



SOUTH AFRICA

“Keep Your Head Down”

Unprotected Migrants in South Africa

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“Keep Your Head Down” Unprotected Migrants in South Africa

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Glossary

ACHPR	African (Banjul) Charter on Human and Peoples' Rights
BCE	Basic Conditions of Employment
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
DHA	Department of Home Affairs
DoL	Department of Labour
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
SAHRC	South African Human Rights Commission
TAU	Transvaal Agricultural Union
R	South African rand

Map of Limpopo and Mpumalanga Provinces



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Map of Limpopo Province



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Map of Mpumalanga Province



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Summary

South Africa's vibrant and diverse economy is a powerful draw for Africans from other countries migrating in search of work. But the chance of earning a wage can come with a price: If undocumented, foreign migrants are liable to be arrested, detained, and deported in circumstances and under conditions that flout South Africa's own laws. And as highlighted by the situation in Limpopo and Mpumalanga provinces, both documented and undocumented foreign farm workers may have their rights under South Africa's basic employment law protections violated by employers in ways ranging from wage exploitation to uncompensated workplace injury, and from appalling housing conditions to workplace violence.

Human Rights Watch has conducted research on the situation and experiences of migrant workers around the globe. Its research demonstrates that migrant workers, whether documented or undocumented, are particularly vulnerable to human rights abuses. Such abuses can be the result of many different factors including inadequate legal protections, illegal actions of unscrupulous employers or state officials, and lack of state capacity or political will to enforce legal protections and to hold abusive employers and officials to account. The focus of this report is principally the situation of Zimbabweans and Mozambicans in South Africa's Limpopo and Mpumalanga provinces.

Human Rights Watch believes that in South Africa migrants are regularly subject to human rights violations when they are deported, and that South Africa's Immigration Act 2002 is routinely violated. Human Rights Watch researchers spoke with several witnesses who reported that when apprehending suspected undocumented foreigners, police, immigration, and military personnel had assaulted them and extorted money. In one case, a border military patrol failed to prevent the rape of an undocumented migrant whom they had arrested. Unaccompanied child migrants detained by South African officials are held in police cells with adults, contrary to both domestic

and international standards relating to the detention of minors. Deportees allege that police on deportation trains sometimes assault and extort money from them, and have even thrown deportees—who believe they have bought their freedom—off moving trains to their death. Immigration policy provides that foreign migrants facing deportation should be allowed to collect their unpaid wages, savings, and personal possessions, but in practice this seldom occurs.

On the farms of Limpopo and Mpumalanga provinces, many farmers who produce on a large-scale for export or for the domestic market use only documented workers. This leaves farm owners whose market contributions and labor forces are much smaller as the principal employers of undocumented workers. But documented or not, workers experience abuse and exploitation: While many large-scale farmers do adhere to the basic conditions of employment law, other farmers openly disregard the minimum wage, do not pay overtime, sick leave, or annual leave, and make unlawful deductions from workers' wages. Existing legislation also creates disincentives for employers to provide housing for workers. Farm workers are still too often the victims of violence by employers and other farm staff, which the workers may be unwilling to report for fear of losing their jobs.

Many employers do not claim state compensation to be passed on to farm workers who are injured at work, and when they do, the practice whereby payments can only be made into a bank account creates a barrier for foreign workers (who normally are unable to have accounts) to receive compensation settlements.

Although the aspect of the report covering abuse in employment focuses on the human rights situation of foreign migrant workers on farms in Limpopo and Mpumalanga provinces, it also provides one of the first assessments of employment conditions on farms since the introduction of a minimum wage in 2003. Its findings also suggest that South African farm workers suffer a similar lack of legal protection as foreign farm workers regarding basic employment conditions.

Failures by the government to ensure respect for international human rights law and South African immigration and employment laws, as well as certain deficiencies in those South African laws, result in the infringement of rights that migrants, documented and undocumented, should enjoy under international law and that are also protected by the Constitution of South Africa. These rights include, among others, the right to personal freedom, liberty and security, to appropriate conditions of detention, and to fair conditions or practices of work. The South African government should ensure that state officials abide by the procedures for arrest, detention, and deportation in its immigration law. The government should also create a system that permits migrants to report abuses of their human rights; require labor inspectors to produce public reports documenting the number of inspections they conduct, complaints they investigate, and compliance orders they issue to employers for violations of employment law; and investigate and punish state officials and employers who violate the law. The government should remove obstacles to enable migrant workers to access the workers' compensation to which they are legally entitled. Human Rights Watch calls on the government of South Africa to offset practical disincentives for farmers to provide housing by developing a housing policy for farm workers.

Human Rights Watch also calls on the government of South Africa to amend its immigration law to include enforceable rights for undocumented migrants to obtain their wages and possessions in the event that they are deported. 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 domestic law.

The report is based on research on Zimbabweans in Limpopo province in late April and early May 2006, and in Beitbridge, Zimbabwe, in October 2006, and research on Mozambicans in Mpumalanga and Limpopo provinces in September and October 2006. Historically, Zimbabweans have been the main migrant laborers on farms in the far north of Limpopo province and Mozambicans in southern Limpopo and the border areas of Mpumalanga. Our

objective was to research the human rights situation of foreign migrants and ascertain the extent to which state officials were respecting the protections afforded to them in the immigration law and employers were complying with employment laws for farm workers, and in particular for foreign farm workers.

In Limpopo, Human Rights Watch conducted 43 interviews with farmers and farm workers north of the Soutpansberg around Weipe and Tshipise, and south of the Soutpansberg around Levubu and Vivo; 31 interviews with immigration, military, and police officials, and Zimbabweans awaiting deportation at police stations in Makhado and Musina (the busiest detention center for Zimbabweans in Limpopo); 13 interviews with undocumented Zimbabweans, usually walking on the road en route to Johannesburg; and lawyers (invariably farmers themselves) who advise other farmers on how to comply with the immigration and employment laws. Two local nongovernmental organizations (NGOs), Nkuzi Development Association and Musina Legal Advice Office, provided research assistance.

Human Rights Watch and Nkuzi Development Association also spent several days at the International Organization for Migration (IOM) reception center in Beitbridge in October 2006. The center provides humanitarian assistance for Zimbabweans deported from South Africa. At the center we talked to IOM staff members to learn more about the operation of the center and to 27 deportees (some of whom had been working not in Limpopo and Mpumalanga but in other locations in South Africa, and who are nevertheless featured in this report) to learn about their treatment during arrest, detention, and deportation, and their employment conditions if they had had jobs.

In Mpumalanga Human Rights Watch worked with the Forced Migration Studies Programme of the University of the Witwatersrand and Nkuzi Development Association, and received assistance from TRAC-Mpumalanga and Masisukumeni Women's Crisis Center. We interviewed in total over 100 people in Mpumalanga. Our interviewees included nine foreign nationals in detention at Komatipoort (the busiest detention center for Mozambicans in Mpumalanga); the only foreign national in detention at Nelspruit; and seven

police and immigration officials at Nelspruit, Komatipoort, and Lebombo border post, several of whom were interviewed on multiple occasions. In Nelspruit we also interviewed the Mozambican Department of Labor's sub-delegate, a Food and Agricultural Workers' Union official, a labor inspector in the Department of Labour, and a staff member at the Mozambican recruitment agency Agencia Algos. We concentrated our interviews with 17 farmers or managers and 75 farm workers around Hoedspruit in southern Limpopo, and Hazyview, Kiepersol, and Komatipoort in eastern Mpumalanga.

The names of farmers, farms, and foreign migrants, and on occasion of state officials, are not used, chiefly in the interests of protecting the security of individuals concerned. Many individuals were the victims or alleged victims of multiple human rights abuses by state officials or employers. By withholding names, the report does not, however, reveal the extent to which the same individuals are often the victims or alleged victims of multiple abuses.

A variety of terms are used in legal and other documents to refer to foreign migrants who lack legal status. We use the terminology in South Africa's immigration law, "illegal foreigner," to refer to foreign migrants who enter South Africa without the documents required by the immigration law. Other foreign migrants, and in particular many Mozambicans, hold passports or emergency travel documents that give them the right to reside legally in South Africa. However, the right to be in the country is distinct from the right to work in the country. Mozambicans who are legally in South Africa in terms of the immigration law may be working illegally. Where relevant and known, the work and immigration status of foreign migrants is noted. Otherwise, we use the general term "undocumented migrants" to refer to foreign migrants who lack the legal permission to work or the legal permission to be in the country.

Recommendations

To the Government of South Africa

- The Department of Home Affairs, the South African Police Service, and the Department of Defense should ensure that the correct procedures for arrest, detention, and deportation as set out in the immigration law are consistently followed by state officials. Measures should include improved training of officials in the law and legal procedures; the introduction of a system for undocumented migrants to report on officials who engage in unlawful practices; more rigorous investigation; and prosecution and disciplining of those officials who are found to have committed violations of the laws. In particular:
 - The Department of Home Affairs, the South African Police Service, and the Department of Defense should investigate allegations that officials participating in arrests and deportations have been involved in assaults on foreign nationals, and all incidents in which deportees have allegedly been forced to jump from moving trains, and initiate prosecutions where possible.
 - The Department of Home Affairs and the South African Police Service should ensure that the practice of detaining minors with adults in violation of constitutional and international legal provisions ceases.
 - The Department of Home Affairs and the South African Police Service should improve their internal monitoring of abuses by officials, and include in their annual reports information on the results of their internal monitoring procedures, including how many officials they discipline for abuses relating to foreign migrants, the nature of the abuses, and the kind of disciplinary measures imposed.
- The Department of Home Affairs should formalize and publicize its immigration policy to permit undocumented workers access to their

unpaid wages, savings, and personal belongings in the event that they are deported.

- The Department of Home Affairs should amend the immigration law to make it an offense for state officials not to give receipts when they take documents and other items from suspected “illegal foreigners.”
- The Department of Home Affairs should develop policy regarding the use of independent oversight mechanisms in immigration detention facilities such as the Judicial Inspectorate of Prisons.
- The Department of Home Affairs should ensure that the detention and deportation procedures at the proposed new immigration detention facility near Musina in Limpopo province developed by the South African Police Service comply with the provisions of Section 34 of the Immigration Act.
- The Minister of Home Affairs should develop the terms and conditions for granting permanent residence status as contemplated by section 31(2)(b) of the Immigration Act for migrants or categories of migrants, including asylum seekers and refugees, for whom special circumstances exist, as in the case of former Mozambican refugees who have failed to obtain permanent residence status during the previous regularization program.
- The Department of Social Development should collaborate with the Department of Home Affairs and the South African Police Service in ensuring that the practice of detaining minors with adults ceases.
- The Department of Labour should ensure that all workers in an employment relationship, whether documented or undocumented, benefit from the provisions relating to conditions of employment as set out in South African employment law, and that these provisions are consistently enforced.
- The Department of Labour should consider introducing a cheaper corporate permit for farmers with small labor forces to offset the current high cost of corporate permits for farmers who only hire small numbers of workers and to encourage the documentation of small workforces.

- The Department of Labour should review, in consultation with farmers, the housing provisions in the Sectoral Determination for the Farm Worker Sector to ensure that this legal provision is not creating a disincentive for farmers to provide housing for farm workers, and if it is, to develop and put in place a remedy.
- The Department of Labour should fill all vacancies for labor inspectors and require labor inspectors to produce public reports with statistics on the numbers of farms they visited, employers and employees whom they interviewed about conditions of employment, violations identified, and employers' compliance and follow-up actions in cases of employers' non-compliance.
- The Department of Labour should create incentives for nongovernmental organizations to assist with independent monitoring of labor laws.
- The Department of Labour should develop a mass public information campaign to educate farm workers and employers about farm workers' rights and the penalties for committing abuse. The information should be disseminated in the languages spoken by farm workers and farmers.
- The Department of Labour should ensure that the right of workers (whether documented or undocumented) injured on duty to receive workers' compensation is enforced, including by imposing penalties on employers who fail to report work-related accidents or violate other aspects of the workers' compensation law.
- The Department of Labour should create and publicize accessible complaints mechanisms for farm workers to report problems such as violence, unpaid wages, or poor working conditions, including hotlines, support for nongovernmental organizations that assist farm workers, and helpdesks at locations frequented by farm workers.
- The government of South Africa should ratify the International Covenant on Economic, Social and Cultural Rights signed in 1994.
- The government of South African should 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.

To the Parliament of South Africa

- Members of Parliament and the Parliamentary Portfolio Committee on Labour should pressure the executive to enforce legal protections for foreign migrants.
- Members of Parliament and the Parliamentary Portfolio Committees should ensure that they adequately oversee the functioning of the line ministries that have responsibilities for foreign migrants and farm workers, both foreign and South African. The Portfolio Committee on Labour should ensure that labor inspectors are regularly inspecting farms and issuing the appropriate documents and citations. The Safety and Security Portfolio Committee and the Home Affairs Portfolio Committee should ensure that arrest, detention, and deportation processes comply with the law.
- Members of Parliament and the Parliamentary Portfolio Committee on Labour should urge the executive to introduce an amendment to the immigration law to enable foreign workers to collect their unpaid wages, possessions, and savings prior to deportation, and propose legislation to encourage the provision of housing for farm workers.
- Members of Parliament should urge the executive to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and to ratify the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides for the establishment of independent monitoring bodies with a mandate to visit all places of detention.

To Trade Unions

- Trade unions representing farm workers should establish a presence or increase their visibility in rural areas, expand their efforts to educate all farm workers—including foreign migrants—on their rights, and promote all farm workers’ interests.
- The Congress of South African Trade Unions should lobby the government to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and to ratify the International Covenant on Economic, Social and Cultural Rights.

To Civil Society

- Civil society should extend its legal services and monitoring to rural areas and work for the protection of all foreign migrants, including farm workers, regardless of nationality.

To Farmer Associations

- Farmer associations should monitor their members to ensure compliance with labor and immigration law.

To Independent Bodies

- The Human Rights Commission and the Commission for Gender Equality should regularly monitor and report on human rights abuses in the farm sector.
- The Legal Aid Board should play a more active role in providing legal services to all farm workers, including foreign migrants.

To the Governments of Zimbabwe and Mozambique

- The embassies/high commissions and foreign ministries of Zimbabwe and Mozambique should prioritize increased protections for migrant workers in South Africa through bilateral diplomacy and increased cooperation with other labor-sending countries. They should conduct

information campaigns on workers' rights; create services for workers reporting abuse, including access to legal aid; and track and make publicly available data on the number of migrant workers and reported cases of abuse.

To International Donors

- International donors should provide funding for services for deportees or migrants who are abused in South Africa, support civil society groups in South Africa that promote, monitor, and seek to protect the rights of foreign migrants, and support governmental or civil society public information campaigns on the rights of foreign migrants in South Africa.

To International Organizations

- The International Organization for Migration should urge the governments of Zimbabwe and South Africa to facilitate legal migration by removing current obstacles to Zimbabweans obtaining passports and visas to visit South Africa.
- The UNHCR should collaborate with the International Organization for Migration in Beitbridge to ensure that those who have sought asylum in South Africa are provided protection and the opportunity to return to South Africa.

Background

Recent labor migration to South Africa

Since 1994 the number of documented and undocumented foreign migrants in South Africa has greatly increased. Most migrants come from neighboring countries that are also members of the regional organization, the Southern African Development Community (SADC). Long-term structural and more recent factors have contributed to the growing influx of foreign migrants. Long-term factors include South Africa's long and porous borders with its neighbors, which are difficult to control;¹ the "enormous and elastic" potential supply of labor from the SADC member states;² and South Africa's economic dominance in the region, which makes it an attractive destination for migrants. Newer factors include South Africa's democratic dispensation since 1994, which offers migrants more rights than they can claim in most other countries of the region, and changing conditions in neighboring countries, notably Mozambique and Zimbabwe. While the end of the Mozambican civil war in 1992 halted the stream of refugees into South Africa, it did not reduce economic migration from that country. The political and economic situation in Zimbabwe, which has continued to deteriorate since 2000, has fuelled Zimbabwean migration.³ Today, Zimbabweans are arguably

¹ Jonathan Crush, *Covert Operations: Clandestine Migration, Temporary Work and Immigration Policy in South Africa* (Cape Town: Institute for Democracy in South Africa and Queen's University, Canada, 1997), Southern African Migration Project (SAMP) Migration Policy Series No.1, <http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat1.pdf> (accessed February 5, 2007), p. 20.

² 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, July 6-8, 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.

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

the largest group of foreign Africans in South Africa,⁴ having recently overtaken Mozambicans, who historically held that position.⁵

South Africa's policy toward legal and undocumented migration has been about enforcement, control, and exclusion. Immigration policy today, as in the past, promotes the use of temporary foreign workers who are generally not allowed to be accompanied by their families. As in the 1990s, South Africa still seeks to control undocumented migrants through deportations rather than pressure on employers to comply with immigration law.⁶ Its aggressive deportation policy, despite making substantial demands on financial and human resources, has not been able to stem the increase in undocumented migrants. The media frequently uses an estimate of 5–8 million foreigners without immigration documents, while migration scholars generally agree that the lower end of this range, 5 million, is a reasonable estimate.⁷

The number of deportations from South Africa has grown significantly in recent years, as Department of Home Affairs (DHA) statistics indicate: 44,225 (1988),⁸ 96,600(1993), 151,653 (2002), 164,294 (2003), 167,137 (2004), and

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

⁵ Department of Home Affairs, Republic of South Africa, Annual Reports, 1992-2000 (January to November), 2001-2, 2002-3, 2003-4 (April-March); Jonathan Crush and David McDonald, "Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid," *Africa Today*, vol. 48, no.3, 2002, pp. 1-13.

⁶ "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 (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.

⁷ Jonathan Crush, Vincent Williams, and Sally Peberdy, "Migration in Southern Africa," paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005, pp. 12-13, see also p. 25.

⁸ 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, published by Forced Migration Studies Programme, University of the Witwatersrand, as Forced Migration Working Paper Series No. 13, January 2005, <http://migration.wits.ac.za/Xenophobia.pdf> (accessed February 5, 2007), p. 32.

209,988 (2005).⁹ Groups monitoring migration have noted that deported individuals often return almost immediately to South Africa, underscoring the limitations of the deportation policy.¹⁰

From at least 1990, Mozambicans and Zimbabweans have comprised at least 80 percent of total annual deportations.¹¹ Between 1990 and 2004, more Mozambicans than any other foreign national group were deported, and Zimbabweans were in second place. Since 2005, Zimbabweans and Mozambicans have traded places in the deportation chart, reflecting changes in their relative proportion of deportations that began around 2000. Zimbabwean migrant deportations from South Africa have increased rapidly—approximately 46,000 in 2000,¹² 74,765 in 2004,¹³ more than 97,000 in 2005, and almost 80,000 between May 31 and December 31, 2006.¹⁴ The increasing number of Zimbabwean deportees has put particular pressure on Musina police station in Limpopo province, which is close to the border with Zimbabwe and is the major point of deportation for Zimbabweans. To accommodate the large numbers of detainees being deported to Zimbabwe from Musina, the South African Police Service is in the process of building an immigration detention facility in Musina.

Rather than helping to contain the numbers of undocumented migrants, a restrictive immigration policy has had the effect of encouraging “a massive

⁹ Department of Home Affairs, Republic of South Africa, Annual Reports, 1993 (January–November), 2000 (January to November), 2002–3 (April to March), 2003–4 (April to March), 2004–5 (April to March), 2005–6 (April to March), <http://home-affairs.pwv.gov.za/documents.asp> (accessed February 14, 2007).

¹⁰ SAMP, “Making Up the Numbers: Measuring ‘Illegal Immigration’ to South Africa,” Migration Policy Brief No. 3, 2001, <http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief3.pdf> (accessed February 5, 2007), p. 12.

¹¹ Department of Home Affairs, Republic of South Africa, Annual Reports.

¹² Department of Home Affairs, Republic of South Africa, Annual Report, 2000–2001.

¹³ Tara Polzer, “Crossing Borders: Asylum Seekers at the Zimbabwean & Mozambican Frontiers,” in Loren Landau, Tara Polzer, Gayatri Singh, et al., “Crossing Borders, Accessing Rights, and Detention: Asylum and Refugee Protection in South Africa,” Forced Migration Studies Programme, University of Witwatersrand, Lawyers for Human Rights, and University of Witwatersrand Law Clinic, July 20, 2005, p. 38.

¹⁴ “SA deports 80 000 Zimbabweans,” *The Daily Mirror* (Zimbabwe), January 10, 2007, http://www.zimbabwesituation.com/jan11_2007.html#Z24 (accessed February 5, 2007); Human Rights Watch email correspondence with Nick van der Vyver, program officer, IOM reception center, Beitbridge, January 23, 2007. No official statistics for the full year 2006 are available at this writing.

‘trade’ in forged documentation” and “police corruption as migrants buy the right to stay.”¹⁵ The process of seeking asylum and of refugee determination has also become enmeshed in corruption in large part as a result of the South African government’s efforts to severely limit the number of asylum seekers and refugees.¹⁶

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 particularly by officials in the DHA and the South African Police Service (SAPS).¹⁷ 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 status.¹⁸ 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.¹⁹

Foreign migrant farm workers and commercial farmers in South Africa

Agriculture in South Africa accounts for less than 5 percent of gross domestic product, almost 11 percent of formal sector employment, and nearly 10 percent of South Africa’s total exports.²⁰ Continuing a long-term trend, the

¹⁵ Crush, Williams, and Peberdy, “Migration in Southern Africa,” p. 13, also p. 25.

¹⁶ “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; National Consortium for Refugee Affairs (NCRA) in collaboration with Forced Migration Studies Programme, University of the Witwatersrand, “Refugee Protection in South Africa 2006,” June 2006.

¹⁷ “The Documented Experiences of Refugees, Deportees and Asylum Seekers in South Africa,” p. 6.

¹⁸ *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 Ramjathan-Keogh and Ramokhele, “Detention: The Lindela Repatriation Centre,” in Landau et al., “Crossing Borders, Accessing Rights, and Detention,” 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.

¹⁹ The statistics are estimates provided by the Department of Home Affairs to Forced Migration Studies Programme, University of the Witwatersrand.

²⁰ Statistics South Africa, “Latest Key Indicators,” <http://www.statssa.gov.za/keyindicators/keyindicators.asp> (accessed November 30, 2006); Department of Agriculture, Republic of South Africa, “The Strategic Plan for South

number of agricultural workers decreased by 152,445 (13.9 percent) from just over 1 million in 1993 to 940,820 in 2002.²¹ Nearly half of the employees in 2002 were casual and seasonal workers, and their number had increased by 3.2 percent since 1993.²² Despite different methods used to count agricultural employees in the 2002 census and the Statistics South Africa annual labor surveys, the latter also record an ongoing and significant decline in agricultural employment between 2001 and 2005.²³

Despite the decline in agricultural employment, there appears to have been an increase in the employment of foreign agricultural workers. The 1996 Farmworkers Research and Resource Project (FRRP) survey of farm workers, the first attempt to document conditions on South African farms, suggested that the employment of foreign migrants in agriculture had increased since 1990.²⁴ This finding is significant because the survey did not focus on border areas or on major migration routes that cross commercial farming districts, where foreign migrants are known to concentrate.²⁵ A 1998 study of farm workers in precisely such areas seemed to corroborate the view that foreigners are providing a larger share of farm labor, noting that “it also seems that border farmers are drawing, perhaps like never before, on cross-border migrants to meet their temporary and seasonal labour needs.”²⁶

African Agriculture,” http://www.nda.agric.za/docs/sectorplan/sectorplanE.htm#current_reality (accessed November 30, 2006); Department of Agriculture, “Agriculture and land affairs,” in *South Africa Yearbook 2005/06* (Republic of South Africa: 2006), <http://www.gcis.gov.za/docs/publications/yearbook/agriculture.pdf> (accessed January 31, 2007), p. 75 (stating that primary commercial agriculture contributes about 3.3 percent to GDP, and accounts for around 7.2 percent of formal employment and an average 8 percent (2000-2004) of total exports).

