALLEGATIONS RELATED TO **MONITORING AND OVERSIGHT:**

- 9.6.1. An important basis of the complaint by the first Complainant was that civil society organisations are refused access to Lindela for the purposes of monitoring health related issues at Lindela.⁹⁶
- 9.6.2. **There do not appear to be widely accessible written policies which state criteria for access to Lindela and, when requested, the manager for Lindela was unable to provide records to this effect. It does appear however, from discussion with the Manager as well as information provided by certain civil society organisations that access is permitted in the instances where the civil society organisation provides legal services to detainees, or where requests for access have been approved in writing.**
- 9.6.3. Access by any civil society organisation not directly involved in assisting detainees with legal representation therefore appears to rest largely on the exercise of the Chief Director and / or the Minister's discretion.
- 9.6.4. Allegations by the first Respondent that civil society organisations directly involved in assisting detainees with legal representation are given "walk-in access," is also inconsistent with information provided by the third Complainant regarding its experience in this

⁹⁵ <http://www.bosasagroup.com/content/1361/1275/lindela-repatriation-centre>.

⁹⁶ Granting access to civil society to relevant government facilities is an integral requirement in adhering to international human rights imperatives, see paragraph 8.10 above.

regard.⁹⁷ The Commission records that despite requests for information from the first Respondent, same has not been provided.

9.6.5. In contrast, **Justice Cameron's Lindela Report** noted **Lindela officials indicated that civil society organisations' applications for access to Lindela would be assessed and would be approved where this was appropriate.**⁹⁸

9.6.6. It was noted earlier in this report that insofar as access by civil society organisations which provide legal representation are concerned, **access is subject to a 48 hour prior notification** to third Respondent before contact based engagement with the respective detainee can be made. **Justice Moseneke expressed concern over this condition effectively limiting access.** He stated that, "*the need to arrange a visit 48 hours in advance seems completely unnecessary especially considering the constraints in such cases. Nothing in the IA allows for such a denial of access to legal representation and it is essential that persons deprived of liberty be given access to legal assistance without unnecessary hindrance.*"⁹⁹

9.6.7. The approach by first and third Respondents with regard to civil society organisations' access to Lindela is therefore inconsistent in respect of those civil society organisations providing legal assistance and those providing other forms of assistance or undertaking monitoring activities.

9.6.8. While the Commission notes that, when assisting the Commission in its investigation, civil society organisations were not denied access, this may be attributed to the fact that the delegation was

⁹⁷ See paragraphs 7.7.2.1 and 7.8.1 above.

⁹⁸ Justice Cameron's Lindela Report at page 14.

⁹⁹ The Moseneke report, at Page 9.

being led by the Commission. Access to Lindela by the Commission has however been endorsed by the Courts and indeed has been respected by the first Respondent.¹⁰⁰

9.7. WITH REGARD TO THE ALLEGATIONS RELATED TO **INFORMING DETAINEES OF THEIR RIGHTS AND THE DETENTION OF DETAINEES FOR PERIODS IN EXCESS OF LEGISLATED DETENTION TIME-PERIODS:**

9.7.1. Survey results indicated that respondents to the questionnaires were generally unaware of their rights.¹⁰¹ These results are inconsistent with the explanation provided by Mr Job Jackson.¹⁰² The Commission finds it fair to infer, on the basis of the overwhelming responses from respondents indicating uncorroborated and similar responses with respect to notification of rights, that the respondents may have not adequately provided such information to detainees. In this respect the right of access to information and right to just administrative action as well as the specific rights of detainees, as contained in sections 35(2) of the Constitution are potentially being adversely impacted.

9.7.2. Insofar as the survey results indicate that detainees have been held for periods in excess of 120 (one hundred and twenty) days, and insofar as this is supported by objective data contained in the lists provided by the third Respondent,¹⁰³ **the Commission finds that such detentions are extra-legal and amount to a violation of the right to freedom and security of such persons. The**

¹⁰⁰ This oversight and right of access to Lindela was expressly agreed to between the Respondent and the Commission in the unreported matter of the South African Human Rights Commission and Forty Others / Minister of Home Affairs and Dyambu (Pty) Limited T/A The Lindela Repatriation Centre in the WLD, Case Number 1999/28367.

¹⁰¹ See paragraphs 7.5.3 and 7.5.4 above.

¹⁰² See paragraph 7.7.2.5 above.

