



Neighbors In Need

Zimbabweans Seeking Refuge in South Africa

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I. Summary

Since 2005 an estimated one to 1.5 million Zimbabweans have fled across the border into South Africa, the region's economic power. They have run from persecution, for the majority in the form of targeted, mass, forced evictions destroying homes and livelihoods, and from economic destitution as the Zimbabwean economy collapses. Recent refugees fleeing the brutal crackdown on political opponents of President Robert Mugabe in the aftermath of the March 2008 Zimbabwean elections are the latest wave.

In South Africa they face a vulnerable and uncertain situation. Without documents, they have no right to work and have limited rights and access to social assistance such as health care and housing. Liable to arrest and deportation at any time, they live in permanent insecurity. Due to South Africa's dysfunctional asylum system and unlawful deportation practices, many of the tens of thousands that have applied for asylum are at constant risk of being *refouled*—unlawfully returned.

These are not voluntary economic migrants, even if for many economic destitution is one of multiple reasons for crossing into South Africa. Their presence in South Africa underlines a failure of foreign policy—the failure to use South Africa's leverage effectively to address the brutal human rights violations and failed economic policies in Zimbabwe causing their flight. Their undocumented status and vulnerability in South Africa, and the increasing public resentment against them, represents a failure of domestic policy—the failure to develop and implement a legal, comprehensive, and workable policy to address the reality of the existence of Zimbabweans in South Africa.

The choice the South African government faces is difficult and stark. Either it continues to breach its fundamental obligations under international law and ignores the reality of the hundreds of thousands of undocumented Zimbabweans on its territory. To do this means allowing many to be mistreated by police, abused and exploited by employers, while many others are removed haphazardly, arbitrarily,

expensively, and ineffectively to Zimbabwe (most returning back over the border within days or weeks).

Or the government can choose to regularize their stay.

This report calls on the South African authorities to adopt a broad-based policy aimed at regularizing the presence of Zimbabweans in South Africa. This should allow Zimbabweans to enter South Africa legally, should regularize their status once in country, should end their deportation, and should give them the right to work in South Africa on a temporary and reviewable basis. Under the 2002 Immigration Act, the minister of home affairs could establish a new temporary permit scheme called “temporary immigration exemption status for Zimbabweans” (TIES).

The fact of public resentment against foreigners should not deter the South African government from fulfilling its legal obligations and doing what is right. This report outlines eight arguments why regularizing the status of Zimbabweans makes both legal and practical sense:

- Regularization would allow South Africa to meet its fundamental international legal obligation not to unlawfully deport Zimbabwean asylum seekers.
- Regularization would unburden the asylum system of unnecessary claims.
- Regularization would protect Zimbabweans during entry and stay in South Africa, including against xenophobic violence at the hands of South African citizens.
- Regularization would offset the cost to the South African taxpayer of ineffective deportation and wasteful use of police resources.
- Regularization would provide data on hundreds of thousands of currently undocumented Zimbabweans.
- Regularization would help the authorities to enforce employers’ minimum-wage obligations and create a level playing field on which South African nationals could compete fairly for jobs.

- Regularization leading to the right to work would address Zimbabweans' humanitarian needs in South Africa, which would reduce the pressure on South African social assistance programs.
- Regularization leading to the right to work would help Zimbabweans support desperate families remaining in Zimbabwe, thereby possibly reducing the number of Zimbabweans fleeing their country for South Africa.

The fact of the matter, as this report shows, is that repression in Zimbabwe has a direct impact on South Africa. As resentment among the urban poor against foreigners has grown—with Zimbabweans becoming a prime target of xenophobic violence which has killed dozens, injured hundreds and displaced tens of thousands of foreigners—this includes impact on South African social harmony, public safety, and the rule of law.

Accordingly, the South African government, working closely with the Southern African Development Community (SADC), the African Union (AU), and the United Nations (UN), also has every reason to urgently identify a fundamentally more effective political strategy than has been seen over recent months to address respect for human rights and the rule of law in Zimbabwe itself. This is not an alternative to regularizing the status of Zimbabweans in South Africa—the legacy of repression in Zimbabwe, including Zimbabweans fleeing to South Africa, will take time to overcome, even if measures to address it are implemented immediately and effectively.

Why are hundreds of thousands of Zimbabweans crossing to South Africa?

Testimonies from Zimbabweans in South Africa presented in this report explain in personal and individual terms how the Zimbabwean government's political actions and the country's decline have led to their economic destitution and desperation, and have ultimately forced them to leave the country to survive the political and economic crisis.

Political repression has included the direct, violent targeting of opposition supporters, policies resulting in the dislocation of hundreds of thousands of citizens,

and an assault on the informal trading sector. These policies have resulted in severe social and economic disruption for massive numbers of people.

Until the 1990s, Zimbabwe was one of the wealthiest countries in sub-Saharan Africa. With the collapse of much of the formal economy after 2000, the informal sector expanded and by 2005 employed three-to-four times the number of people employed in the formal sector. Meanwhile, in the late 1990s, the Movement for Democratic Change (MDC) began to emerge as a nascent political alternative to the dictatorial Zimbabwe African National Union-Patriotic Front (ZANU-PF) regime led by Robert Mugabe, claiming support in various parts of the country, including many high-density suburbs.

Always authoritarian when facing political opposition, the Zimbabwean government became even more repressive following the emergence of the MDC. During election periods (2000, 2002, 2005, and 2008), large numbers of political activists have been assaulted and displaced.

In 2005, in a forcible eviction action called *Operation Murambatsvina* (which translates as “Operation Clear the Filth”), the Zimbabwean government destroyed the homes and livelihoods of about 700,000 people (or 6 percent of the Zimbabwean population) living in the high-density suburbs of Zimbabwe’s cities. Because the evictions caused massive economic destitution and had a huge impact on the broader Zimbabwean economy, the evictions triggered the escalation of the contemporary influx of Zimbabweans to South Africa.

Zimbabwe’s high-density suburbs were areas of significant support for the MDC. As this and other reports describe, the evictions were almost certainly carried out for political reasons.

The eviction campaign destroyed tens of thousands of houses and thousands of informal business structures. A further 1.7 million people were indirectly affected. A strictly-enforced government ban on informal trading after the evictions resulted in a severe crisis for individuals engaged in small enterprises and vending.

Though it is not known how many victims of *Operation Murambatsvina* have crossed the border, it is possible that tens of thousands of breadwinners from targeted families rendered destitute by the government's action have come to South Africa to help their families survive. Interviews conducted by Human Rights Watch for this report identified dozens of such people.

The brutal crackdown that followed the March 2008 parliamentary and disputed presidential elections to prevent opposition supporters from voting the same way in the presidential runoffs has caused further displacement, with thousands of MDC activists and supporters fleeing from rural areas, some of them across the border to South Africa. These most recent asylum seekers arriving in South Africa are fleeing persecution in the form of torture, beatings, arbitrary arrest, and detention.

Like those targeted for their political activities, people targeted during the 2005 evictions have a strong claim for refugee status under international refugee law. And Zimbabweans fleeing generalized destitution caused by Mugabe's ruinous policies cannot be regarded as voluntary migrants merely seeking financial advantage; the gravity of the current economic crisis suggests that almost all are leaving involuntarily.

This report presents the testimony of those evicted and those fleeing generalised economic deprivation. Without fail these people told Human Rights Watch that they were compelled to leave Zimbabwe and looked to South Africa as their last option for survival.

In 2008 Zimbabwe has one of the world's "fastest shrinking economies" and, by far, the world's highest rate of inflation, estimated by the Zimbabwean state statistical office at 100,000 percent. The real gross domestic product has shrunk for nine consecutive years, and the engine of Zimbabwe's economy, agriculture, has contracted sharply. The proportion of the population living below the poverty line increased from 25 percent in 1990 to 83 percent in 2007. Throughout 2007 and in 2008 unemployment has been estimated at 80 percent.

The collapse in food production has caused a serious food deficit, affecting 4.1 million Zimbabweans (more than one-third of the population) in early 2008. Until June 4, 2008, food assistance programs by international agencies such as the World Food Program were expected to meet all of the assessed needs in rural areas, though only one-third of the one million urban Zimbabweans estimated to be food insecure were receiving formal food assistance. On June 4, 2008, the Zimbabwean authorities announced a complete halt to the work of all aid agencies in Zimbabwe, including those distributing emergency food rations, alleging that agencies had been using their programs to campaign for the opposition party. This followed President Mugabe's announcement on May 29, 2008, that Zimbabwe had had to import 600,000 tons of maize to ease food shortages, and warnings that in the coming 12 months Zimbabwe's cereal production will cover only 28 per cent of the populations' needs.

The health sector in general has been plagued with difficulties providing basic services. Shortages of key drugs are frequent and massive emigration of medical personnel has occurred. Currently, 50 percent of health care positions, including 88 percent of primary health care nurse positions, are vacant. Due to regular increases in fees, the cost of health care has increased. A dramatic drop in a broad range of health indicators reflects reduced access to health care. Maternal mortality rose from 283 per 100,000 live births in 1994, to 1,100 per 100,000 live births in 2005. Women's life expectancy has fallen from 56 years in 1978, to 34 years in 2006.

As of December 2007 an estimated 1.7 million out of 13 million Zimbabweans were living with HIV, sharply increasing the burden on the health care system. Over 70 percent of admissions to medical wards in Zimbabwe's major hospitals are patients with AIDS-related diseases. About 350,000 of the 1.7 million people living with HIV need anti-retroviral treatment (ART), and 600,000 need care and support. While medical care provided to People Living with HIV/AIDS (PLWHA) has increased in the past few years, it still falls far short of the needs. Only about 90,000 Zimbabweans needing ART are currently being treated with anti-retroviral medicines and reports have indicated that some Zimbabweans are fleeing to neighboring countries because of their inability to access ART.

The 2007 Global Tuberculosis Control Report from the World Health Organization ranks Zimbabwe among 22 countries with the highest tuberculosis (TB) burden in the world. Zimbabwe has six times more TB cases than it did 20 years ago, and an estimated two-thirds of Zimbabweans with TB are also infected with HIV. Cholera outbreaks have repeatedly occurred in recent years, as the country's water and sanitation systems have broken down. In December 2007 459 cases of cholera were reported in two high-density suburbs of Harare. In Bulawayo, 11 people died from cholera and more than 300 were hospitalized in 2007. Electric power outages and shortages of chemicals to treat water have interrupted water supplies and compelled individuals to drink untreated water contaminated with fecal matter. At least 6 million people in Zimbabwe—about half the population—do not have access to clean water or sanitation.

The South African government and international actors' recognition of the involuntary nature of Zimbabweans' displacement is a necessary step to identifying the most effective response to their presence in South Africa.

South Africa's response

The influx of more than a million destitute and hungry Zimbabweans has placed an enormous burden on South Africa. This has resulted in some excessive reactions by the authorities, such as the police raid in January 2008 on the Central Methodist Church in Johannesburg, which shelters over 1,000 homeless Zimbabweans. It has also led to unlawful practices such as rapid deportations by the South African Police Services in the border region.

However, generally the response of the South African authorities has been to turn a blind eye to the presence of Zimbabweans, remaining silent on why they have come to South Africa in such high numbers and on the scale of the human rights violations in Zimbabwe that has driven them. Even during the mass evictions of 2005 affecting 2.4 million people, and the post-March 2008 election violence, the South African government has not set out a clear public policy with its assessment of the reasons for the influx or with a frank admission of the challenges it faces in responding.

Nor has the government responded in a concerted way to the significant and almost certainly increasing humanitarian needs of particularly vulnerable Zimbabweans in South Africa, such as unaccompanied children and the very sick (including PLWHA).