²¹ Statistics South Africa, “Report -11-02-01- Census of Commercial Agriculture: Financial and production statistics,” revised April 21, 2005, <http://www.statssa.gov.za/publications/statsdownload.asp?PPN=Report-11-02-01&SCH=3670> (accessed November 30, 2006), p. 2.

²² *Ibid.*

²³ Statistics South Africa, “Labour Force Survey: September 2005,” January 24, 2006, <http://www.statssa.gov.za/Publications/Po210/Po210September2005.pdf> (accessed January 19, 2007), Table D, p. vi. The percentage drop in agricultural employment between 2001 and 2005 is over 20 percent.

²⁴ Jonathan Crush, “Making Hay with Foreign Farmworkers,” in Jonathan Crush, ed., *Borderline Farming: Foreign Migrants in South African Commercial Agriculture* (Cape Town: Idasa and Queen’s University, Canada, 2000), SAMP Migration Policy Series No. 16, <http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat16.pdf> (accessed July 9, 2006), pp. 5-6.

²⁵ *Ibid.*, pp. 3, 6.

²⁶ *Ibid.*, p. 6.

Border farmers in the Free State draw heavily on labor from Lesotho, those in Mpumalanga and in the south and southeast of Limpopo province on Mozambicans, and those in the northern part of Limpopo province on Zimbabweans.

Often foreign farm workers' de jure status as temporary residents or undocumented residents is at variance with a de facto status as permanent residents. Many foreign farm workers have worked on farms for extended periods of time. The 1996 FRRP survey 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."²⁷ It is also the case that some farmers will use the label "temporary" even though the farm workers have actually been working full-time and for long periods.

Farm workers, including foreign migrants, have had a right to organize since 1993.²⁸ Whereas nearly 30 percent of the labor force was unionized in 2006, less than 9 percent of employees in the agricultural sector were trade union members. Only employees in private households had lower rates of organization (under 2 percent).²⁹ As in other countries, the agricultural sector is difficult to organize because of low pay and problems of access and communication with workers who are geographically isolated. Employers are hostile to union organizers who must obtain the employers' permission to visit the farms as they are private property, and workers who try to form or join

²⁷ Ibid., p. 5; see also p. 2.

²⁸ Human Rights Watch, *Unequal Protection: The State Response to Violent Crime on South African Farms*, August 2001, <http://www.hrw.org/reports/2001/safrica2/>, p. 42.

²⁹ Statistics South Africa, "March 2006: Labour Force Survey," September 26, 2006, <http://www.statssa.gov.za/publications/Po210/Po210March2006.pdf> (accessed January 19, 2007), p. 38. The construction sector, which had around 10 percent of its employees belonging to unions, was only slightly more organized than the agricultural sector.

trade unions may face intimidation, violence, and dismissal.³⁰ In South Africa, farm workers' unions also suffer from lack of organizational and financial capacity.³¹

According to a Statistics South Africa 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."³² Human Rights Watch research found that working conditions for many in the sector have improved since 2000, but abuses remain commonplace. Undocumented foreign farm workers remain, as in the past, especially vulnerable to exploitation, despite significant improvements in the legal protections provided for them.³³

Commercial farmers face dramatic challenges arising from changes in their business and legal environment. Farmers have had to adapt to the removal of subsidies, protective tariffs, cheap finance, and a labor force whose productivity is compromised by the prevalence of HIV/AIDS. Additionally, farmers face land claims under land redistribution laws and must contend with laws, such as the Extension of Security of Tenure Act, protecting farm residents from arbitrary eviction. A 2001 Human Rights Watch report captures the magnitude of legal and non-legal changes affecting commercial farmers: "Among employment sectors, the 1994 change of government has had perhaps the most profound effect on the working environment of the commercial farmer in South Africa."³⁴ As discussed later, farmers have also had to adapt to legal changes affecting their relationships with their employees and their wage bill.

³⁰ International Confederation of Free Trade Unions, "South Africa: Annual Survey of Violations of Trade Union Rights," June 2006, <http://www.icftu.org/displaydocument.asp?Index=991223889&Language=EN> (accessed January 19, 2007).

³¹ Human Rights Watch, *Unequal Protection*, pp. 45-46.

³² *Ibid.*, p. 55, citing *Employment Trends in Agriculture in South Africa* (Pretoria: Stats SA National Department of Agriculture, 2000), p. 93.

³³ *Ibid.*, pp. 61-62.

³⁴ Human Rights Watch, *Unequal Protection*, p. 46.

Mozambican and Zimbabwean farm workers in Limpopo and Mpumalanga provinces

Nearly 90 percent of Limpopo's 5.6 million people live in rural areas, making it the most rural province in the country.³⁵ About 61 percent of Mpumalanga's 3.2 million people live in rural areas.³⁶ Limpopo is the poorest province of South Africa, with the highest official unemployment rate (32.4 percent) and the worst scores on other poverty indicators.³⁷ More than 33 percent of Limpopo's population aged 20 years and older has not received any form of schooling.³⁸ Mpumalanga compares favorably with Limpopo in these respects: Mpumalanga's official unemployment rate is 27.4 percent and about the same percentage of its population 20 years or older has not had any form of education.³⁹ Limpopo contributed 6.5 percent and Mpumalanga 7.5 percent to the country's gross domestic product in 2003.⁴⁰ Limpopo's provincial capital is Polokwane (Pietersburg) and Mpumalanga's is Nelspruit.

Over two-thirds of the land in Limpopo and Mpumalanga 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 in Limpopo and KaNgwane in Mpumalanga—that occupied most of the remaining one-third of the land.⁴¹ Though the pace of land reform in both provinces has accelerated,

³⁵ South African Government Information, "The land and its people," <http://www.info.gov.za/aboutsa/landpeople.htm> (accessed December 1, 2006); 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 (accessed July 9, 2006), p. 99; 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 (accessed July 9, 2006), p. 16.

³⁶ SAHRC, "Final Report on the Inquiry into Human Rights Violations in Farming Communities," p. 149; South African Government Information, "The land and its people."

³⁷ SAHRC, "Final Report on the Inquiry into Human Rights Violations in Farming Communities," p. 99 and p. 214, footnote 1, citing 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. For the unemployment rate, see South African Government Information, "The land and its people."

³⁸ South African Government Information, "The land and its people."

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Wegerif, *A Critical Appraisal of South Africa's Market-based Land Reform Policy*, pp. 15-16.

and restitution claims have succeeded or are being adjudicated, the apartheid era's racially discriminatory patterns of land ownership have not substantially altered.⁴² Most large commercial farms are still owned by whites; black farmers engage mainly in subsistence farming on communal land. Black farmers who engage in commercial farming in the former homelands on land that cannot be privately owned are sometimes referred to as Trust land farmers (they only occupy their land, which is held in trust by the chiefs).

Commercial agricultural production and employment

In Limpopo, 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), Tshipise, and Waterpoort. At the foot of the Soutpansberg, subtropical fruits and a variety of nuts are grown in the Makhado area, including Levubu, and also in Tzaneen. 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.⁴³ The province produces about 75 percent of the country's mangoes, 65 percent of its papaya, 36 percent of its tea, 25 percent of its citrus, bananas, and litchis, 60 percent of its avocados, and 60 percent of its tomatoes.⁴⁴

Mpumalanga's highveld region is dominated by rain-fed grain production. The lowveld region's agriculture focuses on citrus, subtropical fruits, vegetables, and macadamia nuts. Because these crops require irrigation, the farms are close to the major rivers around the lowveld districts of Nelspruit, Barberton, and White River. Transvaal Suiker Beperk (TSB), or Transvaal Sugar Limited, built sugar mills at Malelane in the 1970s and near Komatipoor in the 1980s. Adjacent commercial farms now grow a combination of sugar and one or more

⁴² 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.

⁴³ David Lincoln with Claude Maririke, "Southward Migrants in the Far North: Zimbabwean Farmworkers in Northern Province," in Crush, ed., *Borderline Farming*, pp. 40-42.

⁴⁴ South African Government Information, "The land and its people."

varieties of citrus, subtropical fruit (avocados, litchis, mangoes, bananas), and vegetables.⁴⁵ Nelspruit is the second largest citrus-producing area in South Africa and accounts for one-third of the country's exports of oranges. There is extensive commercial forestry along the escarpment around Sabie and Graskop, which provide a large part of the country's forestry products.⁴⁶

In 2002 (the date of the most recent commercial agriculture census) Limpopo's 2,915 commercial farm units represented 6.36 percent of commercial farm units in the country, and employed 101,249 regular, casual, and seasonal workers. Mpumalanga's 5,104 commercial farm units in Mpumalanga represented 11.14 percent of commercial farm units nationally, and employed 108,083 workers.⁴⁷ In Limpopo, some 45 percent of full-time workers were women, compared to 62 percent of casual and seasonal workers. The percentage of female casual and seasonal workers was slightly greater (64 percent) in Mpumalanga than in Limpopo, while the percentage of female full-time farm workers (under 30 percent) was lower in Mpumalanga.⁴⁸ These data indicate the importance of female farm workers, particularly as casual and seasonal workers.

Recruitment and legal status of Zimbabwean and Mozambican farm workers

Foreign farm workers are concentrated on the commercial farms in the border areas of both provinces. Around the late 1960s, farms along the Limpopo border began to rely increasingly on workers who came from the immediate border area. In 1999, before a big influx of Zimbabweans, there were an estimated 15,000 Zimbabwean farm workers, documented and undocumented, north of the Soutpansberg.⁴⁹ The deterioration of the political

⁴⁵ Charles Mather and Freddie Mathebula, "The Farmer Prefers Us: Mozambican Farmworkers in the Mpumalanga Lowveld," in Crush, ed., *Borderline Farming*, p. 14.

⁴⁶ South African Government Information, "The land and its people."

⁴⁷ Statistics South Africa, "Report -11-02-01- Census of Commercial Agriculture," p. 2.

⁴⁸ These percentages are calculated from data in Statistics South Africa, "Report -11-02-01- Census of Commercial Agriculture," p. 18.

⁴⁹ "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).

and economic situation in Zimbabwe from 2000 onwards led to Zimbabweans from all over Zimbabwe seeking farm employment in South Africa. These migrant farm workers return regularly to Zimbabwe. For some, farm work is merely a stepping stone en route to a job in Johannesburg.⁵⁰

Farmers north and south of the Soutpansberg who rely on Zimbabwean workers praise their work habits, their ability to speak English, and their level of education (the more recently arrived Zimbabwean farm workers are more likely than in the past to include high school leavers).⁵¹ Farmers south of the Soutpansberg who depend on South African labor are hostile to Zimbabwean migrants, holding them responsible for the increase in crime in the province.⁵² Some farmers talk openly of how they strive to keep their areas “clean of Zimbabweans.”⁵³

Lowveld farmers in today’s Mpumalanga province have recruited Mozambican farm labor since at least the 1920s.⁵⁴ In the mid-1980s the Mozambican civil war led to a large influx of Mozambican refugees into the Transvaal, part of which is now Limpopo and Mpumalanga. Approximately 240,000 settled in the homelands of Gazankulu, KaNgwane, and Kwazulu, and most remained

⁵⁰ See, for example, Human Rights Watch, *Unprotected Migrants: Zimbabweans in South Africa’s Limpopo Province*, vol. 18, no. 6(A), July 2006, <http://hrw.org/reports/2006/southafrica0806/southafrica0806web.pdf>, p. 13; Human Rights Watch interview with white farmer and Transvaal Agricultural Union (TAU) safety and security chair of the northern region, Makhado, April 25, 2006, who told us that Zimbabwean farm workers north of the Soutpansberg “become like a satellite. They work for a while then move south. Today’s darling is tomorrow’s devil. They want to go to a better area.” Jonathan Crush, in “Making Hay With Foreign Farmworkers” (p. 6), notes that “[i]n the case of Northern Province [Limpopo] and Mpumalanga, the farms also straddle major migration and transportation routes to the south and west. As a result, many migrants simply use the farms as a “refueling station” before moving on to their primary urban destination. The fact that farmers in these areas experience much greater rates of labour turnover is therefore not surprising.”

⁵¹ For example, Human Rights Watch interview with white farmer and TAU safety and security chair of the northern region, Makhado, April 25, 2006; and Human Rights Watch interview with white farmer, Weipe, April 26, 2006, who said, “I like to work with Zimbabweans. They are much more literate than South Africans. I have people working for me who are computer literate. And they are hard workers.” Human Rights Watch also interviewed a number of Zimbabwean farm workers who had arrived since 2000 and who had completed several years of high school. For example, on one farm in Weipe on April 27, 2006, Human Rights Watch interviewed two Zimbabwean farm workers who had “O” levels and another Zimbabwean farm worker who had completed Form 4.

⁵² Human Rights Watch, *Unprotected Migrants*, p. 13. Human Rights Watch interview with white farmer and TAU safety and security chair of the northern region, Makhado, April 25, 2006. The farmer spoke of undocumented Zimbabweans as responsible for much crime in the province.

⁵³ Human Rights Watch, *Unprotected Migrants*, p. 13.

⁵⁴ Mather and Mathebula, “The Farmer Prefers Us,” p. 21.

there after the end of the war in 1992.⁵⁵ Unlike other foreign farm workers, these Mozambicans were never migrants but constituted a resident population.⁵⁶ They became part of the “captive labor pool” of the homelands, but were preferred for work on the farms over South Africans because of a reputation then, as today, for hard work and docility.⁵⁷ Without legal documents to reside or work in South Africa, the Mozambican refugees joined the vulnerable population of undocumented foreign workers.⁵⁸

Amnesties affecting Mozambicans

Between 1995 and 1999 the South African cabinet offered three immigration amnesties—in 1995 for foreign migrant miners who had worked on the mines for more than 10 years;⁵⁹ in 1996 for citizens of SADC countries who had entered South Africa illegally before 1990; and in 1999 for Mozambican refugees⁶⁰—through which a total of 197, 125 Mozambicans resident in South Africa received South African identity documents with permanent residence.⁶¹ An unknown number of Mozambicans or children of Mozambicans born in South Africa also received South African identity documents with citizenship through marriage, adoption into local families, and integration through the

⁵⁵ Chris Dolan, *The Changing Status of Mozambicans in South Africa and the Impact of this on Repatriation to and Re-integration in Mozambique* (Maputo: Norwegian Refugee Council, 1997), Document Series No.2.

⁵⁶ Crush, “Making Hay with Foreign Farmworkers,” p. 6.

⁵⁷ Charles Mather, “Foreign Migrants in Export Agriculture: Mozambican Labour in the Mpumalanga Lowveld, South Africa,” *Tijdschrift voor Economische en Sociale Geografie*, vol. 91, pp. 426-436; Jonathan Crush, “The Long-Averted Clash: Farm Labour Competition in the South African Countryside,” *Canadian Journal of African Studies*, vol. 27, pp. 404-423; Forced Migration Studies Programme interview with manager and human resources person, Schoenwald group, Hoedspruit area, September 26, 2006; Human Rights Watch and Forced Migration Studies Programme interview with Custodio Cuna, sub-delegate, Mozambique Labor Department, Nelspruit, September 21, 2006.

⁵⁸ SAMP, “The Point of No Return: Evaluating the Amnesty for Mozambican Refugees in South Africa,” Migration Policy Brief No. 6, 2001, p. 3.

⁵⁹ Fion de Vletter, *Sons of Mozambique: Mozambican Miners and Post-Apartheid South Africa* (Cape Town: Idasa and Queen’s University, Canada, 2000), SAMP Migration Policy Series No. 8, <http://www.queensu.ca/samp/sampresources/samppublications/policyseries/policy8.htm> (accessed December 1, 2006).

⁶⁰ Crush and Williams, “International Migration and Development: Dynamics and Challenges in South and Southern Africa,” pp. 12-13.

⁶¹ Jonathan Crush and Vincent Williams, *The New South Africans? The Immigration Amnesties and their Aftermath* (Cape Town: Idasa, 1999); SAMP, “The Point of No Return.”

school system.⁶² It is estimated that about 80 percent of all Mozambicans who are long-term residents of Limpopo and Mpumalanga now have South African identity documents.⁶³ According to Mpumalanga province's head of the Immigration Inspectorate in Nelspruit, the amnesties resulted in "a big part of the workforce" leaving the farms, with most heading for urban areas, and therefore large-scale recruitment of new workers.⁶⁴

Today the Mozambique Labor Department's sub-delegate office in Nelspruit has 25,000-27,000 Mozambicans who are registered as working legally on farms in Limpopo and Mpumalanga provinces. Most of these Mozambicans—around 20,000—work in Mpumalanga, chiefly in the border areas. In Limpopo, Mozambican farm workers are concentrated around Hoedspruit, Tzaneen, and Phalaborwa. ZZ2, the largest tomato farm in Africa, lies between Tzaneen and Makhado and employs about 1,400 Mozambican workers.⁶⁵

Institutional differences facing Mozambicans and Zimbabweans

An important institutional difference governs the legal recruitment of Mozambican and Zimbabwean farm labor. Since 1964, a bilateral treaty between Mozambique and South Africa has regulated the recruitment and repatriation of Mozambican mine workers. Today farm workers benefit from a measure of protection provided by institutions established to implement the bilateral treaty for mine workers.⁶⁶ In particular, there is a private recruiting

⁶² Tara Polzer, "Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa," Forced Migration Studies Programme, University of the Witwatersrand, Forced Migration Working Paper Series No. 17, May 2005, <http://migration.wits.ac.za/LegalFrame.pdf> (accessed February 5, 2007). Young people in South Africa apply for IDs when they are 16, and therefore mostly still in school. Many young people in rural areas do not have birth certificates, including South Africans, so it was common in the early and mid-1990s for entire school classes to apply for birth certificates and IDs together, with supporting letters from the school principal for those who did not already have birth certificates. The pupils would get IDs on that basis, without needing their parents' IDs.

⁶³ Polzer, "Adapting to Changing Legal Frameworks."

⁶⁴ Human Rights Watch and Forced Migration Studies Programme interview with J.P. du Plessis, head of Immigration Inspectorate, Department of Home Affairs, Nelspruit, September 20, 2006.

⁶⁵ Human Rights Watch and Forced Migration Studies Programme interview with Custodio Cuna, sub-delegate, Mozambique Labor Department, Nelspruit, September 21, 2006.

⁶⁶ Human Rights Watch and Forced Migration Studies Programme interview with Custodio Cuna, sub-delegate, Mozambique Labor Department, Nelspruit, September 21, 2006. Cuna pointed to the irony that the apartheid era bilateral treaty, which is being renegotiated because both the South African and Mozambican governments consider it offensive, today facilitates a measure of worker protection.

organization, Agencia Algos, which has an office in Nelspruit. Mozambicans in South Africa can apply for Mozambican passports through Algos, and Algos issues service contracts to be signed by farmers and workers.⁶⁷ Mozambican workers may also request the Mozambique Labor Department's office in Nelspruit to help with documentation, work-related grievances, and social matters, including the repatriation of deceased workers' bodies or burial arrangements. The labor office also uses at least one nongovernmental organization, Masisukumeni Women's Crisis Centre, to promote and facilitate the documentation of Mozambicans in Mpumalanga.

Unlike Mozambique, Zimbabwe has never had a bilateral treaty with South Africa on the recruitment and repatriation of Zimbabwean workers. Zimbabweans in South Africa, therefore, have no Zimbabwean government labor office or private recruitment agencies to help them obtain documents, mediate workplace disputes, repatriate deceased workers' bodies, and bury workers who die. The governments of Zimbabwe and South Africa are believed to be moving toward signing a bilateral agreement: In October 2004 they signed a Memorandum of Understanding (MOU) on Employment and Labour to ensure that farm owners in the entire Limpopo province—and not only north of the Soutpansberg—comply with immigration and labor laws.⁶⁸

Mozambican migrants encounter another institutional advantage over Zimbabwean migrants with respect to visa requirements to enter South Africa. Since April 2005 Mozambicans may enter South Africa for up to 30 days without a visa. Previously, they had to pay R425 (US\$60.98)⁶⁹ for a visa and meet various entry requirements, including having to demonstrate to the South African High Commission (or embassy) that they had accommodation and sufficient funds to support themselves. Since the withdrawal of these requirements, the number of Mozambicans who enter or leave South Africa has doubled from 4,000 per day to 8,000 per day, and tourism has been

⁶⁷ Mather and Mathebula, "The Farmer Prefers Us," pp. 24-33.

⁶⁸ For background to the MOU, see "Minister Calls for Closer Cooperation with Zimbabwe," Department of Labour media statement, January 9, 2003, http://www.labour.gov.za/media/statement.jsp?statementdisplay_id=9781 (accessed July 9, 2006).

⁶⁹ Currency exchange rate as of January 3, 2006: R6.97 to US\$1.

encouraged. If Mozambicans overstay the 30-day limit—and many do—the DHA may fine them.⁷⁰

Zimbabweans who wish to visit South Africa for any period, including for short visits up to 30 days, must obtain a visa. The visa itself is free but the South African government requires them to demonstrate that they have R1, 000 (US\$143.47) in travelers' checks and must comply with other requirements before they may be granted a visa. The head of the Immigration Inspectorate in Nelspruit said that of all SADC member states' citizens, only Zimbabweans had to meet visa requirements to enter South Africa.⁷¹

Zimbabweans also have found it difficult to obtain a passport in a timely manner because of their government's bureaucratic delays. The government of Zimbabwe agreed under the MOU to issue Zimbabwean migrants on farms in the Limpopo with emergency travel documents (ETDs). ETDs are issued more quickly and cheaply than passports but they are not available to most Zimbabwean migrants. In November 2006 the Registrar General's office stopped issuing Zimbabwean passports, already difficult to obtain, because it lacked the foreign exchange to import the ink used.⁷² The stringent visa requirements and the problems of securing a passport mean that most Zimbabweans who wish to migrate have little option but to become irregular migrants.

International Organization for Migration and Zimbabwean deportees

The IOM has become involved in providing protection for Zimbabweans as a result of establishing a reception center to provide humanitarian assistance to Zimbabwean deportees. Funded mainly by the United Kingdom

⁷⁰ Human Rights Watch interview with Barbara Stassen, acting head, DHA, Lebombo border post, September 28, 2006; Human Rights Watch and Forced Migration Studies Programme interview with J.P. du Plessis, head of Immigration Inspectorate, DHA, Nelspruit, September 20, 2006.

⁷¹ Human Rights Watch and Forced Migration Studies Programme interview with J.P. du Plessis, head of Immigration Inspectorate, DHA, Nelspruit, September 20, 2006.

⁷² "Cash Crisis forces Harare to suspend issuing of passports," *Zim Online*, November 29, 2006, http://www.zimbabwesituation.com/nov29_2006.html (accessed December 15, 2006).

government's Department for International Development (DFID), the IOM opened the center for deportees at the end of May 2006 in the border town of Beitbridge in Zimbabwe.⁷³

In our August 2006 report, "Unprotected Migrants: Zimbabweans in South Africa's Limpopo province," Human Rights Watch had expressed deep skepticism about the likelihood of the IOM center benefiting Zimbabweans forced to leave South Africa.⁷⁴ Human Rights Watch had also stated that the IOM's past failure to confront and criticize the Zimbabwean government's human rights abuses in the context of international humanitarian assistance suggested that it would be unlikely to defend deportees' and migrants' rights should so doing require an oppositional stance toward the government of Zimbabwe.

Human Rights Watch had an opportunity to visit the center in October 2006. We were impressed by the assistance that the IOM is providing to deportees and by its efforts to protect the rights of deportees, as we describe below. However, we note that a significant percentage of Zimbabweans reject any IOM assistance, as IOM statistics provided below indicate, and prefer to return immediately to South Africa, as IOM staff themselves acknowledged in interviews with us.⁷⁵ Zimbabweans will continue to participate in irregular migration for at least two reasons. Firstly, they are unable to obtain employment at home. Secondly, they are unable to obtain passports because the government of Zimbabwe has stopped issuing them and the stringent financial requirements to obtain a visa are beyond the means of the vast majority of Zimbabwean migrants, as discussed above. The IOM should use its working relationship with the Zimbabwe government to pressure it to facilitate "regular" or legal migration by making it possible for Zimbabweans to obtain passports and visas expeditiously and inexpensively.

