

A comment on the Human Rights Watch Report 'Unprotected migrants: Zimbabweans in South Africa's Limpopo Province'

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On 10 August 2006, Human Rights Watch (HRW) presented its latest report, 'Unprotected migrants: Zimbabweans in South Africa's Limpopo Province', at a seminar held at the Park Hyatt Hotel in Rosebank.¹ HRW is the non-governmental human rights organisation (NGO) with the highest global profile, ranked perhaps with Amnesty International. HRW, however, differs significantly from Amnesty International, which works in part through local chapters open to all. HRW works exclusively by having permanent and consulting staff that carry out its research and advocacy work. 'Unprotected migrants' was thus the product of Ford Foundation-funded research principally conducted by two non-resident consultants employed directly by HRW's Africa Division, one of whom travelled to Limpopo Province in late April and early May 2006, consulting with local NGOs there. While debatable, the loss in local knowledge and throughput for the local human rights community for this kind of human rights reporting is arguably offset by the gain in independence, review by New York-based persons with human rights advocacy experience² as well as perhaps by greater global exposure of

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¹ Human Rights Watch Volume 18, No 6A (July 2006) (52 pages) <http://hrw.org/reports/2006/southafrica0806/> (accessed 31 March 2007). This is not the first time that Human Rights Watch has written a report critical of the treatment of foreign nationals in South Africa. In March 1998, Human Rights Watch released 'Prohibited persons': Abuse of undocumented migrants, asylum-seekers, and refugees in South Africa' <http://www.hrw.org/reports98/sareport> (accessed 31 March 2007), which created a minor furore. The author assisted in the research and writing of that report which was principally written by a HRW staffer, Peter Bouckaert.

² The acknowledgments list three persons as having 'edited and reviewed' the report, two persons as having 'reviewed' the report, and two others as having offered 'valuable insights and helpful comments'.

the findings of the report.³ Furthermore, the Johannesburg workshop organised and hosted by HRW in an open and consultative manner demonstrates the sensitivity of HRW to the concern of facilitating and fostering local advocacy efforts.

'Unprotected migrants' does not find a happy situation in Limpopo. According to HRW:

Documented and undocumented migrants from Zimbabwe are vulnerable to human rights abuses in South Africa and occupy an ambiguous space in the law with respect to certain rights guarantees. Their constitutional rights to personal freedom and security, conditions of detention which are consistent with human dignity, and fair labour practices are infringed upon by violations of immigration and employment laws and also deficiencies in these laws. Their inability to access adequate housing presents challenging issues of unsettled law, which will require further adjudication. In the public sector, the police and immigration officials violate the lawful procedures for the arrest, detention, and deportation of foreign migrants in the Immigration Act. In the private sector, employers violate the prescribed basic conditions of employment for farm workers, including by not paying the minimum wage, making unlawful deductions from workers' wages, and calculating workers' wages based on productivity rather than the number of hours worked. Employers in the cities pay discriminatory wages to undocumented foreign migrants who do the same work as South African citizens. South African workers and private security officials discriminate and use violence against foreign workers, documented and undocumented. With respect to the right to social security, foreign migrants suffer *de facto* exclusion from workers' compensation. Existing legislation discourages farmers from investing in farm workers' housing and the government has no housing policy for farm workers, whether South African or foreign.

As is its usual practice, HRW does not simply employ a strategy of naming and shaming. 'Unprotected migrants' also makes a number of recommendations, intended as constructive suggestions to the South African government. In a short report such as this, the recommendations are two pages long. In a full-scale report, such as 'Prohibited persons', the recommendations may be targeted at a number of different governments and organisations and comprise a lengthy section. In 'Unprotected migrants', HRW summarised its recommendations as follows:

To address the human rights abuses of Zimbabwean foreign migrants, Human Rights Watch recommends that the government of South Africa

³ That one can imagine other models for the production, quality assurance and distribution of human rights research does not mean that the HRW model is not itself doing worthwhile work. One alternative model might invite proposals for human rights research from locally-based researchers, selecting some of those proposals for funding, and then editing, reviewing and publishing within HRW channels some of the reports actually completed. Informally, this perhaps occurs. Another alternative model might see HRW undertaking such a report as a joint project with a local human rights NGO. In the making of 'Unprotected migrants', two employees of the Musina Legal Advice Office are thanked in the acknowledgments. Other persons attending the seminar also raised possibilities of future joint publications with HRW.