Instead it has adopted a business-as-usual approach, treating Zimbabweans like any other foreign nationals by requiring them to go through standard immigration procedures, or to apply for asylum in a system incapable of dealing with the number of applications. As there are only limited possibilities for obtaining work permits in South Africa, many of the almost 20,000 Zimbabweans who make asylum claims every year do so because they have no other option for legally working and legally remaining in South Africa. Consequently, the asylum system is burdened with potentially thousands of claims that could be better processed under an alternative immigration policy.

The government's policy of deporting some of the hundreds of thousands of undocumented Zimbabweans does not reduce the number of Zimbabweans in South Africa. It does not deter illegal entry and is highly costly to the South African taxpayer, a fact that has increasingly been recognized at the highest levels of government. Despite this recognition, an estimated 200,000 Zimbabweans were deported in 2007. Most returned to South Africa within days or weeks.

Echoing the media's often emotive language used to describe Zimbabweans in South Africa— "a human tsunami," "illegal immigrants," or "border jumpers"—the government has suggested that Zimbabweans in South Africa are all voluntary economic migrants. President Thabo Mbeki has referred to them as an "inflow of illegal people." Other South African officials have made various statements including "there is no war in Zimbabwe," implying that Zimbabweans cannot possibly have valid asylum claims, that they voluntarily leave their country, and that Zimbabweans "are economic migrants" or "not real refugees."

This business-as-usual approach, which has continued despite the April 2008 campaign of violence, coupled with the tendency to describe all Zimbabweans in identical terms (as voluntary economic migrants), allows the government to ignore three awkward interrelated questions. What are South Africa's legal obligations

towards Zimbabweans in South Africa? What should South Africa do to meaningfully respond to their presence? How can the South African government more effectively address the human rights violations and repression causing their flight?

South Africa's legal obligations to recognize and not deport Zimbabwean refugees from South Africa

South Africa has specific legal obligations not to deport Zimbabweans who are lawfully present: those with temporary residence permits (visitors and workers, including farm workers, in the tens of thousands) and those who have claimed asylum and who await a determination of their status or who have been recognized as refugees (44,423 Zimbabweans claimed asylum in South Africa between 2005 and 2007; within the approximately 5,000 new asylum applications processed each year, the government recognised 241 Zimbabweans as refugees between 2004 and 2006).

Under international refugee law, those targeted under *Operation Murambatsvina* have strong claims for refugee status, but until now the South African asylum system has not considered them to be protected under the 1951 Refugee Convention. To successfully claim refugee status under the 1951 Refugee Convention asylum seekers need to show that they cannot be sent back to their country because they have a well-founded fear of being persecuted on account of their “race, religion, nationality, membership of a particular social group or political opinion.” Persecution is generally regarded as a “serious harm” that the government is responsible for causing or for being unwilling or unable to prevent.

Human Rights Watch believes that Zimbabweans who were targeted by the forced evictions are refugees. This is because their rights to shelter, work, food, and in many cases education and health care were and continue to be violated to such an extent that they would suffer serious harm if returned to Zimbabwe, and because the Zimbabwean government, responsible for the original rights violations, continues to fail to protect them against the effects of those rights violations.

Zimbabweans targeted by the evictions fear being persecuted because the Zimbabwean government sees them as a political threat. This is because the government views poor Zimbabweans living in high-density suburbs as holding

“political opinions” in opposition to it and because it views those suburbs as fertile political ground for fomenting general political dissent.

This report argues that the South African government should ensure that the asylum system recognizes that people targeted by the mass forced evictions have valid asylum claims and that its refugee status determination staff is adequately trained to consider such claims in an efficient and legally coherent way.

Ten years after the 1998 Refugees Act was enacted, South Africa’s asylum system and deportation practice continue to be dysfunctional. Asylum procedures create significant obstacles for Zimbabweans at every stage of the application process, particularly in terms of gaining initial access to the system.

These obstacles often violate the most fundamental provisions of South African refugee law. Deportation practice, including deportation focusing specifically on Zimbabweans in the border areas, is often unlawful. There have been documented violations of the most basic principle of international refugee law, the principle of *non-refoulement*, to which South Africa is bound as a party to the 1951 Refugee Convention, and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. A person’s right not to be *refouled* is the right not to be forcibly returned to a place where she would face a threat of persecution or a real risk of torture or cruel, inhuman or degrading treatment or punishment.

The dysfunctional nature of the asylum system and of current deportation practices in South Africa means that there is a generalized high risk of Zimbabwean asylum seekers being deported. Under the principle of *non-refoulement* it is unlawful to deport an asylum seeker because the claim is yet to be processed.

Key to improving the system and thereby to prevent *refoulement* is resolving the ongoing challenge of a large backlog of asylum cases. In September 2007 the South African Department of Home Affairs (DHA) confirmed an asylum backlog of 76,400 cases filed before August 1, 2005. Progress made in reducing this old backlog risks being rendered meaningless by the number of new applications. With a total of 105,000 cases lodged on or after August 1, 2005, still not dealt with by the end of

2007, a new backlog is in the making. Until the asylum system is able to find a way of dealing more efficiently with its caseload, the obstacles faced by Zimbabwean asylum seekers and the related risk of *refoulement* will continue.

South Africa's legal obligations to address assistance needs of Zimbabweans in South Africa

The South African government not only faces the presence of large numbers of Zimbabweans on its territory, but also a Zimbabwean population with serious assistance needs. This is not a problem of South Africa's making. Meeting the needs of Zimbabweans in South Africa is a global responsibility and donor countries should support South Africa to enable it to meet in particular the humanitarian needs of the most vulnerable—the sick, including PLWHA, children, and the elderly.

South African law clearly provides that everyone in South Africa, regardless of nationality or immigration status, enjoys a number of rights which address such needs: access to free emergency health care, including to ART for people infected with HIV, to other forms of fee-based health care, and to basic education. Recognized refugees have a number of additional rights clearly spelled out in South African law and developed by the courts that ought to guarantee them access to certain types of social assistance. South African courts have yet to unequivocally establish the rights of asylum seekers to certain forms of assistance such as housing, food, water, and social security, but asylum seekers do have the right to study and work. Undocumented Zimbabweans, however, do not have the right to work or other rights to social assistance, except access to emergency and basic health care.

Refugees and asylum seekers continue to face serious obstacles in gaining access to many types of assistance to which they are legally entitled, including access to health care, such as ART. Asylum seekers are often rejected by prospective employers who appear not to be aware of their right to work. Undocumented Zimbabweans are unable to access medical treatment and face various other assistance needs. Nearly all Zimbabweans, documented or undocumented, have desperate accommodation needs. In 2007 many South African charities reported an increase in the number of highly vulnerable Zimbabweans coming to their doors.

The May 2008 violence against tens of thousands of Zimbabweans and other foreign nationals, which follows many similar isolated incidents throughout 2007 and early 2008, has drawn dramatic attention to their vulnerability and needs.

The need for a broad-based policy for all Zimbabweans in South Africa

The crisis in Zimbabwe, including the ongoing government-orchestrated violence in 2008, means that hundreds of thousands of Zimbabweans will remain in South Africa for the foreseeable future. Many more will join them. With the vast majority having no hope of regularizing their stay, they will continue to enter and remain in the country without documentation in the hope of finding work to help themselves and their families in Zimbabwe survive.

Human Rights Watch believes that a broad-based policy aimed at regularizing the presence of Zimbabweans in South Africa is the most appropriate legal and practical way forward. The policy's components should include: a) allowing Zimbabweans to enter South Africa legally; b) regularizing their status once in country; c) ending the deportation of Zimbabweans; and, d) giving Zimbabweans the right to work in South Africa on a temporary and reviewable basis.

There are at least eight legal and practical arguments for such an approach:

First, regularization would allow South Africa to meet its fundamental international legal obligations. Despite recent initial steps to reform the asylum system, there is no practical prospect of South Africa's asylum and deportation systems improving in the short term. Therefore, Zimbabwean asylum seekers face the risk of being subjected to *refoulement*—forced return to persecution. These include possibly thousands of Zimbabweans who wish to claim asylum in light of the political violence in Zimbabwe in 2008 and people targeted by *Operation Murambatsvina*, if they claim asylum in the future. Because the current asylum and deportation systems currently fail to adequately identify and protect many Zimbabwean asylum seekers, the only way to end their unlawful deportation and to ensure that South Africa respects its obligations under international law is to end deportation of all Zimbabweans in South Africa.

Second, regularization would unburden the asylum system of unnecessary claims. Because many Zimbabweans access the asylum system as the only way to regularize their legal status and to obtain the right to work in South Africa, regularizing their status and giving them the right to work would help reduce the number of claims in the asylum system.

Third, regularization would protect Zimbabweans during entry and stay in South Africa, including against xenophobic violence at the hands of South African citizens. When crossing informally into South Africa, large numbers of Zimbabweans become victims of serious criminal offences, including murder and rape, committed by violent Zimbabwean people smugglers. Once in South Africa, Zimbabweans' undocumented status exposes them to violence at the hands of South African citizens who almost certainly believe that their vulnerable victims won't report them to the police. Zimbabweans' undocumented status also exposes them to exploitation by employers and to harassment by the South African police. Helping Zimbabweans enter through formal border crossings would attenuate predatory practices at the border. Ensuring Zimbabweans are documented and can work would significantly reduce their vulnerability to xenophobic violence at the hands of criminals, to exploitation by employers, and to corrupt police practices.

Fourth, regularization would offset the cost to the South African taxpayer of ineffective deportation and wasteful use of police resources. The vast majority of undocumented Zimbabweans are not identified or deported, and those who are—up to 200,000 a year or more—return to South Africa within days or weeks.

Fifth, regularization would provide data on hundreds of thousands of currently undocumented Zimbabweans. The South African government would know how many people are in the country, who they are, and where they live and work. In the event of problems that may arise whilst they are covered by the status or when the status comes to an end, the government would be able to identify people it registers under the proposed scheme.

Sixth, regularization would help the authorities to enforce employers' minimum-wage obligations and create a level playing field, on which South African nationals

could compete fairly for jobs. This is all the more important given that much of the xenophobic discourse reported in the South African press focuses on allegations that Zimbabweans “steal” South African citizens’ jobs.

Seventh, regularization leading to the right to work would address Zimbabweans’ humanitarian needs in South Africa, which would reduce the pressure on South African social assistance programs. Because of their undocumented status, Zimbabweans in South Africa are often unable to find or keep jobs, which increases their humanitarian needs. Granting Zimbabweans the right to work in South Africa would help them fend for themselves, which would in turn reduce the number of desperate Zimbabweans seeking help from South Africa’s social assistance programs.

Finally, regularization leading to the right to work would help Zimbabweans support desperate families remaining in Zimbabwe, thereby possibly reducing the number of Zimbabweans fleeing their country for South Africa. The right to work would enable Zimbabweans to send desperately needed basic foodstuffs to their families in Zimbabwe. This, in turn, might reduce the number of Zimbabweans, especially the most vulnerable—children, the elderly, PLWHA—coming to South Africa in search of work and food.

Given the large number of Zimbabweans believed to be in South Africa, the similar needs faced by all of them, and the operational challenges involved in any response, Human Rights Watch believes that the government should adopt the simplest, fairest, and most expedient approach. Human Rights Watch, therefore, urges the government to use its discretionary powers under existing immigration law to grant Zimbabweans in South Africa a limited number of the rights for a limited period of time and under specific terms and conditions. Under the 2002 Immigration Act, the minister of home affairs could establish a new temporary permit scheme called “temporary immigration exemption status for Zimbabweans” (TIES).

