

## Unprotected Migrants Zimbabweans in South Africa’s Limpopo Province

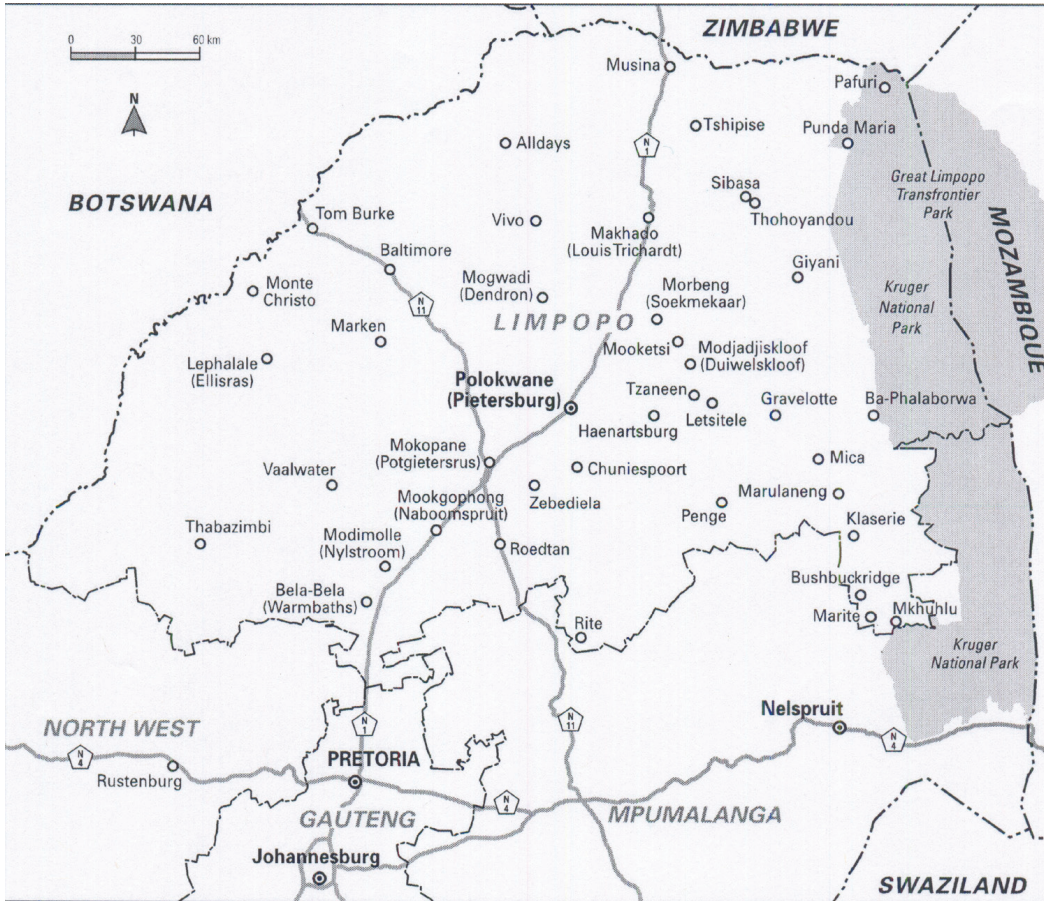
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## Glossary

DHA	Department of Home Affairs
ETD	Emergency Travel Document
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IOM	International Organization for Migration
MOU	Memorandum of Understanding
SADC	Southern African Development Community
TAU	Transvaal Agricultural Union
R	South African rand
Z\$	Zimbabwean dollar

# Map of Limpopo Province



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## Summary

Foreign African migrants in South Africa, whether documented or undocumented, are vulnerable. The situation of Zimbabweans in Limpopo province shows two aspects of the problem. If undocumented, a Zimbabwean migrant is liable to be arrested, detained, and deported under conditions that flout South Africa's Immigration Act. And documented or not, farm workers on commercial farms are subject to their employers violating basic employment law protections.

The Immigration Act is routinely violated. When apprehending suspected undocumented foreigners, police and immigration officials fail to verify their status and identity, and police and military personnel assault and extort money from foreign migrants. Immigration officers also detain undocumented foreigners for more than 30 days without pursuing proper procedures, and detention conditions do not meet prescribed standards. The immigration law makes no provision for migrant workers facing deportation to collect their unpaid wages and transfer their earnings, savings, and personal belongings.

With respect to labor laws, farmers openly disregard the minimum wage, sometimes use a piece rate system rather than the hours of work to calculate remuneration, and make unlawful deductions from workers' wages. The prescribed basic conditions of employment for farm workers create disincentives for employers to provide housing for workers. Though migrant workers are legally entitled to workers' compensation, there are obstacles to them receiving compensation settlements. Documented Zimbabwean farm workers who worked under South African farm supervisors complained of discriminatory treatment.

The violations of immigration and employment laws, and deficiencies in these laws, result in the infringement on rights that migrants should enjoy under the Constitution of South Africa. These rights include, among others, the right to personal freedom and security, and to conditions of detention that are consistent with human dignity and privacy. The failure to protect the constitutional rights of migrants also frequently violates the Government of South Africa's international obligations under the International Covenant on Civil and Political Rights (ICCPR). The constitution also protects the rights of at least documented migrants to fair labor practices.

Human Rights Watch calls on the Government of South Africa to amend the immigration law by inserting provisions to protect migrants against arrest and deportation when their illegal status is due to bureaucratic deficiencies in providing workers' documentation in a timely fashion. The government is urged to become a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and to incorporate its provisions in the Immigration Act.

The government should also enforce compliance with its immigration and labor laws. The government should ensure that the procedures for arrest, detention, and deportation in its immigration law are enforced. It should also create a system that permits migrants to report human rights abuses they have experienced; hire more labor inspectors; train immigration and police officials to adhere to the law; and investigate and punish those officials who violate the law. The government should remove obstacles from the relevant law to enable migrant workers to receive the workers' compensation to which they are legally entitled. Human Rights Watch calls on the government to offset the legal disincentives for farmers to provide housing by developing a housing policy for farm workers.

The government needs to rapidly devise a housing policy for farm workers if it is to meet its constitutional obligations, which were endorsed in 2000 by the Constitutional Court, to progressively realize the provision of adequate housing for everyone. To what extent "everyone" will include migrants will likely depend on future adjudication. Human Rights Watch also urges the Government of South Africa to address the specific situation of undocumented Zimbabwean migrants in South Africa by devising a comprehensive policy to address the lack of status of this large group.

The report is based on a Human Rights Watch mission to Limpopo province in April and May 2006. Because of the historical predominance of Zimbabwean migrants on farms in the far north of Limpopo province and the increasing numbers of Zimbabwean migrants fleeing the deteriorating political and economic situation in Zimbabwe, Human Rights Watch focused its research on Limpopo. Human Rights Watch conducted interviews with farmers and farm workers north of the Soutpansberg around Weipe and Tshipise, and south of the Soutpansberg around Levubu and Vivo, to learn about migrants' status and employment conditions. Human Rights Watch's interviews with police, Zimbabwean migrants awaiting deportation, and undocumented Zimbabwean migrants, usually walking on the road en route to Johannesburg, provided information on the process of arrest, detention, and deportation of illegal foreigners. Human Rights Watch also conducted interviews with lawyers (invariably farmers themselves) who advised other farmers on compliance with the immigration law. In Johannesburg and

Cape Town we spoke to scholars of migration at Forced Migration Studies Programme, Lawyers for Human Rights, and Southern African Migration Project; nongovernmental organizations that provide services for Zimbabwean migrants (for example Southern Africa Women's Migration Association, and Zimbabwe Torture Victims/Survivors Project); and an activist organization, Zimbabwe Solidarity Forum.

The names of farmers, farms, and migrants are not used to protect the security of individuals concerned.

## Recommendations

### *To the Government of South Africa*

- Amend the immigration law to protect migrants who fall into irregular status because government bureaucracies and agents responsible for workers' documentation fail to implement the law and carry out their functions.
- Enforce the procedures for arrest, detention, and deportation by introducing a system for undocumented migrants and co-workers to report officials who engage in unlawful procedures of arrest, detention, and deportation, by further training of officials in the relevant legal procedures, and by investigating and punishing those officials who violate the law.
- Enforce compliance with the basic conditions of employment law by expanding the labor inspectorate, establishing a hotline for workers' complaints about alleged labor law violations, and creating incentives for nongovernmental organizations to assist with monitoring and enforcing labor laws.
- Amend the workers' compensation law to ensure migrant workers' access to compensation.
- Devise a housing policy for farm workers to meet the government's constitutional obligations, as specified by the Constitutional Court in 2000, to progressively realize the provision of adequate housing.
- Ratify the International Covenant on Economic, Social and Cultural Rights signed in 1994.
- Sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and amend domestic laws accordingly. At minimum, the Immigration Act should be amended to include provisions to:

- grant foreign workers tied in terms of their work permits to a specific remunerative activity freedom of choice in jobs after they have resided in the host country lawfully for a specified period (Article 52);
  - grant migrant workers (documented and undocumented) who get deported a reasonable opportunity before or after departure to settle any claims for wages and other entitlements and any pending liabilities (Article 22(6)); and
  - grant migrant workers (documented and undocumented), upon the termination of their stay in South Africa, the opportunity to transfer their earnings, savings, and personal effects and belongings (Article 32).
- Address the particular situation of undocumented Zimbabwean migrants by developing a comprehensive approach to the multifaceted problems and human rights abuses arising from their lack of status, and holding discussions with the Government of Zimbabwe about measures to address the conditions that contribute to migration to South Africa.

## Background

### ***Migration to South Africa***

Since 1994, the number of documented and undocumented migrants in South Africa has greatly increased. Most migrants come from neighboring countries that are fellow members of the regional organization, the Southern African Development Community (SADC). Several factors have contributed to the growing influx of foreign migrants: South Africa's long and porous borders with its neighbors are difficult to control;<sup>1</sup> the potential supply of labor from the SADC member states is "enormous and elastic;"<sup>2</sup> and South Africa's economic dominance in the region makes it an attractive destination for migrants. The political and economic situation in Zimbabwe, which has continued to deteriorate since 2000, also fuels migration.<sup>3</sup> Zimbabweans are arguably the biggest group of foreign Africans in South Africa.<sup>4</sup>

Zimbabweans who seek asylum in South Africa face particular problems. Asylum and refugee determinations are governed by the Refugees Act, 1998 (No. 130 of 1998). A 2006 study commissioned by Lawyers for Human Rights and several other organizations found that Zimbabwean refugees and asylum seekers are especially vulnerable to abuse by various government departments, and more particularly by officials in the Department of Home Affairs (DHA) and South African Police Service.<sup>5</sup> The study also revealed a perception among police officers that there is "no war in Zimbabwe," and therefore Zimbabweans could not possibly have a right to political asylum or refugee

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<sup>1</sup> Jonathan Crush, *Covert Operations: Clandestine Migration, Temporary Work and Immigration Policy in South Africa* (Southern African Migration Project, 1997), p. 20.

<sup>2</sup> Jonathan Crush and Vincent Williams, "International Migration and Development: Dynamics and Challenges in South and Southern Africa," United Nations Expert Group Meeting on International Migration and Development, Population Division, Department of Economic and Social Affairs, United Nations Secretariat, New York, 6-8 July 2005, p. 5, citing Guy Standing, John Sender, and John Weeks, *Restructuring the Labour Market: The South African Challenge* (Geneva: ILO, 1996), pp. 61-62.

<sup>3</sup> Human Rights Watch, "Zimbabwe: Evicted and Forsaken. Internally Displaced Persons in the Aftermath of Operation Murambatsvina," *A Human Rights Watch Report*, vol. 17, no. 16(A), December 2005, <http://hrw.org/reports/2005/zim1205>; "'Clear the Filth': Mass Evictions and Demolitions in Zimbabwe," *A Human Rights Watch Briefing Paper*, September 11, 2005, <http://hrw.org/backgrounders/africa/zimbabwe0905/>; "Not a Level Playing Field: Zimbabwe's Parliamentary Elections in 2005," *A Human Rights Watch Briefing Paper*, March 21, 2005, <http://hrw.org/backgrounders/africa/zimbabwe0305/>; "Zimbabwe's Non-Governmental Organizations Bill: Out of Sync with SADC Standards and a Threat to Civil Society Groups," *A Human Rights Watch Briefing Paper*, December 3, 2004, <http://hrw.org/backgrounders/africa/zimbabwe/2004/12/>; "Zimbabwe: Fast Track Land Reform in Zimbabwe," *A Human Rights Watch Report*, vol. 14, no. 1(A), March 2002, [hrw.org/reports/2002/Zimbabwe/](http://hrw.org/reports/2002/Zimbabwe/).

<sup>4</sup> "Video captures plight of Zimbabwean refugees," *Daily News Online* (Zimbabwe), November 19, 2004, [http://www.zimbabwesituation.com/nov19\\_2004.html#link5](http://www.zimbabwesituation.com/nov19_2004.html#link5) (accessed July 7, 2006).

<sup>5</sup> "The Documented Experiences of Refugees, Deportees and Asylum Seekers in South Africa: A Zimbabwean Case Study," A Written Submission Prepared by Civil Society Organisations Working on the Refugee and Asylum Seekers' Human Rights Issues in South Africa, For Presentation to the Minister of Home Affairs, April 2006, Johannesburg, South Africa, p. 6.

status.<sup>6</sup> Officials' attitudes to Zimbabwean asylum seekers help to explain why at the end of 2005 only 114 Zimbabweans had secured refugee status, while nearly 16,000 Zimbabweans had pending cases for refugee status.<sup>7</sup>

In 2003, South Africa's new immigration law became operational. As in the 1990s, South Africa still seeks to control illegal migrants through deportations rather than pressure on employers to comply with immigration law.<sup>8</sup> Its aggressive deportation policy, despite making substantial demands on financial and human resources, has not been able to stem the increase in illegal migrants. The number of deportations from South Africa has grown significantly in recent years, as Department of Home Affairs (DHA) statistics indicate: 44,225 (1988),<sup>9</sup> 96,515 (1993),<sup>10</sup> 151,653 (2002),<sup>11</sup> approximately 155,000 (2003),<sup>12</sup> 167,137 (2004)<sup>13</sup>; although not made available to us, we were informed that there were still higher numbers for 2005.<sup>14</sup> Zimbabwean migrants deported from South Africa have also increased rapidly—approximately 17,000 (2001),<sup>15</sup> 74,765 (2004),<sup>16</sup> nearly 100,000 (2005).<sup>17</sup> Rather than reflecting greater success in crafting immigration policy, these increases in deportations are more likely indicative of a

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<sup>6</sup> Ibid., p. 7. For further evidence of the particular vulnerability of Zimbabweans to abuse in the asylum process and to unlawful detention and deportation from Lindela detention center, see Kaajal Ramjathan-Keogh and Emma Ramokhele, "Detention: The Lindela Repatriation Centre," in Forced Migration Studies Programme with Lawyers for Human Rights and The Wits University Law Clinic, "Crossing Borders, Accessing Rights, and Detention: Asylum and Refugee Protection in South Africa," p. 71; and Gayatri Singh, "Accessing Rights: Crisis and Corruption at the Rosettenville Refugee Reception Office," in "Crossing Borders, Accessing Rights, and Detention," p. 51.