⁷³ "Deportees now destitute," *Zimbabwe Situation*, March 17, 2006, reproduced by SAMP in *Migration News*, March 2006, http://www.queensu.ca/samp/migrationnews/nws_sum.php?Mig_News_Issue=15 (accessed July 25, 2006).

⁷⁴ Human Rights Watch, *Unprotected Migrants*.

⁷⁵ Human Rights Watch separate interviews with Nick vander Vyver, program officer, and Andrew Gethi, operations officer and deputy, IOM reception center, Beitbridge, October 10-11, 2006.

As explained to Human Rights Watch by IOM officials at the center, on a daily basis the center receives several hundred deportees. Deportees from Lindela (South Africa's detention center, west of Johannesburg, where foreigners awaiting deportation are held) arrive on Thursdays and may number 700 to 1,000. They are transported by train from Johannesburg to Musina police station, and from there to Beitbridge, Zimbabwe by road, either by South African police or immigration officials. Seven days a week deportees arrive by road from police stations in Limpopo province. The deportees attend a mandatory IOM staff lecture to inform them about the hazards of irregular migration, how to obtain passports and visas for South Africa, and what services IOM offers them in Beitbridge so that they can make an informed decision on whether to accept IOM services, including free transport home. The deportees are then processed by the Zimbabwean immigration officials at the newly built police office and immigration office. They may then choose whether to accept IOM assistance. Between May 31 and September 26, 2006, of 47,765 deportees whom South African officials said they had dropped off at the Beitbridge police station in Zimbabwe, almost 50 percent registered to accept IOM assistance, and 92 percent of those who registered availed themselves of transport assistance to their homes.⁷⁶

Those who seek IOM assistance must provide basic personal information to IOM staff, primarily to facilitate the organization of their transport home or medical or quasi-legal assistance and follow up as required. After registration, the deportees are provided with a free meal. Meanwhile, Corridors for Hope, which is contracted by IOM, provides HIV/AIDS information to the deportees and issues vouchers for deportees to visit the clinic nearest to their homes for free HIV/AIDS testing and counseling. All deportees who seek free transport assistance must also be declared "fit for travel" by one of the two IOM nurses. If the nurses find individuals who require further medical assistance, they are taken to Beitbridge Hospital where IOM pays for their treatment. At the end of each day, the buses that will take the deportees to their homes arrive. Before boarding the buses, the World Food Programme provides deportees with a

⁷⁶ Human Rights Watch separate interviews with Nick vander Vyver, program officer, and Andrew Gethi, operations officer and deputy, IOM reception center, Beitbridge, October 10-11, 2006.

food pack of 12.5 kilograms of cereal, and when available, 2 kilograms of lentils.⁷⁷

The IOM holds regular meetings with South African and Zimbabwean government officials at which it raises issues of rights abuses that come to its attention, often from random interviews conducted by its staff members with deportees at the center. Between May 31 and September 26, 2006, the IOM dealt with 20 cases of rape, physical and sexual assault, trafficking, and the deportation of physically and mentally challenged individuals. The IOM has also assisted returned migrants to get their passports back, to report and identify thieves and rapists who operate in the border area and help to bring them to trial, to report officials who have allegedly abused Zimbabweans during arrest or detention, to verify documents of Zimbabweans with a legal right to stay in South Africa and return them to South Africa, amongst other cases. Either the victims or others brought these cases to the IOM's attention and asked it to pursue the cases with South African government officials. Between mid-July and December 31, 2006, the IOM received almost 950 unaccompanied children under 18 years old. These children were referred to the child center, built and maintained by the IOM, financially supported by Save the Children Norway and UNICEF, and under the overall management of the Zimbabwean Ministry of Social Welfare.⁷⁸

In November 2006 the Zimbabwe state media reported that Zimbabwean police conducted Operation Restore Order from November 13 to November 26 along the Limpopo border to target "cross-border criminals."⁷⁹ South African media reported that the police had arrested some 2,000 illegal border crossers. In December 2006, there were high-level meetings between South African and Zimbabwean state officials at the Limpopo border on the issue of

⁷⁷ Ibid.

⁷⁸ Human Rights Watch separate interviews with Nick van der Vyver, program officer, and Sinikiwe Sithole, project assistant, IOM reception center, Beitbridge, October 10, 2006; Human Rights Watch email correspondence with Nick van der Vyver, January 23 and 31, 2007.

⁷⁹ "Notorious robber nabbed," *The Chronicle* (Zimbabwe), November 30, 2006.

cross-border crime.⁸⁰ The program officer of the IOM center believes the police operation was a response to IOM reports about rape, sexual abuse, and deportees' claims of having to pay thieves to cross the Limpopo river.⁸¹

The IOM has informed Human Rights Watch that it would like to establish a reception and support center in Mozambique for Mozambican deportees from South Africa. The IOM expects a Mozambican government official to visit its Beitbridge center in Zimbabwe "in the not too distant future." The IOM recognizes, however, that the donor environment in Mozambique is different from that of Zimbabwe, and that it may take longer to establish a facility in Mozambique.⁸²

⁸⁰ "SA and Zim step up border security," *Sunday Argus* (South Africa), December 10, 2006; "Police nab border jumpers," *Business Day* (South Africa), November 29, 2006.

⁸¹ Human Rights Watch email correspondence with Nick van der Vyver, program officer, IOM reception center, Beitbridge, December 1, 2006.

⁸² Human Rights Watch email correspondence with Nick van der Vyver, program officer, IOM reception center, Beitbridge, February 14, 2007.

The Legal Framework

The Constitution of the Republic of South Africa, the Immigration Act 2002, and the Sectoral Determination 13: Farm Worker Sector (or basic conditions of employment law for farm workers) provide, for the most part, an adequate legal framework for protecting farm workers' rights. Moreover, the legal framework for farm workers is consistent with the government of South Africa's obligations under those international conventions it has ratified—the International Covenant on Civil and Political Rights (ICCPR),⁸³ the African Charter for Human and Peoples' Rights (ACHPR),⁸⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁸⁵

The most notable legal gap in the immigration and labor laws affecting foreign migrants arises with respect to the protection of undocumented workers from exploitation. For example, should an employer hire undocumented migrant workers there are no means to ensure that employers will pay the prescribed minimum wage to undocumented migrants, pay them for work performed, or cover them for work-related injuries. If undocumented migrant workers are unable to enforce basic rights arising from their employee status and work that they have performed, then unscrupulous employers may deliberately avoid compliance with South African law to their own advantage, with impunity.

⁸³ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by South Africa December 10, 1998, <http://www.ohchr.org/english/countries/ratification/4.htm> (accessed July 10, 2006).

⁸⁴ African [Banjul] Charter on Human and Peoples' Rights (ACHPR), adopted June 27, 1981, OAU 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 (accessed July 10, 2006).

⁸⁵ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, ratified by South Africa December 10, 1998, <http://www.ohchr.org/english/law/IICERD.htm> (accessed January 3, 2007).

The following discussion of the legal framework highlights key provisions for foreign migrants in the constitution, immigration law, and the basic conditions of employment law for farm workers. We also draw attention to differential rights for citizens and non-South African citizens in the constitution and labor laws, and examine the protections in international conventions which the Government of South Africa has ratified, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR), which it has signed but not ratified.⁸⁶ We also point to constitutional changes that would be necessary should the government of South Africa ratify the ICESCR.

The constitution and the government of South Africa's international obligations

The South African constitution of 1996 came into force in February 1997. It is the supreme law of the country.⁸⁷ According to the constitution, “[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.”⁸⁸ 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, due process of law, freedom of expression and association, fair labor practices, adequate housing, health care, sufficient food and water, and social security.⁸⁹ With respect to the right to have access to adequate housing and health care, food, water, and social security, the Bill of Rights requires the state to “take reasonable legislative and other measures, within its available resources, to achieve the[ir] progressive realization...”⁹⁰ The Bill of Rights prohibits slavery, servitude, or

⁸⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Suppl. (No. 16) at 49, U.N. Doc A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, signed by South Africa October 3, 1994, http://www.unhchr.ch/html/menu3/b/a_ceschr.htm (accessed January 31, 2007).

⁸⁷ 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).

⁸⁸ *Ibid.*, chapter 2, section 7(1).

⁸⁹ *Ibid.*, chapter 2, sections 9, 10, 12, 14, 16, 18, 23, 26, 27, 33, 34, and 35.

⁹⁰ *Ibid.*, chapter 2, sections 26(2) and 27(2).

forced labor,⁹¹ and the deprivation of property (which is not limited to land) except in terms of law of general application.⁹²

Many rights are subject to limitations in the Bill of Rights. The Bill of Rights expressly limits specific rights to South African citizens: the right to vote, to form a political party, to stand for public office, to obtain a passport, to enter into the country, to freely choose a trade, occupation or profession, and to benefit from state measures to foster conditions that enable access to land.⁹³ The rights in the Bill of Rights may be further limited but “only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society” and “taking into account all relevant factors...”⁹⁴ The extent to which the constitutional provisions mean that non-South African citizens are also entitled to enjoy the rights such as access to adequate housing, health care, food, water, and social security is yet to be adjudicated by the Constitutional Court, and is therefore an area of unsettled law. For example, the court ruled in 2004 that the provisions of the Social Assistance Act, 1992 (No.59 of 1992) that reserved social assistance benefits for only South African citizens were unconstitutional and had to be extended to permanent residents but not to “illegal foreigners” and temporary residents.⁹⁵ The Social Assistance Act, 2004 (No.13 of 2004) reflects the Constitutional Court’s ruling.

International law and the rights of foreign nationals

Under the constitution, international law must be considered in the interpretation of the Bill of Rights and other national legislation.⁹⁶ As indicated above, South Africa has ratified the ICCPR, acceded to the ACHPR, and ratified the ICERD. South Africa has signed but not yet ratified the ICESCR. South Africa has not signed the

⁹¹ Ibid., chapter 2, section 13.

⁹² Ibid., chapter 2, section 25.

⁹³ 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.

⁹⁴ Constitution of the Republic of South Africa, chapter 2, section 36.

⁹⁵ 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*).

⁹⁶ Constitution of the Republic of South Africa, chapter 2, section 39(1)(b) and chapter 15, section 233.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers' Convention).⁹⁷

Most rights provided for in the ICCPR apply to everyone, regardless of immigration status. For example, the ICCPR prohibits the use of torture or cruel, inhuman or degrading treatment or punishment,⁹⁸ and slavery, servitude, and or forced or compulsory labor.⁹⁹ It also provides for the right of everyone to liberty and security of person and prohibits arbitrary arrest or detention;¹⁰⁰ requires all persons deprived of their liberty to be treated with humanity and respect for human dignity; and further specifies the segregation of accused and convicted persons and of juveniles from adults.¹⁰¹

The ICCPR reserves a few specific rights for citizens. Only citizens have the right to vote, to have access on general terms of equality to public service, and to take part in public affairs.¹⁰² The ICCPR also makes a distinction between the rights of lawful and unlawful "aliens."¹⁰³ In particular, only legal residents, like citizens, have the right to liberty of movement and freedom to choose their residence, subject to specific restrictions, including that any restrictions be provided by law.¹⁰⁴ The ICCPR also regulates the procedure for the expulsion of a non-citizen legally within the state. A decision to expel a foreigner legally in a country must be in accordance with law. Foreigners legally in the state can only be expelled on the basis of an individual decision taken relating to their expulsion following due process, including the right

⁹⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention), adopted December 18, 1990, G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force July 1, 2003, http://www.unhcr.ch/html/menu3/b/m_mwctoc.htm (accessed January 21, 2007).

⁹⁸ ICCPR, art. 7.

⁹⁹ ICCPR, art. 8.

¹⁰⁰ ICCPR, art. 9.

¹⁰¹ ICCPR, art. 10.

¹⁰² ICCPR, art. 25.

¹⁰³ The UN Human Rights Committee, in General Comment 15 on "The Position of Aliens Under the Covenant" has stated that the ICCPR obligations apply to any foreign national in the territory of a state party, except those rights in article 25 recognized in the ICCPR, which are expressly applicable only to citizens. 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.

¹⁰⁴ ICCPR, art. 12.

to submit reasons against their expulsion, to have an opportunity to appeal against expulsion and to have a review by a competent authority.¹⁰⁵

Much like the ICCPR, although the ACHPR in the main guarantees everyone—regardless of citizenship or immigration status—fundamental rights, certain rights apply only to citizens and lawfully resident non-nationals. Hence, article 12 stipulates that a non-national legally admitted to a country may only be expelled on the basis of a decision taken in accordance with the law, and prohibits mass expulsions of non-nationals. Article 13(1) and (2) accords only citizens the right to participate freely in the government of their country and the right of equal access to the public service of their country.

The ICERD prohibits racial discrimination, defining it as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”¹⁰⁶

States party to the ICERD may differentiate between citizens and non-citizens, provided legal provisions do not discriminate against any particular nationality.¹⁰⁷ States party may also adopt special measures to promote the advancement of certain racial or ethnic groups or individuals to ensure such groups or individuals the equal enjoyment or exercise of human rights and fundamental freedoms. Such measures will not be considered discrimination provided that they do not lead to the maintenance of separate rights for different racial groups and provided that they are not continued after their objectives have been achieved.¹⁰⁸

¹⁰⁵ ICCPR, art. 13.

¹⁰⁷ ICERD, art. 1(1).

¹⁰⁷ ICERD, arts. 1(2) and 1(3). The South African Human Rights Commission, in a 2006 shadow report to the Committee on the Elimination of Racial Discrimination, criticized South Africa’s failure to report fully on the implementation of its legislation on foreigners, as requested in General Recommendation XI. SAHRC, “Shadow Report on South Africa’s Compliance with the Provisions of the International Convention against all Forms of Racial Discrimination,” June 2006, http://www.sahrc.org.za/sahrc_cms/downloads/IICERD_Shadow%20Report.pdf (accessed January 22, 2007), pp. 16 and 20.

¹⁰⁸ ICERD, art. 1(4).

The ICERD imposes on states party the obligation to condemn racial discrimination and undertake to pursue “by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.”¹⁰⁹ States party must also guarantee the right of everyone to equality before the law, notably in the enjoyment of the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution, as well as political, civil, economic, social, and cultural rights.¹¹⁰

In 2004 the Committee on the Elimination of Racial Discrimination, established under the provisions of the ICERD, adopted General Recommendation No.30, which deals specifically with discrimination against non-citizens.¹¹¹ General Recommendation No.30 states that differential treatment based on citizenship or immigration status “will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”¹¹² Other provisions address protection against hate speech and racial violence, access to citizenship, administration of justice, expulsion and deportation, and economic, social, and cultural rights.

For example, states party must take steps to address xenophobic attitudes and behavior toward non-citizens, and take firm action to counter any tendency to target, stigmatize, stereotype, or profile, on the basis of race, color, descent, and national or ethnic origins, members of “non-citizen” population groups, especially by politicians, officials, educators, and the media, and in society at large.¹¹³

With respect to ensuring that non-citizens enjoy equal protection and recognition before the law, General Recommendation No. 30 requires that states party “combat

¹⁰⁹ ICERD, art. 2 (1).

¹¹⁰ ICERD, art. 5.

¹¹¹ UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination Against Non Citizens, CERD/C/64/Misc.11/rev.3 (2004) , adopted in May 2005, [http://www.unhchr.ch/tbs/doc.nsf/o/b12db96f5c1e2491c1256ffdo04914d8/\\$FILE/Go541496.pdf](http://www.unhchr.ch/tbs/doc.nsf/o/b12db96f5c1e2491c1256ffdo04914d8/$FILE/Go541496.pdf) (accessed January 3, 2007).

¹¹² *Ibid.*, I (4).

¹¹³ *Ibid.*, III (11) and III (12).

ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights” and “ensure that claims of racial discrimination brought by non-citizens are investigated thoroughly and that claims made against officials, notably those concerning discriminatory or racist behavior, are subject to independent and effective scrutiny.”¹¹⁴

International legal standards on rights at work for migrant workers

The ICESCR recognizes a defined set of social, economic, and cultural rights, which states undertake “individually and through international assistance and co-operation” and to the maximum of their available resources, to realize progressively.¹¹⁵ In addition to the progressive realization, and a dependency on available resources, the ICESCR also permits developing countries explicit, but limited, discretion as to the extension of economic rights to foreign nationals. Article 2(3) says, “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” If South Africa were to ratify this treaty, the economic rights provided for in the Covenant would therefore not automatically be extended to foreign migrants.

There is considerable overlap between the economic rights contained in the ICESCR and the economic rights provided for in the Constitution of the Republic of South Africa, which is particularly relevant in light of the imperative that international law inform the scope of the constitutional provisions. Article 7 of the ICESCR, which recognizes “the right of everyone to the enjoyment of just and favourable conditions of work,” is reflected in the constitution’s guarantee of fair labor practices (section 23). Article 7 explicitly states that such conditions must ensure “(a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind...; (ii) A decent

¹¹⁴ Ibid., V (21) and V (23).

¹¹⁵ ICESCR, art. 2 (1).

living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted...; [and] (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”¹¹⁶ The ICESCR also requires that working mothers during a reasonable period before or after childbirth should be accorded paid leave or leave with adequate social security benefits.¹¹⁷ Article 7 of the ICESCR also recognizes the right of everyone to social security, including social insurance¹¹⁸ and adequate housing,¹¹⁹ and in these respects is akin to section 27 of the Constitution of South Africa.

However, the ICESCR would also impose new obligations on the government of South Africa with respect to the protection of economic rights. The ICESCR recognizes the right of everyone to an adequate standard of living and, importantly, the continuous improvement of living conditions. As with many other economic rights, states party are required to take “appropriate steps” to ensure the progressive realization of this right.¹²⁰ While the Constitution of the Republic of South Africa grants everyone the right to a basic education and access to health care services, the ICESCR recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and to compulsory education free of charge.¹²¹

Regarding non-citizens’ rights at work, the Committee on the Elimination of Racial Discrimination’s General Recommendation No. 30 states that once an employment relationship has been initiated and until it is terminated, all individuals, whether they have work permits or not, are entitled to the enjoyment of labor and employment rights, including freedom of assembly and association.¹²² Importantly, as a state party to the ICERD, the government of South Africa therefore has an

¹¹⁶ See also ICESCR, General Comment No. 18, Right to Work, E/C.12/GC/18, on Article 6.

¹¹⁷ ICESCR, art. 10(2).

¹¹⁸ ICESCR, art. 9.

¹¹⁹ ICESCR, art. 11.

¹²⁰ ICESCR, art. 11 (1). Article 2 (1) of the Covenant also provides that each State Party must take steps “with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means”.

¹²¹ ICESCR, arts. 12 and 13, respectively.

¹²² General Recommendation No. 30, VII (35).

obligation to ensure that, at minimum, employers must pay the prescribed minimum wages and incur responsibility for work-related injuries of even undocumented workers, including those whom the government seeks to deport.

The ACHPR recognizes the inextricable link between economic, social, and cultural rights and civil and political rights in its preamble. Article 15 of the ACHPR provides that “every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”¹²³ In December 2004 the African Commission on Human and Peoples’ Rights¹²⁴ adopted a Resolution on Economic, Social and Cultural Rights in Africa.¹²⁵ The resolution incorporated the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa, which articulates the scope of several of the articles of the ACHPR, including article 15.¹²⁶ The adopted declaration sets out that the right to work in article 15 of the ACHPR entails among other things:

- Fair remuneration, a minimum living wage for labor, and equal remuneration for work of equal value.
- Equitable and satisfactory conditions of work, including effective and accessible remedies for workplace-related injuries, hazards and accidents;
- Prohibition against forced labor and economic exploitation of children, and other vulnerable persons.
- The right to rest and leisure, including reasonable limitation of working hours, periodic holidays with pay and remuneration for public holidays.¹²⁷

¹²³ ACHPR, art. 15.

¹²⁴ The African Commission on Human and Peoples’ Rights has a mandate under article 45 of the ACHPR to promote and protect human rights in Africa.

¹²⁵ Resolution On Economic, Social And Cultural Rights In Africa, ACHPR/Res.73(XXXVI)04, adopted at the 36th Ordinary Session of the African Commission on Human and Peoples’ Rights in Dakar, Senegal, December 7, 2004, http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution78_en.html (accessed January 20, 2007).

¹²⁶ The African Commission on Human and Peoples’ Rights in collaboration with the International Centre for Legal Protection of Human Rights (INTERIGHTS), the Cairo Institute for Human Rights Studies, and the Centre for Human Rights, University of Pretoria, held a Seminar on Economic, Social and Cultural Rights on September 13–17, 2004, in Pretoria, South Africa, which culminated in the adoption of the Declaration (September 17, 2004).

¹²⁷ Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa, art. 6.

South Africa is also a member of the International Labour Organization (ILO), the leading international agency setting standards on both the right to work and rights at work. As a member of the ILO, South Africa has obligations to comply with the organization's aims regarding the provision of "decent work" and has a duty to comply with the ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration).¹²⁸ The Declaration notes that the ILO should "give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers," and lists the elimination of discrimination in respect of employment and occupation as one of the "fundamental rights," which all ILO members have an obligation to protect.

The Migrant Workers' Convention, which South Africa has not signed, provides for the protection of certain rights for all migrants, both documented and undocumented, and of other rights for only documented migrants. Among protections for undocumented workers that are not explicitly provided for in other conventions which South Africa has ratified, article 22(6) requires that deportees "have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities." Article 32 stipulates that when migrant workers and members of their families' stay in the host country terminates, they must have "the right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings."

The Immigration Act

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 known as the "two gates policy." The normal immigration rules and regulations for Europeans in the Aliens Control Act of 1991 provided one "gate"; specific exemptions from the act for non-South African workers in the case of bilateral government conventions or temporary employment schemes provided a second "gate." The act did not prescribe or regulate such schemes. It merely gave

¹²⁸ International Labour Conference, ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998.

discretion to the minister of home affairs to exempt particular employers and “special recruitment schemes.” 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.¹²⁹ The Aliens Control Act was replaced by the Immigration Act, 2002, which became effective in 2003.

The 2002 immigration law was developed by then-Minister of Home Affairs Mangosuthu Buthelezi and his advisors, who were not members of the governing African National Congress party.¹³⁰ The 2002 act and the accompanying regulations were largely inconsistent with stated government policy to remove obstacles 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.¹³¹ 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 2005.¹³²

The Immigration Act, 2002 (No. 13 of 2002) and the Immigration Amendment Act, 2004 (No. 19 of 2004) empower the minister of home affairs to delegate, subject to the conditions that s/he may deem necessary, his powers (with a few specified exceptions) in terms of the act to other officers or employees in the Public Service.¹³³ The Department of Home Affairs, owing to a shortage of personnel, has delegated

¹²⁹ Crush, *Covert Operations*, pp. 8, 23.

¹³⁰ For details, see Crush and Williams, “International Migration and Development: Dynamics and Challenges in South and Southern Africa,” pp. 23-24; and SAMP, “Gender Concerns in South African Migration Policy,” Migration Policy Brief No. 4, 2001, <http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief4.pdf> (accessed July 10, 2006).

¹³¹ Crush and Williams, “International Migration and Development: Dynamics and Challenges in South and Southern Africa,” p. 24.

¹³² 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.