In practice the scheme would allow Zimbabweans to enter South Africa followed by regularization at registration centers for all new arrivals and for all Zimbabweans already in South Africa. On proving their nationality, Zimbabweans would receive a

permit which would clearly state that the holder cannot be deported and has the right to work for a limited period of time. To ensure that South African citizens understand the need for such a temporary permit scheme, a government information campaign could make clear that hundreds of thousands of Zimbabweans are already working without work permits in South Africa and that officially granting them the right to work would help to regulate their access to the job market and help control wages.

South Africa's role in addressing the situation, including human rights violations, in Zimbabwe

Over the past two years the deteriorating situation in Zimbabwe has brought regional concern to a sharper focus. In March 2007 SADC mandated President Thabo Mbeki to mediate talks between the opposition MDC and Robert Mugabe's ZANU-PF, with the objectives of securing agreement on constitutional reform ahead of the March 2008 elections and ending the economic crisis.

During its one year as mediator, the South African government repeatedly championed a "quiet diplomacy" approach, avoiding statements that could be construed as critical of President Mugabe, and leading to widespread criticism that it was not sufficiently assertive. The government failed, for example, to hold President Mugabe accountable to undertakings made during the talks. In line with SADC's deafening silence on human rights abuses committed in Zimbabwe for the past eight years, the South African government also repeatedly failed to condemn the serious rights violations carried out by the Zimbabwean security forces.

The mediation initiative appears to have singularly failed to leverage change in President Mugabe and ZANU-PF's repressive practices. The fact of the violent crackdown that followed the parliamentary and presidential elections in March 2008 demonstrates the failure to send a clear message to President Mugabe that there would be consequences for failing to reach agreement with the MDC on how best to ensure free and fair elections.

As the ZANU-PF organized violence has intensified building up to the June 27, 2008 presidential runoff elections, South Africa's response has remained deeply

inadequate. In contrast to other regional leaders, President Mbeki has refused to acknowledge the serious nature of the situation, for example, failing during a visit to Harare on May 9 to condemn or call for an end to the violence, even after he received a preliminary report on the violence from a group of South African former army generals he had appointed to investigate the situation.

These different positions have prevented SADC and the AU from taking concerted and decisive action to intervene in the crisis which has, in turn, emboldened the government of Zimbabwe to turn state institutions even more aggressively against Zimbabweans seeking democratic change and an end to the destruction of their country's economy.

The South African government must abandon its discredited "quiet diplomacy" approach towards Zimbabwe and must urgently play a central role within the AU and SADC to pressure the Zimbabwean authorities to end the current violence and their destruction of the democratic process.

II. Methodology

This report is based on research conducted in South Africa between 13 October and 12 November 2007, and on research conducted in Zimbabwe between 11 and 19 February 2008.

In South Africa, in-depth interviews with 99 Zimbabweans (56 female and 43 male) were conducted by a Human Rights Watch researcher and by an independent South African legal consultant, students from the University of Cape Town, and staff working with a legal assistance NGO in Pretoria, all of whom worked closely with the researcher. Interviews were conducted in Cape Town, Johannesburg, and Pretoria, and in rural areas close to Cape Town and Pretoria. The locations were chosen because most Zimbabweans in South Africa are believed to live in or near to one of South Africa's cities.

Some interviewees were identified one or two days in advance by South African and Zimbabwean civil society groups providing assistance or legal services to Zimbabweans. Others were identified on the day of the interviews by Human Rights Watch. Interviewees were identified and selected by explaining to groups of Zimbabweans that Human Rights Watch wanted to speak with people who had faced difficulties in Zimbabwe relating to food, shelter, employment, health care, and education, and to people who had been affected by *Operation Murambatsvina* (the 2005 evictions). Interviews were conducted with a wide range of profiles including single men and single women (with and without extended families in Zimbabwe), couples with or without children, married men and women who had left their partners and/or children in Zimbabwe, and female-headed households with and without their children in South Africa. Interviews were conducted individually in confidential settings, in English, and lasted an average of 45 minutes.

Human Rights Watch conducted a further 28 interviews with government officials, members of the Refugee Appeals Board, UNHCR, South African lawyers, local and international NGOs, and academics.

In Zimbabwe, two Human Rights Watch researchers conducted 26 interviews (18 female and 8 male) with Zimbabweans in Harare and Bulawayo. Interviewees were identified with the assistance of a number of local NGOs providing assistance to people displaced by *Operation Murambatsvina* and to others in need of social assistance. Interviews were conducted individually in confidential settings and lasted an average of 45 minutes. Almost all were conducted in English, though a small number were conducted in English and Shona using local Shona speakers as interpreters.

In Harare and Bulawayo, Human Rights Watch conducted a further 20 interviews with UN staff and with staff from local and international NGOs.

Human Rights Watch did not publish in the report the names of Zimbabweans who were interviewed because of a fear that the disclosure of their identity might expose them to adverse consequences.

III. Recommendations

To the Government of South Africa

In relation to all Zimbabweans in South Africa

- Use section 31(2)(b) of the 2002 Immigration Act to introduce a new “temporary immigration exemption status for Zimbabweans” (TIES) which allows Zimbabweans to legally enter South Africa, regularizes their status, ends deportations of Zimbabweans, and grants them the right to work in South Africa.
- Cooperate closely with the United Nations High Commissioner for Refugees (UNHCR) to put in place a registration system for the new status.
- Ensure that all deportations of Zimbabweans are stopped pending implementation of this new status.
- In accordance with the South African Constitution, ensure that all Zimbabweans in need of emergency and basic medical care, including those in need of anti-retroviral treatment (ART) and tuberculosis (TB) treatment, have access to such care.
- Ensure that the most vulnerable Zimbabweans, such as unaccompanied children, the elderly, and the most sick (including the most vulnerable PLWHA) are provided with other forms of emergency assistance such as food and social welfare assistance.
- Engage in a public information campaign to demonstrate to the South African people that:
 - Zimbabweans’ decision to leave their country and come to South Africa is fundamentally involuntary;
 - the deportation of Zimbabweans is ineffective and a waste of tax payers’ money;
 - the simplest, fairest, and most effective way to address the humanitarian needs of Zimbabweans in South Africa is to allow Zimbabweans to fend for themselves through giving them the right to work; and that
 - a regulated Zimbabwean work force will not undercut wages and opportunities for South African workers.

- End its discredited “quiet diplomacy” approach pursued since March 2007 as SADC-sponsored mediator between the MDC and ZANU-PF, and urgently play a central role within the African Union (AU) and SADC to pressure the Zimbabwean authorities to end the current violence and their destruction of the democratic process.

In relation to Zimbabwean asylum seekers in South Africa

- Take immediate steps to ensure that no Zimbabwean asylum seekers, including those fleeing the 2008 post-election repression and violence, are deported from South Africa.
- Officially recognize that despite ongoing reforms, the current dysfunctional state of the asylum system and deportation practices combine to create a high risk of *refoulement* for Zimbabweans.
- Ensure that Zimbabweans are given adequate documentation at all stages of the asylum process to protect them against arrest, detention, and deportation.
- Use the opportunity provided by the current reforms to the asylum system to cooperate with UNHCR and South African nongovernmental organizations (NGOs) to ensure that Refugee Status Determination Officers receive regular and in-depth training on international refugee law, including ongoing on-the-job training.
- Ensure that directors of the five Refugee Reception Offices and all Refugee Status Determination Officers interviewing Zimbabweans who have been targeted by *Operation Murambatsvina* are instructed to consider such people as having, as a matter of principle, strong asylum claims and to ensure that they interview such applicants in-depth in order to establish their potential claim.
- If the proposed “temporary immigration exemption status for Zimbabweans” is not adopted, create a specific team of Refugee Status Determination Officers in each of South Africa’s five Refugee Reception Offices with the specific task and expertise required to review asylum claims by people directly targeted by *Operation Murambatsvina*.

To UNHCR in South Africa

- Assist the Department of Home Affairs in establishing a new “temporary immigration exemption status for Zimbabweans,” in particular through registration procedures.
- Recognize that people targeted by Operation Murambatsvina have strong prima facie claims to refugee status under the 1951 Refugee Convention.
- Work in close cooperation with the Department of Home Affairs and South African civil society to provide regular and in-depth training to Refugee Status Determination Officers in international refugee law, including to special teams focusing on asylum claims made by people targeted by *Operation Murambatsvina*.

To international donors

- Encourage the Government of South Africa to introduce a new “temporary immigration exemption status for Zimbabweans” (TIES).
- Provide financial and technical assistance to the government of South Africa to put in place systems to help implement the new status.
- Provide financial assistance to UNHCR and South African civil society to assist them to provide regular in-depth training to Refugee Status Determination Officers in refugee law.
- Provide the South African government with financial assistance to ensure that particularly vulnerable Zimbabweans, such as unaccompanied children and the very sick, have access to medical care and food.
- Provide all necessary support to Southern Africa Development Community (SADC) governments to assure continuity of care for People Living with HIV/AIDS (PLWHA) and tuberculosis (TB) patients on anti-retroviral treatment (ART) and Directly Observed Therapy, Short-Course (DOTS) treatment who move between states, and to ensure synchronization of standards (e.g. recognition of medical tests) and remove eligibility barriers for donor-supported treatment.

IV. Zimbabweans in South Africa

Increased Numbers of Zimbabweans in South Africa

Since the sharp deterioration of the political and economic situation in Zimbabwe began in 2000, Zimbabweans have been forced to leave their country in increasing numbers. Those with enough money to pay for airfare, usually middle class professionals, have left for industrialized countries, above all the United Kingdom.¹ However, most have gone to Zimbabwe's immediate neighbors: Botswana,² Mozambique, Zambia,³ and above all to South Africa.

Because the vast majority enter these four countries through informal border crossings and remain undocumented throughout their stay, there are no reliable statistics on the number of people leaving Zimbabwe.

In South Africa there is broad agreement that the rate of undocumented emigration from Zimbabwe to South Africa increased after 2005, the year in which Zimbabwean authorities destroyed 700,000 peoples' homes and businesses, and when a sharp deterioration in the Zimbabwean economy left an increasing number in desperate economic need. Deportation statistics also suggest that there has been an increase in the past two years: in 2006 South Africa deported over 80,000 Zimbabweans and the rate in 2007 appears to have increased dramatically.⁴ In 2007 government and

¹ Based on a compilation of official statistics, a December 2006 report prepared for the International Organization for Migration (IOM) concludes that 395,000 Zimbabweans are likely to be in the United Kingdom. IOM, "Mapping Exercise, Zimbabwe," December 2006,

www.iomlondon.org/doc/mapping/Zimbabwepercent20Mappingpercent20Exercisepercent20Finalpercent20Report.pdf (accessed March 15, 2008).

² Estimates for Botswana, Zimbabwe's second richest neighbour after South Africa, are between 200,000 and 300,000. Stephanie Hanson, "Botswana: An African Success Story shows Strains," *US Council of Foreign Relations*, January 10, 2008, <http://www.cfr.org/publication/15108/> (accessed March 2, 2008).

³ Mozambique and Zambia have both reportedly seen an increase in Zimbabweans crossing their borders but there are very few estimates available.

⁴ South Africa's Department of Home Affairs (DHA) does not break down its annual deportation statistics by nationality. Between April 1, 2006, and March 31, 2007, South Africa deported 266,067 people. DHA, Annual Report, 2006-2007, http://home-affairs.pwv.gov.za/documents/Annual_Report_2006-2007.pdf (accessed March 4, 2008). Human Rights Watch has obtained unpublished DHA deportation statistics for the 2006 calendar year which state that Zimbabweans made up a little less than half (81,289) of the 165,270 deportations for that year. On file with Human Rights Watch. Other statistics in later sections of this report suggest that by March 2007 Zimbabweans were being deported at a rate of 18,000 per month (an annual rate of 212,000). Deportation statistics only have limited value in estimating the number of Zimbabweans in South Africa because they do not say anything about how many undocumented Zimbabweans are not identified and deported by the police and they include people who are deported more than once, counting each deportation as a new deportation.

civil society have documented and commented on apparent increased entry into South Africa through informal border crossing points.⁵

By the beginning of 2008 there were probably between one and 1.5 million Zimbabweans in South Africa.⁶ Almost all entered and have remained in South Africa without visas or documentation of any kind.