<sup>7</sup> The statistics are estimates provided by the Department of Home Affairs. "Introduction and Overview" in Forced Migration Studies Programme et al., "Crossing Borders, Accessing Rights, and Detention," p. 17, refers to the backlog of cases and its dual effect of delaying protection to asylum seekers while opening the asylum system to abuse by those who wish to use the asylum process as a way to legalize their stay in South Africa.

<sup>8</sup> "Shambles at Home Affairs escalates," *Business Day* (South Africa), February 13, 2006, [http://www.queensu.ca/samp/migrationnews/article.php?Mig\\_News\\_ID=2523&Mig\\_News\\_Issue=14&Mig\\_News\\_Cat=8](http://www.queensu.ca/samp/migrationnews/article.php?Mig_News_ID=2523&Mig_News_Issue=14&Mig_News_Cat=8) (accessed July 7, 2006). It notes that the 2002 Immigration Act sought to capture the white paper's immigration enforcement strategy, a central feature of which was to put pressure on employers to comply with the law. However, the Department of Home Affairs instructed its officials that Parliament's direction was unenforceable.

<sup>9</sup> Loren B. Landau, Kaajal Ramjathan-Keogh, and Gayatri Singh, "Xenophobia in South Africa and Problems Related To It," Background paper prepared for open hearings on "Xenophobia and Problems Related to It" hosted by the South African Human Rights Commission with the Portfolio Committee of the Departments of Foreign Affairs and Home Affairs, Johannesburg, South Africa, November 2, 2004, *Forced Migration Working Paper Series #13* (Johannesburg: Forced Migration Studies Programme, January 2005), p. 32.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> International Organization for Migration (IOM), *Current Migration Themes in Southern Africa: An IOM Perspective* (Pretoria: IOM Regional Office for Southern Africa, May 2005), <http://www.sarpn.org.za/documents/d0001355/index.php> (accessed July 9, 2006), p. 4, citing DHA figures.

<sup>13</sup> Ramjathan-Keogh and Ramokhele, "Detention: The Lindela Repatriation Centre" in Forced Migration Studies Programme et al., "Crossing Borders, Accessing Rights, and Detention," p. 70.

<sup>14</sup> Human Rights Watch interview with South African immigration officer, Beitbridge, South Africa-Zimbabwe border, April 28, 2006.

<sup>15</sup> Landau, Ramjathan-Keogh, and Singh, "Xenophobia in South Africa and Problems Related To It," p. 32.

<sup>16</sup> Tara Polzer, "Crossing Borders: Asylum Seekers at the Zimbabwean & Mozambican Frontiers" in Forced Migration Studies Programme et al., "Crossing Borders, Accessing Rights, and Detention," p. 38.

<sup>17</sup> UN Regional Inter-Agency Coordination Support Office (UNRIACSO), Southern African Humanitarian Crisis update (UNRIACSO, January 13, 2006), <http://www.reliefweb.int/library/documents/2006/riacso-safrica-13jan.pdf> (accessed July 9, 2006); refers to nearly 100,000 deportees in 2005, citing media quoting the DHA.

growing number of undocumented migrants. Deported individuals often return almost immediately to South Africa, underscoring the limitations of the deportation policy.<sup>18</sup>

### **Foreign migrants on farms in South Africa**

Agriculture in South Africa is a major employer of foreign migrant labor.<sup>19</sup> While the number of people employed in regular and seasonal employment on commercial farms has declined, there has been an increase in the employment of foreign migrants since 1990. Farms in border areas in particular employ foreign migrants, who tend to concentrate in border areas or where major migration routes cross commercial farming districts. Hence migrants from Lesotho are found concentrated in the Free State, Mozambicans in Mpumalanga and in the south and southeast of Limpopo province, and Zimbabweans in the northern part of Limpopo province.

Many foreign farm workers have worked on farms for extended periods of time. The 1996 Farmworkers Research and Resource Project survey of farm workers, the first attempt to document conditions on South African farms, concluded that over 50 percent of “immigrant farmworkers” had been on the farm for more than five years, about 16 percent for 11-20 years, and some 10 percent for more than 20 years. These findings suggest, as Jonathan Crush notes, “a long-standing pattern of permanent farmwork and residence in South Africa by non-South Africans.”<sup>20</sup> The data on foreign farm workers also blur the distinctions between permanent residents, temporary residents, and illegal residents, insofar as these categories rest on assumptions about temporary residents and illegal residents—unlike permanent residents—having “only a tenuous link” with South Africa. Precisely such an assumption undergirds an important component of the reasoning behind the Constitutional Court’s 2004 judgment in the two cases in which permanent residents challenged certain provisions of the Social Assistance Act, 1992 (No. 59 of 1992).<sup>21</sup> The Constitutional Court ruled that the provisions that reserved

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<sup>18</sup> Southern African Migration Project (SAMP), “Making Up the Numbers: Measuring “Illegal Immigration” to South Africa,” *Migration Policy Brief No. 3* (SAMP, 2001), p. 12.

<sup>19</sup> This paragraph draws on Human Rights Watch, *Unequal Protection: The State Response to Violent Crime on South African Farms* (New York: Human Rights Watch, 2001), pp. 52-62; and Jonathan Crush, “Making Hay with Foreign Farmworkers,” in Jonathan Crush, ed., *Borderline Farming: Foreign Migrants in South African Commercial Agriculture*, Southern African Migration Project, *Migration Policy Series No. 16* (Cape Town: Idasa and Queen’s University, Canada, 2000), <http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat16.pdf> (accessed July 9, 2006), pp. 3, 5-7.

<sup>20</sup> Crush, “Making Hay with Foreign Farmworkers,” in Crush, ed., *Borderline Farming*, p. 5; and see also p. 2.

<sup>21</sup> Constitutional Court of South Africa. *Louis Khosa v. Minister of Social Development*, Case CCT 12/03 and *Saleta Mahlaule v. Minister of Social Development*, Case CCT 13/03 (henceforth referred to as *Khosa v. Minister of Social Development*), para 59: “It may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country. The position of permanent residents is, however, quite different to that of temporary or illegal residents. They reside legally in the country and may have done so for a considerable length of time. Like citizens, they have made South Africa their home. While citizens may leave the country indefinitely without forfeiting their citizenship, permanent residents are compelled to return to the country (except in certain circumstances) at

social assistance benefits for only South African citizens were unconstitutional and had to be extended to include permanent residents.

Farm workers, including foreign migrants, have had the right to organize since 1993, but they have unionization rates of only 12 to 14 percent. According to a Stats SA 2000 survey of employment trends in agriculture, “in terms of key socio-economic variables, the situation of people employed in the agricultural sector tends to be less favorable than every other major sector of the economy.”<sup>22</sup> A 1998 study of border area commercial farms found many foreign migrants were undocumented, making them even more vulnerable to exploitation.

### ***Zimbabwean farm workers in Limpopo province***

Limpopo province has a population of approximately 5.3 million. Nearly 90 percent of the population lives in rural areas, making it the most rural province in the country.<sup>23</sup> It is also the poorest province of South Africa, with the highest official unemployment rate (34 percent) and the worst scores on other poverty indicators.<sup>24</sup> Its economy relies primarily on agriculture and tourism. Over two-thirds of the land in Limpopo was allocated for white ownership and use in the past. The vast majority of the population lived in the former homelands—Lebowa, Gazankulu, and Venda—that occupied most of the remaining one-third of the land.<sup>25</sup>

Though the pace of land reform in Limpopo province has accelerated, and restitution claims have succeeded or are being adjudicated, the apartheid era’s racially discriminatory

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least once every three years. While they do not have the rights tied to citizenship, such as political rights and the right to a South African passport, they are, for all other purposes mentioned above, in much the same position as citizens. Once admitted as permanent residents they can enter and leave the country. Their homes, and no doubt in most cases their families too, are in South Africa. Some will have children born in South Africa. They have the right to work in South Africa, and even owe a duty of allegiance to the state. For these reasons, I exclude temporary residents and it would have been appropriate for the High Court to have done so.”

<sup>22</sup> Human Rights Watch, *Unequal Protection*, p. 55, citing *Employment Trends in Agriculture in South Africa* (Pretoria: Stats SA National Department of Agriculture, 2000), p.93.

<sup>23</sup> This paragraph relies on the South African Human Rights Commission (SAHRC), “Final Report on the Inquiry into Human Rights Violations in Farming Communities,” August 2003, [http://www.sahrc.org.za/sahrc\\_cms/publish/cat\\_index\\_41.shtml](http://www.sahrc.org.za/sahrc_cms/publish/cat_index_41.shtml) (accessed July 9, 2006), p. 99; and Marc Wegerif, *A Critical Appraisal of South Africa’s Market-based Land Reform Policy: The Case of the Land Redistribution for Agricultural Development (LRAD) Programme in Limpopo*, *Research Report no. 19* (Cape Town: Programme for Land and Agrarian Studies, University of Western Cape, December 2004), [http://www.sarpn.org.za/documents/d0001269/P1506-RR\\_19\\_Marc\\_Wegerif.pdf](http://www.sarpn.org.za/documents/d0001269/P1506-RR_19_Marc_Wegerif.pdf) (accessed July 9, 2006), p. 16.

<sup>24</sup> SAHRC, “Final Report on the Inquiry into Human Rights Violations in Farming Communities,” p. 214, footnote 1, cites Health Systems Trust, “Health and Related Indicators,” 2001 Report, for the following data: 19.5 percent of households use electricity for cooking, 12.1 percent have piped water inside their homes, and 7.4 percent have telephones. Wegerif, *Critical Appraisal of South Africa’s Market-based Land Reform Policy*, p. 16, provides different figures: citing Stats SA, 2003, Wegerif notes that Limpopo province is “arguably” the poorest province in the country and that the province has an unemployment rate of 48.8 percent.

<sup>25</sup> Wegerif, *Critical Appraisal of South Africa’s Market-based Land Reform Policy*, pp. 15-16.

patterns of land ownership have not substantially altered.<sup>26</sup> Most large commercial farms are still owned by whites; black farmers engage mainly in subsistence farming on communal land or small-scale commercial farming.

There is great diversity and complexity in the commercial agricultural sector. North of the Soutpansberg, mainly stock farms and a smaller number of game farms cover most of the land given over to commercial farming. Citrus and vegetable farms are concentrated in the Limpopo Valley, especially Weipe, in Tshipise, and in Waterpoort. At the foot of the Soutpansberg, there is sub-tropical agriculture in Levubu. Commercial forests lie on the higher slopes and stock farms are to the south. The province also has private tea estates on land leased from the state, and tobacco farms.<sup>27</sup>

The agricultural sector is the largest employer outside the public sector, employing 118,261 people (only the Western Cape has a larger number of farm workers).<sup>28</sup> The most labor intensive commercial agricultural farms are the citrus and fruit farms north of the Soutpansberg, and most of these farms each depend on hundreds of Zimbabwean workers—seasonal and permanent—who live on the farm. Farms at the foot of the Soutpansberg producing sub-tropical products or vegetables are less labor intensive than those to the north, and depend almost solely on South African labor that is more readily accessible because of the proximity of the former Venda homeland. The local workers commute to their homes on weekends or even daily. Farmers who depend on South African labor are hostile to Zimbabwean migrants, holding them responsible for the increase in crime in the province. Some farmers talk openly of how they strive to keep their areas “clean of Zimbabweans.”<sup>29</sup>

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<sup>26</sup> Ibid., pp. 10, 16-17. See also “Magoebaskloof farmers agree to sell,” *Mirror* (South Africa), April 28, 2006, which reported that one community was claiming 200 Magoebaskloof fruit estates and had successfully claimed state land leased to the Sapekoe Tea Estate. On land claims in Limpopo province, see *Farmer’s Weekly* (South Africa), September 10, 2004, pp. 34-35.

<sup>27</sup> David Lincoln with Claude Maririke, “Southward Migrants in the Far North: Zimbabwean Farmworkers in Northern Province,” in Crush, ed., *Borderline Farming*, pp. 40-42.

<sup>28</sup> Wegerif, *Critical Appraisal of South Africa’s Market-based Land Reform Policy*, p. 16.

<sup>29</sup> Human Rights Watch interview with a white commercial farmer who was a Transvaal Agricultural Union (TAU) official for Soutpansberg, Levubu, April 29, 2006; Human Rights Watch interview with a white commercial farmer and lawyer, Makhado, April 25, 2006.

*I told the minister of labor in Tshipise I don't want us to employ Zimbabweans. They come on the farms overnight and stay with friends; then they go to Johannesburg. They are putting pressure on crime and the social system. Ask the police. Many pregnant Zimbabwean women come here to have a child. They can get a grant of R 190 per month per child. I grew up on a farm. They [Africans] are lazy. Where they can get money for free, they will. The main problem is the security threat. They [undocumented foreigners] can't be traced because they don't have fingerprints. Police are arresting Zimbabweans for crime and illegal immigration. We don't want them in front of the mountain and we want to get rid of the stepping stone [foreign migrants using farm work as a stepping stone to get to Johannesburg]. I want this area clean of Zimbabweans. Local crime syndicates are using Zimbabweans to achieve their aim. From Levubu to around town [Makhado/Louis Trichardt], we try to avoid them. I don't have any..... If they are walking around on the farm, Farm Watch will arrest them and take them to the police. Sometimes we'll get police involved. We'll tell them where Zimbabweans are, etc. and they'll go and raid them.*

*Despite this farmer's opposition to the use of Zimbabwean labor, he said many contractors, on whom Levubu farmers increasingly rely, did use undocumented Zimbabwean workers. "Why must I police the contractor? The department of labor must. In practice, farmers are not checking on contractors. You sign a contract that he'll meet all labor laws but he doesn't."*

—Human Rights Watch interview with a white farmer and TAU official, Levubu, April 29, 2006

*A Bluegumspoort farmer said, "We've cleaned them [Zimbabweans] out in Bluegumspoort because they are an extreme danger. They killed the Haywards [owners of Mountain View Lodge]. We only clean out those without work permits. They kill the people, they rob; they threaten the Venda. Venda are now working with us to get rid of them." The wife of a farmer interjected: "Venda, if they see a Zimbabwean, they stone them."*

—Human Rights Watch interview with a white farmer and lawyer, Makhado/Louis Trichardt, April 25, 2006

From the early 1980s, farmers north of the Soutpansberg recruited Zimbabwean workers under the special exemption provision in the Aliens Control Act. Many farmers disregarded the law and employed undocumented workers.<sup>30</sup> In 1999 the farmers were instructed by the provincial DHA to phase out their approximately 15,000 Zimbabwean workers and hire only South African labor by mid-October 2001.<sup>31</sup> Farmers failed to comply, arguing that South African labor was not available for work on their farms. In November 2001, the Transvaal Agricultural Union (TAU, the conservative farmers' union), and the government reached an informal agreement to allow farmers to employ Zimbabweans on farms north of the Soutpansberg, provided foreign workers received the same wages and benefits as South African farm workers.<sup>32</sup>

In October 2004, the governments of South Africa and Zimbabwe signed a Memorandum of Understanding (MOU) on Employment and Labor to ensure that farm owners in the entire Limpopo province—and not only north of the Soutpansberg—comply with immigration and labor laws.<sup>33</sup> Specifically to facilitate the documentation of Zimbabwean migrants on farms in Limpopo, the government of Zimbabwe agreed under the MOU to issue them emergency travel documents (ETDs). ETDs are issued more quickly and cheaply than passports, thus advantaging Zimbabweans who already work as farm workers or who will work on farms in Limpopo province over other prospective Zimbabwean migrants to South Africa, who must obtain a passport.