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

One could critique this report (and presumably nearly every other HRW report) for misplacing its focus in several ways. First, the report's major finding is that the laws are not followed. As anyone who is exposed to some of the South African news media would probably know, this is not surprising in this sector at this point. We knew that and even most government officials would not dispute such a finding. What would be particularly revealing would be information about the laws and their lack of implementation that would contribute directly towards improving the situation in Limpopo. As representatives from the Forced Migration Studies Programme (Wits) have noted, this would require a more sustained investigation of migration governance in the province. Such work ought to pay particular attention to (1) the amount of resources (both human and material) currently available to local government agencies (Department of Labour, SAPS, Home Affairs) for ensuring compliance with migrant and migrant worker protections referred to in the report, and (2) the nature and relative success of national oversight mechanisms. This could begin with parliamentary committees for the relevant departments and the Border Control Operational Co-ordinating Committee.

Thus, second, it is significant that the report neither notes nor addresses the organisational difficulties (and potential solutions to those difficulties) of the Department of Home Affairs and its capacity constraints.⁴ One could make a very good case that this department⁵ is both nearly at the bottom of the barrel in terms of resources, skills, capacity and organisational discipline and also currently under its most competent and most human rights concerned political leadership ever, noting in particular the independent inquiry commissioned into

⁴ Other HRW reports do cover issues of state capacity and this topic is thus understood to fall within the organisation's mandate. See 'Unequal protection: The state response to violent crime on South African farms' (HRW 2001). For a report that mostly finds violations of existing laws, the topic of capacity would have been worth including.

⁵ Other departments such as the SAPS, which are also part of the ongoing human rights issue, do not face capacity constraints of the same magnitude.

the operation of Lindela.⁶ There might well be a receptive audience for a report aimed at such questions.

A third criticism could be that the HRW report barely, if at all, touches upon the root cause of the economic/democratic crisis in Zimbabwe and the response or lack thereof from the South African side. But, as said, these criticisms would be valid for nearly each and every HRW report and are perhaps too broad to gauge. At the least the issue requires further discussion within the South African human rights community, including global human rights groups such as HRW and Amnesty International. Thus, the remainder of this review/comment proposes to take the report at its face value and to engage with it within the frame it itself proposes.

'Unprotected migrants' gives background to the current situation in and around the Limpopo Province by outlining the numbers of migrants heading towards South Africa, the particular vulnerability of Zimbabwean asylum seekers to abuse and delay in the refugee determination process, and the continued reliance by South Africa on a deportation rather than an employer-policing policy to control the number of undocumented migrants. Many of those deported simply return through the borders of the South African territory. Reflecting longstanding patterns, the percentage of foreign farm workers among farm labour is significant and has been increasing since South Africa's transition from apartheid. Limpopo, the most rural and poor of the provinces, has farms that depend heavily on workers from Zimbabwe. After some discussions between South Africa and Zimbabwe, led by the South African Minister of Labour, the farm owners currently take advantage of 'corporate work permits' in the Immigration Act, paying R1 520 for a variable number of foreign farm workers, each of whom must have some type of travel document from Zimbabwe (which, since October 2004, the Zimbabwean government has provided in the form of emergency travel documents). With donor funding from the United Kingdom, the International Organisation of Migration (IOM) in May 2006 opened a reception and support centre on the Zimbabwean side of the border to provide co-ordinated social services to the large numbers of persons deported from South Africa to Zimbabwe. The IOM plan, of which HRW is 'deeply sceptical' (as well as of the IOM itself), is to facilitate the employment on South African farms of qualified Zimbabweans, while providing passage to other deportees to their homes of origin. According to the report:

IOM's past failure to publicly confront and criticise the Zimbabwean government's human rights abuses in the context of international humanitarian assistance suggests it will be unlikely to defend migrants' and deportees' rights should so doing require an oppositional stance toward the government.

⁶ In May 2005, the Minister received a report from the Independent Committee of Inquiry into the Deaths at the Lindela Holding Facility.

Recognising the historical context of this situation, the report notes the two-gate character of the apartheid immigration regime, facilitating permanent immigration through individual permits (mostly for Europeans), on the one hand, and, on the other hand, encouraging employment schemes largely administered by the mines or farmers' association that exempted foreign employees from the requirements and protections afforded to immigrants.⁷ This brief history directly links the problems noted in the report to the apartheid experience of migrant workers. This increases the appeal of the report and is valuable for this report's particular emphasis on migrant workers as opposed to asylum seekers (where HRW recognises that much local research and advocacy exist).

Much of what HRW found and reports on were violations of the Immigration Act. As the report notes:

Human Rights Watch found violations of the procedures for the arrest, detention, and deportation of 'illegal foreigners' by police and immigration officials. These violations have been documented in other research and must be understood as widespread and systematic rather than idiosyncratic and anecdotal.