Zimbabweans have been coming to work in South Africa for decades with a significant increase since 1990.⁷ Although there have always been a significant number of undocumented Zimbabwean workers in South Africa, much of the migration in the past has been legal (through work or trading permits), from the southern part of Zimbabwe, and “circular,” with Zimbabweans regularly moving back and forth across the border.⁸

⁵ The DHA has acknowledged that “recently there have been record increases in the number of people entering South Africa illegally.” DHA, “Statement On Zimbabwean Nationals Entering SA,” August 2007, http://www.dha.gov.za/media_releases.asp?id=419 (accessed March 3, 2008). See also, Forced Migration Studies Programme (FMSP) at Witwatersrand (Wits) University, Johannesburg, “Facts or Fiction?: Examining Zimbabwean Cross-Border Migration into South Africa,” September 4, 2007, www.migration.org.za/wordpress/wp-content/uploads/2007/10/fmsp-2007-b-zimbabwe-border-1.pdf (accessed March 2, 2008).

⁶ There are no reliable statistics on the number of Zimbabweans in South Africa. The South African government has made no statement. Studies by research institutions are geographically limited or target only specific groups. The most systematic study has calculated 800,000 – one million. Daniel Makina, “Survey of Profile of Migrant Zimbabweans in South Africa: a Pilot Study,” University of South Africa, September 2007, www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1994 (accessed March 4, 2008). Some media reports have placed the figure as high as 3.5 million. The 2002 Zimbabwe census recorded 11.6 million people of whom 6 million were children. Unpublished information obtained by Human Rights Watch from the private think tank Robertson Economic Information Services (<http://www.economic.co.zw/>) concluding that around 2.7 million Zimbabweans from the 2002 census were economically active in 2002 (900,000 in regular employment, 700,000 in the informal sector, and 1,100,000 small-scale farmers) with a further 1,950,000 unemployed but potentially economically active, making a total pool of 4,650,000 working-age adults. (The remaining 1,450,000 were split between 450,000 adults too old to work and one million women bringing up children). Given that at least 500,000 mostly economically active Zimbabweans are in the UK and Botswana, that tens of thousands more are in other countries, and that at the very least 1.5 million actually or potentially economically active adults remain in Zimbabwe, the total number of Zimbabweans in South Africa is likely to be far less than 3.5 million. On the basis of this consideration and lower civil society figures, Human Rights Watch adopts the figure of one - 1.5 million.

⁷ Human Rights Watch, *Unprotected Migrants: Zimbabweans in South Africa's Limpopo Province*, August 2006, vol. 18, no. 6(A), July 2006, <http://hrw.org/reports/2006/southafrica0806/>, pp.10-11; and *Keep Your Head Down: Unprotected Migrants in South Africa*, vol. 19, no. 3(A), February 2007, <http://hrw.org/reports/2007/southafrica0207/> (accessed March 5, 2008). For numerous reports and policy documents on migration into South Africa, see the Southern African Migration Project, www.queensu.ca/samp/.

⁸ There is no data on Zimbabwean’s average length of stay in South Africa. Some come for hours (cross-border shopping), some come for days (short-term jobs in the border areas), some stay for several months (to earn income on farms or in urban areas), and others stay for years (work and asylum). Human Rights Watch interviews with Zimbabweans in Cape Town, Johannesburg, and Pretoria, October-November 2007. As the situation in Zimbabwe deteriorates the length of period Zimbabweans stay in South Africa to work will inevitably increase.

In contrast, the current situation is unprecedented. Hundreds of thousands of Zimbabweans from all parts of their country⁹ have come to South Africa without permits to enter and remain because the situation in Zimbabwe has left them little other choice. Without fail, Zimbabweans interviewed by Human Rights Watch in October and November 2007 said that they had no intention of returning to live in their country until the crisis was over and they could once again find work and food for their families.¹⁰

The South African Government's Response to Date

Despite the unprecedented numbers of Zimbabweans crossing its borders and apart from its unsuccessful policy of deporting tens of thousands of Zimbabweans each year,¹¹ the South African government has effectively turned a blind eye to their presence.

Instead of setting out a clear public policy with the government's assessment of the reasons for the influx as well as a frank admission of the challenges it faces in responding, the South African government has adopted a business-as-usual approach. It treats Zimbabweans like any other foreign nationals by requiring them either to obtain visitors permits or work permits, or to make an asylum application. The police or immigration services deport those who breach these requirements. No special arrangements have been put in place to respond to the significant humanitarian needs of particularly vulnerable Zimbabweans in South Africa, such as unaccompanied children and the sick (including PLWHA).¹²

In more political terms, the government's response is also questionable, using the media's language to generalize about Zimbabweans in a negative way. Most South

⁹ Human Rights Watch interviewed almost 100 Zimbabweans in and around Cape Town, Johannesburg, and Pretoria in October and November 2007 who came from all parts of Zimbabwe with the majority coming from or near Harare.

¹⁰ Human Rights Watch interviews, Cape Town, Johannesburg and Pretoria, October -November 2007. The violence against foreigners in South Africa in May 2008 reportedly led to thousands of foreign nationals, including Zimbabweans, returning to their home countries. Available statistics at the end of May 2008 suggested that the vast majority (around 30,000) were Mozambicans, whilst according to the IOM working on the South African-Zimbabwe border, only a small number of Zimbabweans – 123 – returned to Zimbabwe after the violence. International Federation of Red Cross And Red Crescent Societies, "South Africa: Urban disturbance DREF Operation No. MDRZA002 Update No. 1," 30 May 2008, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/EDIS-7F5QKC?OpenDocument&rc=1&cc=zaf> (accessed June 1, 2008).

¹¹ The ineffectiveness of South Africa's deportation practice is looked at in detail in Chapter VII.

¹² On the assistance needs of Zimbabweans in South Africa, see below pp. 34-37.

African and international media refer to recent Zimbabwean arrivals in South Africa as if they were a single group of people all coming for the same reason. The media usually chooses emotive phrases such as “a human tsunami,” “illegal immigrants,” “economic migrants,” or “border jumpers” to describe, without distinction, the hundreds of thousands of Zimbabweans currently living in South Africa.

The government, like the media, tends to group all Zimbabweans together and uses legally imprecise and emotive language to paint a picture that suggests that Zimbabweans have all voluntarily left their country and that their motives are purely economic.

President Thabo Mbeki has referred to Zimbabweans in South Africa as “this ... inflow of illegal people.”¹³ South African police officers involved in arresting Zimbabweans before deportation are reported to have made comments such as, “there is no war in Zimbabwe,” implying that Zimbabweans cannot possibly have valid asylum claims.¹⁴ Officials from South African National Defense Forces (SANDF) and municipal councils working on the border have said that all Zimbabweans “are economic migrants” or “not real refugees.”¹⁵

The business-as-usual approach helps the government avoid publicly addressing two key awkward questions: why exactly are Zimbabweans coming to South Africa in increasing numbers, and what, in light of their reasons for coming, are South Africa’s legal obligations?

South Africa’s foreign affairs response

Over the past two years, however, the deteriorating situation in Zimbabwe has brought regional concern to a sharper focus. After brutal violence by Zimbabwean police on opposition members and civil society activists on March 11, 2007, leaders of the Southern Africa Development Community (SADC) convened an extraordinary

¹³ Speech to South African National Assembly May 17, 2007. “Mbeki: Zimbabweans here to stay,” *News 24*, May 17, 2007, http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2114967,00.html (accessed March 6, 2008).

¹⁴ Written submission by civil society organizations working on the refugee and asylum seekers’ human rights issue in South Africa for presentation to the minister of Home Affairs, “The Documented Experiences of Refugees, Deportees and Asylum Seekers in South Africa: A Zimbabwean Case Study,” April 2006, p. 7. Not available online. On file with Human Rights Watch.

¹⁵ FMSP, “Facts or Fiction,” p. 8.

summit. SADC mandated President Thabo Mbeki to mediate talks between the opposition party, the Movement for Democratic Change (MDC), and Robert Mugabe's ruling Zimbabwe African National Union-Patriotic Front (ZANU-PF), with the objectives of securing agreement on constitutional reform ahead of March 2008 elections and ending the economic crisis.¹⁶

During its one year as mediator, the South African government repeatedly championed a "quiet diplomacy" approach. It avoided making statements that could have been interpreted as critical of President Mugabe, leading to widespread criticism that it was not sufficiently assertive. The government failed, for example, to hold President Mugabe accountable to undertakings made during the talks.¹⁷ In line with SADC's deafening silence on human rights abuses committed in Zimbabwe for the past eight years,¹⁸ the South African government also repeatedly failed to condemn the serious rights violations carried out by the Zimbabwean security forces.¹⁹

While "quiet diplomacy" may not have been an inappropriate starting point, the mediation initiative appears to have singularly failed to leverage change in President Mugabe and ZANU-PF's repressive practices. The fact of the violent crackdown that followed the parliamentary and presidential elections in March 2008 demonstrates the failure to send a clear message to President Mugabe that there would be consequences for failing to reach agreement with the MDC on how best to ensure free and fair elections.

¹⁶ SADC, "Communiqué from the 2007 Extra-Ordinary Summit of Heads of State and Government held in Dar es Salaam, United Republic of Tanzania 28th to 29th March 2007," <http://www.dfa.gov.za/docs/2007/sadc0330.htm> (accessed June 6, 2008). For recommendations made by Human Rights Watch to SADC's annual summit in August 2007, see *A Call to Action: The Crisis in Zimbabwe, SADC's Human Rights Credibility on the Line*, August 2007, <http://hrw.org/backgroundunder/africa/zimbabwe0807/>.

¹⁷ In a joint press conference in Johannesburg, South Africa, on February 21, 2008, the secretaries general of the MDC's two factions, Tendai Biti and Welshman Ncube, announced that the Zimbabwe government had reneged on agreements to implement a new constitution and make legislative reforms before elections were held. "Mbeki's Zimbabwe mediation has failed," IOL (South Africa), February 22, 2008, http://www.iol.co.za/index.php?from=rss_South%20Africa&set_id=1&click_id=13&art_id=vn20080222112349801C434308, (accessed June 6, 2008).

¹⁸ After the April 2007 annual meeting of SADC, President Mugabe said "we got full backing: not even one [SADC leader] criticized our actions." Arnold Tsunga, "Mugabe's Enables," *Washington Post*, April 5, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/04/AR2007040402253.html> (accessed June 6, 2008).

¹⁹ Tiseke Kasambala, "Silence of the Lambs," *Sowetan*, April 4, 2007, <http://hrw.org/english/docs/2007/04/05/zimbabwe15658.htm> (accessed June 6, 2008).

As the ZANU-PF organized violence has intensified building up to the June 27, 2008 presidential runoff elections, South Africa's response has remained deeply inadequate. Some regional leaders, for example President Levy Mwanawasa of Zambia, have been forthright in condemning the violence and criticizing the political situation in Zimbabwe. In contrast, President Mbeki has refused to acknowledge the serious nature of the situation, for example, failing during a visit to Harare on May 9 to condemn or call for an end to the violence even after he received a preliminary report on the violence from a group of South African former army generals he had appointed to investigate the situation.²⁰

As Human Rights Watch has recently argued,²¹ these different positions have prevented SADC and the AU from taking concerted and decisive action to intervene in the crisis which has, in turn, emboldened the government of Zimbabwe to turn state institutions even more aggressively against Zimbabweans seeking democratic change and an end to the destruction of their countries' economy.