Since 2005, under the Immigration Act, 2002 (No. 13 of 2002),<sup>34</sup> which was amended by the Immigration Amendment Act, 2004 (No. 19 of 2004),<sup>35</sup> farmers who seek to employ foreigners apply to the DHA for a corporate permit. The DHA determines the maximum number of foreigners the corporate permit applicant may hire.<sup>36</sup> Farmers must submit proof of the need to employ the requested number of foreigners (see below)—evidently a formality—and provide a job description and proposed remuneration for each foreigner.<sup>37</sup> With a flat fee of R1,520 (US\$215) irrespective of the

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<sup>30</sup> Crush, *Covert Operations*, p. 15, footnote 46, p. 37.

<sup>31</sup> "Zimbabwean Farm Labourers in the Northern Soutpansberg Area Ordered to Leave," Lawyers for Human Rights Statement, October 12, 2001, <http://www.lhr.org.za/refugee/news01.htm> (accessed July 9, 2006); "Farmers refuse to commit economic suicide," *Zoutpansberger* (Soutpansberg), October 19, 2001.

<sup>32</sup> Human Rights Watch interview with a white commercial farmer who was a TAU official for the northern region, Makhado, April 25, 2006.

<sup>33</sup> For background to the MOU, see "Minister Calls for Closer Cooperation with Zimbabwe," South African Department of Labour, January 9, 2003, [http://www.labour.gov.za/media/statement.jsp?statementdisplay\\_id=9781](http://www.labour.gov.za/media/statement.jsp?statementdisplay_id=9781) (accessed July 9, 2006).

<sup>34</sup> Immigration Act, No. 13 of 2002, <http://www.info.gov.za/gazette/acts/2002/a13-02.pdf> (accessed July 9, 2006).

<sup>35</sup> Immigration Amendment Act, No. 19 of 2004, <http://www.info.gov.za/gazette/acts/2004/a19-04.pdf> (accessed July 9, 2006).

<sup>36</sup> Immigration Act, as amended by Immigration Amendment Act, section 21(2).

<sup>37</sup> Immigration Regulations, 2005, section 18(1)(b) and (c), [http://www.dha.gov.za/documents/IMMIGRATION%20REGULATIONS%20FINAL\\_excl%20Annexure%20A.pdf](http://www.dha.gov.za/documents/IMMIGRATION%20REGULATIONS%20FINAL_excl%20Annexure%20A.pdf) (accessed July 9, 2006).

number of corporate workers hired, the corporate permit is cheap; individual work permits cost R1,520 each.<sup>38</sup> The corporate permit holder must ensure that the passport (or the ETD) of the foreigner is valid at all times, that the foreigner is employed only in the specific position for which the permit has been issued, and that the foreign worker departs from South Africa upon completion of the job.<sup>39</sup>

### ***The International Organization for Migration and Zimbabwean migrants***

At the end of May 2006, the International Organization for Migration (IOM) opened a reception and support center on the Zimbabwean side of the South Africa-Zimbabwe border at Beitbridge. The center, funded by the British government's Department for International Development, is an inter-ministerial project that will involve the Zimbabwean ministries of health, home affairs, and labor and social welfare.<sup>40</sup> The center will also house offices for these ministries.<sup>41</sup> A major objective of the center is to provide humanitarian assistance to the growing number of Zimbabwean migrants deported from South Africa. IOM offers all deportees a free meal, medical assessments and information materials on HIV and irregular migration, and entitlement to free basic health care at Beitbridge Hospital upon referral. In addition, the IOM offers free transport and a food pack to deportees who choose to return to their homes.<sup>42</sup> The program will also assist the government of Zimbabwe to cope with social problems in Beitbridge that are related to the growing concentration of deportees in the town.

In coordination with the Department of Social Welfare in Zimbabwe, the IOM intends to establish an agency "which will facilitate the placement of qualified Zimbabweans (above 18 years and with passports) on commercial farms in Limpopo province of South Africa."<sup>43</sup> In correspondence, the IOM said it will work with nongovernmental organizations like Nkuzi Development Association, to "ensure that those Zimbabweans who choose to work on commercial farms do so legally and are treated fairly."<sup>44</sup>

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<sup>38</sup> Regulations on Fees, June 27, 2005, section 2,

<http://www.dha.gov.za/documents/IMMIGRATION%20REGULATIONS%20FEES.pdf> (accessed July 9, 2006).

<sup>39</sup> Immigration Regulations, 2005, Section 3. Section 21(2)(b) of the Immigration Act, 2002, makes employers bear the primary responsibility for monitoring the workers' compliance with the provisions of the corporate permit and the Immigration Act.

<sup>40</sup> SAMP, "Deportees now destitute," Zimbabwe Situation, March 17, 2006, in *Migration News*, March 2006, [http://www.queensu.ca/samp/migrationnews/nws\\_sum.php?Mig\\_News\\_Issue=15](http://www.queensu.ca/samp/migrationnews/nws_sum.php?Mig_News_Issue=15) (accessed July 25, 2006).

<sup>41</sup> Human Rights Watch email correspondence with Nicola Simmonds, IOM, Harare, April 19, 2006, with attachment "Humanitarian Assistance for Deportees" (undated).

<sup>42</sup> "The IOM Reception and Support Centre in Beitbridge", in *IOM Harare Newsletter*, No.3, July 2006; Human Rights Watch email correspondence with Nicola Simmonds, IOM, Harare, June 27, 2006.

<sup>43</sup> *Ibid.*

<sup>44</sup> Human Rights Watch email correspondence with Nicola Simmonds, IOM, Harare, June 12, 2006.

Most deportees seek to return to South Africa because they have few, if any, income earning possibilities in Zimbabwe and because food and basic social services are either lacking or too expensive. Sending deportees to their homes is in the interests of the government of South Africa, which for some time has wanted the government of Zimbabwe to return deportees to their home areas to prevent them from immediately re-entering South Africa.<sup>45</sup>

Human Rights Watch is deeply skeptical of how the IOM's humanitarian assistance program will benefit Zimbabweans who have been forced to leave South Africa. Moreover, IOM's past failure to publicly confront and criticize the Zimbabwean government's human rights abuses in the context of international humanitarian assistance suggests it will be unlikely to defend migrants' and deportees' rights should so doing require an oppositional stance toward the government.<sup>46</sup>

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<sup>45</sup> Human Rights Watch interview with a South African immigration official, Beitbridge, South Africa-Zimbabwe border, April 28, 2006.

<sup>46</sup> Human Rights Watch, "Zimbabwe: Evicted and Forsaken," and "Human Rights Watch Statement to the IOM Governing Council 29 Nov-2 Dec 2005 (90<sup>th</sup> Session)," <http://www.hrw.org/backgrounder/arms/arms1205/arms1205.pdf> (accessed July 31, 2006).

## The Legal Framework: Migrants' Status and Employment Conditions

The South African constitution is the supreme law of the country<sup>47</sup>—any law or conduct inconsistent with it is invalid. The legislature, the executive, the judiciary and every organ of the state are all bound to respect, protect, promote, and fulfill the rights contained in the constitution.<sup>48</sup> The constitution guarantees most fundamental rights to all individuals, whether they are citizens or non-citizens. Rights associated with voting, political party formation, standing for public office, obtaining a passport, entry into the country, freely choosing a trade, occupation or profession, and benefiting from state measures to foster conditions which enable access to land, are expressly limited to South African citizens.<sup>49</sup> According to South Africa's Constitutional Court, when the constitution intends to confine rights to citizens, it says so.<sup>50</sup> The constitution states that “[the] Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”<sup>51</sup>

The Bill of Rights entrenches the rights of everyone in South Africa, inter alia, to equality before the law, human dignity, personal freedom and security, privacy, and due process of law.<sup>52</sup> For example, everyone, including a non-citizen, who is arrested for allegedly committing an offense has the right to be brought before a court within 48 hours after the arrest, and everyone who is detained has the right, inter alia, to challenge the lawfulness of the detention before a court, and to have conditions of detention that are consistent with human dignity.<sup>53</sup> Similarly, under international law some civil and political rights must be provided on an equal basis to nationals and migrants, either because the right is absolute or because selective denial could not be justified by the government as reasonable or proportionate. Economic and social rights for migrants, however, present a greater challenge in domestic and international law as these rights are not absolute. Fair labor practices for all workers do not present the same challenge in international law: equality of employment conditions for those in the work force,

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<sup>47</sup> The Constitution of the Republic of South Africa (No. 108 of 1996), chapter 1, section 2, <http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1> (accessed July 9, 2006).

<sup>48</sup> *Ibid.*, chapter 2, section 8(1).

<sup>49</sup> *Ibid.*, chapter 2, sections 19, 21(3), 21(4), 22, 25(5). Section 37(6) and 37(7), relating to rights of detainees in a state of emergency, do not apply to persons who are not South African citizens.

<sup>50</sup> Constitutional Court of South Africa. *Lawyers for Human Rights v Minister of Home Affairs*, Case CCT 18/03, para. 27.

<sup>51</sup> The Constitution of the Republic of South Africa, chapter 2, section 7(1).

<sup>52</sup> *Ibid.*, chapter 2, sections 9, 10, 12, 14, 23, 26, 27, 33, and 34 respectively.

<sup>53</sup> *Ibid.*, chapter 2, section 35.

including irregular migrants, is perhaps less controversial than other socio-economic rights under international law.<sup>54</sup>

Under the constitution, international law must be considered in the interpretation of the Bill of Rights and other national legislation.<sup>55</sup> South Africa has ratified the International Covenant on Civil and Political Rights<sup>56</sup> and signed the International Covenant on Economic, Social and Cultural Rights.<sup>57</sup> South Africa has also signed, but has not ratified, the African (Banjul) Charter on Human and People's Rights.<sup>58</sup> (A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed that treaty.)<sup>59</sup>

The Aliens Control Act, 1991, amended in 1996, encouraged and governed permanent immigration for Europeans. African migrants from the Southern Africa region seeking legal access to South Africa were subjected to a dual system of control. The Aliens Control Act provided specific exemptions from the Act for persons who entered South Africa for employment in terms either of any conventions with the governments of neighboring states or temporary employment schemes approved by the minister of home affairs. These exemptions were designed for the mining industry and white commercial farmers, and allowed them the right to employ non-South Africans under separate terms and conditions than those prescribed by the Act.<sup>60</sup> The Aliens Control Act was replaced by the Immigration Act of 2002, which became effective in 2003.

The 2002 immigration law was developed by then-Minister of Home Affairs Mangosuthu Gatsha Buthelezi and his advisors, who were not members of the governing African National Congress party.<sup>61</sup> The 2002 Act and the accompanying regulations were largely inconsistent with stated government policy to remove obstacles

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<sup>54</sup> Joan Fitzpatrick, "The Human Rights of Migrants" in Alexander Aleinikoff and Vincent Chetail, eds., *Migration and International Legal Norms* (The Hague: Asser Press), p. 180.

<sup>55</sup> The Constitution of the Republic of South Africa, chapter 2, section 39(1)(b) and chapter 15, section 233.

<sup>56</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A(XXI), U.N. Doc. A/6316 (entered into force March 23, 1976), ratified by South Africa March 10, 1999, [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (accessed July 10, 2006).

<sup>57</sup> International Covenant on Economic, Social and Cultural Rights, December 16, 1966, G.A. Res. 2200A(XXI), U.N. Doc. A/6316 (entered into force January 3, 1976), signed by South Africa October 3, 1994, but not yet ratified, [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (accessed July 10, 2006).

<sup>58</sup> African (Banjul) Charter on Human and People's Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force October 21, 1986), acceded to by South Africa July 9, 1996, [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf) (accessed July 10, 2006).

<sup>59</sup> See Article 18, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (entered into force April 24, 1970).

<sup>60</sup> Crush, *Covert Operations*, pp. 8, 23.

<sup>61</sup> For details, see Crush and Williams, "International Migration and Development: Dynamics and Challenges in South and Southern Africa," pp. 23-24; and Southern African Migration Project (SAMP), "Gender Concerns in South African Migration Policy," *Migration Policy Brief No. 4* (SAMP: 2001), <http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief4.pdf> (accessed July 10, 2006).

to the entry of skilled migrants. Except for large employers, the 2002 Act together with the regulations mostly made the process of entry more complicated and time consuming.<sup>62</sup> Following a 2004 directive from President Thabo Mbeki to the Ministry of Home Affairs to bring the Immigration Act into line with national policy objectives, the Immigration Amendment Act was introduced and became fully operational with the publication of new Immigration Regulations in July 2005.<sup>63</sup>

The Immigration Act provides for the arrest, detention, and deportation of “illegal foreigners” and for the punishment, by a fine or imprisonment, of those who employ or aid them.<sup>64</sup> With respect to foreign workers, the legislation generally promotes temporary rather than permanent residence and does not encourage family immigration.<sup>65</sup> The legislation provides for thirteen types of temporary residence permit and five types of work permit.<sup>66</sup> Generally, the main consideration in issuing work permits is whether the employer can demonstrate that a South African citizen or permanent resident is not available for the position.<sup>67</sup> The employer is also required to demonstrate that the terms and conditions of employment will not be inferior to those applicable for citizens.<sup>68</sup> The Immigration Act ends employers’ access to special exemptions for the recruitment of foreign workers based on the minister’s approval, but provides for bilateral agreements, thereby preserving existing treaties with governments in the region.<sup>69</sup>

The legal environment for farm workers has improved substantially, beginning in 1993.<sup>70</sup> South African labor legislation implicitly assumes that foreign workers are legal under the Immigration Act and therefore does not distinguish between documented and undocumented workers. Additionally, South Africa’s employment laws apply to all legal workers in the country, and therefore these laws make no explicit distinctions between

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<sup>62</sup> Crush and Williams, “International Migration and Development: Dynamics and Challenges in South and Southern Africa,” p. 24.