¹⁰³ See paragraph 6.1.5 above.

interpretation is supported by jurisprudential authority to this effect and the much publicised impact of the court ruling of which officials must be deemed to be aware.¹⁰⁴ The findings of the Commission in respect of delays in deportation were also noted by the learned Justice Moseneke who states in his inspection report that "*a situation where only detainees who can afford their own transport to their home countries are deported without delay is unacceptable. Government budgeting processes must seriously be reviewed in order to elimination the undue deprivation of liberty.*"¹⁰⁵

9.8. WITH REGARD TO THE ALLEGATIONS RELATED TO HEALTH CARE:

9.8.1. The law regarding the content of the state obligation to provide health care is not exhaustive. Legislative provisions guarantees immigration detainees access to basic health facilities¹⁰⁶ and to medical treatment,¹⁰⁷ but there are no official definitions of the terms 'basic health care,' 'primary health care services,' or 'basic health facilities.' This complicates efforts to determine precisely what levels of care should be provided in detention facilities. The Commission is therefore guided in its analysis of these allegations by the Constitutional principles, the existing broad international framework and the second Respondent's NSP.¹⁰⁸

9.8.2. The NSP sets out the country's comprehensive strategy in relation to HIV and TB and identifies migrant populations as a "key

¹⁰⁴ See paragraph 8.23 above.

¹⁰⁵ Ibid footnote 80, Page 10.

¹⁰⁶ Regulation 1(a) of the IA.

¹⁰⁷ Section 35(2) of the Constitution.

¹⁰⁸ See paragraph 8.24 above.

population for the HIV and TB response," **urgently in need of a "comprehensive package of services."**

- 9.8.3. With respect to detention, the NSP states that detention facilities must **target specific efforts to screen, diagnose and provide treatment services to detainees.** It also highlights the need for *"a continuum of care for migrant populations, both between rural and urban areas and provinces within South Africa, and between countries in the region."*
- 9.8.4. The NSP further specifically provides for the "full package of screening" to include referral for psychological care.
- 9.8.5. The NSP's recommended action with regard to the mitigation of the HIV epidemic includes *inter alia* **"increased and consistent"** condom use among key populations.
- 9.8.6. Insofar the Commission's inspection indicated that there is:
- 9.8.6.1. a lack of condom dispensers at Lindela;
 - 9.8.6.2. a lack of psychological care;
 - 9.8.6.3. a lack of proactive VCT;
 - 9.8.6.4. a lack of ventilation and natural light in the clinic's isolation unit;
 - 9.8.6.5. no tetanus vaccine in the clinic's fridge;
 - 9.8.6.6. prolonged period of detention; and
- 9.8.7. Insofar as the survey results indicate that:
- 9.8.7.1. A lack of **lack of measures to ensure continuity of treatment with respect to chronic medication,** particularly with regard to TB and HIV treatment; and
 - 9.8.7.2. That the **time-interval between the serving** of the evening meal and breakfast does not comply with the time-periods prescribed in the Regulations to the IA.

The Commission finds on this basis that there has been an infringement of detainees' right to health care.¹⁰⁹

10. RECOMMENDATIONS

Based on the findings set out above, the Commission recommends:

10.1. WITH REGARD TO THE FINDINGS RELATED TO MONITORING AND OVERSIGHT:

Noting the need for monitoring and oversight, the Commission considered whether this responsibility should reside with it, as an institution specifically established by Chapter 9 of the Constitution to support constitutional democracy, and the monitoring of human rights.

It is clear from the provisions of sections 184(1)(c) and (3) that the Commission has a constitutional duty to monitor the observance and implementation of human rights in South Africa. Section 184(3) specifically provides that the Commission must require relevant state organs to provide it annually with information on measures taken towards the realisation of *inter alia*, the right to health care. It is thus clear, from the provisions of the Constitution as well as the provisions of section 7(2) of the HRCA, that **state organs have a constitutional and statutory obligation to support the Commission in the performance of its duties and specifically, its monitoring duty.** The Constitution however, does not specify what the Commission's constitutional duty to monitor entails.

¹⁰⁹ As contained in both sections 27 and 35(2)(e) of the Constitution.

The relevant provisions of the Constitution read together with the HRCA confer a **broad monitoring function on the Commission**, encompassing a monitoring duty in relation to practically all the rights in the Bill of Rights. The Commission's monitoring function is therefore a function aimed at assessing compliance at a **broader systemic level** rather than at assessing matters on a case-by-case or on an interventionist basis. The Commission therefore, in the formulation of specific monitoring interventions, bearing in mind this broad-level function as well the capacity constraints of the Commission, formulates interventions that will target broader systemic issues rather than monitoring the everyday functions of Respondents. The monitoring mandate of the Commission depends on the accuracy of reports obtained from the government departments. This **monitoring function however, particularly in the context of places of detention such as Lindela, requires independent monitoring, to be undertaken with closer and frequent scrutiny.**