The South African government must abandon its discredited "quiet diplomacy" approach towards Zimbabwe, and must urgently play a central role within the African Union (AU) and SADC to pressure the Zimbabwean authorities to end the current violence and their destruction of the democratic process.

Why Zimbabweans are Coming to South Africa: an Overview of a "Mixed Flow" of People

The government's approach fails to recognize that Zimbabweans are leaving their country for various reasons and that the vast majority are not voluntary economic migrants.

In October and November 2007 Human Rights Watch interviewed 99 Zimbabweans in or near Cape Town, Johannesburg, and Pretoria. Almost all interviewees came to

²⁰ Tererai Karimakwenda, "Mbeki's Generals Investigating Violence," *SWRadio Africa*, May 13, 2008, <http://allafrica.com/stories/200805130957.html> (accessed June 7, 2008); "Mbeki sends generals to Zim," *News 24*, May 12, 2008, http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2321153,00.html (accessed June 7, 2008).

²¹ Human Rights Watch, 'Bullets for Each of You': State-Sponsored Violence since Zimbabwe's March 29 Elections, June 9, 2008, <http://hrw.org/reports/2008/zimbabwe0608/>.

South Africa in 2005, 2006, or 2007, and many had been in South Africa for more than two years.

Many Zimbabweans, probably in the thousands, have fled over the past eight years to South Africa to escape persecution in the form of arbitrary arrest and detention, torture, and beatings.²²

Such persecution has once again reached alarming levels in the aftermath of the March 29, 2008 elections.²³ Officials from ZANU-PF, often working through proxy forces of so-called war veterans and youth militia, backed by members of the armed forces and police, have used hundreds of base camps to beat and torture at least 2,000 suspected MDC activists and supporters. At least 36 people have been killed, including abducted MDC activists.

Abusive “re-education” meetings have been held to compel MDC supporters to vote for Mugabe. In one of these meetings, on May 5 in Chiweshe, ZANU-PF officials and “war veterans” beat six men to death and tortured another 70 men and women. ZANU-PF and its allies have engaged in a campaign of looting and destruction, slaughtering animals, stealing food and property, and burning down homesteads. More than 3,000 people are known to have fled the violence and are now internally displaced in cities and towns throughout the country, with inadequate access to food and water.

Although there are no statistics available, the political crackdown carried out by the government after the March 2008 elections has undoubtedly led to hundreds if not

²² Many reports from the past few years document Zimbabweans’ testimony about their fear of political violence and intimidation. For a leading report by a South African-based NGO dealing with Zimbabwean survivors of torture reporting on the testimony of Zimbabwean victims of civil and political rights violations who are now in South Africa, see Zimbabwe Torture Victims Project, “Over Our Dead Bodies: A Story of Survival,” June 2006, http://www.zimbabwesituation.com/ztpv_over_our_dead_bodies_0607.doc (accessed March 3, 2008). For recent Human Rights Watch reports on civil and political rights violations in Zimbabwe, see *All Over Again, Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe’s Coming General Elections*, vol. 20, no. 2(A), March 2008, <http://www.hrw.org/reports/2008/zimbabwe0308/>; *A Call to Action: the Crisis in Zimbabwe*, August 2007, <http://hrw.org/backgrounders/africa/zimbabwe0807/>; *Oral Submission to 41st Ordinary Session of the African Commission on Human and Peoples’ Rights on the Human Rights Situation in Zimbabwe*, August 2007, <http://hrw.org/english/docs/2007/05/18/zimbab15968.htm>; *Bashing Dissent: Escalating Violence and State Repression in Zimbabwe*, vol. 19, no. 6(A), May 2007, <http://hrw.org/reports/2007/zimbabwe0507/>; *You Will be Thoroughly Beaten*, vol. 18, no. 10(A), November 2006, <http://www.hrw.org/reports/2006/zimbabwe1106/>.

²³ Human Rights Watch, ‘*Bullets for Each of You.*’

thousands of Zimbabweans fleeing their country to seek protection in South Africa and elsewhere.

Since 2000 such cases of persecution have been well-documented. However, because the number of such people is relatively small compared to the total number of Zimbabweans in South Africa, Human Rights Watch interviews for this report focused on two other groups of Zimbabweans who represent hundreds of thousands of people.

The first group is made up of those who were targeted by the Zimbabwean government's campaign of forced evictions in 2005. They told Human Rights Watch how they had lost their homes and businesses and how they had unsuccessfully tried to find a place to live in order to rebuild their lives in Zimbabwe. For months and years they continued to suffer serious violations of their rights to housing, work, and other rights in Zimbabwe. They have strong claims for refugee status.

The second group was made up of those who left Zimbabwe because they had found it increasingly hard to find work or had a salary that had no value because of inflation. Desperate to find work to help their families survive, they have come to South Africa because they have found no other way of coping with their economic destitution in Zimbabwe.

Many people interviewed (falling in one of the two groups) are HIV infected. Many told Human Rights Watch how they had been unable to afford even basic health care services or to access desperately needed ART in Zimbabwe.

When combined with testimony of political violence and intimidation,²⁴ these different stories combine to create a picture of a "mixed flow" of people who are leaving their country for a mixture of reasons.²⁵ The final picture is a far cry from the

²⁴ Ibid.

²⁵ The terms "mixed flow" or "mixed migration" are used by agencies such as UNHCR and IOM to describe a group of people who enter countries at the same time (or even by the same mode of transport such as boats or trucks) but who have different reasons for leaving their country. Because some are refugees and others are "economic migrants" (voluntary or involuntary), the debate surrounding how to deal with mixed flows is often referred to as the "asylum-migration nexus" debate. In his opening statement to UNHCR's Executive Committee (ExCom) on October 1, 2007, Antonio Guterres, the UN High Commissioner, said, "If there is anywhere in the world that best exemplifies the challenges of the asylum-migration nexus it is South Africa." Notes taken by Human Rights Watch during ExCom's Opening Session, October 1, 2007. The words are not reported in the

simplistic “illegal economic migrant” image that is presented by the media and the South African government.

Legal Obligations Towards Lawfully Present Zimbabweans

South Africa has specific legal obligations toward Zimbabweans who are lawfully present in South Africa. These fall into two groups.

The first group are people who have been granted one of the temporary residence permits provided for under South African immigration law.

The four types of permit most likely to be used by Zimbabweans coming legally to South Africa in recent years are visitor’s permits, cross-border trading permits, work permits, and special permits issued under the corporate permit system (used to employ large groups of people mostly on farms).²⁶ When a Zimbabwean arrives at the border with one of these permits and a passport, the border authorities normally allow the person to enter.

There are no official government statistics on how many of each permit are granted to foreign nationals each year. Official statistics, which only cover certain types of permits, show that the total number of permits granted per year is around 60,000, and that the vast majority of these are visitors permits which do not grant the permit holder the right to work.²⁷ It is, therefore, impossible to say how many Zimbabweans enter South Africa each year on the basis of a temporary residence permit.

official record of the speech. UNHCR, “Opening Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, at the Fifty-eighth Session of the Executive Committee of the High Commissioner’s Programme,” October 1, 2007, <http://www.unhcr.org/admin/ADMIN/4700eff54.html> (accessed May 1, 2008).

²⁶ Chapter IX of the report briefly looks at how difficult it is to obtain such permits. The permits are provided for in ss. 10-24 of the Immigration Act, 2002, No. 13 of 2002, <http://www.info.gov.za/gazette/acts/2002/a13-02.pdf> (accessed March 9, 2008), as amended by the Immigration Amendment Act, 2004, No. 19 of 2004, http://www.dha.gov.za/legislation_admin.asp (accessed March 9, 2008), and the Immigration Regulations adopted under the 2002 Act, Immigration Regulations No. R616, June 2005, http://lnw.creamermedia.co.za/articles/attachments/02112_regulation616.pdf (accessed April 23, 2008). Together they set the conditions for entry and residence of all non-nationals who are not asylum seekers or refugees (who are covered by the 1998 Refugees Act). Immigration Regulation 21(1) establishes Cross Border Permits.

²⁷ The DHA states that between April 1, 2006, and March 31, 2007, the authorities issued 19,601 “work permits” and 34,360 “visitor’s permits,” a slight increase from the year before. DHA, “Annual Report 2006-2007.” These statistics do not include corporate work permits, which tens of thousands of Zimbabweans working on farms in the border areas and elsewhere use. At the time of publication there were no statistics available for the post March 2007 period. Other statistics provide additional limited insight. In December 2007, one of the busiest months of the year, the Zimbabwe-South Africa border was crossed 95,033 times by Zimbabweans. 89,441 of these crossings were made by people “on holiday”. It is not clear on what legal basis they enter South Africa. 1,468 entered on unspecified types of work visa. The total number of crossings made overland was

The South African authorities' obligation toward Zimbabweans with valid permits is not to return them to Zimbabwe unless they become "prohibited persons" or "undesirable persons."²⁸

The second group of Zimbabweans whose rights to enter and remain in South Africa are clearly set out in South Africa and international law are asylum seekers and recognized refugees. Between 2005 and 2007 some 44,423 Zimbabweans claimed asylum in South Africa, roughly one-third of all asylum claims in each of those three years.²⁹

Once an asylum claim has been lodged the asylum seeker has a right to remain until the claim has been processed.³⁰ As later sections of the report explain, the South African asylum system continues to fall short of what is required by law. Because its procedures are dysfunctional and have not, to date, considered Zimbabweans who were targeted by the 2005 forced evictions as being people with valid asylum claims, there is a high risk of Zimbabwean asylum seekers being unlawfully returned to Zimbabwe. Instead South Africa considers these people to be in the same position as any other Zimbabwean coming to South Africa to escape the current economic conditions there.

Although the South African constitution accords basic human rights to all, including Zimbabweans living in South Africa, regardless of their legal status,³¹ those

83,596. The statistics do not record the number of different individuals crossing, only the total number of crossings. Many individuals regularly cross the border and are counted each time as a new "crossing." Statistics South Africa, "Tourism and Migration," December 2007, <http://www.statssa.gov.za/publications/Po351/Po351December2007.pdf> (accessed March 18, 2008).

²⁸ Ss. 29 and 30 of the 2002 Immigration Act, respectively. Although there are a number of grounds for being deemed "prohibited and undesirable," most relate to criminal activities.

²⁹ In 2005 27 percent (7,783) of the total number of claims (28,522) were made by Zimbabweans. UNHCR, "Statistical Yearbook 2005, Statistical Annex III, Country Data Sheet for South Africa," <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/> (accessed March 9, 2008). UNHCR has no figures for the number of Zimbabweans who contributed to the 32,565 claims in 2004. In 2006 it was 35.5 percent (18,973 out of 53,361). UNHCR, "Statistical Yearbook 2006", Statistical Annex. In 2007 it was 38 percent (17,667 out of 45,673). UNHCR News Story, "South Africa gets 45,673 asylum seekers in 2007, warns of rising numbers," February 26, 2008, <http://www.unhcr.org/news/NEWS/47c41c164.html> (accessed March 9, 2008).

³⁰ If they are granted refugee status they have the right to remain in South Africa until it is safe for them to return. If after five years it is still not safe they are entitled to apply for permanent residence status. Chapter VIII of this report explains that under South African law, people who have entered South Africa illegally and who express their wish to claim asylum once inside the country cannot be deported and must be allowed to lodge their claim at one of the country's five Refugee Reception Offices.