<sup>63</sup> For the Presidential directive, see “Address by Hon. NN Mapisa-Nqakula on the Occasion of the Presentation of the 2006 Budget Vote of the Department of Home Affairs (Budget Vote 4),” The National Assembly, Cape Town, May 30, 2006, <http://www.home-affairs.gov.za/speeches.asp?id=161> (accessed June 15, 2006). On differences between the Immigration Act, 2002, and the Immigration Amendment Act, 2004, see Crush and Williams, “International Migration and Development: Dynamics and Challenges in South and Southern Africa,” pp. 24-25.

<sup>64</sup> The Immigration Act, section 38(1) forbids employers to hire undocumented foreigners; the Immigration Act, as amended by Immigration Amendment Act, section 40, makes it an offense to hire or aid undocumented workers.

<sup>65</sup> Crush and Williams, “International Migration and Development: Dynamics and Challenges in South and Southern Africa,” p. 25.

<sup>66</sup> Immigration Act, as amended by Immigration Amendment Act, sections 10 to 24.

<sup>67</sup> South African Department of Home Affairs, [http://www.home-affairs.gov.za/services\\_foreigners.asp?topic=temp](http://www.home-affairs.gov.za/services_foreigners.asp?topic=temp) (accessed July 10, 2006).

<sup>68</sup> For examples see Immigration Act, as amended by Immigration Amendment Act, section 19(2)(b); Immigration Regulations, sections 18(1) and 16(4)(i).

<sup>69</sup> Immigration Act, as amended by Immigration Amendment Act, section 21(4)(b).

<sup>70</sup> This paragraph draws on Human Rights Watch, *Unequal Protection*, pp. 42-46.

citizens and non-citizens.<sup>71</sup> Farm workers came under the protection of the Basic Conditions of Employment Act, 1993. The Agricultural Labor Act, 1993 (No. 147 of 1993) recognized the right of farm workers to organize. The Labor Relations Act, 1995 (No. 66 of 1995) introduced a new framework for employer-employee relations that included the commercial farm sector. The Unemployment Insurance Act, 2001 (No. 63 of 2001) extended unemployment benefits to farm workers.<sup>72</sup> Importantly, this legislation and its counterpart, the Unemployment Insurance Contributions Act, 2002 (No.4 of 2002)<sup>73</sup> explicitly exclude, among others, foreign workers on contract, and hence all documented foreign migrant farm workers.<sup>74</sup> Consequently, neither farmers who employ foreign workers on contract nor foreign contract workers are required to make the mandatory contributions to the unemployment insurance fund.

The Basic Conditions of Employment Act, 1997,<sup>75</sup> which was amended in 2002,<sup>76</sup> seeks to give effect to and regulate the right to fair labor practices conferred by section 23(1) of the constitution by establishing and enforcing basic conditions of employment, and to give effect to the state's obligations as a member state of the International Labour Organization.<sup>77</sup> In December 2002, the minister of labor announced a Sectoral Determination for the Farm Worker Sector, using his power in terms of the Basic Conditions of Employment Act, 1997.<sup>78</sup> The Sectoral Determination included a minimum wage for farm workers for the first time and regulations for the particulars of employment, hours of work, leave, the prohibition of child labor and forced labor, and termination of employment. <sup>79</sup> On February 17, 2006, the minister of labor announced a new Sectoral Determination for the Farm Worker Sector<sup>80</sup> that provides for an increase in the minimum wage from R785.79 (US\$113) per month/R4.03 (US\$0.57) per hour to R885 (US\$126) per month/R4.54 per hour (US\$0.64) (Area A), and from R949.58 (US\$134) per month/R4.87 (US\$0.68) per hour to R994 (US\$140) per month/R5.10

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<sup>71</sup> "Minister Calls for Closer Cooperation with Zimbabwe", South African Department of Labor, January 9, 2003, reported the South African Minister of Labor, Membathisi Mdladlana, as saying: "South African labour legislation— including the recently launched Sectoral Determination for the Agricultural Sector—applies to all people working in South Africa, irrespective of whether they are South African nationals or not."

<sup>72</sup> Unemployment Insurance Act, No. 63 of 2001, <http://www.labour.gov.za/download/8483/Act%20-%20Unemployment%20Insurance%20Fund.doc> (accessed July 26, 2006).

<sup>73</sup> Unemployment Insurance Contributions Act, No. 4 of 2002, <http://www.info.gov.za/gazette/acts/2002/a4-02.pdf> (accessed July 26, 2006).

<sup>74</sup> *Ibid.*, section 4(1)(d); Unemployment Insurance Act, 2001, s(3)(1)(d).

<sup>75</sup> Basic Conditions of Employment Act, No. 75 of 1997, <http://www.labour.gov.za/docs/legislation/bcea/act75-97.pdf> (accessed July 28, 2006).

<sup>76</sup> *Ibid.*, No. 11 of 2002, <http://www.info.gov.za/gazette/acts/2002/a11-02.pdf> (accessed July 24, 2006).

<sup>77</sup> *Ibid.*, section 2.

<sup>78</sup> *Ibid.*, section 51 (1), provides for the minister to make a sectoral determination establishing basic conditions of employment for employees in a sector and area. Basic Conditions of Employment Act, No. 75 of 1997, Sectoral Determination 8: Farm Worker Sector, South Africa, December 2, 2002, No. R. 1499, [http://www.workinfo.com/free/Sub\\_for\\_legres/Data/BCEA/r14992002.htm](http://www.workinfo.com/free/Sub_for_legres/Data/BCEA/r14992002.htm) (accessed July 10, 2006).

<sup>79</sup> SAHRC, "Final Report on the Inquiry into Human Rights Violations in Farming Communities," pp. 32-33.

<sup>80</sup> Sectoral Determination 13: Farm Worker Sector, South Africa, February 17, 2006, Government Notice No. R. 149, <http://www.labour.gov.za/download/6331/Sectoral%20Determination%2013%20-%20Farm%20Workers.pdf> (accessed July 10, 2006).

(US\$0.72) per hour (Area B), to apply between March 1, 2006, and February 28, 2007.<sup>81</sup> The 2006 Sectoral Determination also prescribes minimum wage increases for 2007 and 2008 respectively.

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<sup>81</sup> Sectoral Determination 8: Farm Worker Sector, South Africa, section 3; Sectoral Determination 13: Farm Worker Sector, South Africa, section 3. Area A contains a list of specific municipalities and covers mainly urban areas; Area B refers to all areas not mentioned in Area A.

## The Immigration Act: Violations and Gaps Resulting in Human Rights Abuses

The Immigration Act, as amended by the Immigration Amendment Act, defines a “foreigner” as an individual who is not a citizen and an “illegal foreigner” to mean a foreigner who is in South Africa in contravention of the Act.<sup>82</sup> Section 34 of the Immigration Act, as amended by the Immigration Amendment Act, governs the procedures for the arrest, deportation and detention of “illegal foreigners”. Lawyers for Human Rights challenged the constitutionality of parts of section 34 in the Pretoria High Court,<sup>83</sup> and sought confirmation in the Constitutional Court of the High Court’s order with respect to those provisions that the High Court ruled to be unconstitutional.<sup>84</sup> Despite these constitutional challenges, section 34 remains intact.

Human Rights Watch found violations of the procedures for the arrest, detention, and deportation of “illegal foreigners” by police and immigration officials. These violations have been documented in other research and must be understood as widespread and systematic rather than idiosyncratic and anecdotal.<sup>85</sup> Human Rights Watch also became aware of legal gaps in the Immigration Act and the Immigration Amendment Act, arising from the administration of the corporate permit provisions and the arrest, detention, and deportation process. These legal violations and gaps, and where applicable, their consequences for the human rights of foreign migrants as provided for in the constitution, are identified below.

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<sup>82</sup> Immigration Act, as amended by Immigration Amendment Act, section 1.

<sup>83</sup> Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2003(8)BCLR 891(T).

<sup>84</sup> Constitutional Court of South Africa. Lawyers for Human Rights v Minister of Home Affairs, Case CCT 18/03. The Constitutional Court, para. 45, found only section 34(8) to be inconsistent with the constitution, and “in a very limited way.” The Court ordered that section 34(8), which deals with foreign nationals who enter South Africa illegally by air or sea, be read with the following sentence: “A person detained in terms of this section may not be held in detention for longer than 30 calendar days without an order of a court which may extend the detention for an additional period not exceeding 90 calendar days on reasonable grounds.” That is, the Court ordered that section 34(8) be read in conjunction with section 34(1)(d).

<sup>85</sup> Landau, Ramjathan-Keogh, and Singh, “Xenophobia in South Africa and Problems Related To It”; Forced Migration Studies Programme et al., “Crossing Borders, Accessing Rights, and Detention”; and Human Rights Watch, “Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg,” *A Human Rights Watch Report*, vol. 17, No.15(A), November 2005, <http://hrw.org/reports/2005/southafrica1105/southafrica1105.pdf>. For similar abuses under the Aliens Control Act, see Human Rights Watch, “Prohibited Persons’: Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa,” *A Human Rights Watch Report*, March 1998, <http://www.hrw.org/reports98/sareport>.

## ***Unlawful procedures and acts in the arrest, detention, and deportation of undocumented foreigners***

### ***Officers' failure to verify the status and identity of suspected "illegal foreigners"***

The Immigration Act and Immigration Regulations provide that an immigration or police officer must assist an individual apprehended on suspicion of being illegally in the country to verify his or her identity or status, including by accessing readily available relevant documents or contacting relatives or others who could prove the individual's identity and status.<sup>86</sup>

At Makhado (Louis Trichardt) police station, a police officer described to Human Rights Watch the role of the Department of Home Affairs with respect to illegal immigrants who were detained in the police cells: "We call the Home Affairs Department to come and check illegals' documents. If Home Affairs finds the documents okay, Home Affairs is the one to release him. Maybe the person doesn't have his document. Maybe the next day, the friend will bring the passport or document. Home Affairs must be the one to release."<sup>87</sup>

Detainees in the Makhado police cell told Human Rights Watch that no officials had visited them. Many had been arrested the previous day, but one detainee had spent 19 days and another over three months in the police cell. A Zimbabwean from Bulawayo who had been working on a farm related how he had not been given an opportunity to retrieve his work permit: "I've been working there [on the farm] six years. It's along the Thohoyandou road. I'm the only Zimbabwean on that farm. After 12 days I get R560 [US\$80]. I was arrested yesterday. I have a work permit at work. I asked them this morning to phone my home to ask them to bring the document but they did not. Nobody at home even knows where I am."<sup>88</sup> Another Zimbabwean detainee said his South African wife had taken his ID when she left him: "I was married to a South African, with a child. I am working here since 1999. She left with the ID. I went to Home Affairs. They have fingerprints, etc. but they did nothing. How can I get my ID back?"<sup>89</sup>

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<sup>86</sup> Immigration Act, as amended by Immigration Amendment Act, section 41(1) and Immigration Regulations, section 32.

<sup>87</sup> Human Rights Watch interview with a police official, Makhado police station, Makhado, April 29, 2006.

<sup>88</sup> Human Rights Watch interview with a Zimbabwean detainee awaiting deportation, Makhado police station, Makhado, April 29, 2006.

<sup>89</sup> Ibid.

At Musina police station, two police officers gave initially contradictory accounts of the role of DHA officials with respect to Zimbabwean detainees awaiting deportation. A police inspector told Human Rights Watch: “You can’t deport Malawians without the DHA first dealing with them.” When asked why there was a different practice for Malawians and Zimbabweans, he replied, “The instruction is that we can simply deport Zimbabweans, unlike Malawians who must first see the DHA. I don’t know why.”<sup>90</sup> About an hour later, the police officer in charge of communications described standard procedures, which included: “The station calls the Home Affairs Department to verify the information of the Zimbabweans.”<sup>91</sup> He went on to talk about asylum seekers. At Musina police station, he said, no one had claimed asylum. On a different visit, the communications officer acknowledged that the DHA treated Malawians and Zimbabweans in detention differently. “Malawians are usually claiming asylum, that’s why DHA is involved.” Otherwise, “DHA does spot checks to verify identities. Maybe DHA comes to establish if there are any problems for asylum.”<sup>92</sup>

The DHA practice at Musina police station of assuming that all Zimbabweans are economic migrants deprives those seeking asylum of an opportunity to declare their status to a DHA official. The assumption that Zimbabwean migrants are not asylum seekers because Zimbabwe is not at war is, as noted earlier, widespread among officials in the DHAs and the South African Police Service, and does not explain the different treatment Malawians receive, as Malawi is also not at war.

On a third visit to Musina police station, Human Rights Watch encountered a Zimbabwean asylum seeker who was awaiting deportation. The 36-year-old Zimbabwean man from Chipinge said he and a friend had crossed the border illegally and had been arrested on a bus at Masisi, near Kruger National Park, en route to Thohoyandou. They were taken to Masisi police camp, and then to Musina police station. “We are opposition party supporters. We have been chased, and then we ran, and then we came here.”<sup>93</sup> They were trying to reach Pretoria, where the interviewee had been told he could get a refugee permit. This was his second attempt to obtain refugee status: On his first attempt in May 2005, he had entered South Africa illegally. The DHA at Beitbridge had issued him with an asylum transit permit—in terms of the Immigration Act, as amended, the director-general of the DHA may issue an asylum transit permit, valid for 14 days, to a person who at a port of entry claims to be an

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<sup>90</sup> Human Rights Watch interview with a police official, Musina police station, Musina, April 22, 2006.

<sup>91</sup> Human Rights Watch interview with the police officer in charge of communications, Musina police station, Musina, April 22, 2006.

<sup>92</sup> Human Rights Watch interview with a police official, Musina police station, Musina, April 24, 2006.