While the Commission's broad oversight remains unfettered,¹¹⁰ as described above, it is submitted that **the first Respondent has the legislative mandate to monitor the performance of officials responsible for the day to day running of Lindela. Such oversight at this level has a number of benefits for the operations of the facility and the state commitment to the upholding of human rights. More significantly such monitoring will result in enhanced outcomes when coupled with Independent oversight.** The first Respondent also bears the duty as an organ of the state to comply with the Constitution, and statutory frameworks which dictate the exercise of its power and delivery of its service. In this respect the duty to routinely monitor compliance with regard to statutory and constitutional duties imposed on officials therefore falls more appropriately and necessarily on

¹¹⁰ The South African Human Rights Commission and Forty Others/ the Minister of Home Affairs and Dyambu (Pty) Limited T/A The Lindela Repatriation Centre in the WLD, Case Number 1999/28367.

the first Respondent. Such monitoring by the Respondent however, will significantly be enhanced with independent monitoring in place.

In the circumstances, and recognising the need for close monitoring and oversight flowing from its investigation, the Commission recommends that:

- 10.1.1. The first Respondent implement measures to ensure the human rights defenders are able to advance the protection of human rights.¹¹¹ In this respect the first Respondent is to, **within two (2) months of the date of receipt of the Commission's report**, in consultation with civil society organisations and other relevant stakeholders, review existing protocols for access to Lindela by civil society organisations and develop objective criteria and protocols to regulate access to Lindela by civil society organisations. Such criteria and protocols are to be provided to the Commission **within three (3) weeks of finalisation**. The criteria and protocols referred to above shall:
 - 10.1.1.1. Make specific provisions for a "good cause" requirement, requiring civil society organisations to provide substantive grounds for the need for access in applications therefore;
 - 10.1.1.2. Provide clear timelines for response to access requests which should not be in excess of 24 (twenty four) hours;
 - 10.1.1.3. Permit for delays in approval on the basis of agreed extensions in time for consideration and approval between the parties; and
 - 10.1.1.4. Should include processes for requests for urgent access including requests by nongovernmental medical specialists;
 - 10.1.1.5. Be made publically available and accessible, specifically at Lindela;

¹¹¹ See paragraph 0 above.

- 10.1.1.6. Be communicated clearly to detainees and visibly displayed within Lindela.
- 10.1.2. Detainees be provided the means through which to access such civil society organisations from within Lindela.
- 10.1.3. The first Respondent implement and maintain a record system for accurate record keeping of the number and type of civil society organisations provided access to Lindela.
- 10.1.4. The first Respondent consider options for an independent monitoring mechanism¹¹² in consultation with a broad and inclusive range of stakeholders. In this regard, the first Respondent is to provide the Commission, **within 3 (three) months** of the date of receipt of the Commission's report, with a report on the viability, process for and recommendations to relevant authorities, for the implementation of such a mechanism to address this need. Such report shall:
 - 10.1.4.1. Outline the steps to be taken as well as timelines for implementation of such a system;
 - 10.1.4.2. Make provision for an accessible and safe manner for detainees and staff to use the complaints mechanism;
 - 10.1.4.3. Make further provision for strict compliance with admission procedures and with legislated requirements for the extension of periods of detention. The first Respondent is to consider whether this should take the form of a duty on the relevant independent body to automatically monitor periods of detention every 30 (thirty) days;
 - 10.1.4.4. Make provision for the submission of:

¹¹² See footnote 50 above.

- 10.1.4.4.1. Annual reports to the Commission for the purposes of its monitoring function in terms of section 184(3) of the Constitution; and
- 10.1.4.4.2. Quarterly reports to the Commission providing the names and details of persons in detention, whose term of detention has reached 20 (twenty) days and 100 (one hundred) days respectively.
- 10.1.5. In this regard, the first Respondent is to engage with the Commission **within three (3) months** of the date of receipt of this report to develop a protocol around the Commission's monitoring of the facility and in respect of the first Respondent's reporting as referred to in paragraphs 10.1.4.4.1 and 10.1.4.4.2 above.
- 10.1.6. The Commission has previously strongly recommended ratification of the Optional Protocol to the Convention against Torture (OPCAT), without reservations in respect of the National Preventative Mechanism (NMP).¹¹³ **The Commission again repeats this recommendation to the fifth Respondent.** The OPCAT specifically allows for independent monitoring of places of detention, a measure which is strongly advocated by the Commission in this report and elsewhere.
- 10.1.7. The Commission further recommends that the fifth Respondent consider signing and ratifying the **International Convention on the Protection of the Rights of All Migrant Workers and their Families**, to strengthen South Africa's commitment to Insuring adequate protection of the rights of citizens and non-nationals alike.

¹¹³ Online available at <http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=34>.