¹³³ Immigration Act, No. 13 of 2002, <http://www.info.gov.za/gazette/acts/2002/a13-02.pdf> (accessed July 9, 2006), section 3, amended by Immigration Amendment Act, No. 19 of 2004, <http://www.info.gov.za/gazette/acts/2004/a19-04.pdf> (accessed July 9, 2006).

powers to the SAPS to conduct searches, arrests, and deportations, and sometimes to the South African National Defence Force (SANDF) to make arrests.¹³⁴

The Immigration Act, 2002 generally promotes temporary rather than permanent residence and does not encourage family immigration or unification.¹³⁵ The legislation provides for 13 types of temporary residence permit and five types of work permit.¹³⁶ 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.¹³⁷ The employer is also required to demonstrate that the terms and conditions of employment will not be inferior to those applicable for citizens.¹³⁸ The Immigration Act ends employers' access to special exemptions for the recruitment of foreign workers based on ministerial approval, but preserves existing treaties with governments in the region.¹³⁹

Farmers who seek to employ foreigners apply to the DHA for a corporate permit, a new type of permit. The DHA determines the maximum number of foreigners the corporate permit applicant may hire.¹⁴⁰ Farmers must submit proof of the need to employ the requested number of foreigners and provide a job description and proposed remuneration for each foreigner.¹⁴¹ With a flat fee of R1,520 (US\$218.08) irrespective of the number of corporate workers hired, the corporate permit is cheap;

¹³⁴ The SAHRC's "Shadow Report on South Africa's Compliance with the Provisions of the International Convention against all Forms of Racial Discrimination," cites (at p. 21) section 3 of the Immigration Act, 2002 when it asserts, "the Immigration Act effectively authorizes Department of Home Affairs officials to conduct searches, arrests and deportations without reference to other constitutional or legal protections." The SAHRC then says, "SAPS has exploited this law to legalise what would otherwise be illegal raids on buildings inhabited by suspected criminals and, potentially, illegal immigrants often conducted at night and away from oversight. Police officers force entry, demand identity documents, and arrest both non-nationals and South Africans without respect for normal legal provisions."

¹³⁵ Crush and Williams, "International Migration and Development: Dynamics and Challenges in South and Southern Africa," p. 25.

¹³⁶ Immigration Act, as amended by Immigration Amendment Act, sections 10 to 24.

¹³⁷ South African Department of Home Affairs, "Services to foreigners," http://www.home-affairs.gov.za/services_foreigners.asp?topic=temp (accessed July 10, 2006).

¹³⁸ For examples see Immigration Act, as amended by Immigration Amendment Act, section 19(2)(b); Immigration Regulations, sections 18(1) and 16(4)(i).

¹³⁹ Immigration Act, as amended by Immigration Amendment Act, section 21(4)(b).

¹⁴⁰ *Ibid.*, section 21(2).

¹⁴¹ Immigration Regulations, 2005, section 18(1)(b) and (c), http://www.dha.gov.za/documents/IMMIGRATION%20REGULATIONS%20FINAL_excl%20Annexure%20A.pdf (accessed July 9, 2006).

individual work permits cost R1,520 each.¹⁴² The corporate permit holder must ensure that the passport (or the emergency travel document, 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.¹⁴³

In both Limpopo and Mpumalanga, most farmers with substantial foreign labor forces have applied for corporate permits to legalize foreigners who are already in the country. This is technically unlawful but it does facilitate the regularization of foreigners who are in the country in violation of the immigration law. The Mozambique Labor Department's sub-delegate estimated that only 20 percent of the farmers who come to his Nelspruit office seek to recruit Mozambicans from Mozambique unique the technically correct legal process.¹⁴⁴ This official supports the process of documenting workers even if they are already in the country. He believes he was instrumental in persuading the DHA not to deport some 600 undocumented Mozambican workers on tomato producer ZZ2, in Limpopo province. Instead, in December 2005 the DHA, the South African Department of Labour, and his own office with the assistance of Agencia Algos documented the workers. He described the process by which the status of the workers was regularized, albeit not as set out in the law: the DHA issued the company with a corporate permit, after the Department of Labour had accepted that South African workers were not available for the jobs; the Mozambican sub-delegate visited the farm to issue travel documents (for which the workers pay); Agencia Algos provided service contracts (for which the employer pays) after the DHA had issued each worker with corporate worker authorization certificates; then the worker crossed the border into Mozambique to obtain a border stamp in the service contract.¹⁴⁵

¹⁴² Department of Home Affairs South Africa, Regulations on Fees, June 27, 2005, section 2, <http://www.dha.gov.za/documents/IMMIGRATION%20REGULATIONS%20FEES.pdf> (accessed July 9, 2006).

¹⁴³ 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.

¹⁴⁴ Human Rights Watch and Forced Migration Studies Programme interview with Custodio Cuna, sub-delegate, Mozambique Labor Department, Nelspruit, September 21, 2006.

¹⁴⁵ Ibid. We were also told that a five-year passport costs R130 (US\$18.65); the passport photograph R35 (US\$5.02); and the service contract R100 (US\$14.35) per worker. Human Rights Watch interview with secretary, Agencia Algos, Nelspruit, September 22, 2006. Twelve-month emergency travel documents are issued for R110. Human Rights Watch interview with Jane Nkumalo, Masisukumeni Women's Crisis Center, Nkomazi Block A, September 24, 2006.

Another new permit provided for in the Immigration Act is the asylum transit permit. The director-general of the DHA may issue a 14-day asylum transit permit to a person who at a port of entry claims to be an asylum seeker. Within 14 days the asylum seeker must report to one of the country's five Refugee Reception Offices.¹⁴⁶ At these offices, all people have the right to apply for asylum and to have their application fairly considered in terms of the Refugee Act, 1998.

The Immigration Act defines a "foreigner" as an individual who is not a citizen and an "illegal foreigner" as a foreigner who is in South Africa and in contravention of the Act.¹⁴⁷ 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."¹⁴⁸ The legislation also forbids employers to hire undocumented foreigners,¹⁴⁹ and makes it an offense, punishable by a fine or imprisonment, to hire or aid "illegal foreigners."¹⁵⁰

An immigration official requires a warrant to enter a private dwelling to search or make inquiries.¹⁵¹ Farms are ordinarily treated as private dwellings. In early 2002 the minister of safety and security and Agri South Africa (Agri SA), the largest national farmers' organization, negotiated an agreement that requires officials in health, labor, agriculture, home affairs, the police, and defense force to give advance notice to farmers before they visit. Only within 10 kilometers from borders may immigration officials, police, and soldiers visit farms unannounced. Farmers negotiated this agreement on the grounds that people posing as government officials were attacking

¹⁴⁶ 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 under the 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 Landau et al., "Crossing Borders, Accessing Rights, and Detention," pp. 25-26, 40.

¹⁴⁷ Immigration Act, as amended by Immigration Amendment Act, section 1.

¹⁴⁸ Lawyers for Human Rights challenged the constitutionality of parts of section 34 in the Pretoria High Court, 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. Despite these constitutional challenges, section 34 remains intact. For the High Court judgment, see *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another* 2003(8)BCLR 891(T). For the Constitutional Court judgment, see *Constitutional Court of South Africa. Lawyers for Human Rights and Ann Francis Eveleth v. Minister of Home Affairs and Director-General: Department of Home Affairs*, Case CCT 18/03.

¹⁴⁹ Immigration Act, section 38(1).

¹⁵⁰ Immigration Act, section 49, as amended by Immigration Amendment Act, section 45.

¹⁵¹ Immigration Act, section 34(9)(a).

farm owners.¹⁵² According to police and immigration officials, the agreement handicaps them should they wish to visit a farm to investigate whether the farmer is hiring “illegal foreigners.” Warned of a pending visit by government officials, a farmer hiring undocumented workers will make sure they are nowhere to be seen when the officials visit.¹⁵³

Because giving advance warning to farmers is self-defeating, a labor inspector in Nelspruit said labor inspectors did not abide by the agreement: they visited farms unannounced but only concerned themselves with employers who hired “illegal foreigners” if they received complaints of employers’ abuse.¹⁵⁴ A number of farmers—typically large-scale producers—whom Human Rights Watch interviewed in Mpumalanga reported experiencing blitz inspections.¹⁵⁵

Labor laws

The legal environment for farm workers improved substantially, beginning in 1993.¹⁵⁶ That year, the government extended the right to organize and the basic conditions of employment law to the agricultural sector. In December 2002 the minister of labour used his power under the Basic Conditions of Employment Act, 1997 (BCE) to set basic conditions for the farm sector, including the introduction of a minimum wage.¹⁵⁷ The 2002 Sectoral Determination 8: Farm Worker Sector set minimum wages for March 2003 to February 2004.¹⁵⁸ Different minimum wages were set for primarily urban (Area A) and rural (Area B) municipalities.

¹⁵² Human Rights Watch and Forced Migration Studies Programme interview with J.P. du Plessis, head of Immigration Inspectorate, DHA, Nelspruit, September 20, 2006.

¹⁵³ Human Rights Watch interview with acting head, DHA, Lebombo, September 27, 2006.

¹⁵⁴ Forced Migration Studies Programme interview with Gert Smith, labor inspector, Department of Labour, Labour Center, Nelspruit, October 10, 2006.

¹⁵⁵ For example, Human Rights Watch interview with white commercial farmer, south of Malelane, September 25, 2006.

¹⁵⁶ For a discussion of legislative improvements affecting farm workers, see Human Rights Watch, *Unequal Protection*, pp. 42-46.

¹⁵⁷ The Basic Conditions of Employment (BCE) Act, 1997 (No. 75 of 1997), <http://www.labour.gov.za/docs/legislation/bcea/act75-97.pdf> (accessed July 28, 2006), amended by the Basic Conditions of Employment Act (No. 11 of 2002), <http://www.info.gov.za/gazette/acts/2002/a11-02.pdf> (accessed July 24, 2006), section 51(1). The BCE Act, as amended, seeks to give effect to and regulate the right to fair labor practices conferred by section 23(1) of the constitution and to give effect to the state’s obligations as a member state of the International Labour Organization.

¹⁵⁸ Sectoral Determination 8: Farm Worker Sector, South Africa, December 2, 2002, Government Notice No. R. 1499, http://www.workinfo.com/free/Sub_for_legres/Data/BCEA/r14992002.htm (accessed July 10, 2006).

Sectoral determinations are made for sectors where workers lack the organizational power to ensure adequate protection of their rights through negotiation with employers. The Employment Conditions Commission, which is appointed by the minister of labour and which is composed of a representative of organized labor and organized business, must advise the minister on the impact of a sectoral determination on various matters, including the ability of employers to carry on their business successfully; the operation of small, medium or micro-enterprises and new enterprises; the cost of living; the alleviation of poverty; and the likely impact of any proposed condition of employment on current employment or the creation of employment.¹⁵⁹

On February 17, 2006, the minister of labour announced the new Sectoral Determination for the Farm Worker Sector.¹⁶⁰ For predominantly rural areas, the minimum wage was raised from R785.79 (US\$112.74) per month or R4.03 (US\$0.58) per hour to R885 (US\$126.97) per month or R4.54 per hour (US\$0.65) to apply between March 1, 2006, and February 28, 2007.¹⁶¹ The 2006 Sectoral Determination also set minimum wage increases for 2007 and 2008 respectively, and made a few other changes, including the provision to have only one minimum wage level in the agricultural sector from March 1, 2008.

The minimum wage for farm workers is among the lowest, if not the lowest, in the formal employment sector. In 2006 the prescribed minimum wage for domestic servants in rural municipalities was just over R5.00 (US\$0.72) per hour (slightly higher than for farm workers in rural areas) and just under R620 per month (lower than for rural-based farm workers).¹⁶² The estimated average monthly earnings at

¹⁵⁹ BCE Act, 1997, amended by the BCE Amendment Act, section 54 and section 60.

¹⁶⁰ 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).

¹⁶¹ *Ibid.*, section 3; Sectoral Determination 8, section 3.

¹⁶² Amendment of Sectoral Determination 7: Domestic Worker Sector, South Africa, November 11, 2005, Government Notice No. R. 1104, <http://www.info.gov.za/gazette/regulation/2005/28223.pdf> (accessed January 21, 2007).

current prices (and including bonuses and overtime payments) for all formal non-agricultural industries in February 2006 was over R7,000 (US\$1,044.78).¹⁶³

Foreign farm workers benefit from some, but not all, the improvements in South African labor law. In January 2003, Minister of Labour Membathisi Mdladlana stated, “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.”¹⁶⁴ As undocumented workers are also “people working in South Africa”, the laws should also protect their rights so that undocumented workers should receive the minimum wage and enjoy mandatory time off and compensation for work performed. This is yet to be tested in the courts. Likewise, the Compensation for Occupational Injuries and Diseases Act, 1993 (No. 130 of 1993, amended by No.61 of 1997), which governs worker compensation and medical payments for work-related injuries and diseases, does not distinguish between South African citizens and foreign workers. With few exceptions that are not related to citizenship, all employers are required to contribute to the workers’ compensation fund.

There is labor legislation that discriminates between foreign and South African workers. The Unemployment Insurance Act, 2001 (No. 63 of 2001),¹⁶⁵ and its counterpart, the Unemployment Insurance Contributions Act, 2002 (No.4 of 2002),¹⁶⁶ which was amended in 2003, explicitly exclude, among others, foreign workers on contract, including therefore all foreign migrant farm workers who are employed by virtue of their employers having been issued with corporate permits.¹⁶⁷ Neither the farmers nor the foreign contract workers they employ are required to make the otherwise mandatory monthly contributions to the Unemployment Insurance Fund (UIF)—1 percent of full wages paid for employers, and 1 percent of wages received for

¹⁶³ Statistics South Africa, “Quarterly employment statistics : September 2006,” December 12, 2006, <http://www.statssa.gov.za/publications/Po277/Po277September2006.pdf> (accessed January 22, 2007), p. 17.

¹⁶⁴ “Minister Calls for Closer Cooperation with Zimbabwe,” Department of Labour media statement.

¹⁶⁵ Unemployment Insurance Act, No. 63 of 2001, <http://www.labour.gov.za/download/8483/Act%20-%20Unemployment%20Insurance%20Fund.doc> (accessed July 26, 2006).

¹⁶⁶ Unemployment Insurance Contributions Act, No. 4 of 2002, <http://www.info.gov.za/gazette/acts/2002/a4-02.pdf> (accessed July 26, 2006).

¹⁶⁷ *Ibid.*, section 4(1)(d); Unemployment Insurance Act, 2001, s(3)(1)(d).

employees. Foreign farm workers are therefore not eligible for short-term relief that contributors to the UIF are entitled to claim: unemployment benefits, if the employer terminates the services of the contributor or a fixed-term contract ends or the employer becomes insolvent; illness benefits for periods of illness lasting up to 14 days; maternity benefits and maternity leave for a maximum period of 17.32 weeks; dependants (death) benefits for the surviving spouse or life partner, or under certain conditions, for any dependant child under 25 years of age.

At least two other labor laws explicitly differentiate between citizens and non-citizens. The Employment Equity Act, 1998 (No.55 of 1998) seeks to eliminate unfair discrimination in the workplace and to implement affirmative action measures to redress the disadvantages in employment experienced by “designated groups.” Designated groups were defined to mean black people (i.e. Africans, Coloreds, and Indians), women, and people with disabilities. In August 2006 an amendment to the Employment Equity Regulations added the qualification that designated groups had to meet citizenship requirements.¹⁶⁸ The Skills Development Act, 1998 and the associated skills development levy on employers apply only to the South African labor force.

Mechanisms of enforcement and remedies

Labor inspectors are responsible for monitoring and enforcing compliance with employment laws in all work places and not only farms. Employment laws include the Unemployment Insurance Act, the Skills Development Act, the Employment Equity Act, the Occupational Health and Safety Act, and the Compensation for Occupational Injuries and Diseases Act.¹⁶⁹ The minister of labour is responsible for appointing or designating and certifying labor inspectors from persons in the public service.¹⁷⁰ Labor inspectors may promote, monitor, and enforce compliance with an employment law by advising employees and employers of their rights and obligations in terms of an employment law, conducting inspections, investigating

¹⁶⁸ Employment Equity Act, 1998 (Act No. 55 of 1998): Amendment to the Employment Equity Regulations, Government Notice No. R. 841, August 18, 2006, section 1.5.

¹⁶⁹ BCE Act, 1997, section 1, as amended by the BCE Amendment Act, 2002.

¹⁷⁰ BCE Act, 1997, section 63.

complaints, and by securing undertakings or issuing compliance orders.¹⁷¹ To monitor or enforce compliance with an employment law, a labor inspector has specific powers that include requiring a person to disclose information or provide records or documents relating to an employment law.¹⁷²

There were 1,012 inspectors in March 2006, and 145 unfilled positions for inspectors—a vacancy rate of 12.5 percent for inspector posts.¹⁷³ Though there are 200 more labor inspectors than in 2003,¹⁷⁴ the Department of Labour’s director-general acknowledged in the annual report for 2005-06 the need “to strengthen the implementation, enforcement and monitoring mechanisms of our legislation.”¹⁷⁵

An employer may challenge a compliance order by making representations in writing to the director-general of labour, and may appeal to the Labour Court against an order of the director-general.¹⁷⁶ Employees’ rights include the right to complain to a trade union representative, a trade union official, or a labor inspector about any alleged failure or refusal by an employer to comply with the BCE Act; to refuse to comply with any instruction that is contrary to the BCE Act or any sectoral determination; and to refuse to consent to any condition of employment that is contrary to the BCE Act or any sectoral determination.¹⁷⁷ Employees or employers may refer any dispute about the interpretation of application of the aforementioned rights of employees to the Commission for Conciliation, Mediation and Arbitration (CCMA) established in terms of section 112 of the Labour Relations Act, 1995.

¹⁷¹ *Ibid.*, section 64.

¹⁷² *Ibid.*, section 66.

¹⁷³ Department of Labour, Annual Report, 2005-6, <http://www.labour.gov.za/download/10789/Annual%20Report%20-%20Department%20of%20Labour%202006%20-%20Intro.pdf>, p. 165

¹⁷⁴ SAHRC, “Final Report on the Inquiry into Human Rights Violations in Farming Communities,” p. 30.

¹⁷⁵ Department of Labour, Annual Report 2005-6, p. 1.

¹⁷⁶ BCE Act, 1997, section 71, as amended by the BCE Amendment Act, 2002, and section 72.

¹⁷⁷ BCE Act, 1997, section 78.

The CCMA is an independent government-funded dispute resolution mechanism.¹⁷⁸ Its compulsory statutory functions include the conciliation of workplace disputes and the arbitration of certain categories of disputes that remain unresolved after conciliation. Conciliation must be conducted within the statutory 30-day period and arbitration awards rendered within the statutory 14 days. If asked, the commission may provide employers, employees, and unions with advice or training relating to the primary objectives of the Labour Relations Act. The commission's governing body is appointed by the minister of labour and is composed of representatives of organized labor, organized business, and the state. The governing body appoints commissioners who may be part-time or full-time and who have fixed terms.

The CCMA compiles and publishes information and statistics about its activities, as mandated in the Labour Relations Act.¹⁷⁹ The CCMA had an average of nearly 500 disputes per working day referred to it between April 2005 and March 2006.¹⁸⁰ Unfair dismissal disputes accounted for the largest percentage of issues (about 80 percent) referred to the CCMA. Unfair labor practices, the next largest percentage of disputes, comprised over 6 percent of referrals to the CCMA. Referrals by sector remained relatively consistent throughout the 2005 to 2006 period. In particular, the agricultural sector and the food and beverage manufacture sectors each accounted for about 4 percent of referrals—the lowest percentage of referrals by sector. In the arbitration awards rendered by the CCMA, 63 percent were in favor of the employee party and 35 percent in favor of the employer party. The overwhelming number of conciliation cases and arbitration awards were completed within the statutory timeframes.

¹⁷⁸ Labour Relations Act, 1995 (No. 66 of 1995), sections 112-117 and section 122 discuss the establishment, composition, funding, and functions of the CCMA. Sections 135 and 138 provide the statutory timeframes for making arbitration awards and conducting conciliation.

¹⁷⁹ Labour Relations Act, 1995, section 115 (1)(d).

¹⁸⁰ The statistics on the CCMA in this paragraph are drawn from the Commission for Conciliation, Mediation and Arbitration, Annual Report, 2005/2006, pp. 12-13.

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

Our research in Limpopo and Mpumalanga found many employers who unlawfully hired undocumented foreign workers. We also found that police and immigration officials violate the procedures for the arrest, detention, and deportation of foreigners residing in the country illegally. Other research has documented similar violations in the treatment of foreigners in South African,¹⁸¹ and taken in its entirety this body of research suggests that the violations committed by police and immigration officials are widespread rather than isolated, individualized incidents. We identify these violations and also deficiencies in the immigration law, and where applicable, their consequences for the human rights of foreign migrants.

Employers' failure to document foreign farm workers

It is, as previously noted, a violation of the Immigration Act, and an offense, for an employer to hire a foreigner whose immigration status is illegal. Our findings suggest that the use of undocumented farm workers is a diminishing problem, largely confined to small and less financially successful farmers (most farmers who produce on a large scale for export or for the domestic market use only documented workers). Undocumented workers, as we discuss later, are often more vulnerable to human rights abuses, including the denial of the right to fair conditions of work.

Most of the undocumented workers whom Human Rights Watch interviewed worked either for Trust land farmers who farm 10 to 15 hectares and hire no more than 10 or 12 workers, or for farmers on small privately-owned farms. None of the

¹⁸¹ Landau, Ramjathan-Keogh, and Singh, "Xenophobia in South Africa and Problems Related To It"; Landau et al., "Crossing Borders, Accessing Rights, and Detention"; Human Rights Watch, *South Africa – Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg*, vol. 17, No.15(A), November 2005, <http://hrw.org/reports/2005/southafrica1105/southafrica1105.pdf>; "The Documented Experiences of Refugees, Deportees and Asylum Seekers in South Africa"; National Consortium for Refugee Affairs (NCRA) in collaboration with Forced Migration Studies Programme, University of the Witwatersrand, "Refugee Protection in South Africa 2006," June 2006. 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*, March 1998, <http://www.hrw.org/reports98/sareport>.

undocumented farm workers whom we interviewed, as discussed later, get paid the minimum wage.¹⁸²

In Limpopo, Human Rights Watch visited a 15-hectare Trust land farm in the former Venda homeland. The farmer told us how he had paid for a corporate permit for his Zimbabwean workers but one by one they had deserted. The farmer believed they had left because he could not pay them the minimum and he could only provide them with shacks.¹⁸³ The farmer had not applied for a corporate permit for the nine Zimbabweans he was then employing. They, too, hoped to find better paid work and better accommodation, though they expressed concern that their undocumented status would be a constraint.¹⁸⁴ A 35-year-old Zimbabwean deportee told Human Rights Watch at Beitbridge that he had worked illegally in South Africa for a black farmer. He was the only worker on the farm in Maguni, near Njelele in Limpopo province.¹⁸⁵

In Mpumalanga, Human Rights Watch interviewed many Mozambicans who worked for Trust land farmers in Nkomazi in the former KaNgwane homeland. A Mozambican woman, a refugee from Magudu in Maputo province, did not get a South African identity document during the amnesty, though her husband did. Five years ago, after her previous employer, a Trust land farmer died, she took a job with another farmer in Nkomazi. She and another person are the only two workers, and both are undocumented. Her undocumented status is the reason why she does not leave in search of a better paid job, as other workers have done.¹⁸⁶

Nkuzi Development Association interviewed two Mozambican women who worked illegally in sugarcane fields for Trust land farmers who employed fewer than five workers.¹⁸⁷ A widow who fled Mozambique in 1990 after her husband had been killed

¹⁸² Human Rights Watch interview with South African and Mozambican workers, Komatipoort area, September 28, 2006.

¹⁸³ Human Rights Watch interview with Trust land farmer, Nwanedi, April 30, 2006.

¹⁸⁴ Human Rights Watch interview with nine undocumented Zimbabwean farm workers, Nwanedi, April 30, 2006.

¹⁸⁵ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 10, 2006.

¹⁸⁶ Human Rights Watch interview with undocumented Mozambican woman, Nkomazi Block A, September 23, 2006.