<sup>93</sup> Human Rights Watch interview with a Zimbabwean asylum seeker in detention and awaiting deportation, Musina police station, Musina, April 26, 2006.

asylum seeker<sup>94</sup>—and had told him to report to a Refugee Reception Office. Worried about his family’s safety, he had decided to return home, however. When Human Rights Watch asked whether the police officer could advise the detainee, the police officer told the detainee: “Tell the police to drop you at Beitbridge on the South Africa side.” The police officer said to us, “We set up an office in Beitbridge especially for issuing refugee permits. They are only valid for 14 days. Home Affairs came and interviewed all of them. Why didn’t he [the asylum seeker] tell them?” Asked if the police would drop the detainee off at Beitbridge on the South African side, the communications officer responded: “They should. Will they? That’s another thing. I’m working tomorrow and will tell the police to drop him at Beitbridge, SA.”<sup>95</sup>

### ***Assault, bribery, and theft by police during arrest of suspected illegal migrants***

The Immigration Act, as amended, states that any entry upon or search of any premises by an immigration official who has a search warrant must be conducted “with strict regard to decency and order, including – (a) a person’s right to, respect for, and the protection of, his or her dignity; (b) the right of a person to freedom and security; and (c) the right of a person to his or her personal privacy.”<sup>96</sup> The immigration legislation also makes it an offense for any civil servant to accept bribes,<sup>97</sup> and requires an immigration official who takes documents “or any other thing” from a suspected “illegal foreigner” to issue a receipt.<sup>98</sup> Human Rights Watch found violations of all these legislative provisions.

At Makhado police station, a Zimbabwean man reported having been beaten by police when he was arrested: “I stay in Chikota [a township in Makhado]. Early this morning [Saturday], police stopped us. We were going to the market. We buy and sell biscuits. They beat us. There were two police. We were two. They beat us in the bush. They hit us with baton sticks.”<sup>99</sup>

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<sup>94</sup> Immigration Act, as amended by Immigration Amendment Act, section 23(1). Section 23(2) stipulates that if the asylum transit permit expires before the holder reports in person to a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act No. 130 of 1998), the holder of the permit will become an “illegal foreigner” and be dealt with in accordance with the Immigration Act. For a discussion of how section 23 violates international law, see Polzer, “Crossing Borders: Asylum Seekers at the Zimbabwean & Mozambican Frontiers” in Forced Migration Studies Programme et al., “Crossing Borders, Accessing Rights, and Detention,” pp. 25-26, 40.

<sup>95</sup> Human Rights Watch interview with a white police officer, Musina police station, Musina, April 26, 2006.

<sup>96</sup> Immigration Act, section 33(7)(c).

<sup>97</sup> Ibid., section 49(5).

<sup>98</sup> Ibid., section 33(5)(c).

<sup>99</sup> Human Rights Watch interview with a Zimbabwean detainee awaiting deportation, Makhado police station, Makhado, April 29, 2006.

A farmer in Weipe complained to Human Rights Watch of police and military raids at the workers' compound, mainly at night or early in the morning, during which workers were ill-treated. He related an incident of a military raid on the compound early one morning. A worker used his cellphone to call him and said, "Come and help. These people are chasing us at three in the morning. We have to work tomorrow." The farmer commented, "The police want a surprise element. They are not handling these guys very humanely. Last week, they've been three times." He also referred to an incident in which a policeman had torn up the identity document of a South African worker. The destruction of South African citizens' identity documents and their arrest on suspicion of being undocumented migrants is reportedly a common problem that arises because police and army officers often rely on arbitrary procedures to identify undocumented foreigners and assume that some individuals with South African identity documents are foreigners using fraudulent documents.<sup>100</sup>

I have two workers—a brother who is a driver and a sister who works in the house. Last week a group of policemen came to the farm compound and one policeman tore up their ID documents. They have worked 15 years on the farm—longer than me.... The police took the man to the police station. They just released him. There was no case. They knew it. It cost the man R30 [US\$4.26] to take the taxi back.<sup>101</sup>

This farmer's African farm supervisor, a Zimbabwean who has worked on the farm for 13 years, said: "They want permit or passport. If you argue, they hit. They are also looking for cigarettes."<sup>102</sup>

As well as violating provisions of the Immigration Act, assault in the process of arrest violates the constitutional right to personal freedom and security, including the right to be free from all forms of violence from either public or private sources and the right not to be treated or punished in a cruel, inhuman or degrading way.<sup>103</sup> Similar protections exist in Article 7 of the ICCPR.<sup>104</sup>

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<sup>100</sup> See, for example, Human Rights Watch, "Prohibited Persons."

<sup>101</sup> Human Rights Watch interview with a white commercial farmer, Weipe, April 24, 2006.

<sup>102</sup> Human Rights Watch interview with a Zimbabwean farm supervisor, Weipe, April 24, 2006.

<sup>103</sup> The Constitution of the Republic of South Africa, chapter 2, section 12.

<sup>104</sup> General Comment 15 on "The Position of Aliens Under the Covenant" in United Nations Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, HRI/GEN/1/Rev4, February 7, 2000, p. 98, para. 7, states that the ICCPR obligations apply to any foreign national in the territory of a state party, except those rights recognized in the ICCPR, which are expressly applicable only to citizens (Article 25).

A 25-year-old Zimbabwean from Masvingo town talked to Human Rights Watch on the N1 highway, close to the Tshipise turn-off. He was returning to Pretoria where he had held a building job since 2003. He said he had been arrested five times in Johannesburg, and each time the police had treated him badly. “They are asking for ID, for permit, and they want money from you. If you have money, you give it to them. Then they leave you. If you don’t have money, they arrest you. They start from R50 [US\$7.10]. If you are not cooperative, they search you. And if they find more, they’ll take it all. If they search you and find no money, they arrest you.” He was deported only once, in 2003. Asked where he got arrested, he replied, “At work for me.” As to how his employer, a black South African builder, responded to his arrests, he said: “He just kept quiet. Usually the police know the employer and they won’t even say anything to him.”<sup>105</sup>

A farmer, who was also a TAU official for the northern region of Limpopo province, had a dim view of police exploiting traffic violators to take bribes from undocumented migrants: “They stop trailers, cars on the road. They look at lights, etc. That’s the traffic police function. They do it just to take money. Many times they will let illegals through or even transport them.”<sup>106</sup>

### ***Detention exceeding 30 days without proper procedures***

The Immigration Act, as amended, states that an “illegal foreigner” “may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days.”<sup>107</sup> The Immigration Regulations require an immigration officer intending to apply for the extension of the detention period to give written notice to the detainee of his or her intention within 20 days following the detainee’s arrest, provide the detainee an opportunity to make representations in this regard within three days of receiving the notice, and within 25 days following the arrest of the detainee, submit an application with the court clerk for the extension of the period of detention.<sup>108</sup> Human Rights Watch came across several cases in which this procedure was allegedly violated.

At Makhado (Louis Trichardt) police station, a Mozambican to whom Human Rights Watch spoke claimed he had been kept in the cell for about three months. He said:

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<sup>105</sup> Human Rights Watch interview with an undocumented Zimbabwean male, N1 highway near the Tshipise turn-off, April 30, 2006.

<sup>106</sup> Human Rights Watch interview with a white commercial farmer who was a TAU committee chair, northern region, Makhado, April 25, 2006.

<sup>107</sup> Immigration Act, as amended by Immigration Amendment Act, section 34(1)(d).

<sup>108</sup> *Ibid.*, section 34(1)(d) and Immigration Regulations, section 28(4).

I was arrested three months back at my house in Chihota. I bought a car. I have the papers and receipts. The only problem is I don't have a passport. But I have a passport number. I am Mozambican. The police don't understand me. The car is at the police station. For a visa to come to South Africa, it's very expensive. Where can I get that money now? My wife and child (who was born in South Africa) were also arrested this morning. I saw when they walked past. It was better for police to open a docket to go to court.<sup>109</sup>

Human Rights Watch came across another detainee who claimed she had been detained for more than 30 days, apparently without any of the necessary legal procedures. The 21-year-old Zimbabwean from Gweru had been self-employed as a hairdresser in Polokwane since 2004, but did not have a work permit. She told us, "I was caught in Pietersburg [Polokwane] on March 3. They [the police] said: 'We are waiting for people from Home Affairs.' Then we waited two weeks. Home Affairs came and took our fingerprints. We waited more time. At least the conditions in the cell were fine. I was only deported yesterday."<sup>110</sup> She had returned to South Africa the next day and had immediately been arrested in the Limpopo river; Human Rights Watch talked to her that same day.

To attempt to verify these allegations of violations of the 30-day detention provision with police at Makhado and Musina police stations might have endangered the two undocumented foreigners. For this reason, Human Rights Watch did not return to the police at these police stations for comment on these specific cases. Violations of the 30-day detention provision have been widely reported on by other researchers.<sup>111</sup>

### ***Detention not in compliance with prescribed standards***

The Immigration Act provides for "illegal foreigners" to be detained "in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."<sup>112</sup> The Immigration Regulations stipulate the minimum standards for accommodation, nutrition, and hygiene in detention.<sup>113</sup> Every detainee must be provided with a bed, mattress, and at least one blanket. Male and female detainees

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<sup>109</sup> Human Rights Watch interview with a Mozambican detainee awaiting deportation, Makhado police station, Makhado, April 29, 2006, with translation assistance from a Zimbabwean detainee.

<sup>110</sup> Human Rights Watch interview with a Zimbabwean woman awaiting deportation, Musina police station, Musina, April 26, 2006.

<sup>111</sup> Landau, Ramjathan-Keogh, and Singh, "Xenophobia in South Africa and Problems Related To It"; Forced Migration Studies Programme et al., "Crossing Borders, Accessing Rights, and Detention." See also, Human Rights Watch, "Living on the Margins," and "Prohibited Persons."

<sup>112</sup> Immigration Act, section 34(1)(e).

<sup>113</sup> Immigration Act, section 34(1)(e) and Immigration Regulations, section 28(5) and Annexure B.

(unless spouses), detained minors who are not with their parents, and detainees in different security risk categories should all be kept separately. Unaccompanied minors should not be detained. Each detainee must be provided with food served at defined intervals, with not more than 14 hours between the evening meal and breakfast the next day. The DHA must provide the means for every detainee to keep his or her person, clothing, bedding and room clean and tidy. Human Rights Watch found violations of the prescribed standards for conditions of detention at both Musina and Makhado police stations, and heard of other violations from detainees awaiting deportation.

The violations of prescribed standards for detention contravene the constitution. Section 28(1)(g) of the constitution protects all children from detention, unless it is a measure of last resort, in which case children must be kept separately from detained persons over 18 years old. In September 2004 the Pretoria High Court ruled that unaccompanied foreign children must be dealt with under the provisions of the Child Care Act rather than the Immigration Act.<sup>114</sup> Section 35(2)(e) of the constitution stipulates that everyone who is detained has the right “to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.” International standards provide similar provisions for the minimum standards of conditions of detention.<sup>115</sup>

At Musina police station, often over 80 men, women, and children slept outside in a fenced area. In bad weather the detainees are brought into an adjacent roofed area. The men and women were evidently made to sleep separately. Inside the outdoor “cell” there were a few toilets. The only drinking water was outside the fenced area. Each detainee was provided with a blanket and no mattress. Human Rights Watch observed breakfast being served to detainees through the fence. The evening meal was reportedly served around 4:30-5:00 p.m. and breakfast at about 9:30 a.m.—an interval between meals that exceeded the regulated maximum 14-hour limit. Those who were brought to the police station after dinner and put on transport for deportation before breakfast missed two meals.

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<sup>114</sup> Landau, Ramjathan-Keogh and Singh, “Xenophobia in South Africa and Problems Related to it,” p. 16.

<sup>115</sup> ICCPR, article 10, stipulates that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” UN documents setting out specific guidelines for basic standards of state practice include the Standard Minimum Rules for the Treatment of Prisoners, adopted 1955 by the First UN Congress on the Prevention of Crime and Treatment of Offenders, [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm); the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, December 9, 1988, G.A. Res. 43/173, [http://www.unhchr.ch/html/menu3/b/h\\_comp36.htm](http://www.unhchr.ch/html/menu3/b/h_comp36.htm) (accessed July 30, 2006); and the Basic Principles for the Treatment of Prisoners, adopted December 14, 1990, G.A. Res. 45/111, [http://www.unhchr.ch/html/menu3/b/h\\_comp35.htm](http://www.unhchr.ch/html/menu3/b/h_comp35.htm) (accessed July 30 2006).

*I come from Bulawayo. I am 29 years old.... I worked in a construction company... in Johannesburg. I border jumped. I have no work permit.... I'm still at that job.*

*I got arrested last week on Saturday in Johannesburg.... There was a cross-fire. I was trying to run away. Police said, "Okay, you're not part of them. But where's your ID?" They took me to Brixton station on Saturday. At Brixton I was treated okay, except for not having food, except for Monday [when] they gave us four slices of bread. On Monday, they released me and put me in Lindela. At Lindela we ate nothing.... Then from Lindela we were deported the same day by train to Musina.... They [the police] didn't give me time to collect my belongings at home [when he was arrested]. I arrived in Musina on Tuesday morning. They deported us to Beitbridge from the Musina station.*

*In Beitbridge police station [Zimbabwe], we were kept there 20 minutes. We were told to go home. There was no paper work.... From there we tried to come back on Thursday and we were caught. There were about 15 in our group. Most in the group were those who were deported.... On Thursday around 1 a.m. we crossed the border. From the border crossing point, we walked from 1 a.m. to 5 a.m.... We hired a car in Musina. It was around 1 p.m.*

*We were caught at Louis Trichardt [Makhadu]. It was past 4 p.m. Traffic cops stopped the car. They asked the driver if he had papers. The police just happened to arrive. They asked for our papers. We said we didn't have. They took us to Louis Trichardt station. After some minutes, they wrote down our names and brought us here, Musina. We've been here since yesterday. We arrived in Musina yesterday at about six in the afternoon. There was no food.... We have had no food this morning. We slept on the ground....*

*What they want is just for you to go home. At least something should be done for people who work. It is illegal, but we are working. I'm now owed about R400 for the week I worked. If I get back, maybe I can get that money. I'm now being paid R80 per day. South Africans are getting paid R150 per day and usually we are the ones who know the job. Many people from Zimbabwe just want work. They really don't care about conditions. I got "O" levels in Zimbabwe. The conditions I'm working in are not suitable for "O" levels. South Africans are mostly uneducated. The situation in Zimbabwe is terrible. You'd rather die on the road here. You can't just sit there.*

—Human Rights Watch interview with an undocumented Zimbabwean awaiting deportation, Musina police station, April 28, 2006

Human Rights Watch spoke to a 29-year-old Zimbabwean from Bulawayo who had been en route to Johannesburg in a taxi with about fifteen others with whom he had illegally crossed the border when he had been arrested in Makhado the previous day. They had been taken first to Makhado (Louis Trichardt) police station and then to Musina police station, where they had arrived the previous evening at around six. Dinner had already been served. He told us, “Yesterday one person was allowed to go buy bread using our own money. Those who had money contributed for everybody. We had three loaves of bread amongst us. We have had no food this morning.”<sup>116</sup> This was the second time he was being deported in eight days. The first time he had been arrested in Johannesburg, where he had held the same job in a construction company since 2000. He had been arrested after trying to run away from a shoot-out. Having cleared him of any involvement in the shooting incident, the police asked for his ID: “They took me to Brixton police station on Saturday. At Brixton I was treated okay, except for not having food, except for Monday [when] they gave us four slices of bread. On Monday, they released me and put me in Lindela.”