10.2. WITH REGARD TO THE FINDINGS RELATED TO **INFORMING DETAINEES OF THEIR RIGHTS:**

In accordance with the provisions of section 34 of the IA, the first Respondent must ensure that existing legal requirements relating to informing detainees of their rights are complied with.

Given the inconsistency in the information before the Commission in this respect, the Commission recommends:

- 10.2.1 That the first Respondent, in the manner and form prescribed by the IA and the Regulations thereto, **within one (1) month** of receipt of this report, provide all detainees with written information, to be made available in languages commonly used in Lindela as well as in English, relating to their rights.
- 10.2.2 In line with the constitutional mandate in relation to intergovernmental co-operation, that the first Respondent engage with the fourth Respondent to consider options for the implementation of a system that will ensure:
 - 10.2.2.1 Detainees are from the time of apprehension and detention by the fourth Respondent and at every important juncture of the deportation process informed, in the manner and form prescribed by the IA and the Regulations thereto, of their relevant rights as provided for in the IA and that such a system is to specifically make **provision for written notification** of the following:
 - 10.2.2.1.1 The decision to deport and the right to appeal such decision;
 - 10.2.2.1.2 The right to have legal representation and to have the detention for the purpose of deportation confirmed by a Court; and
 - 10.2.2.1.3 The right not to be held in detention for longer than 30 (thirty) calendar days without a warrant issued by a Court.

- 10.2.1.2. The first and fourth Respondents are to issue a joint report to the Commission **within three (3) months** from date of receipt of this report regarding the steps to be taken by the departments to implement such a system, and the timelines for implementation of the system;
- 10.2.1.3. A special report tabling details of detainees in detention in excess of 120 (one hundred and twenty) days at Lindela and the date of their expected release is to be provided to the Commission **within 48 (forty eight) hours** of receipt hereof.

10.3. WITH REGARD TO THE FINDINGS RELATED TO HEALTH CARE:

The Commission recommends as follows:

- 10.3.1. That the first Respondent undertake a full independent audit of the existing conditions and practice impacting on the right of detainees to access health care.
- 10.3.2. That the first Respondent, **within 3 (three) months** from date of receipt of this report, provide the Commission with a comprehensive report outlining:
- 10.3.2.1. The challenges it has identified;
- 10.3.2.2. The steps it will take to remedy such barriers to the realisation of the right to health care;
- 10.3.2.3. The timelines within which it will do so;
- 10.3.2.4. Timelines within which the needs of persons already in detention at the time of this report will be addressed; and
- 10.3.2.5. Steps that will be taken to ensure that the rules and guidelines are also made applicable to the fourth Respondent and any other authority responsible for the arrest or detention of foreign nationals for the purposes of deportation.

- 10.3.3. In this regard, the Commission requests that the following areas of concern be specifically addressed:
- 10.3.3.1. **The lack of availability of condoms;**
 - 10.3.3.2. **The lack of guidelines for health screening at the point of entry;**
 - 10.3.3.3. **The lack of guidelines to ensure continuity of treatment with respect to chronic medication, particularly with regard to TB and HIV treatment;**
 - 10.3.3.4. **The lack of VCT; and**
 - 10.3.3.5. **The lack of measures to ensure a continuum of care after deportation.**
- 10.3.4. In this regard, the first and second Respondents are to:
- 10.3.4.1. Take into account the guidelines developed by the second Respondent and by the Southern African HIV Clinicians Society;
 - 10.3.4.2. Consider the development of a cross-border referral system;
 - 10.3.4.3. Consider a system for the provision of **referral letters and buffer or trial stocks of medication** for detainees on chronic medication;
 - 10.3.4.4. Consider partnering with civil society organisations to ensure **provision of information at detention centres and at cross-border reception centres about where health facilities in the destination country can be accessed.**
 - 10.3.4.5. Steps to ensure special provision for TB testing and for transfer of infected persons to isolation areas, which receive adequate ventilation and sunlight or ultraviolet germicidal light;
 - 10.3.4.6. **The lack of psychological care;**
 - 10.3.4.7. **The unavailability of tetanus vaccines;**
 - 10.3.4.8. **Overcrowding in rooms;**

- 10.3.4.9. The time interval between the serving of the evening meal and breakfast not complying with the time-periods prescribed in the Regulations to the IA; and
- 10.3.4.10. A possible lack of appropriate and comprehensive training for all relevant staff.

11. APPEAL

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

The Chairperson, Adv M.L. Mushwana
South African Human Rights Commission
Private Bag X2700
Houghton
2041

SIGNED AT Braamfontein ON THIS THE 1st DAY OF September 2014.



Adv M. L. Mushwana
Chairperson
South African Human Rights Commission