¹⁸⁷ Nkuzi Development Association, interviews with undocumented Mozambican women, Nkomazi Block A, September 24, 2006. Shirami Shirinda, Nkuzi Development Association, assisted Human Rights Watch with research and conducted interviews independently on September 24, 2006, in Nkomazi Block A.

by Frelimo soldiers (the Government of Mozambique's armed forces), and who had her amnesty application rejected, works illegally for a farmer originally from Mozambique. All seven workers on the farm in Nkomazi are from Mozambique.¹⁸⁸ A Mozambican man, who came to South Africa in 1975, has no legal work documents. At present he is the sole worker on a 12-hectare farm operated by a woman near Mangweni.¹⁸⁹ A Mozambican man who had just been laid off with four of his 11 co-workers, all Mozambicans, had been working without a legal work document for a farmer in Mzinti. He had not got amnesty because he had been unable to apply within the prescribed time period due to a prolonged illness.¹⁹⁰

On privately-owned farms which employed larger work forces than the Trust land farmers, undocumented workers are usually hired as seasonal, casual, or temporary workers. In law, casual workers are hired per day, temporary workers for less than three months, and seasonal workers for more than three months. Colloquially, people do not always use these terms as they are defined in labor laws.

A farm near Hazyview employs Mozambican workers who do not have the right to work legally in South Africa. On the day that Forced Migration Studies Programme visited the farm there were about 70 workers harvesting string beans in the field. The workers are employed for two to three weeks. According to the *induna* (a Zulu word whose colloquial meaning implies formal authority; in this context it may be translated as "team leader"), "Police come here almost every day, or after 2-3 days. They talk to the farm owner, there in the house on the hill, and then they come over here to see what is happening. They never take anyone with them, at least not since I started here 15 years ago."¹⁹¹ On a banana and avocado farm near Kiepersol there was only one permanent worker and some 20 to 50 temporary workers, most of whom had been working on the farm for five years or more, and only four of whom were Mozambicans. According to a South African worker on the farm, the Mozambicans "don't have IDs. The farm owner doesn't ask about IDs when he hires

¹⁸⁸ Human Rights Watch interview with undocumented Mozambican woman, Nkomazi Block A, September 24, 2006.

¹⁸⁹ Human Rights Watch interview with undocumented Mozambican man, Nkomazi Block A, September 24, 2006.

¹⁹⁰ Human Rights Watch interview with undocumented Mozambican man, Nkomazi Block A, September 24, 2006.

¹⁹¹ Forced Migration Studies Programme interview with *induna*, Hazyview, September 25, 2006.

people.”¹⁹² If the farmer does not ask about IDs, it would suggest that he is unconcerned about whether he hires documented or undocumented workers.

In Hoedspruit area, the owners of a farm that has 55 hectares under cultivation and another 250 hectares under grazing, hire 45 permanent staff, all documented, and about as many temporary workers. The owners admitted to not being concerned if their temporary workers were undocumented. “We don’t check the IDs of temporary workers. Some are just working for a week, so it is a lot of administration. It costs a lot of money to make copies (of IDs and contracts) for 40 to 50 temporary workers. On small farms you are the manager and the mechanic and the human resources person, so you don’t have a lot of time for administration.”¹⁹³

On a farm which employs considerably more than 100 permanent workers, the South African and Mozambican workers said their employer did hire temporary workers without any documents but that they all got the minimum wage.¹⁹⁴ The neighboring farm, which also has a substantial permanent labor force, according to the permanent workers, “had Mozambicans working on the farm without papers but not many.” The workers said, “The police do come and arrest people. They last came last month. They were arrested and they came back. The police came during the day.”¹⁹⁵

Government officials in Nelspruit expressed the opinion to Human Rights Watch that undocumented foreign workers are now employed in greater numbers in construction than on farms. The Nelspruit police station commander maintained that most of the 50-60 undocumented Mozambicans deported monthly from Nelspruit police station were arrested on construction sites and in towns.¹⁹⁶ The head of the Mpumalanga Immigration Inspectorate in Nelspruit claimed there were more

¹⁹² Forced Migration Studies Programme interview with two South African workers, Kiepersol, October 10, 2006.

¹⁹³ Forced Migration Studies Programme interview with farm owners, Hoespruit, September 26, 2006.

¹⁹⁴ Human Rights Watch interview with South African and Mozambican workers, Komatipoort area, September 28, 2006.

¹⁹⁵ Human Rights Watch interview with South African and Mozambican workers, Komatipoort area, September 28, 2006.

¹⁹⁶ Human Rights Watch and Forced Migration Studies Programme interview with station commissioner, Nelspruit police station, September 22, 2006.

undocumented workers on construction sites than on farms, in part because there had been more public pressure on farm owners to document their workers.¹⁹⁷

The Nelspruit labor inspector to whom Forced Migration Studies Programme spoke said,

We get more complaints from the construction and security sectors than from farming nowadays. A farmer might want cheaper foreign labour but they can't get any because he has to go through DHA and us [Department of Labour] and he can't get Mozambicans [through the corporate permit] unless he pays them minimum wages.... Those Mozambicans who come in illegally are still being misused, but not in large numbers.¹⁹⁸

Officers' failure to provide written notification of the decision to deport

The Immigration Act requires that foreigners who are in the country unlawfully must be given written notice of the decision to deport them and of their right to appeal the decision to deport them.¹⁹⁹ Also, they must be informed upon arrest or immediately thereafter of their right to appeal or to have their deportation confirmed by a court warrant issued within 48 hours of request.²⁰⁰ These provisions are consistent with international and constitutionally guaranteed rights to due process. Failure to comply with the protections in the Immigration Act denies individuals their right to due process.

At neither Musina nor Makhado police stations in Limpopo or at Komatipoort police station in Mpumalanga did Human Rights Watch find any evidence that detainees received written notification of the decision to deport them or of their right to appeal a deportation decision. At Komatipoort, a senior immigration official described the

¹⁹⁷ Human Rights Watch and Forced Migration Studies Programme interview with J.P. du Plessis, head of Immigration Inspectorate, Nelspruit, September 21, 2006.

¹⁹⁸ Forced Migration Studies Programme interview with Gert Smith, labor inspector, Department of Labour, Labour Center, Nelspruit, October 10, 2006.

¹⁹⁹ Immigration Act, section 34(1)(a); Immigration Regulations, 2005, s.28.

²⁰⁰ Immigration Act, section 34(1)(a) and (b).

legal procedure as follows: DHA issues to the police at the holding facility a warrant of detention for foreigners unlawfully in the country; the DHA issues a notification of deportation within 48 hours of arrest to the detainee, giving him or her three options: to appeal the deportation decision, to be deported at the first reasonable opportunity, or to request a court warrant to confirm that the detention is for the purpose of deportation. Referring to a Malawian inmate at Komatipoort police station, she said, “For the Malawian, the 48 hours is up today at 1 p.m. I need to issue the notification of deportation.” When Human Rights Watch researchers told her that none of the inmates they had spoken to almost daily for a week in the holding facility at Komatipoort had received a written notification of deportation, she continued, “I wouldn’t say everybody is going the straight way. Everyone wants to shorten their jobs.”²⁰¹

Killings, assault, and extortion of foreign migrants by state officials

As a party to the ICCPR, ICERD, and the African Charter, South Africa has undertaken to guarantee to all, including foreigners unlawfully in the country, basic human rights including the right to life, to personal security, and to be free from all forms of cruel, inhuman or degrading treatment.²⁰² Although this is reinforced through constitutional protection of the same rights,²⁰³ Human Rights Watch has heard from many “illegal foreigners” and even some state officials of alleged assaults of “illegal foreigners” and extortion of money and other property from them by police, military, and immigration officials. Some of the incidents related include unlawful killings by law enforcement officials who forced foreigners to jump to their deaths from moving trains. Killings, assault and other forms of ill-treatment committed by a state agent—be it a law enforcement officer or other immigration official—is not only a crime, but also a serious human rights violation. Where such incidents are routine and the evidence indicates that officials who engage in such illegal activity enjoy effective impunity and are not held to account for their abuse of power and unlawful use of force, the problem is a systemic one and requires urgent and robust response.

²⁰¹ Human Rights Watch interview with senior immigration official, Nelspruit, September 29, 2006.

²⁰² ICCPR, arts. 7 and 9; ACPHR, arts. 4, 5 and 6; ICERD, art. 5.

²⁰³ Constitution of the Republic of South Africa, chapter 2, section 12; Immigration Act, section 33(7).

Even foreigners in South Africa whose immigration status is illegal should also enjoy the protection of the Immigration Act, which makes it an offense for any civil servant to accept “any undue financial or other consideration to perform an act or to exercise his or her discretion in terms of this Act...”²⁰⁴ The Act also requires an immigration official who takes documents “or any other thing” from a suspected “illegal foreigner” to issue a receipt and to return whatever was taken after the purpose of its seizure has been accomplished.²⁰⁵

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 cell phone 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 police officer 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.²⁰⁶

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\$4.30] to take the taxi back.²⁰⁷

²⁰⁴ Immigration Act, section 49(5), as amended by the Immigration Amendment Act.

²⁰⁵ Immigration Act, section 33(5)(c).

²⁰⁶ See, for example, Human Rights Watch, “*Prohibited Persons*,” pp. 54-55.

²⁰⁷ Human Rights Watch interview with white commercial farmer, Weipe, April 24, 2006.

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."²⁰⁸

A 28-year-old Zimbabwean from Mwenezi district, Masvingo, crossed the Limpopo river illegally and was traveling at night in a taxi when soldiers stopped the vehicle at Muswodi. Before taking the approximately 15 passengers to Muswodi police camp, the soldiers forced the passengers to lie on top of each other in groups of five.

They said we must lie down on the ground. Five-five [groups of five], one on top of each other. From 3 to 5 in the morning they made us pile up. They did not beat me. But the only thing they did wrong to me was they put a gun on my chest and made me lie on top of it—two people below me, and two people on top of me. There were so many soldiers. I don't know the number. There were about six to eight. I told the soldiers but they did not care. I said my chest is painful. So I was crying for that time. The soldiers who put the gun on me are speaking Venda.²⁰⁹

This man went with an IOM staff member to report the incident to the South African police.

A 19-year-old Zimbabwean from Mbare, whom we interviewed at Beitbridge, was arrested and beaten by soldiers when he was inside the Limpopo border fence. Demonstrating being hit on his face, he said, "The soldiers give me some claps." Asked why, he replied, "To teach me not to do it [illegally cross the Limpopo] again."²¹⁰

An immigration officer at the DHA Komatipoort office told Human Rights Watch of how a Mozambican girl had been raped in front of a group of Mozambicans who had

²⁰⁸ Human Rights Watch interview with Zimbabwean farm supervisor, Weipe, April 24, 2006.

²⁰⁹ Human Rights Watch interview with deported Zimbabwean, IOM reception center, Beitbridge, October 12, 2006.

²¹⁰ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 11, 2006.

been arrested by an SANDF border unit and left under the guard of one of its members:

Four months ago, the SANDF arrested about 30 illegals. One 40-year-old Mozambican man raped a Mozambican girl of 17 in front of the group of arrested people. No one said anything. We made her open a case. The police said no, give it to the Mozambicans, they will sort it out. The police said the Mozambicans have harsher laws than in SA. We had to take it to the Mozambican side. He was charged.²¹¹

Human Rights Watch interviewed a young Zimbabwean man at the IOM reception center in Beitbridge who had been deported after living and working illegally in South Africa for eight months. He contends that police threatened him with violence, stole from him, and sought to extort money from him on different occasions. When he first came to South Africa, he and a friend from home set up a barber shop on the streets of Johannesburg. “The municipal police took all our machines. It was on a Sunday. It was a very busy day. They said we could get the machines back if we came and paid R820 [US\$117.65].”

He then got a job as a truck driver, earning R500 (US\$71.74) per week. South African drivers were paid about R700 (US\$100.43) per week. After five months, he and four others were arrested by police at their work place in Parkview. Recounting his arrest, he dwelled on unnecessarily aggressive behavior of the police and their attempt to extort money:

The real problem is how police treat us. Before we got to Lindela [detention center], you go to their police station. They use firearms, shooting in the air or behind you. Three shots were fired before I was arrested. I was not running or anything. I was taken to Parkview police station in Johannesburg. Police came at 9:30 a.m. on October 5. [He produced Notification of Rights in Terms of the Constitution (s.35 of Act 108 of 1996) to show his date of arrest.] I failed to produce a valid

²¹¹ Human Rights Watch interview with senior immigration official, DHA, Komatipoort, September 29, 2006.

passport and valid ID.... I stayed one night at Parkview police station. At Parkview police station, the treatment was not so bad but the way they arrested us—gunshots, handcuffs, and they asked us to pay money to release us. R300 [US\$43.04] for each person. If I've got money, it's for my mother.

At Lindela, where he spent five days, he reported that immigration officials who fingerprinted them offered to release them if they could pay R500 (US\$71.74). While being deported, he claimed three people, including one in his coach, had been pushed through the window of the moving train at night by the police. All three men had paid R300 (US\$43.04) to the police to release them on the trip. The police also abused the deportees on the train, forcing them to sleep one on top of the other underneath the bunks.²¹²

Another young man who had traveled on the same train transporting Zimbabwean deportees from Lindela deplored the way he had been treated by police during his arrest, detention, and deportation. Police arrested him at his workplace in Pretoria. When he asked the police to take him home to collect his savings, they beat him. At Garsfontein police station, Pretoria, the police beat all 15 Zimbabweans and sprayed them with teargas. On the train to Musina, he said he had to lie under the train seat with handcuffs that chained him to other deportees. He accused the police of beating them with batons and spraying them with teargas on the train. According to him, many deportees paid R300 (US\$43.04) to the police in exchange for promises to be allowed to jump off the train. In his train coach alone, he claimed six deportees jumped off the train, three of them to their death. After people had died, he said,

Police are laughing at us. They are saying we are baboons. If you are continuing to talk, we can spray your mouth. In your country you have nothing. You have no food to eat. Your country Zimbabwe is poor. At Musina, when we depart [disembarked], they took four people and say, "Clean this train (more than 24 trucks), then you can go free." But after they'd cleaned the train, they put those people into the *gumbakumba*

²¹² Human Rights Watch interview with deported Zimbabwean, IOM reception center, Beitbridge, October 12, 2006.

[police truck] and said, “Go back to your country. We don’t want to see you in South Africa.”²¹³

A 33-year-old Zimbabwean, who was deported on the same train, recounted a similar story of beatings and other abuses by police and extortion by immigration and police officers:

We [referring to his friend who had been deported with him] were coming from work. We were just looking for some meat. They started to search us thinking we had guns. They asked for papers. We said we had asylum permits. We could go home [to Thembisa, east of Johannesburg] and get them. [The Immigration Act requires the arresting officers give foreigners who are suspected of having an illegal immigration status an opportunity to verify their legal status.] Then they just arrested us. “Can you give us a chance to get home?” we asked. Then they asked for money. R500 [US\$71.74] per person, they asked for. We said we only have R20 [US\$2.87] on us. When we get home, we can give you money. My wife came a day later [to the police station] and brought money. They wouldn’t accept it. At Lindela, when we came in, immigration [officials] are also asking for about R700 [US\$100.43] to get out. Others having money were paying and getting out. We didn’t have the money up to their figure. Together we had R200 [US\$28.69] from my wife....

And on the train coming from Lindela, that’s where the big problem was. When you get into the train, there’s their term “chufkop,” meaning keep your head down so you won’t know where you are.²¹⁴ If you don’t put your head down, they’ll come and beat you. Once you put your head down, they start asking who has got money to go free. If you pay that R500 [US\$71.74], they’ll force you to jump out of the window. About three died. Others were injured. The train is moving

²¹³ Human Rights Watch interview with deported Zimbabwean, IOM reception center, Beitbridge, October 12, 2006.

²¹⁴ The police use an Afrikaans word, the literal meaning of which is “drop your head”. To the Zimbabwean, the Afrikaans word sounded like “chufkop”.

fast. One of the police was shivering, saying, “Ah, I’ve killed someone.” ... [W]e were forced to sleep under the seats. We complained. They’ll clap you. They’ll come and beat you. They also force you to sleep where you keep your baggage. In our whole coach there are about 70, and everyone is sleeping under the seat. The police sit on the seats. In the morning they said “wake up.” Then we sat on the seats.²¹⁵

We were informed that at least one deportee had accompanied an IOM staff member to report to the South African police the deaths of Zimbabweans who were on the train transporting Zimbabwean deportees who had been at Lindela detention center to Musina police station.

A newspaper report in March 2006 quoted a Zimbabwean deportee describing a similar type of police abuse on the train from Johannesburg to Musina. “When deported, people are forced to squat under train benches the whole journey to Musina. No-one is allowed to raise a head as they fear that people might try to jump from the moving train. The journey is gruelling, it’s like a torture exercise.”²¹⁶

A 24-year-old Zimbabwean who has been selling curios in South Africa since 2003, was arrested in East London by police. Speaking at the IOM reception center at Beitbridge, he told us he had gone to the beachfront to display his curios, intending to return home to bath and dress properly. The police told him he had only a tourist visa and not a business visa. They confiscated his curios, which he estimated to be worth R25,000 (US\$3,586.80). He appealed to the police to let him go home and put on shoes and get a jacket but they refused. He was kept in Westbank prison for three weeks before being deported.²¹⁷

A 23-year-old Mozambican from Moambo and his 28-year-old friend who is of mixed Mozambican-Tanzanian parentage live on the compound of a farm that is no longer operational. The compound provides rental accommodation to many who work in the

²¹⁵ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 12, 2006.

²¹⁶ “Corruption rampant at Lindela,” *Zimbabwean*, March 30, 2006.

²¹⁷ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 12, 2006.

vicinity of Nelspruit. Both men are in South Africa without passports. They told us of how police, immigration, and farm security personnel visited the farm in the early hours of the morning, assaulted residents and stole from them, before arresting them. While the younger man was fortunate to escape assault and theft, the other described how he became a victim during the raid:

It was two months ago. Police came around 3 in the morning. Everyone is sleeping. They knock one by one on the door. They ask for passport and ID. Some open the door, others did not. They knock me [on my door]. I open the door. They ask me, “Where’s your passport, where’s your ID?” I’ve never had any documents. They said okay. I tell them I’m from Mozambique. [His father is Mozambican; his mother is Tanzanian.] They said okay. They took my kettle, TV, DVD, duvet, and other things from my [South African] girlfriend. They took our rings. Even money. They took R800 belonging to my girlfriend [who was visiting her mother]. It was police, immigration, and security.

After they took things, we went to the police station [Nelspruit]. I spent two weeks in the prison cell. They suspect me of stolen property. My girlfriend came to visit. I phoned her. She asked them to return our things. The police asked for R200 [US\$28.69] from her for them to return the stolen properties. She gave R200 to the police. They didn’t give the things. I am on bail for R500 [US\$71.74]. I am going to court about the properties stolen from me. The case is on October 12 in Nelspruit. They said I can get a lawyer or speak myself. I said I’ll speak myself. Now it’s three times they give me a reminder [officials have reminded him on three occasions of his pending court case]. I know the police—there were three of them—and security—there were two—and immigration—there were two.²¹⁸

This man also claimed that police often harassed and stole from foreigners when they went shopping in town at the end of the month. “If I come to town to shop, they

²¹⁸ Human Rights Watch interview with undocumented Tanzanian, Agencia Algos, outside the office, Nelspruit, October 3, 2006.

stop me. They search me. About a month ago, they looked at my phone. They didn't take it. It's a cheap phone. It's not the only time. It happens often. Every month, at the end of the month, we shop. We go to Shoprite and Pick 'n Pay [in Nelspruit]. That's when the police stop us."²¹⁹

A 22-year-old Zimbabwean told Human Rights Watch at the IOM reception center in Beitbridge that he had successfully bribed police in June 2006 not to arrest him. He was working in the garden of a man with a brickyard in Manini village near Thohoyandou in Limpopo when the police arrived. "I said, 'We can help each other. Maybe you need money.' I said, 'I've got R50 [US\$7.17].' They said it's too little. I said, 'R70 [US\$10.04]. That's all I have.' They agreed."²²⁰

DHA officials at Komatipoort and the Lebombo border post informed Human Rights Watch that the SANDF border patrollers took money from Mozambicans who entered South Africa illegally. A DHA official at Lebombo border post described how the SANDF's Mpumalanga headquarters in Nelspruit had military units at Macadamia, Lebombo, and Skukuza in the Kruger National Park that rotate every three months. Though each new batch receives training on the legal procedures, the DHA official volunteered that corruption persisted.²²¹ Asked if she could explain monthly fluctuations in the number of Mozambican deportees from the Komatipoort police station, an immigration official at DHA Komatipoort office said,

Yes. We mostly rely on SANDF on the border. They're only here for three months. The first two months they are full of energy. After a month or so, they drop. They take bribes. There's a loss of energy. This month they've caught at most 10.²²²

²¹⁹ Ibid.

²²⁰ Human Rights Watch interview with deported Zimbabwean, IOM reception center, Beitbridge, October 11, 2006.

²²¹ Human Rights Watch interview with DHA official, Lebombo border post, September 28, 2006.

²²² Human Rights Watch interview with senior immigration official, DHA, Komatipoort, September 29, 2006.

Pressed on how she knew the border military units took bribes, she explained,

The people we've caught say they've paid SANDF.... Each and every person who goes through the fence must pay the [Mozambican] runner.... The "runner" asks [the border jumper] for R200 [US\$28.69]. He [the runner] must give the Mozambican official and the SANDF a cut. The runner only makes about R30 [US\$4.30] per head. The SANDF asks for R10 per head. There's a hole on the riverside [the Crocodile river]; a guy showed us. We found R240 [US\$34.43]. We did contact the Colonel of the base group but we don't know what happened. There are several of these holes in the ground along the border post area. SANDF doesn't actually directly take the money but they can collect it at the hole. At each and every office—even at this office—there are people who take money. It's not right to say it of your colleagues. But the truth is the truth.²²³

A 23-year-old Mozambican from Moamba described how on his first trip to South Africa in January 2003 he and his friends arrived at the border gate without passports. The Mozambican officials told them they could not cross. They each paid R150 (US\$21.52) to runners who showed them the way to enter South Africa. On their second day in South Africa they encountered police and soldiers at a military camp. "They also requested money from us. They just requested money for cool drink. Because we didn't have any small money to give them, when I took out R100, they took it. They took money from all of us."²²⁴

Detention not in compliance with legal standards

As a party to the ICCPR, South Africa has the obligation to treat with humanity and human dignity all persons deprived of their liberty. Accused and convicted persons, accused juveniles and adults, and juvenile and adult offenders must all be separated from one another.²²⁵ Moreover, South Africa's obligations under the ICCPR

²²³ Ibid.

²²⁴ Human Rights Watch interview with Mozambican, Agencia Algos, outside the office, Nelspruit, October 3, 2006.

²²⁵ ICCPR, art. 10.

and the ACHPR prohibit all forms of degradation, including inhuman or degrading punishment and treatment.²²⁶ South Africa's international obligations to respect the right not to be detained in conditions that are inhuman or degrading and to respect the rights of minors in detention are reflected in several pieces of domestic law.

The Immigration Act provides that an "illegal foreigner" must be detained "in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."²²⁷ Under the constitution, 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."²²⁸ The constitution also 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.²²⁹

The Immigration Regulations stipulate the minimum standards for accommodation, nutrition, and hygiene in detention.²³⁰ Every detainee must be provided with a bed, mattress, and at least one blanket; three meals a day, served at defined intervals and not more than 14 hours between the evening meal and breakfast the next day; and the means to keep his or her person, clothing, bedding, and room clean and tidy. Male and female detainees (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. 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.²³¹

²²⁶ ACPHR, art. 5; ICCPR, art. 7.

²²⁷ Immigration Act, section 34(1)(e).

²²⁸ Constitution of the Republic of South Africa, chapter 2, section 35(2)(e).