Three Zimbabweans walking along the Tshipise road, hoping to get a ride to Johannesburg, told Human Rights Watch that they had been arrested by immigration officials at Beitbridge border post where they had entered with passports but without visas, which they said they could not afford. They had been taken from the border post to Musina police station, where they claimed that they had spent three days without receiving any food. They said that they had escaped in the night while the police were asleep.<sup>117</sup>

A police official at Makhado police station volunteered to Human Rights Watch that male and female detainees awaiting deportation were kept separately but that female detainees were kept together with people facing criminal charges: “They sleep in the police cells, males and females separately. The female ones are mixed with the criminals—we have only one cell for females. The male illegals are kept separate from criminals.”<sup>118</sup> It is a violation of the Immigration Regulations to keep detainees awaiting deportation with criminals.

At Makhado police station, Human Rights Watch learned that there were two children in the cell with the adult men. The two boys, age 15 and 17, were from Chipinge, Zimbabwe, and had been arrested on the road to Pretoria, where they lived with

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<sup>116</sup> Human Rights Watch interview with a Zimbabwean detainee awaiting deportation, Musina police station, Musina, April 28, 2006.

<sup>117</sup> Human Rights Watch interview with three undocumented Zimbabweans, on the Tshipise road, April 30, 2006.

<sup>118</sup> Human Rights Watch interview with a police official, Makhado police station, April 29, 2006.

brothers who were working legally.<sup>119</sup> The two children were evidently traveling unaccompanied by adults, and ought not to have been detained.

We were allowed into the sleeping quarters of the men awaiting deportation at Makhado police station. Each person had only a blanket. There were no mattresses.

### ***Deportation without an opportunity to collect remuneration, savings, and personal belongings***

The Immigration Act does not require state officials to give undocumented migrants the opportunity to collect remuneration, savings, and personal belongings prior to deportation. Failure to enable migrants awaiting deportation to collect unpaid wages, savings, and personal belongings is viewed by migrants, and Human Rights Watch, as a serious injustice, if not necessarily a human rights violation. Given that the police apparently permit undocumented migrants to collect their bank savings prior to deportation (see below), the case for allowing undocumented workers the opportunity to access their unpaid wages, savings not held in a bank, and personal property seems strong. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which the South African government has not signed, provides for the right of foreign workers (documented and undocumented) who get deported to be granted a reasonable opportunity before or after departure to settle any claims for wages and other entitlements and any pending liabilities,<sup>120</sup> and, upon termination of their stay in the state of employment, to be accorded the opportunity to transfer their earnings, savings, and personal effects and belongings.<sup>121</sup>

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<sup>119</sup> Human Rights Watch interview with a Mozambican detainee, Makhado police station, April 29, 2006, with the translation assistance of a Zimbabwean detainee.

<sup>120</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted December 18, 1990, G.A. Res. 45/158, article 22(6), <http://www.ohchr.org/english/law/cmwf.htm> (accessed July 10, 2006).

<sup>121</sup> *Ibid.*, article 32.

*I am 21 years old. I come from Zaka, Masvingo province. I was attending Morgenster Teacher's College where I was doing a three-year course to teach primary school. I have done two-and-a-half years and will finish in December 2006. I came here to get money to pay fees to finish. The fees went up. Last term cost Z\$16 million [US\$158] per term. This coming term will cost Z\$50 million [US\$495].<sup>122</sup> There are around three hundred students. Most are going to drop out because of the fee escalation. My father passed away in 2002. My mother is not working. My father left cattle. We are sometimes selling cattle to get money.*

*I came to South Africa on April 18. I border jumped. There are people there [at the Zimbabwe border] who do it as a business. They are Zimbabweans. They have three vans. Malatchas—it's the name of the business. To go to Johannesburg, they charge about R800. We were about 14 in the van. Our uncle in Johannesburg paid when we got there. They phoned my uncle from Beitbridge [Zimbabwe]. He agreed to pay. It is common procedure. We went by foot at night from Beitbridge [Zimbabwe] to Musina, going through farms. We walked from about 11 p.m. Around six in the morning they picked us up in the van. [The driver of the van has documents to cross the border legally.] We arrived in Johannesburg at about eleven in the morning.*

*We looked for work. I worked for two weeks. It was very unfortunate. When I was on my way from work to my uncle's place, I was taken there. I was working at a construction company with a Zimbabwean friend with whom I'd crossed [the border]. We were not paid. They were to pay us in a fortnight. There were many Zimbabweans working at the construction company. They did have workers' permits. The company comes to Beitbridge and finds one Zimbabwean person, who will search for others in Zimbabwe because these people here [South Africans] don't want to work. I observe these people are more of thieves than to work on their own.*

*Then we were transported by train to Musina. You feel uncomfortable [to be arrested and deported]. You've tried everything. You've used money from others, and you won't have anything.*

—Human Rights Watch interview with an undocumented Zimbabwean migrant awaiting deportation, Musina police station, April 26, 2006

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<sup>122</sup> This is a conversion rate of Z\$101,101 = US\$1. Note that at the end of July 2006, the government of Zimbabwe announced that three zeros would be taken off every banknote to help consumers deal with inflation of almost 1,200 percent. The official exchange rate was also devalued. The new exchange rate is Z\$250 = US\$1.

Human Rights Watch learned in interviews that the police permit undocumented migrants awaiting deportation the right to access their bank savings, even though migrants are not necessarily informed that they have this opportunity. A Zimbabwean man awaiting deportation at Musina police station asked Human Rights Watch how he could access his savings in a bank account. He said that he had a job in a shop in Roodepoort on the West Rand, had been arrested there and deported, had almost immediately re-entered South Africa illegally only to be arrested in Polokwane en route to Roodepoort, and eventually taken to Musina police station. He had R500 (US\$71) in a Standard Bank account. “Now I can’t access it,” he said.<sup>123</sup> Human Rights Watch referred his case to a police officer, who said, “We allow them to go to the ATM with an escort.”<sup>124</sup> However, this man had not been informed that he had the right to retrieve his bank savings.

Most foreign migrants, documented and undocumented, are unable to open bank accounts. A Foreign Migration Studies Programme publication noted:

Although current banking legislation technically prevents anyone except permanent residents and citizens from opening bank accounts, this policy may be waived on a discretionary level as often done with people in the country on temporary contracts. Under pressure from lobbying groups, some banks have now begun extending services to refugees, but are still unwilling to open accounts for most other African immigrants who are unlikely to have the requisite thirteen digit ID number, foreign passport, or a formal employment contract.<sup>125</sup>

Some foreign migrants are able to open bank accounts by fraudulently obtaining South African ID documents.<sup>126</sup>

A 21-year-old from Zaka district, Masvingo in Zimbabwe spoke to Human Rights Watch from the police “cell” at Musina police station. He had been arrested in Johannesburg the previous day, and was only to be paid for his first month of work at the end of the month. “I worked for two weeks. It was very unfortunate when I was on

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<sup>123</sup> Human Rights Watch interview with an undocumented Zimbabwean awaiting deportation, Musina police station, Musina, April 28, 2006.

<sup>124</sup> Human Rights Watch interview with a white police official, Musina police station, Musina, April 28, 2006.

<sup>125</sup> Landau, Ramjathan-Keogh, and Singh, “Xenophobia in South Africa and Problems Related To It,” p. 23.

<sup>126</sup> Human Rights Watch interview with Echo 4 leader of a military border patrol unit, Limpopo border, April 27, 2006. The military official related how a Zimbabwean whom he had arrested had requested that he be taken to the bank to draw his money before being deported. Asked how the Zimbabwean was able to get a bank account, the military official replied that foreign migrants can use fraudulent South African IDs to open bank accounts.

my way from work to my uncle's place, I was arrested. I was working at a construction company with a Zimbabwean friend with whom I'd crossed [the border]. We were not paid. They were to pay us in a fortnight. My friend was also arrested. He's with me."<sup>127</sup>

The 29-year-old Zimbabwean from Bulawayo, awaiting deportation at Musina police station, had been working illegally since 2000 for a construction company in Johannesburg. He got paid R80 (US\$11.34) per day—slightly under half the daily pay rate of his South African co-workers, even though “usually we are the ones who know the job.” The company owed him about R400 (US\$57) for the week he had worked. “If I get back, maybe I can get that money,” he remarked.<sup>128</sup> He noted that when he had been arrested following a shoot-out in Johannesburg, “They [the police] didn't give me time to collect my belongings at home.”

From the Makhado (Louis Trichardt) police cell for detainees awaiting deportation, a Zimbabwean man said: “We were working. Now Monday and Tuesday people will be paid and we won't be paid. I was working at the towing company in Louis Trichardt. They were paying me R950 [US\$135] per month.”<sup>129</sup>

At Makhado police station, two of the approximately 20 people in the police cell said they had personal savings they were not given an opportunity to collect. A Zimbabwean said he had saved R600 (US\$85) from doing “piece jobs” such as gardening.<sup>130</sup> A Zimbabwean farm worker, who said he had a work permit, claimed to have R700 (US\$99) at home.

### ***Migrants' vulnerability to arrest and deportation arising from government deficiencies in documenting corporate workers***

The Immigration Act does not provide for the protection of migrants who, through no fault of their own, lose their legal status. Consequently, migrants are vulnerable to arrest and deportation if they do not have valid emergency travel documents (ETDs) and temporary residence permits. The government of Zimbabwe issues or renews Zimbabwean migrants' ETDs; the South Africa government then issues or renews the migrants' temporary residence permits. Employers, the corporate permit holders, are

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<sup>127</sup> Human Rights Watch interview with an undocumented Zimbabwean awaiting deportation, Musina police station, Musina, April 26, 2006.

<sup>128</sup> Human Rights Watch interview with an undocumented Zimbabwean detainee awaiting deportation, Musina police station, Musina, April 28, 2006.

<sup>129</sup> Human Rights Watch interview with an undocumented Zimbabwean detainee awaiting deportation, Makhado police station, Makhado, April 29, 2006.

<sup>130</sup> Human Rights Watch interviews with Zimbabweans awaiting deportation, Makhado police station, Makhado, April 29, 2006.

responsible for ensuring that their corporate workers comply with the provisions of the corporate permit and the Immigration Act. Corporate workers who have become illegal because of a government failure to properly document them in a timely fashion should not be subjected to early morning raids, arrests or deportation. Human Rights Watch learned of migrant workers who had been subjected to police raids and even arrested and deported because the government of Zimbabwe had delayed renewing their ETDs and/or the government of South Africa had delayed renewing their temporary residence permits.

A commercial farmer on the Limpopo border complained about the ineptitude of the governments of South Africa and Zimbabwe in issuing workers' documentation in a timely fashion. He said:

I'm working with two governments and they are very slow and bureaucratic. Police and/or soldiers come and arrest our people because they don't have permits. But it's not our fault. They're only focusing on us along the border. We work out a rapport with the police commander stationed in this area, then we get another baboon coming along and he says something else. They come and disturb our guys for three to four hours at night on the compound. They have guns and the others don't. That's the only thing.<sup>131</sup>

On a neighboring farm, there had been three police and/or military raids in the previous week, resulting in the deportation of a large number of workers. The farm owner lamented:

It's no good explaining to the police or military the problems with the system. The first lot took about 70 workers and another 120 were arrested in the subsequent two raids. What then happens is that within a day-and-a-half 90 percent are all back again working. You must realize I still owe them money.... Because they are getting arrested, a lot don't even sleep in the houses provided. A lot sleep outside where they are more safe.<sup>132</sup>

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<sup>131</sup> Human Rights Watch interview with a white commercial farmer, Weipe, April 24, 2006.

<sup>132</sup> Human Rights Watch interview with a white commercial farmer, Weipe, April 26, 2006.

### ***Migrants' vulnerability to financial abuses by corporate permit holders***

The Immigration Act does not provide any protection against employers, the corporate permit holders, charging migrant workers (including those who are not employed by them) a fee for obtaining the passport (or ETD) and temporary residence permit that they require to be legal. The Act should make it an offense for employers to claim workers on the corporate permit who do not work for them and to charge workers anything other than the actual cost of the ETD for documenting them (see the section on Employment Laws, below).

Human Rights Watch learned that a corporate permit holder, who is a farmer as well as a labor contractor and labor consultant, had applied for a work permit for a Zimbabwean migrant who did not work for him, and passed on to the worker almost the full price of a corporate permit application. As noted above, the cost of the application is independent of the number of corporate workers requested, and currently costs R1,520 (US\$215); the corporate permit is valid for three years. A Zimbabwean who works in a farm store near Tshipise, told Human Rights Watch:

My boss has a farm.... He doesn't like South Africans. I asked him for a permit. At first he said it's R2,000 [US\$283]. I must pay half. He'll pay half. Then he said no, and I had to deal for myself. I've been working for two years there. I'm staying with [name of labor contractor provided] contract workers on [name of farm supplied].... There are many Zimbabweans there. The Zimbabweans gave me the tip. When I spoke to [name of labor contractor provided], he said he'd speak to my boss. The following morning I told my boss that [name of labor contractor provided] told me he would get me a permit if I could pay R1,000 [US\$142]. He got angry with me. He said it's my own funeral. But when the military come, he's hiding me. Last year the army was tough, I tell you. He had to hide me a lot. If they caught me working there, he'd have to pay a lot. Now I'm still paying R1,000 for the permit. So far I've paid him R500... I got the permit in November 2005.... [Name of labor contractor provided]—that man is very harsh. If he hears about this, he'll kill me. The permit says the employer is [name of labor contractor provided] and the [worker's] occupation is farm worker.... I come in and out using it."<sup>133</sup>

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<sup>133</sup> Human Rights Watch interview with a Zimbabwean farm store worker, Tshipise, April 20, 2006.

## **Employment Laws: Violations and Gaps Resulting in Human Rights Violations**

Human Rights Watch found violations by employers of the basic conditions of employment of farm workers that are provided for in the Sectoral Determination for the Farm Worker Sector, which became operational on March 1, 2006. The violations include: failure to pay minimum wages; overtime without workers' consent and failure to pay overtime rates; remuneration based on piece rate; and unlawful deductions from workers' remuneration. The failure of employers to comply with the basic conditions of employment for farm workers also contravenes section 23 of the constitution that provides for everyone to enjoy fair labor practices. Human Rights Watch also learned of legal gaps and exclusions affecting farm workers in the Basic Conditions of Employment Act, 1997, and other labor laws. The Sectoral Determination is silent about who should provide decent housing and living conditions for farm workers. All these violations affect all farm workers, and not just foreign migrant workers.