³¹ People with no permission to stay in South Africa have a wide range of basic human rights under the South African Constitution's Bill of Rights, including the right to equality, dignity and the right not to be subjected to violence or to be arbitrarily arrested or detained. Constitution of the Republic of South Africa, No. 108 of 1996,

Zimbabweans who do not have a temporary residence permit or who have not made an asylum claim or have not been recognized as refugees do not have the right under national or international law to enter or remain in South Africa.

Zimbabweans' Assistance Rights and Needs in South Africa

The South African government not only faces the presence of large numbers of Zimbabweans on its territory, but also a Zimbabwean population with serious assistance needs.

Rights to assistance

As a matter of broadly stated law, “everyone” residing in South Africa, regardless of status, has the rights set out in South Africa’s Bill of Rights.³² But when it comes to the detail, the situation is less clear. In relation to the bill’s civil and political rights, such as the right to be free from all forms of violence and not to be arbitrarily detained, these unequivocally apply to everyone.³³ In relation to the bill’s economic and social rights, the law spells out that certain of these rights belong to everyone, regardless of their legal status in South Africa: access to emergency and basic health care³⁴ and access to a basic education.³⁵ In the cases of other such rights in the Bill of Rights, including access to adequate housing, food, water, and social security, South African courts have not yet unequivocally recognized that these rights belong to everyone. In 2004 the South African Constitutional Court decided that such rights are enjoyed by “permanent residents” (as well as South African citizens).³⁶

<http://www.info.gov.za/documents/constitution/index.htm> (accessed March 9, 2008). S. 7(1) of the bill says it “enshrines the rights of *all people in our country...*” (emphasis added).

³² Ibid. S. 7(1) provides that “all people” in South Africa have the rights in the Bill of Rights and the word “everyone” is repeatedly used throughout the bill.

³³ Ss. 9-21 and 32-35. S. 19’s political rights only apply to citizens.

³⁴ S. 27. Basic health care in South Africa is fee-based for South Africans and foreigners alike. Emergency health care is free; s. 27.3 states that “no one may be refused emergency medical treatment.”

³⁵ S. 29.

³⁶ The South African Constitutional Court decided that permanent residents have the same rights as South African citizens to all forms of social grants (including child support grants, disability grants, old age pensions, foster care grants, and care dependency grants) as citizens. *Khosa and Others v. Minister of Social Development and Others*, Case CCT, 12/03; and *Mahlaule and Another v. Minister of Social Development and Others*, CCT 13/03.

Foreigners, including Zimbabweans, with temporary residence permits (visitors or people with work-related visas) are not entitled to receive social welfare assistance, such as to housing and food.³⁷

The 1998 Refugees Act provides that recognized refugees, including the small number of Zimbabweans recognized as refugees,³⁸ have all the rights set out in the Bill of Rights.³⁹ However, in practice, recognized refugees have not been able to secure rights to social assistance. Two leading South African groups working on public interest cases, the Legal Resources Centre and Lawyers for Human Rights, have been at the forefront of using litigation and negotiation strategies to ensure that particularly vulnerable recognized refugees receive social assistance grants in the same way as people with permanent residency status in South Africa.⁴⁰

It is arguable that like refugees, asylum seekers have all the rights in South Africa's Bill of Rights, but this has yet to be tested in court. To date the government has not explicitly recognized asylum seekers' rights to social security assistance.⁴¹ The 1998 Refugees Act is silent on asylum seekers' right to housing assistance⁴² and non-health related social services such as food and social security. Thanks to civil society groups' intense lobbying and threats of litigation, asylum seekers, including the

³⁷ Unless the visa-holder is or has a child: under s. 28 of the Constitution all children, irrespective of legal status, are guaranteed a wide range of rights including "basic nutrition, shelter, basic health care services and social services." With regards to housing, the National Housing Code explicitly states that access to housing subsidies is limited to South African citizens and permanent residents. Jennifer Greenberg and Tara Polzer, "Migrant Access to Housing in South African Cities," February 2008, <http://www.migration.org.za> (accessed March 12, 2008), p. 4.

³⁸ South Africa recognized 241 Zimbabweans as refugees between 2004 and 2006 at the initial status determination stage. UNHCR, "Statistics Yearbooks 2004, 2005 and 2006." At the time of publication there were no statistics available for 2007.

³⁹ S. 27 of the 1998 Refugees Act provides that recognized refugees have all the rights set out in the Bill of Rights.

⁴⁰ For the progress made by South African civil society in seeking to ensure that both refugees and asylum seekers are more effectively integrated into basic state-funded social services, see Consortium for Refugees and Migrants in South Africa (CRMSA), "Protecting Refugees and Asylum Seekers in South Africa," June 2007, <http://www.lhr.org.za/documents/CRMSA07Report.pdf> (accessed March 2, 2008), p.42; and National Consortium for Refugee Affairs (NCRA), "Refugee Protection in South Africa 2006," June 2006, <http://migration.org.za/wordpress/wp-content/uploads/2007/10/ncra06.pdf> (accessed March 2, 2008), pp. 47-61.

⁴¹ See Florencia Belvedere, Piers Pigou and Jeff Handmaker, "Realizing Rights: the Development of Health and Welfare Policies for Asylum-Seekers and Refugees in South Africa," in Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren, eds., *Advancing Refugee Protection in South Africa*, (New York: Berghahn Books, 2008).

⁴² As noted above, under the national Housing Code only South African citizens and permanent residents have access to housing related programs. Jennifer Greenberg and Tara Polzer, "Migrant Access to Housing in South African Cities," p. 4.

44,423 Zimbabweans who made asylum claims between 2005 and 2007, are legally entitled to work and study,⁴³ and, if HIV infected, do not have to pay for ART.⁴⁴

Struggling to secure rights to assistance

Despite these pockets of improvement, both refugees and asylum seekers continue to face serious obstacles in gaining access to many types of assistance to which they are legally entitled.⁴⁵

Refugees continue to struggle to gain access to emergency and non-emergency health care, housing, and other forms of social security assistance. Despite these theoretical rights, there has been slow progress in giving them practical effect: there is no national or local government policy explicitly reiterating these rights or establishing procedures to help refugees claim them with service providers.⁴⁶

Asylum seekers also face difficulties in gaining access to fee-based health care, and despite some improvements, continue to face significant difficulties in gaining access to ART.⁴⁷ With respect to access to housing, little has changed for asylum seekers since Human Rights Watch reported on their housing situation in November 2005.⁴⁸ Finally, ensuring asylum seekers are able to claim their right to work is an essential means of reducing their dependence on state assistance. However,

⁴³The DHA granted asylum seekers the right to work and study in March 2003 after the Legal Resources Centre challenged the constitutionality of a government prohibition. For an overview of ongoing problems in securing work and study, related to the problematic nature of the asylum seeker's permit that confirms these rights, see NCRA, "Refugee Protection," p. 36.

⁴⁴ "Asylum seekers with or without a permit" and recognized refugees have these rights: "Revenue Directive by Department of Health to all Provincial Health Managers and HIV/AIDS Directorates," September 19, 2007. On file with Human Rights Watch. In practice this means that anyone, whether or not registered as an asylum seeker, has a right to access free ART. Whether or not intended, this accords with the right of "everyone" in South Africa to access emergency medical care under s. 27.3 of the Constitution. Both positive developments and continued obstacles relating to access to medical care are reported in CRMSA, "Protecting Refugees," pp. 49-51. Further examples of obstacles to access are reported in Federation International des Droits de l'Homme (FIDH), "Surplus People? Undocumented and other vulnerable migrants in South Africa," February 1, 2008, <http://www.fidh.org/spip.php?article5166> (accessed March 10, 2008), p. 31.

⁴⁵ The submission by the UN High Commissioner on Human Rights to the UN Human Rights Council ahead of its 2008 review of South Africa's human rights record notes these problems: "In practice, immigrants and asylum seekers face serious difficulties in the areas of housing and health care." UN Compilation of Information on South Africa for Human Rights Council's Universal Periodic Review, http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/A_HRC_WG6_1_ZAF_2_SouthAfrica_compilation.pdf (accessed March 12, 2008), para 21.

⁴⁶ See CRMSA, "Protecting Refugees," pp. 35-39 and 42; NCRA, "Refugee Protection," pp. 47-61; and F. Belvedere et al., "Realizing Rights."

⁴⁷ See CRMSA, "Protecting Refugees," pp. 36-37; and Joint Submission to the South African National Aids Council (SANAC) Plenary, "Vulnerable groups: refugees, asylum seekers, and undocumented persons – the health situation of vulnerable groups in South Africa," March 4, 2008, <http://www.pmg.org.za/files/docs/o80326sanac.pdf> (accessed April 25, 2008), pp. 7-8.

⁴⁸ Human Rights Watch, *Living on the Margins*, pp. 55-58. See also, CRMSA, "Protecting Refugees," pp. 43-45; NCRA, "Refugee Protection," pp. 51-53.

Zimbabweans interviewed by Human Rights Watch repeatedly spoke of employers' unwillingness to recognize asylum seekers' permits as valid documents, a practice that has been documented for years and which could easily be changed through a concerted government information campaign.⁴⁹

The needs of undocumented Zimbabweans in South Africa

The vast majority of Zimbabweans in South Africa, in the hundreds of thousands, are undocumented; they have neither temporary-residence nor asylum-seeker permits. They are, therefore, not entitled to access social services, with the exception of primary education and free emergency health care.⁵⁰ They are also not entitled to work. The majority of Zimbabweans are, therefore, extremely vulnerable once they come to South Africa, a fact underlined by the recent violence against mainly undocumented foreign nationals that swept South Africa in May 2008.

Regardless of their legal status in South Africa, Zimbabweans generally live where they hope to find income and shelter: large numbers stay in the border areas where they work mainly on farms;⁵¹ some work in industrial and mining areas; some go to townships on the outskirts of medium-sized towns;⁵² others, almost certainly the vast majority, go to the major urban centers of Johannesburg, Pretoria, Cape Town, Durban, and Port Elizabeth, where they are most likely to find informal work as domestic workers, street vendors, car watchers, and laborers on construction sites. These jobs are commonly referred to in South Africa as "piece work," and are both hard to find and difficult to keep.⁵³

Although there are no recent exhaustive, country-wide studies on the extent and nature of Zimbabweans' humanitarian needs in South Africa,⁵⁴ it is widely reported

⁴⁹Human Rights Watch, *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/>, pp.54-55; CRMSA, "Protecting Refugees," p. 46; NCRA, "Refugee Protection," p. 56.

⁵⁰ These rights are guaranteed to everyone under the South African Bill of Rights.

⁵¹ Human Rights Watch, *Keep Your Head Down*; Human Rights Watch, *Unprotected Migrants*.

⁵² Human Rights Watch interviews in farming areas surrounding Johannesburg and Pretoria, October and November 2007.

⁵³ Human Rights Watch interviews in Cape Town and Johannesburg, October-November 2007. See also, NCRA, "Refugee Protection," pp. 56-60.