²²⁹ *Ibid.* chapter 2, section 28(1)(g).

²³⁰ Immigration Act, section 34(1)(e), and Immigration Regulations, section 28(5) and Annexure B.

²³¹ Landau, Ramjathan-Keogh, and Singh, "Xenophobia in South Africa and Problems Related to it," p. 16.

Failure to provide adequate food, access to medical care, and clean cells

Human Rights Watch interviewed two Zimbabwean farm workers, both in their early twenties, who were arrested near the end of their first month on a farm in Thohoyandou, Limpopo province. Police arrested them on the farm at night while they were asleep. They spent that night at Muswodi police station and received no food the next day. They were transferred in the afternoon to Tshamutumbu police station. They were given supper at around 3:30 that afternoon and for each of the next three days they received only supper at the same hour. They were given foam rubber to sleep on but no blankets. They had to wait for four days until there were enough people to justify providing transport to deport them. “The last number we had when I counted was 152. You can’t sleep. You just stand. This morning we got deported. It was over, overcrowded in the van. More than 50 in that van—that’s their rule. You can only get fresh air when the van starts to move.”²³²

After being beaten and stripped of their clothing by Zimbabwean criminals as they crossed the Limpopo river, a 48-year-old Zimbabwean, his 32-year-old wife, and his two cousins were arrested by police near Madimbo:

If you’re arrested and put in the cell, they don’t provide enough food. My wife was in the cell of ladies.... The two cousins were in the cell with me.... We were arrested in the morning yesterday and we were supplied with one meal up until this morning [the next day] when we were provided with a cup of tea and a piece of bread as we were getting into the car. I think the government is providing the food but police are taking it. They just give you a little. Most of them will be Zimbabweans in the cell but we have not committed an offense. We can call it Madimbo police station.... I think there were about 150 males in the cell and 23 females in one cell. They just push you in the cell and they lock. They don’t provide blankets. Yesterday they deported two trips [truck loads], then we [in the cell] were left with 50. When we were coming in the car, it’s overloaded. Some of the women

²³² Human Rights Watch interview with Zimbabwean deportee and his companion, IOM reception center, Beitbridge, October 10, 2006.

are carrying babies, crying the whole way. They took more this morning and left 11 of us [in the cell]. We said no, take us. It's just because of starving. Otherwise we wait till they can fill up the car.²³³

The 19-year-old Zimbabwean from Mbare who described to us his arrest inside the Limpopo border fence (see above) told us how soldiers took him to Musina police station at round 3 that afternoon. He left the next day around 1 p.m. "I had no dinner at Musina. No breakfast. No food at Musina. They told you to make a straight line. If you're at the back, you don't get food. There wasn't enough food."²³⁴

Five Mozambican males who had been detained over a long weekend at Komatipoort police station in Mpumalanga said they had been served two meals a day—dinner around noon and then tea without bread for breakfast at about 8 in the morning.²³⁵ A few days later, a new group of inmates also alleged that they had only been served two meals a day.²³⁶ When we told a police inspector about the police station's failure to serve three meals a day, he challenged the inmates' claims, saying he would show us the register where the police record the number of meals served daily. The register confirmed that on some days only two meals had been served. Indeed, there were days in which the record showed no evidence of the police providing any food. The inspector volunteered to take up the issue with the captain.²³⁷ On the following day, the inmates reported being served three meals a day.²³⁸

On several visits to Komatipoort police station, the inmates complained to Human Rights Watch that the cell was not clean. They said nobody had been to clean the cells, the blankets smelled of urine, and the toilet was leaking. A Malawian detainee told us, "We asked three times for a hosepipe and broom to clean it [the water coming from the toilet] but it did not come."²³⁹ The police constable who was present

²³³ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 10, 2006.

²³⁴ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 11, 2006.

²³⁵ Human Rights Watch interview with Mozambican detainees, Komatipoort police station, September 26, 2006.

²³⁶ Human Rights Watch interview with detainees, Komatipoort police station, September 28, 2006.

²³⁷ Human Rights Watch interview with police inspector, Komatipoort police station, September 28, 2006.

²³⁸ Human Rights Watch interview with deportees, Komatipoort police station, September 29, 2006.

²³⁹ Human Rights Watch interview with detainee, Komatipoort police station, September 30, 2006.

acknowledged the problem of the leaking toilet, and said the police were waiting for the contractor to repair the toilet.²⁴⁰

Human Rights Watch learned directly of a case where neither the soldiers who arrested an undocumented foreigner nor the police who detained the person heeded a request to provide medical attention. A 20-year-old Tanzanian and a 24-year-old from the DRC had both been arrested around 8 at night by soldiers at a Total garage in Komatipoort. The two men had crossed the border illegally that evening. They had met for the first time on the South African side of the border. According to the man from the DRC, they had been attacked by three civilians shortly before being arrested by soldiers. Their attackers had stabbed the Tanzanian and taken the Congolese man's wallet containing R16, documents, and the shoes he was wearing. When the soldiers arrested the two men, they ignored the Congolese man's request that they take the Tanzanian man to hospital.²⁴¹ The police only took the man to a clinic on his second full day in the cell.

Unlawful detention of children

On Human Rights Watch's first visit to Komatipoort police station, six of the 21 detainees in the cell for males claimed they were under 18 years old (two said they were 15, and four claimed to be 17). They had all crossed the border with the assistance of runners. All of them had brothers who had each paid the runners amounts ranging between R100 (US\$14.35) and R150 (US\$21.52). Because all the brothers had passports and could cross legally, they arranged to link up with their siblings in Komatipoort. From there, they would go together to Johannesburg, where the older brothers had jobs. Their plans were thwarted because the younger brothers were arrested when the taxis they were traveling in were stopped in roadblocks or when they were about to get into taxis. The arrests took place in the vicinity of the Shell garage in Komatipoort on a Friday night. Those claiming to be minors spent the weekend and the Monday, a public holiday, in the cell. According to a policeman at the police station, minors were only kept separately from adults if they were arrested

²⁴⁰ Human Rights Watch interview with police constable, Komatipoort police station, September 30, 2006.

²⁴¹ Human Rights Watch interview with DRC detainee, Komatipoort police station, September 28, 2006.

as suspected criminals.²⁴² Police officers at Komatipoort police station are acting in violation of the Immigration Act, and South Africa’s obligations under the ICCPR, when they detain unaccompanied minors with adults.

On their fifth day of detention, the 21 detainees awaiting deportation were finally transported by a DHA official to the DHA Komatipoort office for interviews prior to their deportation. The officials paid no heed to detainees who claimed during the interviews to be unaccompanied minors. When a detainee said he was 15 years old, one of the DHA officials said to us, “Normally the child is with the mother. He’s just saying he’s 15 because he doesn’t want to be fingerprinted. He’ll come with a different name next time. With a child, we don’t fingerprint.”²⁴³ Another DHA official at the Lebombo border post dismissed even more strongly the possibility of finding “unaccompanied minors,” saying, “You don’t have it. The child is always accompanied by someone.”²⁴⁴

A senior immigration officer at the DHA Komatipoort office, however, acknowledged to Human Rights Watch that they deal with about 50 unaccompanied children per year. “Children up to 15 must not be detained. They go to social services. Either we contact social services at Tonga (small center not too far from Komatipoort, Mpumalanga) or we send them direct to Tonga.”²⁴⁵

Unlawful detention of those awaiting deportation with convicted prisoners and those awaiting trial

At the IOM reception center in Zimbabwe, Human Rights Watch was informed by a number of deportees that they had been detained in South African police stations in cells for convicted prisoners or people on remand.

A 28-year-old Zimbabwean who has “A” levels (Advanced Level high school qualifications, commonly referred to as sixth form) was making a living selling curios

²⁴² Human Rights Watch interview with police official, Komatipoort police station, September 26, 2006.

²⁴³ Human Rights Watch interview with DHA officials, Komatipoort, September 26, 2006.

²⁴⁴ Human Rights Watch interview with acting head of DHA office, Lebombo border post, September 28, 2006.

²⁴⁵ Human Rights Watch interview with senior immigration official, DHA, Komatipoort, September 29, 2006.

on the Durban beachfront. Police arrested him in mid-August because he did not have a business permit. They took him to the DHA, who took him to Durban-Westville Prison, where he spent three weeks:

There in the prison it was terrible. We were put together with rapists, murderers. They have what you call remand. We were put with remandists. Some were armed robbers, carjackers. For us to be friendly with those people, you are supposed to have a visitor who will bring you cigarettes. Those people like cigarettes. Those terrible people. For you to have enough food, cigarettes play a role. In the kitchen you could buy breakfast with cigarettes, buy meat with cigarettes, make home calls. Even the prison officers, if you have cigarettes, you are their best friend. Me, since I'm an artist, I have a couple of white friends who would bring me fruits and cigarettes.²⁴⁶

When a 21-year-old Zimbabwean from Bulawayo was arrested by police in Polokwane for having entered South Africa without a passport and visa, he told Human Rights Watch that he was made to share a cell with seven South African prisoners, apparently convicted for shoplifting. Also in the cell were 42 other Zimbabweans. He told of how he was harassed and beaten by the South Africans in the cell. "The South African prisoners told us to beat drums and sing. When I was tired I wanted to sleep. Two guys came. They started beating me. They were kicking us with their shoes. One was carrying gum boots and beating me. They were saying if we don't do what they tell you, they'll kill us." Asked if he complained to the police, he replied, "The police knew what they were doing. They put us in the cell with prisoners."²⁴⁷

Two IOM staff members at the reception center in Beitbridge told Human Rights Watch that one of the most common complaints they heard in their interviews with deportees was that they had been detained with prisoners. The staff members said they had spoken to 15 deportees on October 2, 2006, who had been held for more than two months at Senwabarwana police station near Polokwane. They were kept in

²⁴⁶ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 12, 2006.

²⁴⁷ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 12, 2006.

a cell with South African prisoners who harassed them. The inmates made the Zimbabweans do their laundry, clean the cell, and buy them cigarettes. If they had no money, the inmates would beat them.²⁴⁸

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. It is immigration policy, but not yet enshrined in the law, to arrange with employers to pay the unpaid wages of “illegal foreigners” who have been arrested and detained, and to permit foreigners whose immigration status was unlawful access to their bank accounts and their personal belongings before their deportation.²⁴⁹ When state officials enforcing the Immigration Act do not respect this policy, migrant workers are being denied a means of enforcing their constitutional right to “fair labour practices,” including the right to be paid for work performed, and are effectively being deprived of their property, despite a constitutional prohibition on such deprivation.

The rights of migrants who get deported to access unpaid wages and savings and to retrieve personal belongings are important provisions in the Migrant Workers’ Convention.²⁵⁰ Although, South Africa is yet to become a party to this convention, other international treaties that South Africa has signed reinforce the rights of undocumented foreigners to be paid for work performed and to be able to obtain their savings and belongings prior to their deportation. For instance, the ICCPR prohibits servitude and forced labor, the African Charter prohibits “all forms of exploitation,” and the ICERD committee has affirmed that the ICERD protects the

²⁴⁸ Human Rights Watch interview with Mpilo Nkomo and Kuda Ndlovu, IOM reception center, October 11, 2006.

²⁴⁹ Human Rights Watch separate interviews with Director of Deportations Ricardo Abrams, DHA, Pretoria, October 5, 2006, and Limpopo province Head of Deportations Albertus Venter, DHA, Polokwane, October 13, 2006; Human Rights Watch and Forced Migration Studies Programme interview with J.P. du Plessis, Mpumalanga province head of Immigration Inspectorate, DHA, Nelspruit, September 20, 2006.

²⁵⁰ Migrant Workers Convention, arts. 22(6) and 32.

labor and employment rights of even undocumented workers as long as they are in an employment relationship.²⁵¹

A 23-year-old from Zimbabwe whom Human Rights Watch interviewed in Beitbridge lamented not being able to collect his earnings before deportation:

Our problem is no money after being arrested. I left more than R1,250 [US\$179.34] in Pretoria. If I die in Zimbabwe, who is going to take this money? I'm working for nothing. And South African policemen come and arrest us at our jobs, not on the road or in a tavern. The citizens of South Africa tell them to arrest us at our job. Now we are working for nothing. It's better if they arrested us and took us home to get our money. When I asked if they could take us with our white employer [name supplied], a building contractor, to get our money at home, then the police [three of them] beat me and put me in tight handcuffs.²⁵²

A 23-year-old Zimbabwean who has an international diploma in business studies had been working for three months as a shop assistant for an Indian mini-mart owner. He earned R1,200 (US\$172.17) per month. He was traveling on a bus from Beitbridge to Johannesburg, returning to his job, when he was arrested in a roadblock close to Musina. The police ordered everyone off the bus to check their papers. "I never managed to get anything from the bus. I only managed to get this backpack. I was carrying it at the time I got out of the bus. I left a bag with clothes and money in it. I had R500 [US\$71.74]. We were taken back to where the soldiers' camp is. It was yesterday." Asked if he requested permission from the police to get his money on the bus, he replied, "I did. They just refused."²⁵³

A Zimbabwean who had been deported from Polokwane was distressed not only about having to leave his R50 (US\$7.17) per day job as a plumber but also about having to leave behind his belongings at his rental accommodation on a farm. He

²⁵¹ ICCPR, art. 8; ACPHR, art. 5; General Recommendation No. 30.

²⁵² Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 12, 2006.

²⁵³ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 10, 2006.

told Human Rights Watch, “My problem is I left everything—money (R580 [US\$83.21]), clothes, radio, omega watch, digital camera.”²⁵⁴

Human Rights Watch interviewed a 40-year-old from Inhambane province in Mozambique in front of DHA officials who were registering and fingerprinting detainees prior to their deportation. He told Human Rights Watch that he had worked in South Africa since 1997 and was arrested at work in Nelspruit because he did not have a work permit. “I was working for a building contractor. The employer is a black person by the surname of X [name supplied]. We were building houses in Nelspruit. I was plastering. This month I was arrested before I got the money. I was owed R250 [US\$35.87]. I was arrested when I was entering the building on Friday.”²⁵⁵ Immigration officials did not suggest that arrangements be made to enable him to recover his unpaid wages.

²⁵⁴ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 12, 2006.

²⁵⁵ Human Rights Watch interview with Mozambican detainee, DHA office, Komatipoort, September 26, 2006.

Employment Laws: Violations and Legal Gaps Resulting in Human Rights Violations

Farm workers reported to Human Rights Watch multiple types of employer violations of the basic conditions of employment law and other labor-related laws. These multiple violations point to the extent of worker exploitation by employers and the failure of the government of South Africa to enforce workers' legal protections and their constitutional right to "fair labour practices." We do not analyze the causes of workers' exploitation, which may include structural factors such as global and domestic competition.

South African and foreign farm workers reported employer violations of worker entitlements to protection in the basic employment law, including failure to pay minimum wages, overtime, and public holiday rates; failure to grant paid sick leave and paid annual leave; and unlawful deductions from workers' remuneration. Farm workers also experienced significant problems accessing remedies and compensation for work-related injuries. Foreign workers on contract have an additional obstacle to surmount to obtain compensation because it is government policy to pay compensation into workers' bank accounts and it is difficult if not impossible for foreign contract workers to open bank accounts. We observed on some farms the deplorable living conditions of workers and heard some workers complain of their experience of workplace violence.

Cumulatively the evidence of farm workers experiences suggests that the state is failing to ensure that workers enjoy even the minimum employment conditions provided in domestic law. As a result, the state is failing to meet its obligations under the constitution to guarantee fair labor practices. The state is also not meeting its obligations under international law to guarantee just and favorable conditions of work and decent work.²⁵⁶

²⁵⁶ ACPHR, arts. 5 and 15; ICERD, art. 5; ICESCR, art. 7.

Employers' failure to pay minimum wages

The Sectoral Determination establishes in rural municipalities (Area B), a minimum wage of R885 (US\$126.97) per month for farm workers who work 45 hours per week and a minimum of R4.54 (US\$0.65) per hour for those who work less than 45 hours per week.²⁵⁷ Human Rights Watch understands from Agri SA director of labour affairs that the use of a piece rate—the calculation of remuneration based on the amount a worker produces in an hour—is legal provided that a piece work arrangement is structured in a way that does not deny the worker the right to the prescribed minimum level of remuneration.²⁵⁸ Farmers or their organizations may apply to the minister of labour to replace or exclude any basic condition of employment, including the minimum wage rates.²⁵⁹

An employer is required by law to give a meal interval of at least one continuous hour to a farm worker who works continuously for more than five hours. The one-hour meal interval may be reduced to 30 minutes by mutual agreement.²⁶⁰ Meal intervals (as opposed to tea breaks) do not form part of ordinary working hours.²⁶¹

It was Human Rights Watch's observation that most large-scale commercial farms were complying with the mandatory minimum wage rates. Small commercial farmers and those less financially successful were more apt to evade the minimum wage law. Black farmers in the former homelands on Trust land are arguably least likely to comply with the minimum wage law.

The national farmer's organization TAU issued a public statement that its farmers would not comply with the minimum wage increases announced in February 2006.²⁶²

²⁵⁷ Sectoral Determination 13: Farm Worker Sector, sections 2 and 3. These figures are for what the Sectoral Determination defines as "ordinary" hours, as opposed to overtime hours, for which see below.

²⁵⁸ Human Rights Watch email correspondence with Kobus Kleynhans, director of labour affairs, Agri SA, December 6, 2006.

²⁵⁹ Basic Conditions of Employment Act, 1997, section 50(1)(b).

²⁶⁰ Sectoral Determination 13: Farm Workers, section 18.

²⁶¹ Human Rights Watch email correspondence with Kobus Kleynhans, director of labour affairs, Agri SA, November 28, 2006.

²⁶² 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).

The TAU official for the Soutpansberg region, Limpopo province, 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 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.²⁶³

Human Rights Watch was similarly informed that not all farmers in Weipe in Limpopo province were complying with the minimum wage.²⁶⁴ 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."²⁶⁵ Another Weipe farm 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.²⁶⁶

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 the seasonal workers who were only earning R500 (US\$71.74), 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

²⁶³ Human Rights Watch interview with white commercial farmer, Levubu, April 29, 2006.

²⁶⁴ Human Rights Watch interview with 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.

²⁶⁵ Human Rights Watch interview with white commercial farmer, Weipe, April 27, 2006.

²⁶⁶ Human Rights Watch interview with white commercial farmer, Weipe, April 26, 2006.

money [less than the minimum].”²⁶⁷ Seasonals were being paid by a piece rate arrangement, as he explained, and it obviously did not guarantee them a minimum wage. “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 working all day. He’s paying them R500 [US\$71.74]. He’s not showing these [to the labor inspectors].”²⁶⁸

The same Zimbabwean permanent worker criticized labor inspectors for being too easily bribed by farmers and for not visiting the workers.

I have a problem on my mind. Why doesn’t labour [inspection] come at the end of the year and check our pay slips. Labour comes to boss. He shows them his books. They drink tea together. He can give them a sheep. You’ll never know.²⁶⁹

Other workers on farms in Mpumalanga also told us that labor inspectors visited only the employer and spoke only briefly or not at all to the workers themselves. Inadvertently confirming the need for labor inspectors to verify the validity of farmers’ bookkeeping against worker realities, the TAU official for the Soutpansberg region, who mistakenly believed that piece rate was illegal even though he and other employers used it, said, “I don’t tell the Department of Labour. I just cook the book.”²⁷⁰ “Cooking the books” is an offense under section 92(b) of the Basic Conditions of Employment Act (BCE).

According to this TAU official, the black farmers’ union allegedly made an unsuccessful attempt to get the government to approve a lower minimum wage for its members.²⁷¹ He also said that many white farmers in Limpopo claim the most serious labor abuses are being perpetrated by black farmers whose farms are

²⁶⁷ Human Rights Watch interviews with Zimbabwean farm workers, Weipe, April 27, 2006.

²⁶⁸ Human Rights Watch interview with Zimbabwean farm worker, Weipe, April 23, 2006.

²⁶⁹ *Ibid.*

²⁷⁰ Human Rights Watch interview with white commercial farmer who is a TAU official for the Soutpansberg region, April 29, 2006.

²⁷¹ *Ibid.*

between Tshipise and Mutale in the former homelands.²⁷² Human Rights Watch visited a farmer at Nwanedi, located in this area. The plot holder said he paid his nine Zimbabwean workers R500 (US\$71.74) per month, though he knew the minimum was around R800 (US\$114.78) per month. Just before we went to speak to the workers, he said he started Zimbabweans at R350 (US\$50.22) per month. Like some white farmers, he said he could not afford to pay the minimum.²⁷³ In fact, his workers told Human Rights Watch 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.²⁷⁴ 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.²⁷⁵

A 35-year-old Zimbabwean man who had just been deported from South Africa to Beitbridge, Zimbabwe, told us that he had worked illegally in South Africa for a black farmer. He was the only worker on the farm in Maguni, near Njelele in Limpopo province. He had been paid R215 (US\$30.85) for two weeks, despite working 6 days a week from 7 a.m. to 4:30 p.m. He was arrested by the police on the farm while he was working, after only two weeks in South Africa. The police allowed him to get those of his possessions that were already packed and to collect his pay from his employer.²⁷⁶

Human Rights Watch interviews with Mozambicans who work for Trust land farmers suggest that these workers are rarely, if ever, paid the minimum wage rate. We interviewed eight Mozambicans who worked in Nkomazi East in the former KaNgwane homeland, where some 90 percent of Mozambicans who live in the Nkomazi Blocks (Nkomazi is divided into Nkomazi Block A, B, and C) reside.²⁷⁷ All but one did not have a work permit, even though they had resided in South Africa for a long time; many were old; and they were also often women heads of household. One,

²⁷² *Ibid.*

²⁷³ Human Rights Watch interview with black farmer, Nwanedi, April 30, 2006.

²⁷⁴ Human Rights Watch interview with nine undocumented Zimbabwean farm workers, Nwanedi, April 30, 2006.

²⁷⁵ Human Rights Watch interview with black farmer, on Tshipise road, April 30, 2006.

²⁷⁶ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 10, 2006.

²⁷⁷ Human Rights Watch interview with Rachel Nkosi, director of Masisikumeni Women's Crisis Center, Nkomazi Block A, September 24, 2006.

a 66-year-old undocumented Mozambican woman who has lived in South Africa for 16 years, is one of seven Mozambicans working for a farmer in the Nkomazi Trust land. She works from Monday to Friday from 7 in the morning until 2 in the afternoon (including a 30-minute tea break) for R15 (US\$2.15) per day—that is, for R2.14 (US\$0.31) per hour, or just over half the minimum wage.²⁷⁸ Another undocumented Mozambican, separated from her husband and supporting nine children, works for a farmer in the Trust lands from Monday to Friday, from 6 a.m. to 3 p.m., and gets paid R15 (US\$2.15) per day. Assuming a one-hour lunch interval, which the worker may or may not have had, she earns R1.88 per hour (US\$0.27).²⁷⁹ A 61-year-old undocumented Mozambican who has lived in South Africa for 31 years has been working for a year for a farmer in Mangweni in the Trust lands. The sole worker on the 12 hectare sugarcane farm, he is paid R400 (US\$57.39) per month.²⁸⁰

A Mozambican refugee who did not get a South African identity card during the amnesty for refugees recently stopped working for a black farmer in Komatiport. He was told he would be paid R15 (US\$2.15) per day for an eight-hour day, six days a week, or R720 (US\$103.30) per month. In fact, he received only R100 (US\$14.35) per month.²⁸¹

A commercial farm near Hazyview, Mpumalanga, which employs casual labor—workers hired on a daily basis—to pick beans has a reputation for not paying the minimum wage (one of few such in the area).²⁸² The farmer pays the workers R3 (US\$0.43) per crate of beans. Two 16-year-old girls whose parents are Mozambican said they usually picked about five to six crates per day, working eight-and-a-half hours per day (excluding a one-hour meal interval), five days a week. They were paid about R200 (US\$28.69) for 10 days or R20 (US\$2.87) per day. The girls were therefore earning only R2.35 (US\$0.34) per hour despite working more hours a week (42.5 hours) than permitted by law.²⁸³ According to the law, an employer may not

²⁷⁸ Human Rights Watch interview with undocumented Mozambican, Nkomazi Block A, September 24, 2006.