Other labor law violations affect exclusively foreign migrant workers. The Sectoral Determination does not regulate employer deductions from workers' wages for the cost of complying with corporate permit provisions. Also, employers must contribute to the workers' compensation fund but, in practice, foreign migrants are not able to receive compensation. These legal gaps impede the ability of foreign migrants to enjoy "fair labor practices" as provided for in the constitution. Zimbabwean migrants also were victims of workplace discrimination.

### ***Employers' failure to pay minimum wages, their unlawful use of piece rate, and their disregard of overtime rules***

Employers who do not pay the minimum wage or minimum hourly rate violate sections 2 and 3 of the Sectoral Determination, and the constitutional right of migrants to "fair labor practices."

The farmer's organization TAU issued a public statement that its farmers would not comply with the minimum wage increases announced in February 2006.<sup>134</sup> The TAU official for the Soutpansberg region, who hires only South Africans, said, "We're not against a minimum wage but set it at a fair level. Most farmers are not adhering, and I'm

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<sup>134</sup> Neesa Moodley, "Transvaal Agricultural Union Vows to Fight Labour Minister. Minimum Farm Wages Draw Flak," *Business Report* (IOL online edition), April 4, 2006, <http://www.busrep.co.za/index.php?fSectionId=&fArticleId=3188566> (accessed July 11, 2006).

one of them. I don't put up the wages.... My permanent workers—tractor drivers and foremen—get more than the minimum. The others are getting the old minimum wage of last year. I explained to the workers and they can see. I have less crop. My financial situation is forcing me to do this.”<sup>135</sup>

The TAU regional committee chair also said that he, like many farmers in the Levubu area, used contractors but did not verify, as he is legally required to, that the contractors comply with labor laws, including minimum wage determinations: “Why must I police the contractor. The Department of Labor must. In practice, farmers aren't checking on contractors. You sign a contract that he'll meet all labor laws but he doesn't.... I have 30 contractors.”<sup>136</sup>

The black farmers' union allegedly made an unsuccessful attempt to get the government to approve a lower minimum wage for its members.<sup>137</sup> Many white farmers claim the most serious labor abuses are occurring on black commercial farms between Tshipise and Mutale.<sup>138</sup> Human Rights Watch visited a farmer at Nwanedi, located in this area. The plot holder said he paid his nine Zimbabwean workers R500 (US\$71) per month, though he knew the minimum was around R800 (US\$113) per month. Just before we went to speak to the workers, he said he started Zimbabweans at R350 (US\$50) per month. Like some white farmers, he said he could not afford to pay the minimum.<sup>139</sup> In fact, his workers told us that only one of them earned R350 per month for a five-and-a-half day work week. The other workers all earned less than R350 per month.<sup>140</sup> A black smallholder farming tomatoes, chilies, maize and potatoes in the vicinity of Tshipise said he paid his two South African farm workers R350 each per month.<sup>141</sup>

Human Rights Watch was similarly informed that not all farmers in Weipe district were complying with the minimum wage.<sup>142</sup> A farm owner in Weipe said he welcomed the minimum wage, but lamented the government's failure to enforce it through labor inspections: “Those of us who are compliant can't compete with others. We're competing in the same markets. We hear rumors or stories that some of the officials are being bribed. Not only in our areas. I know from the workers.”<sup>143</sup> Another Weipe farm

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<sup>135</sup> Human Rights Watch interview with a white commercial farmer, Levubu, April 29, 2006.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Human Rights Watch interview with a black small-scale commercial farmer, Nwanedi, April 30, 2006.

<sup>140</sup> Human Rights Watch interview with nine undocumented Zimbabwean farm workers, Nwanedi, April 30, 2006.

<sup>141</sup> Human Rights Watch interview with a black farmer, on Tshipise road, April 30, 2006.

<sup>142</sup> Human Rights Watch interview with a white commercial farmer who is a TAU official for the Soutpansberg region, April 29, 2006; Human Rights Watch interview with leader of Echo 4 military unit, Limpopo border, April 27, 2006.

<sup>143</sup> Human Rights Watch interview with a white commercial farmer, Weipe, April 27, 2006.

owner admitted that he was not paying the minimum wage increase because he had to stop producing cotton as he could not compete with cheap Chinese imports. He said he gave his permanent workers the option of retrenchment or pay per hour, with reduced hours in the off-season.<sup>144</sup>

A Zimbabwean permanent worker on another farm in Weipe, who did get paid the minimum wage, claimed that only 20 of the approximately 75 permanent workers were being paid the minimum (although Human Rights Watch did not interview any permanent worker at this farm who was not receiving minimum wage). He and other Zimbabweans on the farm who earned the minimum wage expressed concern about their seasonal worker colleagues who were only earning R500 (US\$71), despite working the same number of hours: “I know it because we are friends. We show each other the pay slips. Some of the seasonals have been here before me and they are getting that money [less than the minimum].”<sup>145</sup>

The explanation, according to both the owner and his workers, was that seasonal workers at this farm were paid on certain days of the week according to the piece rate system. A piece rate method of calculating remuneration is based on an industry standard of the amount a worker should be able to produce in an hour. The minister of labor is empowered by section 55(g) of the Basic Conditions of Employment Act, 1997, to prohibit piece work in a Sectoral Determination, and section 4 of the Sectoral Determination for farm workers duly provides for the wage or remuneration of a farm worker to be calculated only by reference to the farm worker’s ordinary hours of work. Moreover, when a piece rate system results in workers not receiving the minimum wage (because their production does not meet the industry standard), it violates the constitutional provision for “fair labor practices.”

The TAU official for the Soutpansberg region said, “Piece rate is not allowed by law. But farmers use it. I don’t tell the Department of Labor. I just cook the book.”<sup>146</sup> “Cooking the books” is an offense under section 92(b) of the Basic Conditions of Employment Act, but a Zimbabwean permanent worker at the Weipe farm mentioned above highlighted the absence of scrutiny: “I have a problem on my mind. Why doesn’t labor [inspection] come at the end of the year and check our pay slips. Labor comes to boss. He shows them his books. They drink tea together. He can give them a sheep. You’ll never know. Some people are working for kgs [kilograms]. If you make so many boxes of spanspek and watermelons you can go beyond the minimum. Some are

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<sup>144</sup> Human Rights Watch interview with a white commercial farmer, Weipe, April 26, 2006.

<sup>145</sup> Human Rights Watch interviews with Zimbabwean farm workers, Weipe, April 27, 2006.

<sup>146</sup> Human Rights Watch interview with a white commercial farmer who is a TAU official for the Soutpansberg region, April 29, 2006.

working all day. He's paying them R500. He's not showing these [to the labor inspectors]."<sup>147</sup>

Section 13 of the Sectoral Determination makes overtime work contingent on the employer concluding an agreement with the farm worker. Section 14 stipulates how overtime work must be paid. Failure to comply with overtime regulations violates workers' constitutional right to "fair labor practices."

A Zimbabwean farm store worker, who said his hours were from 7 a.m. to 6 p.m. but that he often was required to work overtime, and even up to 2 a.m. during Christmas time, said he got paid R3.70 (US52¢) per hour.<sup>148</sup> Besides not paying the minimum hourly rate for farm workers (R4.54 or US64¢), the employer had not obtained the worker's consent to overtime work and did not pay, as required, the higher overtime pay rate. On a Weipe farm, a Zimbabwean permanent worker earned the monthly minimum wage but complained that he had to work overtime and did not get paid for it.<sup>149</sup>

### ***Employers' failure to comply with provisions governing deductions from wages***

Human Rights Watch found numerous violations of section 8 of the Sectoral Determination that governs employer deductions from farm workers' wages. These included unlawful deductions for accommodation, electricity and other services, goods purchased at a store, life insurance, and deferred wage payments. These deductions deprive workers of the right to "fair labor practices" that are protected in section 23 of the constitution.

Section (8)3 of the Sectoral Determination specifies that a deduction for accommodation is permitted only if the house meets prescribed standards. The house must have a roof that is durable and waterproof; glass windows that can be opened; electricity must be available inside the house if the infrastructure exists on the farm; safe water must be available inside the house or within 100 meters from the house; a flush toilet or pit latrine must be available in, or in close proximity, to the house; and the house must be not less than 30 square meters in size.

On a Weipe farm, we learned that workers who lived in small self-built clay houses without electricity and with toilets too far away for use were having R50 (US\$7.08) per

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<sup>147</sup> Human Rights Watch interview with a Zimbabwean farm worker, Weipe, April 23, 2006.

<sup>148</sup> Human Rights Watch interview with a Zimbabwean farm store worker, Tshipise, April 30, 2006.

<sup>149</sup> Human Rights Watch interview with a Zimbabwean farm worker, Weipe, April 27, 2006.

month deducted from their below minimum wages of R500 (US\$71) per month.<sup>150</sup> The owner of another farm in Weipe related how the Department of Labor, investigating health conditions in his compound after what was believed at first to be a case of meningitis, learned that he was deducting for housing that did not meet the prescribed minimum standard. He now only deducts for electricity.<sup>151</sup>

Section 8(2)(d) of the Sectoral Determination permits an employer to make a deduction for accommodation only if no deduction is made by the employer for electricity, water or other services. We found deductions for electricity cards were common even when employers were also deducting money for accommodation.

Section 8(10) of the Sectoral Determination stipulates: “A deduction of any goods purchased by the employee must specify the nature and quantity of the goods and the amount that correlates with a proof of purchase.” The Zimbabwean who works in a farm store just off the Tshipise road complained that he was not allowed to obtain a record of store purchases for which the farmer made deductions from his pay. “He deducts what I get from the store. He gives no proof. He writes down in a book what you take. You’re not allowed to see that book.”<sup>152</sup>

Farm workers to whom Human Rights Watch spoke on a Weipe farm said the owner was making a compulsory 10 percent deduction each month from workers’ wages, which he then paid them back at the end of the year. The employer does not have the right to make a compulsory deduction for savings. Moreover, the employer is required by section 75 of the Basic Conditions of Employment Act to pay interest “on any amount due and payable in terms of the Prescribed Rate of Interest Act, 1975, to any person to whom a payment should have been made.”

Deductions for workers’ life insurance are permitted, under section 8(7)(a), only if the employers receive the farm workers’ written request, as stipulated in section 8(1)(c) of the Sectoral Determination. A Vivo farm owner told us that Zimbabweans have been specifically excluded from any private life or funeral insurance for the past two or three years, so in November 2005, after losing four of his 21 permanent workers to AIDS during the year, he made contributions to a life and funeral insurance scheme compulsory for the mainly South African workers on his farm. “The tradition is that the

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<sup>150</sup> Human Rights Watch interview with a Zimbabwean worker, Weipe, April 23, 2006.

<sup>151</sup> Human Rights Watch interview with a white commercial farmer, Weipe, April 26, 2006.

<sup>152</sup> Human Rights Watch interview with a Zimbabwean worker, Tshipise, April 30 2006.

next of kin will come and ask you, as the employer for many years, what can you do for him. You are only their father when it suits them.”<sup>153</sup>

### ***Discrimination and violence against Zimbabwean workers by South Africans in the private sector***

The preamble to the Immigration Amendment Act refers to the need to educate civil society about the rights of foreigners and refugees. The Employment Equity Act, 1998, and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, reinforce the prohibition against unfair discrimination on a number of specific grounds provided for in section 9 of the constitution.<sup>154</sup> Discrimination on the basis of national origin is not explicitly prohibited in section 9 of the constitution or in the above-mentioned legislation, but such discrimination, unless properly justified in terms of other provisions in the constitution,<sup>155</sup> would be antithetical to the constitutional right to equality in section 9. Section 12 of the constitution grants “everyone” the right to freedom and security of person, which includes the right “to be free from all forms of violence from either public or private sources.” “Fair labor practices,” a constitutional right under section 23, would include the protection of workers (including documented migrant workers) from workplace discrimination. Under the ILO Convention Concerning Migration for Employment that South Africa has ratified, treating migrants less favorably than nationals in remuneration, hours of work, and overtime arrangements (among other things) is prohibited.<sup>156</sup> Yet Human Rights Watch documented cases in which Zimbabwean migrants alleged workplace violence and discriminatory treatment by other workers, private security officials, and employers.

A farm in Doreen, near Tshipise, has a labor force that is 10 percent Zimbabwean and 90 percent South African. All the foremen are South African. Human Rights Watch spoke to four Zimbabwean workers who complained of discrimination by the South African foreman against Zimbabweans. One said:

The South African foreman is resistant. On issues like sick leave and family matters, I can go straight to the employer. He [the foreman] will resist me [on sick leave and family issues, for example] just because I’m Zimbabwean. They are not fair. They are not doing the same thing to South Africans. I can go straight to the employer. He treats us the

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<sup>153</sup> Human Rights Watch interview with a white commercial farmer, Vivo, April 21, 2006.

<sup>154</sup> The Constitution of the Republic of South Africa (No.108 of 1996), chapter 2, section 9(3), as already noted, provides that “The state may not unfairly discriminate...” on a number of identified grounds.

<sup>155</sup> For example, *ibid*, section 36.

<sup>156</sup> Convention No. 97 Concerning Migration for Employment, adopted July 1, 1949, General Conference of the International Labour Organization at its 32<sup>nd</sup> Session, Geneva, article 6.

same. South Africans are not happy [about Zimbabweans], even those who are not working. They are too jealous.<sup>157</sup>

We were told by these four workers that Zimbabweans on the farm in Doreen had engaged in an illegal strike in 2001 over being made to do more demanding work than their South African co-workers.

Many undocumented migrants to whom Human Rights Watch spoke either at police stations where they were detained and awaiting deportation or on the road returning to Johannesburg or Pretoria said they had jobs in the construction sector and that they were paid substantially less than South African workers.

Three Zimbabwean men whom we met on the N1 highway en route to Pretoria described how they had just walked some 20 kilometers from a farm in Doreen. All three had worked there for only three days and had left after being assaulted by the foreman. The men, all in their mid-twenties, were seeking work in South Africa for the first time. One, whose carpentry shop in Chiredzi, Zimbabwe, had been destroyed during Operation Murambatsvina,<sup>158</sup> said:

I was hired by Mr. [name provided]. I met someone who told me Mr. [name provided] is employing people. So I went there. My job was pruning grapes. The food on the farm gave me and the two others with me diarrhea so we could not work properly. We were going to the toilet every hour. The manager [foreman] was angry. He said: "We can't work with you like this." The manager was a black man [name provided]. When I got back from the loo, he beat me, saying: "Where were you?" He beat me three times. Then he expelled me saying, "We can't work with you when you're not fit."<sup>159</sup>

Human Rights Watch talked to a 52-year-old Zimbabwean from Beitbridge who has worked on a farm in Tshipise since 2004 and who has a work permit. He said he had been beaten by four private farm security officials who arrested him, another Zimbabwean, and three South Africans:

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<sup>157</sup> Human Rights Watch interview with four documented Zimbabwean workers, Doreen, April 30, 2006.