⁵⁴ The broadest survey on foreign nationals' assistance needs, from 2003, focuses on the needs of asylum seekers and refugees: Community Agency for Social Enquiry, "National Refugee Baseline Study: Final Report," 2003, <http://www.lhr.org.za> (accessed March 12, 2008). The two other main reviews of refugees' and asylum seekers' needs are CRMSA, "Protecting

that they face difficulties in finding work, and that those who do find work are often underpaid and exploited.⁵⁵

Zimbabweans in desperate need of accommodation, food, and health care often overwhelm South African charities and churches. Local service providers consistently cite accommodation as the Zimbabweans priority humanitarian need.⁵⁶ In order to cope with their often desperate housing situation, most Zimbabweans seek support within their own communities, often living in very high numbers, in small shacks or rooms in rural areas, and in tightly packed flats in high-density parts of South Africa's urban centers where dozens of Zimbabweans sleep in four-hour shifts.⁵⁷ A more limited yet significant number find shelter with churches.⁵⁸

South African charities have also noticed an increase in the number of highly vulnerable Zimbabweans in very poor health and often hungry coming to their doors.⁵⁹ A number of interviewees working with these groups told Human Rights Watch that they feared that the continuing deterioration of the already dire circumstances in Zimbabwe will lead to ever greater increases in children, women, and elderly people coming to South Africa to survive.⁶⁰

Until May 2008 the most striking evidence of Zimbabweans' needs and vulnerability in South Africa's urban centers was the Central Methodist Church in Johannesburg, which for a number of years has provided night-time shelter to 1,300 homeless

Refugees" and NCRA, "Refugee Protection." See also, Jennifer Greenberg and Tara Polzer, "Migrant Access to Housing in South African Cities."

⁵⁵ See Human Rights Watch, *Unprotected Migrants and Keep Your Head Down*.

⁵⁶ The FMSP conducted a telephone survey in September 2007 among 29 NGOs assisting Zimbabweans. After documentation, Zimbabweans identified accommodation as their most pressing need, followed by work and food. Unpublished findings, available from Tara Polzer at the FMSP. The two other leading surveys of Zimbabweans' needs are Daniel Makina, "Survey of Profile of Migrant Zimbabweans," and Zimbabwe Torture Victims Project, "Between a Rock and a Hard Place: a window on the situation of Zimbabweans living in Gauteng, Johannesburg," 2005, http://www.queensu.ca/samp/migrationresources/Documents/Zim_Gauteng_Sept2005.pdf (accessed March 12, 2008).

⁵⁷ Human Rights Watch interviews in Pretoria, Cape Town, and Johannesburg, October and November 2007.

⁵⁸ Jennifer Greenberg and Tara Polzer, "Migrant Access to Housing in South African Cities," p. 8.

⁵⁹ Human Rights Watch interviews with Cape Town charities, October 2007.

⁶⁰ Human Rights Watch, confidential interviews in Cape Town October 2007. This is also the conclusion of research conducted by the FIDH. UN, "UN summary of stakeholders' information," February 25, 2008, discussed at the 15 April 2008 Human Rights Council's review of South Africa under the Universal Periodic Review procedure, http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/A_HRC_WG6_1_ZAF_3_SouthAfrica_summary.pdf (accessed May 31, 2008), para 34. The IOM reports an increase of women and children passing through its Beitbridge office in 2007. See South African Red Cross, "Rapid Assessment in Musina and Johannesburg on Zimbabwean Population Movement into South Africa," August 2007. On file with Human Rights Watch, p. 4.

Zimbabweans who sleep in highly cramped conditions side by side in the corridors, rooms, and on the stairs surrounding the church's crypt.⁶¹ On the night of January 30, 2008, the South African police forcibly raided the church. They detained 800 people for a number of hours, a further 300 people for five days, and 68 for two weeks before the Johannesburg High Court ordered all of them to be released, describing the police raid as "a brutal, indifferent, and cruel treatment of human beings."⁶² The raid is a high-profile example of the insecurity faced by Zimbabweans in South Africa.

In May 2008 this vulnerability was brought into sharp focus by the violence against them by South African citizens in many parts of the country. The violence killed at least 62 people, injured 670, and displaced over 100,000,⁶³ and follows many similar isolated incidents that have taken place throughout 2007 and early 2008.⁶⁴ To assist the 29,000 people who have been displaced by the recent violence and who have remained, homeless, in South Africa, the South African authorities have set up 99 "temporary shelters" in Gauteng, Western Cape, and KwaZulu Natal Provinces, in which UN agencies and nongovernmental organizations are to provide emergency assistance to the displaced. As of June 5, many of the sites did not comply with international standards governing the rights of displaced persons.⁶⁵

⁶¹ Thanks to the hospitality of Methodist Church's Bishop, Paul Verryn, Human Rights Watch conducted many of its interviews for this report at the Church in November 2007. On the shelter provided by the Methodist church, see also, Jennifer Greenberg and Tara Polzer, "Migrant Access to Housing in South African Cities," p. 8-9.

⁶² Human Rights Watch, "South Africa: Ensure Justice for Police Raid Victims," February 19, 2008, <http://hrw.org/english/docs/2008/02/19/safric18104.htm>.

⁶³ On May 30, 2008, the South African police confirmed 62 people had died and 670 had been injured in the violence. Reuters Foundation, "S. Africa violence toll rises to 62," May 31, 2008, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/RMOI-7F6KB4?OpenDocument&rc=1&cc=zaf> (accessed Jun 1, 2008). UNHCR have confirmed that an estimated 100,000 people were displaced. UNHCR, "South Africa: UNHCR aid provided to displaced," Briefing Notes, May 30, 2008, <http://www.unhcr.org/news/NEWS/483fef5b2.html> (accessed May 31, 2008).

⁶⁴ For overviews of reports of violence against Zimbabweans by South African citizens that took place before May 2008, see CRMSA, "Protecting Refugees," pp. 50-51 and FIDH, "Surplus People?" pp. 34-35. In April 2008, CoRMSA reported on a number of serious incidents involving killings of foreign nationals and burning of their property, summarizing the situation as follows: "In the first three months of the year, community attacks characterized by mob violence have taken place on foreign nationals in Gauteng, North West, Free State, the Eastern Cape and the Western Cape resulting in the loss of many lives and destruction of many people's property." CoRMSA, "Newsletter No. 9," p.1.

⁶⁵ Human Rights Watch, "South Africa: Protect Victims of Xenophobic Violence," June 5, 2008, <http://hrw.org/english/docs/2008/06/05/safric19026.htm>.

V. Fleeing persecution: *Operation Murambatsvina* (“the evictions”)

People targeted by the 2005 campaign of forced evictions in Zimbabwe have a strong claim to refugee status under international refugee law. Section VI of this report will set out the legal arguments in detail. Before that, this section sets out a summary of the evictions and testimony from Zimbabweans in South African and Zimbabwe who were targeted by the evictions, on which the legal arguments will draw.

The Evictions

On May 25, 2005, the Zimbabwean authorities began “*Operation Murambatsvina*,” which translates as “Clear the Filth.” The two-month campaign, which this report will refer to as “the evictions,” directly or indirectly affected almost 2.7 million persons.⁶⁶ It was officially aimed at “cleaning” Zimbabwe’s urban areas of informal trading and housing structures. The evictions lasted until July 25, 2005, and destroyed informal traders’ trading structures, shanty dwellings of the poorest residents, and unauthorized extensions of more solid homes in the better off parts of the urban areas. Most of Zimbabwe’s urban centers were affected, including Harare, Bulawayo, Chinhoyi, Gweru, Kadoma, Kwe Kew, Marondera and Mutare, and Victoria Falls. After the evictions, the police strictly enforced a ban on informal trading.

While the evictions were still ongoing, the UN Secretary General appointed Anna Tibaijuka, the director of the UN Center for Human Settlements (Habitat), as the UN’s “special envoy on human settlement issues in Zimbabwe.” Based on her visit to Zimbabwe in June 2005, the UN special envoy published a report in August 2005 (UN report)⁶⁷ which concluded that by July 7, 2005, 92,460 housing structures had been destroyed, affecting 133,534 households at more than 52 sites; approximately 700,000 people in cities across the country lost either their homes, their source of

⁶⁶ United Nations (UN), “Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlement Issues in Zimbabwe,” July 18, 2005, <http://www.unhabitat.org/documents/ZimbabweReport.pdf> (accessed March 3, 2008).

⁶⁷ Ibid.

livelihood, or both;⁶⁸ the evictions forced approximately 500,000 children out of school or seriously disrupted their education.

The evictions took place in the context of an increasingly serious economic crisis. Despite facing recurring drought and an AIDS pandemic, the problems faced by Zimbabwe even before the evictions were “primarily man-made,” and “a mixture of failed governance, food insecurity and manipulation of food for political ends, and economic meltdown, including triple digit inflation, over 70 percent unemployment, and large shortages of consumer items, fuel and foreign currency.”⁶⁹

By the time the evictions took place, the formal economy had deteriorated to such an extent that only 1.3 million Zimbabweans were employed, leaving 3 to 4 million Zimbabweans with no other option but to work in the informal economy in the country’s urban centers.⁷⁰ The UN report concluded that by 2004, 70 percent of Zimbabwe’s urban population was unemployed and that 75 percent of this group was living below the poverty line.⁷¹ The informal economy was their only lifeline. Furthermore, the Zimbabwean authorities “turned a blind eye” to this “explosion of the informal sector,” thereby actively encouraging its growth.⁷²

The Zimbabwean government’s decision to destroy the informal economy through the evictions was, therefore, taken in the full knowledge that there would be no employment alternative for those targeted by the evictions that would help them to rebuild their lives and feed their families. This makes the government’s subsequent ban on informal trading and its failure to assist those it had evicted all the more serious.⁷³

⁶⁸ ActionAid’s survey in the aftermath of the evictions found that 70 percent of people who had been working in the informal economy had lost shelter and 76 percent had lost their livelihoods. ActionAid International, “Burning down the house to kill a rat?” July 2005, http://sarpn.org.za/documents/d0001397/ActionAid_Zim_July2005.pdf, p. 71 (accessed March 4, 2008).

⁶⁹ International Crisis Group, “Zimbabwe’s Operation Murambatsvina: The Tipping Point?” August 17, 2005, <http://www.crisisgroup.org/home/index.cfm?id=3618&l=1> (accessed March 4, 2008).

⁷⁰ International Labor Organization statistics cited in Human Rights Watch, *No Bright Future, Government Failures, Human Rights Abuses and Squandered Progress in the Fight against AIDS in Zimbabwe*, vol 18, no. 5(A), July 2006, http://hrw.org/doc/?t=hivaid&document_limit=0,5, p. 14.

⁷¹ UN, “Report of the Fact-Finding Mission to Zimbabwe,” p. 24.

⁷² UN, “Report of the Fact-Finding Mission to Zimbabwe,” pp. 23-24.

⁷³ Under international law, evictions become unlawful and thereby “forced evictions” if, among other things, the state responsible for the evictions fails to provide alternative housing or other means of protection for those it has evicted. Committee on Economic, Social and Cultural Rights (ESCR), General Comment 7, <http://www2.ohchr.org/english/bodies/ESCR/comments.htm> (accessed March 5, 2008), para 3.

The evictions also took place against a backdrop of a housing crisis. The UN report describes how since 1980 the urban population had grown at an annual rate of up to 8 percent. New arrivals to the cities rented cheap rooms in “backyard extensions” built by low-income urban residents without official permission. These owners often became dependent on rent collection as their main source of income. The UN report notes that by the time the evictions took place, “this type of ‘backyard tenancy’ had... become the dominant source of housing for low income families.”⁷⁴

In summary, in carrying out the evictions, the Zimbabwean government targeted people who it knew full well “were already among the most economically disadvantaged groups in society,” and who were inevitably “pushed deeper into poverty... becom[ing] even more vulnerable.”⁷⁵

People Directly⁷⁶ Affected

Numerous reports have documented the immediate aftermath of the evictions.⁷⁷ The International Crisis Group provided an account of the extent of the displacement:

[N]early 20 per cent (114,000) of those displaced by the operation slept in the open at the mercy of winter temperatures as low as 8°C at night, risking sickness or even death through exposure. Another 20 percent returned to rural areas while nearly 30 percent (170,000) sheltered with family and friends in urban areas. The remaining 30 percent took temporary refuge in churches across the country or are moving around cities, sleeping mainly in parks, on the roadside, or in other open places. Police have been rounding up this latter category, either detaining them or sending them to unspecified destinations.⁷⁸

⁷⁴ UN, “Report of the Fact-Finding Mission to Zimbabwe,” p. 24.