²⁷⁹ Human Rights Watch interview with undocumented Mozambican, Nkomazi Block A, September 24, 2006.

²⁸⁰ Human Rights Watch interview with undocumented Mozambican, Nkomazi Block A, September 24, 2006.

²⁸¹ Human Rights Watch interview with undocumented Mozambican, Nkomazi Block A, September 24, 2006.

²⁸² Forced Migration Studies Programme interview with farm worker in the Hazyview area, September 2006.

²⁸³ Forced Migration Studies Programme interview with farm worker, Hazyview, September 25, 2006.

permit a child who is between 15 and 18 years old to work more than 35 hours in any week.²⁸⁴ One of the girls had been working on the farm for three years or since she was 13—a violation of the legal prohibition against employing a child who is under 15 years of age.²⁸⁵

Human Rights Watch found that people from the most vulnerable groups are working on this farm: women and children without work permits. The farmer provides free transport for the workers who live in villages in Bushbuckridge, Limpopo, where there are very high numbers of former Mozambican refugees. One of the 16-year-old girls described her co-workers and their motivation for working on the farm as follows: “Most of the women here were born in Mozambique or their parents were born in Mozambique. Many of the workers are younger than 18. I don’t have an ID and other jobs need an ID. That is why I am working here. Most people here don’t have an ID. Our parents tried to get IDs for themselves and us children...”²⁸⁶

An undocumented Mozambican woman, despite having lived in the country since 1985, works as a sugarcane planter on a large farm along the Crocodile river near Komatipoort. She did not know the name of the farm or farmer for whom she worked—she had started the job two months earlier—and her husband thought she worked for a black contractor. She earns R600 (US\$86.08) per month despite working five days a week for eight-and-a-half hours a day (excluding a one-hour lunch interval).²⁸⁷ Two Mozambican female farm workers, neither of whom had South African identity documents, worked on a commercial farm for R27 (US\$3.87) per day, and were paid R322.50 (US\$46.27) per fortnight if they worked six days per week (Monday-Friday and Saturday morning) and R295 (US\$42.32) per week if they worked five days per week.²⁸⁸ Even when they worked on Saturdays, these women made only R645 (US\$92.54) per month, still short of the minimum R885 (US\$126.97) per month.

²⁸⁴ Sectoral Determination 13: Farm Worker Sector, section 25(7)(b).

²⁸⁵ *Ibid.*, section 25(1)(a).

²⁸⁶ Forced Migration Studies Programme interview with *induna* and female workers, September 25, 2006.

²⁸⁷ Human Rights Watch interview with undocumented Mozambican worker and her husband, Nkomazi Block A, September 24, 2006.

²⁸⁸ Nkuzi Development Association interview with Mozambican women, Nkomazi Block A, September 24, 2006.

On a commercial farm near the turn-off to Malelane and Jeppe's Reef, two "temporary" workers—one a recently arrived Mozambican man, the other a South African woman who has worked on the farm for 13 years—were paid R600 (US\$86.08) per month.²⁸⁹ Mozambican and South African temporary workers on a banana and avocado farm near Kiepersol were paid R400 (US\$57.39) per fortnight or R800 (US\$114.78) per month. The Mozambicans on the farm included some with South African identity documents and others who had no legal right to work.²⁹⁰ A small commercial farm in the Hoedspruit area with 12 permanent workers (eight of them were Mozambican, five of whom had South African identity documents) paid them R700 (US\$100.43) per month.²⁹¹

Ten documented Mozambicans whom Human Rights Watch talked to near Strydomblock on the roadside during their lunch hour work in sugarcane fields, and only get the minimum wage if they finish their portion. If they fail to meet the piece rate target, they will get R600-R700 (US\$86.08-100.43).²⁹²

Human Rights Watch visited only one large commercial farm south of Malelane in Mpumalanga where workers did not receive the minimum wage. The farmer had applied in terms of the BCE Act to not have to pay the prescribed minimum wage because he had suffered five years of drought and could not afford to pay. In 2005 he retrenched 100 permanent workers and has had to limit his use of seasonal workers. He was told to first follow the proper procedures whereby all workers and management must be consulted and agree on whether to cut work days or hours. His workers agreed to reduce the work week to 40 hours and accepted a piece rate arrangement. He maintained half his labor force on the 2006 minimum because of this incentive system; the rest of his labor force received the 2005 monthly minimum wage of R785.85 (US\$112.75).²⁹³

²⁸⁹ Human Rights Watch interview with Mozambican and South African farm worker, south of Malelane, September 25, 2006.

²⁹⁰ Forced Migration Studies Programme interview Mozambican and South African farm workers, Kiepersol, October 10, 2006.

²⁹¹ Forced Migration Studies Programme interview Mozambican and South African farm workers, Hoedspruit, September 26, 2006.

²⁹² Human Rights Watch interview with Mozambican workers on the roadside, September 29, 2006.

²⁹³ Human Rights Watch interview with commercial farmer, south of Malelane, September 25, 2006.

Employers' failure to pay prescribed minimum rates for overtime, Sundays, and public holidays

The Sectoral Determination for the Farm Worker Sector stipulates that an employer “may not require or permit a farm worker to work more than (a) 45 hours in any week (b) nine hours on any day if the farm worker works for five days or less in a week; or (c) eight hours in any day if the farm worker works for more than five days a week.”²⁹⁴ These ordinary work hours may be extended, within specified limits, subject to a written agreement between the worker and employer.²⁹⁵ An employer who wants his workers to work overtime must obtain their agreement and comply with various restrictions on the number of overtime hours permitted,²⁹⁶ and pay at least 1.5 times the farm worker’s wage for ordinary hours, unless the employer and farmer agree to an alternative.²⁹⁷ Work on Sundays must be paid as overtime.²⁹⁸ A worker must explicitly agree to work on a public holiday and the employer must pay workers at least double the ordinary daily wage.²⁹⁹

Human Rights Watch found a number of large commercial farms where workers were paid the minimum wage but provisions for overtime work and public holidays were ignored. Small commercial farms and Trust land farmers who did not pay the minimum also sometimes violated the law governing pay for overtime and public holidays.

On a large commercial farm on the Komatipoort-Mananga road, the workers (documented Mozambican and South African) were being paid the minimum wage but they complained that they were made to work unpaid overtime. They told Human Rights Watch that they worked Monday to Friday, 5:40 a.m. to 2:30 p.m. with only a 30-minute tea break.³⁰⁰ This amounts to nearly 45 ordinary hours of work per week.

²⁹⁴ Sectoral Determination 13: Farm Worker Sector, section 11.

²⁹⁵ *Ibid.*, section 12.

²⁹⁶ *Ibid.*, section 13.

²⁹⁷ *Ibid.*, section 14.

²⁹⁸ *Ibid.*, section 16.

²⁹⁹ *Ibid.*, section 20.

³⁰⁰ Human Rights Watch interview with South African and Mozambican workers on farm south of Komatipoort, September 28, 2006.

They also said that they are required to work on some Saturdays, for which they receive no pay. By law, the employer cannot require them to work on Saturdays without paying them for overtime. On a Weipe farm, a Zimbabwean permanent worker we spoke to earned the monthly minimum wage but complained that he had to work overtime and did not get paid for it.³⁰¹

A 34-year-old Mozambican woman with a South African identity document works in a banana packing house on a large commercial farm in Marloth Park. She gets paid the minimum wage, R885 (US\$126.97) per month, but they work Monday to Friday, 6 a.m. to 5 p.m., or over 10 hours per day (excluding a 45-minute lunch break); on Saturdays they work until 12:30 p.m.³⁰² They are therefore working overtime for at least two hours per day during the week without pay. Because they have already worked more than 45 ordinary hours between Monday and Friday, they should be paid overtime for work on Saturdays. Instead, they are working on Saturday for no pay. Worse, another Mozambican worker from the same farm said, “We don’t clock money for Saturday but if you do not work on a Saturday he deducts money for the other days of the week.”³⁰³ Documented Mozambican and South African workers we spoke to when we visited a farm on the Komatipoort-Mananga road also said they did not get paid for working on Saturdays, and if they refused to work on Saturdays the farmer threatened to deduct their Friday pay.³⁰⁴

A documented 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 (US\$0.53) per hour.³⁰⁵ Besides not paying the minimum hourly rate for farm workers (R4.54 or US\$0.65), 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 farm in Hoedspruit, where documented and undocumented workers were paid less than the monthly minimum wage, they said

³⁰¹ Human Rights Watch interview with Zimbabwean farm worker, Weipe, April 27, 2006.

³⁰² Nkuzi Development Association interview with Mozambican worker, Nkomazi Block A, September 24, 2006.

³⁰³ Nkuzi Development Association interview with Mozambican worker, Nkomazi Block A, September 24, 2006.

³⁰⁴ Human Rights Watch interview with South African and Mozambican workers, south of Komatipoort, September 29, 2006.

³⁰⁵ Human Rights Watch interview with Zimbabwean farm store worker, Tshipise, April 30, 2006.

they also had to work on weekends without being paid for overtime.³⁰⁶ So too did a Mozambican who has permanent residence and works for a Trust land farmer for less than the minimum wage.³⁰⁷ On a farm near Kiepersol, the “temporary” workers, all South Africans except for four undocumented Mozambicans, were paid R800 (US\$114.78) per month. A South African worker said, “We work everyday. There is no weekend and no holiday for us.”³⁰⁸

Human Rights Watch obtained information about some cases where farmers were not paying double the ordinary pay rates, as the law requires, for work on public holidays. Human Rights Watch visited a farm on a public holiday. The farmer told Human Rights Watch that he was paying his bean-pickers, as the law requires, twice their normal rate. The bean-pickers, all South Africans, told Human Rights Watch that they were getting 1.5 times rather than double their ordinary hourly wage.³⁰⁹ An undocumented Mozambican who works for a Trust land farmer ordinarily gets paid R15 (US\$2.15) per day; on a public holiday she gets R16 (US\$2.30) per day.³¹⁰ The September pay slip of a woman who harvests tomatoes on a large commercial farm on the Komatipoort-Mananga road showed that she is paid the monthly minimum and that when she worked on a public holiday she was paid the minimum—R36.31 (US\$5.21) per day (R4.53 or US\$0.65 per hour for 8 hours)—instead of double pay.³¹¹ She seemed unaware that she should have been paid R72.62 (US\$10.42) for the public holiday.

Employers’ unlawful deductions from wages for accommodation

Employers may make deductions from workers’ wages for accommodation that the employer provides, subject to various qualifications. The employer may make a deduction not exceeding 10 percent of the worker’s wage for accommodation. This

³⁰⁶ Forced Migration Studies Programme interview with Mozambican workers, Hoedspruit, September 26, 2006.

³⁰⁷ Human Rights Watch interview with documented Mozambican worker, Nkomazi Block A, September 24, 2006.

³⁰⁸ Forced Migration Studies Programme interview with South African worker on farm, Kiepersol, October 10, 2006.

³⁰⁹ Human Rights Watch interview with South African seasonal workers, south of Malelane, September 25, 2006.

³¹⁰ Human Rights Watch interview with undocumented Mozambican worker, Nkomazi Block A, September 24, 2006.

³¹¹ Human Rights Watch interview with female worker, Komatipoort-Mananga road, September 29, 2006.

deduction may only be made in respect of one farm worker residing in any house.³¹² If the worker is earning R900 (US\$129.12) (i.e. more than the minimum), the farmer may deduct R90 (US\$12.91) for accommodation. To deduct for more than one worker living in a house is unlawful.³¹³ Hence, when workers live together in a house, say as husband and wife, it is illegal to make deductions for each worker. Where more than two farm workers reside in communal accommodation, the employer may not deduct in total more than 25 percent of the minimum wage of an individual worker. The employer must deduct an equal amount for each worker in communal accommodation.³¹⁴ Using the current minimum wage of R885 (US\$126.97) per month, the employer may not charge more than a total of R221.25 (US\$31.74). Assuming five workers share the accommodation, because each of the five workers must have an equal amount deducted, each will pay R44.25 (US\$6.35) per month.

The Sectoral Determination contains additional restrictions concerning deductions for accommodation. An employer may make a deduction for accommodation only if no deduction is made for electricity, water, or other services.³¹⁵ Furthermore, 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.³¹⁶

On a Weipe farm Human Rights Watch 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\$7.17) per month deducted from their below minimum wages of R500 (US\$71.74) per month.³¹⁷ The owner of another farm in Weipe related how the

³¹² Sectoral Determination 13: Farm Worker Sector, section 8(1)(b).

³¹³ *Ibid.*, section 8(4).

³¹⁴ *Ibid.*, section 8(6)(a) and (b).

³¹⁵ *Ibid.*, section 8(2)(d).

³¹⁶ *Ibid.*, section 8(3).

³¹⁷ Human Rights Watch interview with Zimbabwean worker, Weipe, April 23, 2006.

Department of Labour, 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.³¹⁸

On a number of farms in Mpumalanga, Human Rights Watch found other employers who were deducting for houses that did not meet prescribed standards. During a visit to the compound on a large farm on the Komatipoort-Mananga road, we learned from workers (most of them documented Mozambicans but also South African farm workers who live on the farm) that there were three types of accommodation: houses with electricity, water, and toilets inside; houses with only electricity; and shacks built by the workers. The more recently arrived workers, almost all Mozambicans, built shacks using sugarcane stalks for the walls and roof and plastic for the windows. The employer deducted R85 (US\$12.20) per month—10 percent of their monthly wages—for the shacks.

Workers living in the shacks complained that they had to walk long distances to get to a water supply. There were no toilets; they used the nearby banana plantations. Even those workers living in houses with electricity but no inside water supply had no access to toilets outside the house. Workers also reported that the employer deducted from the wages of husbands and wives or from relatives who shared accommodation.³¹⁹

On a neighboring farm that grew bananas, vegetables, and citrus, the employer deducted R90 (US\$12.91) for accommodation from each of his (documented) Mozambican and South African workers' wages of R880 (US\$126.26) per month even though the accommodation did not meet the prescribed minimum standard. Even those living in shacks had deductions from their wages. Workers said the roofs leaked when it rained, the toilets were so far away from the house that the workers used the banana plantations instead, and the water was not safe to use. A Mozambican who had been working on the farm for 16 years as a mechanic and

³¹⁸ Human Rights Watch interview with white commercial farmer, Weipe, April 26, 2006.

³¹⁹ Human Rights Watch interview with South African and documented Mozambican workers, Komatipoort-Mananga road, September 28, 2006.

driver complained about the quality of the water: “We have a borehole. We have a pipe which is used for sewerage on the farm. When we use it, the water gets mixed up with the sewerage. But we still drink that water. If you open the tap, that rubbish will come first.” The employer also deducted from the wages of both husbands and wives for accommodation.³²⁰ A driver who was visiting the compound from a nearby sugarcane farm said that his employer deducted R100 (US\$14.35) from his R2,500 (US\$358.68) monthly earnings (he worked 12 hours per day) for his housing. Though he had electricity, he did not have water or a toilet and had a roof that leaked when it rained.³²¹

Human Rights Watch found employers who deducted more than the legal maximum percentage of wages for accommodation. On a farm compound just off the Komatipoort-Mananga road, South African women seasonal workers told us that they earned R850 (US\$121.95) per month and paid R100 per month for their houses. Their husbands were full-time workers. Employers were violating the Sectoral Determination legislation which prohibits them from deducting more than 10 percent of farm workers’ wages for accommodation.³²²

The owner of a large farm on the Komatipoort-Mananga road deducted for accommodation from the wages of both husbands and wives who shared the same accommodation. Human Rights Watch spoke to a Mozambican worker on the farm while he was at work, a banana team leader. He said he lived with his wife, also a worker on the farm, and their child in a single room in a three-roomed house. They shared the kitchen with another family. Both he and his wife had R89 (US\$12.77) deducted for their accommodation.³²³

³²⁰ Human Rights Watch interview with documented Mozambican worker, Komatipoort-Mananga road, September 28, 2006.

³²¹ Human Rights Watch interview with worker, Komatipoort-Mananga road, September 28, 2006.

³²² Human Rights Watch interview with South African seasonal workers, Komatipoort-Mananga road, September 29, 2006.

³²³ Human Rights Watch interview with documented Mozambican worker, Komatipoort-Mananga road, October 2, 2006. The co-worker who translated for us during this interview, a South African woman who had been hired by the farmer to teach English and computer classes, said that several years ago she had stayed together with her husband in one room in a four-room house in the compound. The house had two bedrooms, a kitchen, and a living room. At the time, she was working in the creche on the farm. Each month R55 (US\$7.89) was deducted from her wages and R150 (US\$21.52) from her husband’s. Human Rights Watch interview with South African teacher, Komatipoort-Mananga road, October 2, 2006.

On a farm in Hoedspruit in Limpopo province, which employed 12 permanent workers including eight Mozambicans, there were houses on the farm for workers with families. Three workers—all originally from Mozambique and of different legal status—told us that the employer deducted R80 (US\$11.48) from their monthly wages of R700 (US\$100.43) (less than the prescribed minimum wage and more than the maximum permitted deduction) for the accommodation. Though the housing had electricity and water, there were no toilets inside or outside the houses, thus making the deductions illegal. The workers also reported that the employer deducted for accommodation for husbands and wives who shared housing.³²⁴

On the road to Strydomblock Human Rights Watch talked to documented Mozambicans farm workers on their lunch break. The men had unlawful deductions made for accommodation because while they had electricity inside and water outside, they had no toilets inside or outside the house. In addition, the men lived between five and eight in a room and had R85 (US\$12.20) deducted from their wages. Assuming they earned the minimum monthly wage (R885 or US\$126.97), which they do not, the employer can only deduct a maximum of 25 percent of the minimum wage (R885 or US\$126.97)—which is R221.25 (US\$31.83)—for all the farm workers together in communal accommodation.³²⁵

A South African, who until recently was a contract worker on a sugarcane farm between Malelane and Hectorspruit, paid R65 (US\$9.33) for two rooms on the compound. The rooms met the prescribed housing standards. However, she only earned about R400 (US\$57.39) per month, so the deduction for accommodation exceeded 10 percent of her wage and was unlawful.³²⁶

Employers' failure to provide paid sick leave

For every three years of employment with the same employer, a farm worker is entitled to an amount of paid sick leave equal to the number of days the farm worker would normally work during a period of six weeks. Thus, if the farm worker works six

³²⁴ Forced Migration Studies Programme interview with Mozambican workers, Hoedspruit, September 29, 2006.

³²⁵ Human Rights Watch interview with documented Mozambican workers, Strydomblock road, September 29, 2006.

³²⁶ Human Rights Watch interview with South African worker, Driekoppies, September 23, 2006.

days a week, after three years of employment with the same employer the worker will accrue 36 days of paid sick leave.³²⁷ New workers are entitled to one day's sick leave for every 26 days worked in the first six months of work.³²⁸ To obtain paid sick leave, the farm worker must not be absent from work for more than two consecutive days or on more than two occasions during an eight-week period.³²⁹ Additionally, upon the request of the employer, the worker must produce a medical certificate stating that the farm worker was unable to work during the period of absence because of sickness or injury. A medical certificate may be provided by, inter alia, a medical practitioner, a clinic nurse practitioner, a traditional healer, and a community health worker.³³⁰ We talked to many Mozambican and South African workers employed by commercial farmers and Trust land farmers who reported that their employers did not provide paid sick leave.

Workers on a number of farms that Human Rights Watch visited alleged that their employers would not accept a medical certificate from the clinic. On a farm employing mostly Mozambicans, a South African woman worker said, "If you're sick, you'll go to the clinic at Komatipoort and get a letter. Then he says he doesn't accept the letter. We must go to a Dr. [name withheld] in Komatipoort. It costs R180 (US\$25.82). Otherwise, he doesn't accept that you are sick and doesn't pay you."³³¹ The owner of a neighboring farm also refused to accept a letter from the clinic validating that the worker was absent from work because of ill-health. A Mozambican worker said, "If you went to the clinic, they just throw that letter away. They say they want a doctor's letter."³³² South African workers on another farm south of Malelane also said their employer refused to give paid sick leave and rejected all medical certificates.³³³

³²⁷ Sectoral Determination 13: Farm Worker Sector, section 22(1).

³²⁸ *Ibid.*, section 22(3).

³²⁹ If a worker takes sick leave for more days than provided for in the Sectoral Determination, the worker is not entitled to be paid for those days.

³³⁰ *Ibid.*, section 22(6) and 22(7).

³³¹ Human Rights Watch interview with South African female worker, south of Komatipoort, September 28, 2006.

³³² Human Rights Watch interview with Mozambican worker, south of Komatipoort, September 28, 2006.

³³³ Human Rights Watch interview with South African workers, south of Malelane, September 25, 2006.

A sugarcane cutter, originally from Mozambique and now a permanent South African resident, reported that he did not get paid sick leave. Interviewed on the roadside next to his work place, he said, “No, I do not get paid [if I’m sick]. Normally I bring a letter but it still doesn’t matter. It is wrong not to pay me. When you bring in your letter, the *induna* [team leader] just writes ‘absent’ rather than ‘sick.’”³³⁴ When we visited that farm compound, we asked a South African woman who is a seasonal worker if she had ever been sick. She answered, “Yes. I had flu. Then I went to the clinic. Yes, I did get a letter and showed it to him [the employer]. I did not get paid. Even if you go to the doctor and show him the medical certificate, still he’ll deduct.”³³⁵

Employers’ failure to provide paid annual leave

The Sectoral Determination requires that an employer grant paid leave to a farm worker. If a farm worker has worked for 12 months, an employer must give the worker at least 21 consecutive days of leave on full pay. There are similar pro rata provisions for farm workers who have not worked for 12 months.³³⁶ The employer can determine when the worker takes the leave or reach an agreement with the worker about when the leave should be taken.³³⁷ An employer must pay a farm worker leave pay before the worker’s leave period.³³⁸ Human Rights Watch found extensive violations of the provisions for paid leave. Indeed, it was rare to find workers who got paid leave in compliance with the Sectoral Determination.

A sugarcane cutter—a Mozambican who is a permanent resident—has worked for the same farmer near Komatipoort for four years. Though he is employed from December to April each year, he says he is registered as a permanent worker and contributes to the Unemployment Insurance Fund. He has no leave.³³⁹

³³⁴ Human Rights Watch interview with Mozambican worker, south of Komatipoort, September 29, 2006.

³³⁵ Human Rights Watch interview with South African seasonal worker, south of Komatipoort, September 29, 2006.

³³⁶ Sectoral Determination 13: Farm Worker Sector, section 21.

³³⁷ *Ibid.*, section 21(5)(a)&(b).

³³⁸ *Ibid.*, section 21(10).

³³⁹ Human Rights Watch interview with Mozambican permanent resident, south of Komatipoort, September 29, 2006.

Five South African women who were permanent employees employed on a farm for periods varying from more than two years to over 13 years, told Human Rights Watch that they did not get leave. From December 23 to January 1, they do not work. But if they request leave during the year, they must work between December 23 and January 1.³⁴⁰ While the employer can determine when a worker takes annual leave, by law the employer is not entitled to deny the worker the prescribed minimum annual paid leave.

At a banana plantation in Marloth Park, the South African and Mozambican workers said they received 15 days paid leave—six days fewer than they are entitled to by law.³⁴¹

A South African seasonal worker at a pawpaw packing house near Hectorspruit has 22 days of leave owed to her, according to her pay slip. However, her daughter, herself a seasonal worker at the packing house, says her mother is not given any paid leave.³⁴²

A Mozambican said she and her co-workers did not have South African identity documents and were regarded as temporary workers. She said she had worked for the same farmer since 2001, weeding and picking oranges, but has never had paid annual leave.³⁴³

A former Mozambican who is now a South African citizen works as a mechanic and welder on a commercial farm. Though he has worked on the farm since 1986, he says he has never had leave.³⁴⁴ A Mozambican, now a permanent resident, when asked whether he had annual paid leave from his employer, said, “I’m 10 years now. I’ve never [had leave]. He doesn’t agree. Not even to a week.”³⁴⁵ Similarly, a Mozambican

³⁴⁰ Human Rights Watch interview with South African women workers, south of Komatipoort, September 29, 2006.