<sup>158</sup> Operation Murambatsvina was an unprecedented government campaign of forced evictions and demolitions in the urban areas of Zimbabwe. See Human Rights Watch, "Zimbabwe: Evicted and Forsaken."

<sup>159</sup> Human Rights Watch interview with three undocumented Zimbabweans, on the N1 highway near the Tshipise turn-off, April 23, 2006.

I was arrested on October 9, 2005, while I was working on the farm. I'm a tractor driver. They accused us of poaching wild animals on the owner's game farm. We denied. In the car driven by the white farmer, we were taken to the security company car. They took us to the bush. At the bush, we were instructed to get the snares from the bush. There we were brutally assaulted with batons. Late at night, around 7 p.m., they took us to Musina to their private-like jail. We slept there. Next day we were taken to the farm. That morning they assaulted us. Again we were being forced to point to snares. They start taking statements without asking us anything. They take us to the owner. Then to Musina in the bush. We were kept there. We were not given any food, no water. Around 3 p.m. we were taken to the police station. We were locked into the police cells. On the third day, we went to court. The case was remanded [on two occasions]. On March 15 the case was withdrawn for lack of evidence. I want to take civil action against the security officials.<sup>160</sup>

The Nkuzi Development Association's lawyer who represented the man said the police wanted to deport the two Zimbabweans (one has since died) but they could not because they had permits.<sup>161</sup>

### ***Housing and living conditions***

In the apartheid era, white commercial farmers received state subsidies to build workers' housing. Since that time, provisions in the Sectoral Determination for farm workers have discouraged employers from building worker housing. Farmers told Human Rights Watch that in the Sectoral Determination the prevailing maximum deduction allowed for accommodation—10 percent of a worker's wages if an individual worker occupies the house and a lower percentage deduction for each worker when a house is shared—and the high prescribed standards (see above) give them no incentive to provide housing for farm workers.<sup>162</sup>

Section 26(1) of the constitution states: "Everyone has the right to have access to adequate housing." Section 26(2) says: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." The Constitutional Court in its 2000 ruling directed the government to take

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<sup>160</sup> Human Rights Watch interview with a Zimbabwean farm worker, Tshipise, April 22, 2006.

<sup>161</sup> Human Rights Watch interview with lawyer Shirhami Shirinda, Nkuzi Development Association, Tshipise farm, April 22, 2006.

<sup>162</sup> Section 8(3) of the Sectoral Determination specifies the prescribed standards of housing, and sections 8(1)(b), 8(5), and 8(6) govern maximum deductions for accommodation.

positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.<sup>163</sup> The Constitutional Court acknowledged that housing entitlements in South Africa would be highly dependent upon context given the diverse variety of housing needs in the country. Accordingly, the Court interpreted the obligation to ensure the “progressive realization” of housing rights present in the Constitution and Article 11 of the ICESCR to mean that accessibility should be progressively facilitated by the state through examining and eliminating legal, administrative, operational and financial barriers to access over time.<sup>164</sup> It is therefore the state’s obligation to create the conditions for access to adequate housing at all economic levels and to devise policies to address diverse groups with different needs. Although the Constitutional Court has suggested that a wide range of possible measures could potentially be adopted by the state to meet housing obligations, present barriers to housing rights in farm communities, created in part by legal disincentives, mark a departure from the path of progressive realization envisioned by the Court.

Read together with the Court’s later interpretation of the meaning of “everyone” in subsequent cases concerning the expansion of rights to migrants, the government must proffer a reasonable justification for denying the constitutional right to adequate housing to non-citizens.<sup>165</sup> While the extent of obligation is unclear under current constitutional jurisprudence, it does appear that some obligation exists and must be further developed. The right of access to adequate housing cannot be seen in isolation from other absolute rights.

The Department of Housing has three different subsidy mechanisms that could be utilized for farm workers’ housing, but it approaches the provision of farm workers’ housing with caution, implying that the farm owner is responsible for providing housing.<sup>166</sup> In 2002, the Department of Housing informed the South African Human Rights Commission that it intended to develop a strategy specifically for farm workers’ housing in 2003. Human Rights Watch found no evidence of such a strategy.<sup>167</sup> The government’s failure to create a housing policy puts it at risk of contravening its constitutional obligation to establish measures for the progressive realization of the provision of adequate housing for everyone.

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<sup>163</sup> The Government of the Republic of South Africa v. Grootboom (2000), para. 24.

<sup>164</sup> *Ibid.*, para. 45. According to the Constitutional Court other agents, such as farmers, must be enabled by legislators and other means to provide housing: “A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses.” (para. 35).

<sup>165</sup> See *Khosa v. Minister of Social Development* (2003), para. 53.

<sup>166</sup> SAHRC, “Final Report on the Inquiry into Human Rights Violations in Farming Communities,” pp. 44-45.

<sup>167</sup> *Ibid.*, p. 45.

*We are both from Harare. We grew up together. We are both 26 years old. We were supposed to do “A” levels but had no finance. We traveled together to South Africa. It is our first time in South Africa. We came at the beginning of the month. We crossed the river together. We do not have permits. We were also on Mr. [name provided] farm [in Doreen]. We got diarrhea and were beaten by [name provided] the South African foremen. We were staying on the farm three days. We were also staying in the compound until expelled. The compound was not good. We were sharing a room—ten in the same room. No bed, no mattress, no nothing; just a floor and a roof. We were drinking water from the canal, and using the same water for washing and bathing. No toilets, no electricity—just the bush. There are permanent workers—all South Africans, about 50 of them. They live better. Their houses are better. Most Zimbabweans are living in a single big room. South Africans have their own personal rooms and water taps, but no toilets or electricity. Food is given. We were given sadza [a thick porridge made from maize meal]. The relish—we don’t understand what it was. We got diarrhea, which led to our expulsion. We are hoping to get to Pretoria and find something better there in construction or gardening. Some of the guys at the farm claim to have been in Pretoria. They got deported. So they are only at [name of farm provided] on their way back to Pretoria.*

—Human Rights Watch interview with two undocumented Zimbabweans, Mopane train station, April 23, 2006

The black small-scale commercial farmer near Tshipise whom we interviewed acknowledged the poor housing and living conditions of his two South African workers: “I built the houses. It’s not good. Just *mkhukhu* [a Zulu word for an informal dwelling].”<sup>168</sup> There were no toilets and the only available water was from the river.

Human Rights Watch visited a black farmer who had a 15-hectare plot on a 100 hectare farm in the former Venda homeland. The accommodation for the nine Zimbabwean farm workers was atrocious; the accommodation for the farmer was only marginally better. Eight of the nine workers shared a small room; the oldest, a 52-year-old, had his own room. The cardboard walls were wet and crumbling, the roof was of corrugated sheeting, and the window openings were filled in with scrap paper. The workers were destitute: they had no blankets and kept themselves warm at night with a fire in the room. According to the farmer, the workers used his toilet when he was absent. The farmer continued: “There was one common one. It’s not in good condition. Even people passing by, they were using it. You can’t get in. It’s terrible.”<sup>169</sup> Of all the Zimbabweans to whom Human Rights Watch talked during the research for this report,

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<sup>168</sup> Human Rights Watch interview with a black small-scale commercial farmer, on Tshipise road, April 30, 2006.

<sup>169</sup> Human Rights Watch interview with a black commercial farmer, Nwanedi, April 30, 2006.

these were the only people who, when asked if their situation was better or worse than in Zimbabwe, uniformly responded, “Ah, this is worse.”<sup>170</sup>

The four Zimbabwean workers to whom we spoke on a Doreen farm—a seasonal worker who had worked on the farm since 2005 and three permanent workers who had worked on the farm for five, seven, and ten years, respectively—were all getting paid the minimum wage. They had no deductions taken from their wages, and they had substantial savings, yet they complained about their living conditions. There were no toilets, they used stream water, and they lived in mud and stone houses that they had built themselves.<sup>171</sup>

### ***Workers’ compensation***

Workers’ compensation is governed by the Compensation for Occupational Injuries and Diseases Act, 1993 (No. 130 of 1993, amended by No.61 of 1997). All employers are required to contribute to the workers’ compensation fund and even foreign employees who work under contract are covered. Zimbabwean migrants receive medical assistance under this law but are unable to obtain compensation for work-related injuries.

A Zimbabwean worker, who got injured on the job on a Weipe farm in 2004, described how he failed to receive compensation:

Someone drove on top of me with my tractor. I got a claim number. From 2004 to the present, nothing has happened. I didn’t try to find out because I’m just a Zimbabwean. I’ve never been to Pretoria. I just went to Pietersburg [Polokwane] hospital. The ambulance drove me there. Another guy, someone drove on top of him. He broke a leg. He was unable to continue to work. He left. One guy cut [off] a finger. He stayed here. They sent him a card from Pretoria. This is your claim, the owner told him. But to this day he’s not seen any money.<sup>172</sup>

Human Rights Watch spoke to this man’s employer, a farm owner, who explained that workers do not receive compensation because they are not allowed to open bank accounts into which compensation settlements are paid: “I had a case where we had a very big accident with a Zimbabwean. All his medical costs were paid. He got covered for the month he could not work. He was sent a check. He couldn’t cash it because he

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<sup>170</sup> Human Rights Watch interview with nine Zimbabwean farm workers, Nwanedi, April 30, 2006.

<sup>171</sup> Human Rights Watch interview with four documented Zimbabwean workers, Doreen Estate, April 30, 2006.

<sup>172</sup> Human Rights Watch interview with a Zimbabwean farm worker, Weipe, April 23, 2006.

didn't have a bank account. We cashed the check and gave him the money."<sup>173</sup> Another farmer attributed the problem with workers' compensation for Zimbabwean migrants to the requirement that workers produce a South African ID. "If you can't produce a South African identification document, there's a presumption of illegality."<sup>174</sup>

The problem of opening a bank account and the need to produce a South African ID, both cited by farmers as obstacles that prevent foreign workers from being able to receive compensation, are two interlinked issues, as previously discussed. To open an account, one must produce a South African identity document. The claim of a labor consultant to have arranged with the Bank of Athens for Zimbabwean migrants to be able to open accounts, if correct, raises questions about why Zimbabwean workers are not routinely allowed to open accounts.<sup>175</sup>

### ***Employer deductions for emergency travel documents (ETDs)***

Farmers who use lawyers or labor consultants to ensure their compliance with the corporate permit provisions in the Immigration Act deduct a share of their legal expenses from workers' wages. A lawyer whose business includes ensuring farmers' compliance with the corporate permit provisions justified the deduction in terms of section 8(1)(d) of the Sectoral Determination that permits the employer to deduct at most 10 percent of the worker's wage towards the repayment of any amount loaned or advanced to the farm worker by the employer.

The Immigration Act should protect workers from corporate permit holders making deductions from workers' wages to pay a fee for compliance with the corporate permit provisions. An amendment might be modeled on the Unemployment Insurance Contributions Act, 2002 (No.4 of 2002), section 7(3)(b) of which states that the employer may not seek or receive a fee from the employee for complying with the Act. Similarly, section 64(1) of the Compensation for Occupational Injuries and Diseases Act makes it an offense for any employer to deduct from the earnings of an employee any amount or receive any amount from the employee to compensate the employer directly or indirectly for any amount which the employer is liable to pay in terms of the Act.

A Zimbabwean worker on a Weipe farm told Human Rights Watch that the farm owner had deducted R102 (US\$14.45) from his wages for the ETD that Zimbabwean officials

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<sup>173</sup> Human Rights Watch interview with a white commercial farmer, Weipe, April 27, 2006.

<sup>174</sup> Human Rights Watch interview with a white commercial farmer, Weipe, April 24, 2006.

<sup>175</sup> Human Rights Watch interview with a white commercial farmer who is also a lawyer, labor broker, and labor consultant, Makhado, April 25, 2006.

issued to his boss.<sup>176</sup> The worker remarked: “In Tshipise, the workers are not paying R 102 for travel documents.” The lawyer who helps farmers to comply with the corporate permit provisions told Human Rights Watch: “The farmer deducts the ETD from the workers’ salary. I charge the farmers R50 to R100 (US\$7-14) per worker for a new ETD application. The precise amount will depend on the numbers of workers.”<sup>177</sup> The lawyer said that he had heard of a company in Johannesburg that charges R5,000 (US\$708) to get an ETD for a worker, and the employer deducts the costs from the worker’s salary. He expressed satisfaction with the service he was providing not only to farmers but also Zimbabwean migrants. “Those recruited don’t even have that Z\$100,000 [roughly US\$1.00] to pay for the ETD. You can also say we are financing the worker. We’re offering an inexpensive service.”

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<sup>176</sup> Human Rights Watch interview with a Zimbabwean farm worker, Weipe, April 23, 2006.

<sup>177</sup> Human Rights Watch interview with a white commercial farmer who is also a lawyer, labor consultant, and labor broker, Makhado, April 25, 2006.

## Conclusion

Documented and undocumented migrants from Zimbabwe are vulnerable to human rights abuses in South Africa and occupy an ambiguous space in the law with respect to certain rights guarantees. Their constitutional rights to personal freedom and security, conditions of detention which are consistent with human dignity, and fair labor practices are infringed upon by violations of immigration and employment laws and also deficiencies in these laws. Their inability to access adequate housing presents challenging issues of unsettled law, which will require further adjudication.

In the public sector, the police and immigration officials violate the lawful procedures for the arrest, detention, and deportation of foreign migrants in the Immigration Act. In the private sector, employers violate the prescribed basic conditions of employment for farm workers, including by not paying the minimum wage, making unlawful deductions from workers' wages, and calculating workers' wages based on productivity rather than the number of hours worked. Employers in the cities pay discriminatory wages to undocumented foreign migrants who do the same work as South African citizens. South African workers and private security officials discriminate and use violence against foreign workers, documented and undocumented. With respect to the right to social security, foreign migrants suffer *de facto* exclusion from workers' compensation. Existing legislation discourages farmers from investing in farm workers' housing and the government has no housing policy for farm workers, whether South African or foreign.

To address the human rights abuses of Zimbabwean foreign migrants, Human Rights Watch recommends that the government of South Africa enforce compliance with its immigration and employment laws, and amend the laws where necessary. Measures such as creating a hotline for foreign migrants to report human rights abuses by employers may complement the introduction of incentives for nongovernmental organizations to assist in monitoring and reporting on labor law violations by employers. Legal impediments to foreign migrants' receiving workers' compensation should be removed by legislative amendments. The government should acknowledge the legal disincentives for employers to provide housing for farm workers—both foreign migrants and nationals—and should devise a housing policy that will enable it to meet its constitutional obligations to progressively realize the provision of adequate housing for everyone within the understanding of the Constitutional Court. Finally, the government should address the specific situation of undocumented Zimbabwean migrants in South Africa through comprehensive rather than ad hoc measures that address their lack of status.

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