This is right and the report is correct to note that these violations are both widespread and revealed through prior research.⁸ It unfortunately reflects the character of human rights advocacy and violations in this area that such research, which in one sense simply replicates earlier findings, remains continuously necessary and urgent.⁹ In this category of failure to respect, the report notes officials' failure to provide assistance in verifying the status or identity of suspected 'illegal foreigners' (23-25), assault, bribery and theft by police during arrest of suspected illegal migrants (25-27), detention exceeding 30 days without proper procedures (27-28), and detention not in compliance with prescribed standards (28-32).¹⁰

In addition, HRW found problems that went beyond the failure to respect the provisions of the existing law.

⁷ HRW 18. In this respect, the report's statement that '[t]he Aliens Control Act, 1991, amended in 1996, encouraged and governed permanent immigration for Europeans' gives the inaccurate impression that only Europeans were able to obtain permanent residence under that law. While discrimination in practice continued to occur, the formal legal criterion of race was removed from the predecessor legislation to the Aliens Control Act in 1986 and was never contained in the Aliens Control Act itself, which otherwise substantially did consolidate (but not reform) the pre-existing apartheid era immigration legal framework, which had indeed encouraged European immigration.

⁸ In addition to the sources cited by the report, there is also a body of research by the South African Human Rights Commission that affirms this point.

⁹ South African Human Rights Commission 'Illegal? Report on the arrest and detention of persons in terms of the Aliens Control Act' (March 1999).

¹⁰ The Johannesburg seminar thought litigation prospects regarding violations of conditions of detention for children were good.

Human Rights Watch also became aware of legal gaps in the Immigration Act and the Immigration Amendment Act, arising from the administration of the corporate permit provisions and the arrest, detention and deportation process. These legal violations and gaps and, where applicable, their consequences for the human rights of foreign migrants as provided for in the constitution, are identified below.

Material in the report in this category includes deportation without an opportunity to collect remuneration, savings and personal belongings (32-35) and migrants' vulnerability to financial abuses by corporate permit holders (37, 49-50).

Both of these gaps are worth addressing, although, in my view, there are more legal resources to work with for addressing the second than for the first.

The first is the issue of deportation without an opportunity to collect remuneration, savings and personal belongings. While the impact on particular persons should be acknowledged, this practice is not necessarily the most serious of human rights violations. Indeed, the report itself terms it only a 'serious injustice', which in HRW language is less serious than a human rights violation. The legal authority for requiring such an opportunity is relatively thin. It is a provision in a 1990 international treaty that South Africa has not signed, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.¹¹ While opinion is increasingly in favour of working with this Convention, it is hardly yet a legal base. Moreover, one wonders just how the DHA would actually be able to cope with such a requirement. If implemented, such a requirement should be part of a shift in strategy towards greater attention to issues of employer workplaces and the criminal justice system. Both of these locations are indeed arguably places where such a requirement would have some effect on strengthening South Africa's migration policy.

The second gap in the law identified by HRW puts the focus on the degree of control the employers have over their employees. Indeed, one of the principled objections to the framework of the Immigration Act at the time of its drafting and adoption concerned this feature: The broad concern was raised that corporate work permits allowed the employer to control the migration status of employees and thus to exercise an additional source of authority that could easily be abused. In at least the setting of the farms of the Limpopo Province, if not the boardrooms of the gold and platinum mining companies, that legal authority has indeed been abused, as 'Unprotected migrants' finds. The particular concern of the report is a narrow if clear issue: the char-

¹¹ The Inter-American Court of Human Rights ruled that international principles of non-discrimination prohibit discrimination on the basis of work conditions and terms with respect to undocumented migration workers. See (2005) 99 *American Journal of International Law* 460-465.

ging of documentation fees beyond the cost of the actual government-issued documentation.¹² However, the problem is a broader one, since financial exploitation is only one of a number of ways that an employer (including a farmer in Limpopo Province) may exploit his workers. Indeed, the entire set of findings relating to non-compliance with employment laws could arguably be based upon this power imbalance, an imbalance sourced in, or at least ratified by, the Immigration Act and its attempt to cater to the private sector through an explicit devolution of documentary power in provisions like the corporate work permit.¹³

Before turning to that set of employment law non-compliance findings, it is worthwhile to point to some material in the report which is perhaps in a category of its own. This is the material in the section on 'migrants' vulnerability to arrest and deportation arising from government deficiencies in documenting corporate workers' (35-36). Here, the report notes:

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

The reason that this material is perhaps in a category of its own is that HRW then recommends that the immigration law be changed in the following fashion:

To the government of South Africa:
Amend the immigration law to protect migrants who fall into irregular status because government bureaucracies and agents responsible for workers' documentation fail to implement the law and carry out their functions.