³⁴¹ Nkuzi Development Association interview with Mozambican and South African workers, Nkomazi Block A, September 24, 2006.

³⁴² Human Rights Watch interview with South African seasonal workers, Mangweni, September 30, 2006.

³⁴³ Human Rights Watch interview with Mozambican worker, Nkomazi Block A, September 24, 2006.

³⁴⁴ Human Rights Watch interview Mozambican worker, Nkomazi Block A, September 24, 2006.

³⁴⁵ Human Rights Watch interview with undocumented Mozambican, Nkomazi Block A, September 24, 2006.

cane cutter who has had the same employer since 2001 told us he has never had paid leave.³⁴⁶

An undocumented Mozambican who worked on a farm at Karino near the airport and whom we talked to at Agencia Algos in Nelspruit said his employer did not allow his eight Mozambican employees to go on leave. According to the worker, “He [the employer] is saying you can’t go on leave unless you have work permits.” The worker does return home but it is unpaid leave.³⁴⁷

Of the Mozambicans, typically undocumented, who worked for farmers in the former KaNgwane homeland, none reported having had paid annual leave.

Contractors’ failure to implement the Sectoral Determination

The Sectoral Determination has a provision that makes the “temporary employment service” that hires farm workers their employers. The temporary employment service and its client, the farmer, “are jointly and severally liable” to comply with the Sectoral Determination in respect of its farm workers.³⁴⁸

Human Rights Watch did not speak to any contractors in the farm sector, but evidence from farmers and workers and the comments of immigration officials suggest that contractors are not complying with the Sectoral Determination and are not being subjected to labor inspections.

South of the Soutpansberg in Limpopo, some farmers contended they were resorting to contract labor because it enabled them to hire workers to do specific jobs for limited time periods, to benefit from specialized teams of workers, and to be freed from the burden of administering and housing often less efficient permanent labor.

The TAU regional committee chair said that he, like many other farmers in the Levubu area, used contractors but did not verify, as he is legally required to, that the

³⁴⁶ Human Rights Watch interview with undocumented Mozambican, Nkomazi Block A, September 24, 2006.

³⁴⁷ Human Rights Watch interview with undocumented Mozambican worker, Agencia Algos, outside the office, October 3, 2006.

³⁴⁸ Sectoral Determination 13: Farm Worker Sector, section 33.

contractors comply with labor laws, including minimum wage determinations: “Why must I police the contractor? The Department of Labour must. In practice, farmers aren’t checking on contractors. You sign a contract that he’ll meet all labour laws but he doesn’t.... I have 30 contractors.”³⁴⁹

Human Rights Watch spoke to a 37-year-old South African woman who, prior to leaving her job because of ill-health, had worked for a black contractor. Both the contractor and the worker had lived on the same sugarcane farm between Malelane and Hectorspruit. The contractor’s 10 workers included Swati-speaking South Africans and Shangaan-speakers from Mozambique who did not have work permits. They all worked nine-and-a-half hours a day (excluding one hour for lunch), five days a week, for R20 (US\$2.87) per day—that is, they earned R2.11 (US\$0.30) per hour rather than the minimum R4.54 (US\$0.65) per hour.³⁵⁰ The undocumented foreigners worked for one month, she said, so they could get enough money to proceed to Johannesburg. She did not have a deduction made for the Unemployment Insurance Fund, as the law requires for South African citizens. Identifying the chief drawback of her job, she said, “The problem is it was a contract.”

The situation of those working for sugarcane contractors in Mpumalanga, at least with respect to the minimum wage, differs from other contract workers. Human Rights Watch was informed that sugarcane cutters, who are almost all contract workers typically earn much more than other farm workers. The sugar industry was concerned that during the cane cutting season in 2006 there had been a shortage of cane cutters, sending their wages higher than usual.³⁵¹

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. The Act provides for and deals

³⁴⁹ Human Rights Watch interview with white commercial farmer who was a TAU official for Soutpansberg, Levubu, April 29, 2006.

³⁵⁰ Human Rights Watch interview with South African ex-worker, Driekoppies, September 23, 2006.

³⁵¹ Human Rights Watch interview with Brian Sugden, TSB, Malelane, September 27, 2006.

with injuries, disablement, disease, and death caused by work-related activities. The most frequent complaint made by workers was that their employers did not apply for compensation when they were injured on duty. Human Rights Watch did receive a few complaints about workers not receiving compensation after employers had applied for it.

A group of South African women who worked at a farm in Mpumalanga alleged that their employer dismissed workers' claims for compensation for work-related injuries. One woman said, "One lost his finger. He requested to be paid for his finger. They said: 'We'll pay you bags of cement.'... He's a young man. That happened last year."³⁵²

A South African plumber on a banana and avocado farm near Kiepersol had an accident on a vehicle at work. He broke both arms and could not work for a year. He went home. He received neither medical assistance nor compensation for his work-related injury. When he had recovered, he returned to work on the same farm.³⁵³

Documented Mozambican workers on the Strydomblock roadside volunteered that their employer did not compensate workers for injuries and work-related deaths:

Some get injured, losing their fingers. Some die. But the farmer doesn't take care of us. There are some who died a long time ago. Last year one died. He was trapped by the cargo. [The men load stones from the fields onto tractors so they can be thrown away.] He was taken to Komatipoort mortuary. The only person who came there was the father. But the farmer did not take care of him. The farmer was supposed to assist the person with travel as he was from Mozambique and also with pay as he'd been working a long time. Even the father of the corpse did not get hold of the corpse.³⁵⁴

³⁵² Human Rights Watch interview with group of South African female workers, on the roadside south of Komatipoort, September 29, 2006.

³⁵³ Forced Migration Studies Programme interview with South African worker, Kiepersol, October 10, 2006.

³⁵⁴ Human Rights Watch interview with group of documented Mozambican workers, on the Strydomblock road, September 29, 2006.

A Mozambican man, who has a South African identity card and who works as a motor mechanic and welder on a farm, claimed that a Mozambican worker had lost a toe on duty. The injured man was apparently told by the farmer that he could not get compensation because he was a Mozambican (in fact the worker had a South African identity card). Regardless of his legal status, the farmer was obliged by law to claim for medical assistance and compensation for the injured worker.³⁵⁵

A Mozambican woman, a documented worker employed at the farm in Marloth Park, related her own experience with a work-related injury: “I personally once fell from a trailer when we just reported to work and at hospital I was given 14 days but because I was not going to get money for the days I decided to go back while the hand was still painful.”³⁵⁶ A South African woman who works on a farm near Komatipoort said, “Those injured at work are not paid. There was a lady who was injured at work. She was a packer. Her leg was broken. She had a plaster [cast] on for three months. She was off work and was not paid.”³⁵⁷

Undocumented workers are not covered by the workers’ compensation fund but employers are still morally and legally, at least in terms of international law, obligated to compensate workers for work-related injuries. During Human Rights Watch’s visit to IOM’s reception center, we encountered two individuals who had been working illegally in South Africa and were injured on duty but received no compensation. One worked for a building contractor in Warmbad (Bela Bela) near Pretoria for R60 (US\$8.61) per day or R600 (US\$86.08) per fortnight. He started work for this contractor on June 6, 2006. On June 22, a wall fell on his leg. His employer took him to Warmbad hospital, which transferred him to Polokwane hospital, where he stayed for eight weeks. He did not pay for medical treatment. He was then sent to Garankuwa hospital for further surgery. He elected to return to Zimbabwe for treatment. While he was well treated by the police who provided him with transport between Polokwane and Garankuwa, and by the hospitals who treated him for free, he now faces the costs of medical treatment and months of unemployment. IOM

³⁵⁵ Human Rights Watch interview with Mozambican worker, Nkomazi Block A, September 24, 2006.

³⁵⁶ Nkuzi Development Association interview with Mozambican worker, Nkomazi Block A, September 24, 2006.

³⁵⁷ Human Rights Watch interview with South African worker, south of Komatipoort, September 28, 2006.

personnel were helping the man to claim compensation from his employer.³⁵⁸ The other case was of a Zimbabwean who lost four fingers working illegally in Limpopo province for an employer in the forestry sector. The IOM, with the help of Nkuzi Development Association, was going to locate the employer and demand that the employer provide compensation.

Besides workers' allegations about employers' failure to apply for workers' compensation, Human Rights Watch also heard different complaints about the implementation of the workers' compensation scheme from workers and employers. One problem arises because of the government policy of paying compensation into bank accounts, and bank policy of not allowing foreigners to open accounts. Another problem concerns bureaucratic delays in receiving compensation.

The owner of a farm south of Malelane criticized the bureaucracy of the workers' compensation scheme:

I think it is a rip-off. We paid R60,000 [US\$8,608.32] last year. A few people benefited and you had to fight for it. I haven't had adequate returns on what I've put in. One woman had a problem with her knees. I don't know if she ever got it in the end. The assistant truck driver drove into something—one person was killed, one became a paraplegic. Yes, they paid for the wheelchair. They said we should employ him. He couldn't sleep well. He got pneumonia and then he died. Then when he died there was no compensation. I just know it isn't a smooth thing.³⁵⁹

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

³⁵⁸ Human Rights Watch interview with Zimbabwean deportee, IOM reception center, Beitbridge, October 12, 2006. We were shown the letter from Warmbaths (Warmbad) hospital to Gweru hospital, dated September 27, 2006, and the letter from the social worker, Limpopo provincial government to the Department of Home Affairs, Government of Zimbabwe, dated October 6, 2006.

³⁵⁹ Human Rights Watch interview with farmer, south of Malelane, September 25, 2006.

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.³⁶⁰

Human Rights Watch has received multiple confirmations that it is the government's policy to pay all work-related compensation money directly into a claimant's bank account.³⁶¹ However, for foreign workers this creates an automatic barrier as it is bank policy to not allow foreigners to open bank accounts. A Limpopo farmer attributed the problem with paying compensation to Zimbabwean migrants to the requirement that workers produce a South African identity document. "If you can't produce a South African identification document, there's a presumption of illegality."³⁶² The issues are interlinked. 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.³⁶³

³⁶⁰ Human Rights Watch interview with Zimbabwean farm worker, Weipe, April 23, 2006.

³⁶¹ In email correspondence with Kobus Kleynhans, director of labor affairs, Agri SA, January 29, 2007, Human Rights Watch was told that it has been the policy to pay compensation into bank accounts for some time, and as of April 2007, compensation would only be paid electronically into bank accounts; no checks would be issued.

³⁶² Human Rights Watch interview with white commercial farmer, Weipe, April 24, 2006.

³⁶³ Landau, Ramjathan-Keogh, and Singh, "Xenophobia in South Africa and Problems Related To It," p. 23.

Workplace violence

The right to bodily integrity and to be protected from acts of violence is incorporated in section 12 of the South African constitution, which grants “everyone” the right to freedom and security of person, including the right “to be free from all forms of violence from either public or private sources.” Human Rights Watch has, however, documented several cases of foreign migrants, documented and undocumented, alleged to have been victims of workplace violence by other workers, private security officials, and/or employers. Some workers reported these instances of assault to the police, others did not. Fear of losing their jobs or, if undocumented, of being deported, discourages workers from reporting workplace violence. In one case, the worker believed the police would support the abusive employer who had been a policeman and had friends in the police force.

Three Zimbabwean men whom Human Rights Watch 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,³⁶⁴ 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.”³⁶⁵

³⁶⁴ Operation Murambatsvina was an unprecedented government campaign of forced evictions and demolitions in the urban areas of Zimbabwe. See Human Rights Watch, *Evicted and Forsaken*.

³⁶⁵ Human Rights Watch interview with three undocumented Zimbabweans, on the N1 highway near the Tshipise turn-off, April 23, 2006.

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:

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 pm, 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 pm 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.³⁶⁶

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.³⁶⁷

An undocumented Mozambican farm worker recalled how his previous employer, a black farmer in Komatipoort, used to beat him and his co-workers. A former refugee, this worker did not apply for the amnesty for Mozambican refugees in 1999-2000 because he was ill and stayed with a traditional healer for three years.

³⁶⁶ Human Rights Watch interview with Zimbabwean farm worker, Tshipise, April 22, 2006.

³⁶⁷ Human Rights Watch interview with Shirhami Shirinda, Nkuzi Development Association, Tshipise farm, April 22, 2006.

[The farmer] did beat me. My ribs are [still] painful.... He was beating each and everyone there. Even women there, he was beating everyone. If you take your time to do the work, he'd beat you. When he has given you that task and you're not finished to do, you'd not knock off until 11 at night. He'd take his car and give you lights until you'd finished.

Asked if he thought to report the farmer, the worker said,

There was no way to report him because he was a policeman before. If you go to the police station, they will want to come and check.³⁶⁸

At Komatipoort police station, Human Rights Watch talked to a Mozambican awaiting deportation. He had come to South Africa in 1982 as a refugee but had not qualified for amnesty because he had visited Mozambique after 1992. In 2003-04 when he was a contract worker, cutting trees to make way for banana planting, he witnessed the farm owner tie a worker upside down. "I'm the witness of the person he tied up. He also assaulted me. Twenty-third of October we'll be going to court with [farmer's name supplied]."³⁶⁹

A police officer, present when we spoke to the Mozambican man who was to be a witness in the upcoming trial of the farmer, said of the Department of Labour, "It has work to do on farms. You can see. We are still having farmer assaults." He referred to another case of assault by a farmer. "On [name supplied] farm, workers wanted to know from the farmer what would happen when he sold the farm. The farmer assaulted a worker. But you can't write that. He [the worker] did not report. The employer phoned us and said there was a strike. The Department of Labour, unions, and police went there. The farmer called the police. It was an illegal strike."³⁷⁰

³⁶⁸ Human Rights Watch interview with undocumented Mozambican worker, Nkomazi Block A, September 24, 2006.

³⁶⁹ Human Rights Watch interview with undocumented Mozambican worker, Komatipoort police station, September 26, 2006. Later that morning, Human Rights Watch was present when DHA officials interviewed the man. They knew about the pending court case and sought to verify when the case would be heard to ensure that the man was not deported before the court hearing.

³⁷⁰ Human Rights Watch interview with policeman, Komatipoort police station, September 26, 2006.

A South African and two documented Mozambican farm workers in the sugarcane fields on a farm in Strydomblock complained that the farmer beat them if they made mistakes. A Mozambican working on the farm since 1997 said, “He’s very abusive. He beat us all, even these old men. But we persevere.... Sometimes he’s a good man. We work very nicely. But sometimes you make a mistake, he must beat you before you sit down and talk. We were spraying the manure. A short space of land was left out. The person who was doing it got beaten. It was not me, yes. But I was working with him.”³⁷¹ Asked if he had ever been beaten, a 24-year-old Mozambican—a recently hired sprayer on the farm—said, “Yes. He pushed me and I fell.” He went on,

The one who got beaten went to Komatipoort to lay a charge. But we don’t have a report back. He still works here and everything is good with the farmer. No, it’s not unusual. If you have done a mistake, he’ll push you or hit you.³⁷²

The South African, a tractor driver who has worked on the farm since 2001, said he had never been beaten. Asked if assaults by the farmer were a problem, he said, “It does happen. Yes, I have seen it happen.... I can’t remember the month, one young man, they didn’t understand each other. Then he beat him. It was over the mixing of manure. It’s not easy to mix the manure.... He [the farmer] is a short-tempered person.”³⁷³

A group of documented Mozambican workers to whom Human Rights Watch spoke during their lunch hour said their employer sometimes beat them. A worker who had come to the farm in 2005, recounted the circumstances leading up to his assault by his employer. “The problem started when the irrigation pipes were twisted. When I was far away, he called. ‘Why did you not run when I called?’ said the farmer. I said, ‘I was not aware you’d called.’ Then he slapped me in the face. Then the farmer talked to the *induna*.”

³⁷¹ Human Rights Watch interview with Mozambican farm worker, Strydomblock, September 27, 2006.

³⁷² Human Rights Watch interview with Mozambican farm worker, Strydomblock, September 27, 2006.

³⁷³ Human Rights Watch interview with South African farm worker, Strydomblock, September 27, 2006.

Housing and living conditions

The Sectoral Determination regulates deductions for housing and establishes housing standards that must be met for the employer to make lawful deductions. It does not deal with the issue of housing for farm workers when employers choose not to provide housing for their workers. Two categories of farm workers are most affected when farmers opt not to provide housing: South Africans whose homes are far from their workplace, and foreign workers on contract, whose temporary work and residence status make it unreasonable for them to invest in building a house, even if they were able to obtain land.

There are a number of reasons why farmers are electing not to provide housing for workers. A number of farmers along the Limpopo border told Human Rights Watch that the maximum deductions allowed for accommodation in the Sectoral Determination and the high prescribed standards for accommodation give them no incentive to provide housing for farm workers. By contrast, in the apartheid era, white commercial farmers received state subsidies to build housing for workers. In Mpumalanga farmers appear to be moving away from housing workers on their farms. Mpumalanga farmers believed that their security was less compromised if they did not have farm workers living on the farm. As in Limpopo, farmers also often cited fear of the Extension of Security of Tenure Act (ESTA), which attempts to protect “occupiers” who reside on land from eviction without due process.³⁷⁴

Regardless of employer preferences with respect to the provision of worker housing, the government has constitutional obligations to ensure that all have access to adequate housing. 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

³⁷⁴ The human resources manager of a company in Mpumalanga said the company no longer housed workers in compounds because of the Extension of Security of Tenure Act. The company, which produces bananas and sugarcane, employs over 700 workers, including permanent, seasonal, and temporary workers. All the workers must have South African identity documents. In 2003 when the company purchased a farm that had a compound, the company destroyed the houses after the human resources manager had negotiated with chiefs in nearby Naas for land for the Mozambican workers who were living in the compound to build new homes. “We organized with chiefs to get them land. When we demolished the buildings, we’d give them [the workers] the roofs and the windows. I went myself to the chiefs and negotiated a price—R250—for each site. It’s a good thing because of this ESTA. We said we’ll organize a site. Now you must build your house. The roofs and windows were just extra.” Human Rights Watch interview with human resources manager, large company on Komatipoort-Mananga road, September 27, 2006.

reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” The Constitutional Court in its 2000 ruling interpreted the state’s 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.³⁷⁵ The extent of the state’s obligation to provide adequate housing for non-citizens who have the right to work in South Africa, as opposed to citizens, is unclear under current constitutional jurisprudence. However, unless the government devises a housing policy for farm workers, it will be at risk of contravening its constitutional obligation to establish measures for the progressive realization of access to adequate housing for everyone.

A 2006 South African Human Rights Commission (SAHRC) report on South Africa’s compliance with the provisions of the ICERD acknowledged that the government had shown a commitment towards the progressive realization of the right to adequate housing, as mandated in the constitution. However, the SAHRC also noted that “the state’s inability to tailor its housing policies to address the needs of the poor and vulnerable suggests that the government still has to comply with its obligations.”³⁷⁶ The report referred to the deplorable conditions under which farm workers on white-owned farms live, their vulnerability to losing their housing when they cease to be employed, and the particular vulnerability of women and children because they are often treated by landowners and the courts as secondary occupiers. The report contends, “Although farm workers are included in programmes relating to housing and the Constitution [sic], they are unable to take advantage of these programmes because of the nature of the demands of their profession. In some instances, farm dwellers are unaware of their socio-economic rights and of the necessary steps that can be taken to access these rights.”³⁷⁷

³⁷⁵ Constitutional Court of South Africa. *Government of the Republic of South Africa, Premier of the Province of the Western Cape, Cape Metropolitan Council, Oostenberg Municipality v. Irene Grootboom and Others*. Case CCT 11/00, 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).

³⁷⁶ SAHRC, “Shadow Report on South Africa's Compliance with the Provisions of the International Convention against all Forms of Racial Discrimination,” p. 39.

³⁷⁷ *Ibid.*, p. 40. The report’s reference to “the demands of their profession” is an allusion to the needs of farm workers to live in reasonable commuting distance to their workplace.

Conclusion

Documented and undocumented migrants from Zimbabwe and Mozambique are vulnerable to having their human rights violated while working as laborers on farms in South Africa. There is ambiguity around the protection offered under South African law to certain of their rights. Rights such as to liberty, security, and appropriate conditions of detention in the event that they are detained, are protected under the constitution and international law but are subject to violation. Their right to fair labor practices as protected under the South African constitution is regularly infringed through failure of relevant actors to comply with immigration and employment laws and also deficiencies in these laws. Migrant farm workers also face barriers in accessing adequate housing. Dismantling these barriers will require the adoption of specific housing policies designed to address the housing needs of migrant and South African farm laborers, and the current unsettled state of the law may lead to further rights-based litigation to help resolve the issue.

Police and immigration officials frequently violate the procedures for the arrest, detention, and deportation of foreign migrants that are set out in the Immigration Act and in violation of South Africa's obligations under international human rights law. In the agricultural sector, chiefly small farmers and Trust land farmers are most apt to operate outside of the legal framework for the employment of migrants, and do not obtain the relevant corporate permits to authorize the hiring of foreign workers.

Failure to comply with prescribed basic conditions of employment for farm workers is commonplace and leads to worker exploitation. Violations include not paying the minimum wage, overtime, sick leave, and annual leave, and making unlawful deductions from workers' wages. Farmers who produce for export are least likely to violate the basic conditions of employment. Among large-scale farmers more generally, many comply with the minimum wage but do not pay for overtime, sick leave, or annual leave. Small farmers and Trust land farmers are unlikely to pay minimum wages, overtime, or leave time.

South African employers, workers, and private security officials use violence against foreign workers, documented and undocumented, and South African workers. With respect to the right to workers' compensation, it is rare for employers to submit claims for work-related injuries for South Africans or foreign migrants, and foreign migrants seem to 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.

The government of South Africa must take steps to ensure that its immigration and employment laws are being enforced, and amend the laws where necessary. Measures such as creating a hotline for foreign migrants to report human rights abuses by employers may complement a role for nongovernmental organizations in helping labor inspectors to monitor compliance with employment law. De facto impediments to foreign migrants receiving workers' compensation, such as access to bank accounts, should be removed. The government should acknowledge the problems facing farm workers—both foreign migrants and nationals—in accessing adequate housing and should devise a housing policy that will enable it to progressively realize the right of access to adequate housing.

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“Keep Your Head Down”

Unprotected Migrants in South Africa

South Africa’s vibrant and diverse economy is a powerful draw for Africans from other countries migrating in search of work. But the chance of earning a wage can come with a price. *“Keep Your Head Down”: Unprotected Migrants in South Africa* examines the vulnerability of undocumented and documented foreign migrants to human rights abuses.

Using the testimonies of Zimbabwean and Mozambican migrants, commercial farmers who employ them, and state officials in Limpopo and Mpumalanga provinces, Human Rights Watch describes how state officials disregard provisions in South Africa’s Immigration Act as they arrest, detain, and deport undocumented migrants; how farmers contravene the law governing employment conditions for their workers; and how ultimately the state fails to enforce the legal protections for foreign migrants.

South Africa’s constitution guarantees the human rights of foreign migrants, but they are infringed upon by violations of the law and by legal deficiencies. The state’s failure to protect the rights of migrants also violates the South African government’s international obligations. Human Rights Watch recommends specific amendments to South Africa’s immigration law, and we call on the government to adopt particular measures to enforce compliance with its immigration and labor laws. We urge the South African government to develop a housing policy for all farm workers. Finally, Human Rights Watch encourages the government to ratify international instruments that would enhance the protection of foreign migrants’ human rights.