Upon closer inspection, however, this recommendation seems to me to be a bit unrealistic. Yes, migrants are caught in a variety of catch-22 and Kafka-esque situations. Yes, these result in significant part from the state's failure to implement. Yes, in these situations migrants are regularly subject to abusive inhumane and exploitative practices. But to amend the immigration law in this way — by providing a blanket exemption for those without documents due to the state's failure — would not, at least on this evidence, strengthen South Africa's migration regulatory regime or align such a policy more closely with human rights standards. Instead, it would simply be diverting attention from the true problems of a lack of capacity and misplaced policy emphasis on deportations as

¹² The report suggests two versions of an amendment to the Immigration Act to prevent charges for complying with the law. In addition, the resource of the code of conduct for immigration practitioners could be used.

¹³ In this respect, it is worthwhile to note that the corporate work permits are also a cause of concern for those at the other end of the client spectrum. See C Watters 'Immigration law update' (July 2006) *De Rebus* 47; J Pokroy 'Intracompany transfer work permits' (August 2006) *De Rebus* 42.

opposed to strengthening labour affairs and the criminal justice system and/or addressing the imbalance of employers' power with respect to migrant employees. A policy recommendation that would perhaps draw upon the same sentiment but be more effective (though perhaps beyond the HRW mandate) would be a call for a further amnesty (such as the SADC, the mineworkers' and the FMR amnesties).¹⁴

Returning to the material on compliance with employment laws, the report makes three types of findings: violations of existing laws and determinations, places where the existing law is inadequate for all workers, and places where foreign migrant workers are in particular legally and in practice disadvantaged.¹⁵ Violations of existing laws and determination includes employers' failure to pay minimum wages, their unlawful use of 'piece rate', their disregard of overtime rules (38-41) and employers' failure to comply with provisions governing deductions from wages (41-43). The report also notes instances and patterns of discrimination and violence against Zimbabwean workers by South Africans in the private sector (43-45).

Further, the report presents findings on housing and living conditions (45-48): Farm owners claim that the maximum deduction of 10% does not provide an incentive for providing housing for farm workers. This section provides a good example of how different human rights advocacy organisations can draw upon each other's work to maximise the impact of their own.

In 2002, the Department of Housing informed the South African Human Rights Commission that it intended to develop a strategy specifically for farm workers' housing in 2003. Human Rights Watch found no evidence of such a strategy (167). The government's failure to create a housing policy puts it at risk of contravening its constitutional obligation to establish measures for the progressive realisation of the provision of adequate housing for everyone.

South African housing policy is currently in a flux and this point should be raised in the ongoing policy debates.

In relation to workers' compensation, the report (48-49) finds problems with foreign workers being able to receive compensation awards through difficulties with accessing the banking system, a finding consistent with other research. Particularly in relation to this last finding, the report will provide a valuable resource for advocacy organisations

¹⁴ See J Crush & V Williams *The new South Africans? Immigration amnesties and their aftermath* (1999). The Johannesburg seminar noted that discussions of a new amnesty had been held within government in 2004. One potential defined group for an amnesty was the group of asylum seekers. Any amnesty should take into account DHA's capacity to deliver documents, both currently and in the future.

¹⁵ 'Unprotected migrants' notes that international law requires equality of rights to fair labour practices between citizens and foreigners, including irregular migrants (HRW 17-18). An important recommendation of the report is the adoption of the convention (n 11 above).

that are seeking a clear outline of the legal environment in which truly unfortunate instances occur, such as the failure to compensate a foreign migrant worker after he was driven over by a tractor.

To end this set of comments on a truly legal note: The report asserts at several points that a violation of various legislative provisions or sectoral determinations also constitutes a violation of the respective constitutional provisions. However, this transfer from the statutory or regulatory level to the constitutional one cannot be assumed quite so easily. It may well be that legislative or regulatory protections provide protections that go beyond those provided by a fair and purposive interpretation of the constitution. If so, then, in particular, there may be jurisdictional hurdles that a Legal Resources Centre or university law clinic lawyer faces in pursuing a claim on behalf of a migrant farm worker. Indeed, this (a jurisdictional obstacle) is currently and seemingly endlessly the situation with respect to procedural fairness in deportation. Because of the failure to institute magistrates' courts with subject matter jurisdiction over violations of the Promotion of Administrative Justice Act (PAJA) (and the deletion of Immigration Courts from the Immigration Act), the only forum that can adjudicate upon a claim of unfair deportation is a High Court, a court out of reach of nearly every unprotected migrant caught up in the deportation machinery. A PAJA claim available only in the High Court might as well be a constitutional claim.

That said, there is at least one constitutional right that ought nonetheless to be deployable in aid of the unprotected migrants identified by this report: the right to dignity. This right is the favourite of this court, arguably more so than the rights to equality and freedom. It is thus worth quoting one opinion of a Constitutional Court judge on the potential applicability of the right to pretty much the precise situation at issue in this report.¹⁶

Contrary to the Centre's argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under section 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity.

The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.

¹⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 124 (footnotes omitted) (*per Sachs J*).