⁷⁵ UN, “Report of the Fact-Finding Mission to Zimbabwe,” p. 45.

⁷⁶ People indirectly affected by the evictions are looked at below in Chapter VI.

⁷⁷ Human Rights Watch, *Clear the Filth: Mass Evictions and Demolitions in Zimbabwe*, September 2005, <http://hrw.org/backgrounder/africa/zimbabwe0905/>; and *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/>. UN, “Report of the Fact-Finding Mission to Zimbabwe.” ActionAid International, “Burning Down the House to Kill a Rat?”

⁷⁸ ICG, “Zimbabwe’s Operation Murambatsvina,” p. 3.

The UN report said that the evictions created a state of emergency, summarizing its findings on the impact on more than half a million rendered homeless as follows:

It has created a state of emergency as tens of thousands of families and vulnerable women and children are left in the open without protection from the elements, without access to adequate water and sanitation or health care, and without food security. Such conditions are clearly life-threatening. In human settlements terms, the Operation has rendered over half a million people, previously housed in so-called substandard dwellings, either homeless or living with friends and relatives in overcrowded and health-threatening conditions. In economic terms, the Operation has destroyed and seriously disrupted the livelihoods... of people who were coping, however poorly, with the consequences of a prolonged economic crisis.⁷⁹

In 2005 Human Rights Watch reported that the evictions took a particularly heavy toll on vulnerable groups: widows, orphans, the elderly, households headed by women or children, and people living with HIV/AIDS. Thousands of people were left destitute, sleeping in the open without shelter or basic services.⁸⁰

Human Rights Watch interviews with 21 Zimbabweans in Harare and Bulawayo in February 2008 corroborated these reports. Two-and-a-half years after the evictions, many Zimbabweans have yet to recover and continue to live in complete destitution, having lost everything: shelter, work, food, health, and education for their children.

A 37-year-old woman from Harare with four children told a story that is typical of many others interviewed by Human Rights Watch:

Before the tsunami⁸¹ I was living in a two-roomed cottage in Mbare National with my four children. I sold tomatoes and drinks in the streets and I had money for food and rent and for school fees. The

⁷⁹ UN, "Report of the Fact-Finding Mission to Zimbabwe," p. 71.

⁸⁰ Human Rights Watch, *'Clear the Filth': Evicted and Forsaken*.

⁸¹ Many Zimbabweans refer to the evictions as "the tsunami."

tsunami destroyed our rooms. We had nowhere to go. My children stopped going to school. We slept for six months in the open at the Mbare-Musika bus station. There were many other people there too. I gave birth to my son in the street outside the nearby hospital because I could not pay for the registration fee. I tried to sell things in the street but the police stopped us and chased us and stole our things. I had to stop my children from suffering so I started to work as a prostitute. I made very little money. Sometimes they paid me with drinks or with a little food.

I bought some sticks and plastic sheets and built a small shelter on wasteland in Mbare. We still live there now with many other families. The police come at least two times a month. They burn our plastic sheets and ask us why we are staying there. Every time I have to make more money to buy new sheets. Sometimes I don't have enough and we sleep under the sky. If it rains, we can't sleep but sometimes I find a small piece of plastic which I put on my children's blankets. When the police come they beat people. They have beaten me, all over my body. The police stopped burning and beating people last month [January 2008]. I think this is because of the elections. They want us to vote for them.⁸²

In 2006 Human Rights Watch reported on how the evictions and the crackdown on the informal economy had made individuals both more vulnerable to infection and less able to access fee-based health care.⁸³ Interviews with PLWHA in February 2008 suggest that for many the dire circumstances have not changed.

A 42-year-old man living with HIV explained how he had tried to survive after the evictions by continuing to sell fruit and vegetables, but that he had been arrested and fined at least 12 times in 2007. Each time the police confiscated his goods. By the time he was due for a Cluster of Differentiation 4 (CD4) test in October 2007 he

⁸² Human Rights Watch interview, Harare, February 15, 2008.

⁸³ Human Rights Watch, *No Bright Future*.

was told that the test fee was Z\$10 million (US\$10)⁸⁴ and that it would take at least six months after registration to be tested. As he was not able to afford the fee he did not register for the test, leading to uncertainty about the state of his health and the possible need to access ART.⁸⁵

Similarly a 41-year-old woman living with HIV, who has five children and who lost her home and ability to trade because of the evictions and the ban on informal trading, explained how her HIV infected husband died of tuberculosis in early 2006 because he had been unable to pay for treatment. She said that she was now unable to pay for basic medical consultations and medication (CTX) or for a CD4 test for her three-year-old HIV infected boy. She said it was impossible for her to afford the cost of a CD4 test for her son.⁸⁶

A 75-year-old woman told Human Rights Watch:

I was renting out two cottages. I used the money for food, water, school fees for my grandchildren and to keep my house up. During the tsunami, they made us tear down the cottages and then they charged us fees to remove the rubble. Now I rent out three rooms in my house and I live in the one other room without a roof with my daughters and grandchildren. I had seven children. Five have died from AIDS. I looked after each one until they died. I have two daughters left. One is sick and her husband just died of AIDS. I don't know if she'll be OK. Some of my grandchildren have died of AIDS too. I was taking care of one and his mother came and took him away and said "I'm not going to let him stay with you and die like all of your children."⁸⁷

She went on to describe how the imposition of health fees has affected her ability to care for her other 35 year-old daughter, who has been diagnosed with mental illness:

⁸⁴ In October 2007 the exchange rate was Z\$1 million to US\$1:
http://en.wikipedia.org/wiki/Zimbabwean_dollar#Exchange_rate_history (accessed May 13, 2008).

⁸⁵ Human Rights Watch interview, Harare, February 16, 2008.

⁸⁶ Human Rights Watch interview, Harare, February 16, 2008.

⁸⁷ Human Rights Watch interview, Harare, February 16, 2008.

She has been hospitalized a number of times. Sometimes they prescribe medicine but then she refuses to take it and becomes manic. She'll get into a terrible rage. Finally I'd be able to get her back on her medicine and things would get a little better. She was able to work a little. But then in December 2007 they said that I would have to buy the medicine. I don't have any money. How can I buy her medicine? I can't. Now things are so much worse. She is filling the house with trash, with dirt, with anything she finds on the street. The house is overflowing with trash.⁸⁸

Explanations for the Evictions

The official explanation

A leading report analyzing the evictions identified nine separate official explanations given by the Zimbabwean authorities:

[t]o stem disorderly or chaotic urbanisation and... problems [preventing] enforcement of national and local authority by-laws [concerning] service delivery [of] water, electricity, sewage and refuse removal; to minimise the threat of major disease outbreaks...; to stop economic crimes especially illegal black market transactions in foreign currency; to eliminate the parallel market and fight economic sabotage; to reorganise micro-, small and medium enterprises; to reduce high crime levels by targeting organised crime syndicates; to arrest social ills, among them prostitution, which promotes the spread of HIV/AIDS and other communicable diseases; to stop the hoarding of consumer commodities, and other commodities in short supply; and to reverse the environmental damage and threat to water sources caused by inappropriate and unlawful urban settlements.⁸⁹

⁸⁸ Ibid.

⁸⁹ Center on Housing Rights and Evictions (COHRE) and Zimbabwe Lawyers for Human Rights (ZLHR), "Operation Murambatsvina: A Crime Against Humanity," May 2007, http://www.cohre.org/view_page.php?page_id=171 (accessed March 6, 2008), pp. 23-24.

A senior Zimbabwean government representative in South Africa blamed the urban poor and informal traders for deteriorating standards of health, housing, and other services in Zimbabwe, as well as for the spiraling crime rate, hoarding, and disappearance of basic commodities from shops, and for a swelling black market including for foreign currency. The Zimbabwean representative argued that all of these problems cost the government considerable revenue and undermined the country's economic turnaround.⁹⁰

The alternative explanation

The political context of the evictions and their timing cast doubt on the official explanation. Indeed, both credibly point to the ruling Zimbabwe African National Union-Patriotic Front (ZANU-PF)⁹¹ conducting the evictions to weaken actual and potential support among the poorest people living in Zimbabwe's cities for the opposition party, the Movement for Democratic Change (MDC). ZANU-PF perceived the urban poor as supporting the MDC and almost certainly would have seen the evictions as a way to assert ZANU-PF's political control over the areas where they were concentrated.⁹² There were also a number of possible secondary benefits for ZANU-PF.

During the March 31, 2005 elections, ZANU-PF won the two-thirds parliamentary majority needed to change the constitution at will, thanks to extensive support in and control of local councils in the rural areas. However, the MDC won 26 of 30 parliamentary seats in major towns and cities throughout the country and controlled local councils in the country's six largest cities (except for Harare where the government had disbanded the local council in 2004 to replace it with a ZANU-PF commission).

⁹⁰ ICG, "Zimbabwe's Operation Murambatsvina," p. 3.

⁹¹ ZANU-PF is Zimbabwe's ruling party, led under that name by Robert Mugabe since 1988.

⁹² This section draws extensively on evidence and arguments set out by the International Crisis Group in its report "Zimbabwe's Operation Murambatsvina," pp. 4-5. In previous reports Human Rights Watch has referred to this and similar explanations. In *Clear the Filth*, Human Rights Watch noted at p. 14 that Zimbabwean human rights lawyers and NGOs argued that the evictions "were an act of retribution against those who voted for the opposition during the... March 2005 elections," or that they "were designed to prevent mass uprisings against deepening food insecurity and worsening economic conditions." In *Evicted and Forsaken*, Human Rights Watch noted at p. 10 that commentary on ZANU-PF's motivations for the evictions included "to debilitate the urban poor, force them to move to rural areas, and prevent mass uprisings against the deteriorating political and economic conditions in high density urban areas."

In April 2005 Zimbabwe's urban areas were, in political terms, the last part of the country that had not fallen under ZANU-PF's full political control. People living in the poorest areas of Zimbabwe's cities undoubtedly contributed in large part to the MDC's success. Given the increasing economic hardship which they faced as a result of the rapidly deteriorating economy, ZANU-PF is likely to have identified them either as actual opposition supporters or as the people most likely to cause civil unrest in the face of ever-increasing economic discontent.

In the build-up to the evictions there were two incidents in particular which indicated that a broader political crackdown was going to take place. During the first half of April 2005, police arrested 100 MDC supporters in a number of different urban areas. On May 11, 2005, police beat up and forcibly dispersed residents of Harare's low-income suburb of Mabvuku who were protesting a lack of water during the previous three days.⁹³

According to an interview conducted by the International Crisis Group with a senior Zimbabwean state security official on July 5, 2005, shortly before the evictions began on May 25, 2005, "[T]he Minister of State Security Didymus Mutasa warned the government of the possibility of spontaneous uprisings in urban areas due to food shortages and other economic problems."⁹⁴

ZANU-PF's calculation of what would happen after the evictions is almost certain to have focused on the fact that a large number of the urban poor had originally come from the rural areas as a result of the failed fast-track land reform process that began in 2000. Before their move to the cities, they had formed part of the vast majority of rural Zimbabweans who voted for ZANU-PF as a result of ZANU-PF's control of traditional chiefs, youth militias, and other patronage structures in those areas. In contrast, during their time in the urban areas, many had switched allegiance to the opposition MDC with its strong urban support-base.

⁹³ ICG, "Zimbabwe's Operation Murambatsvina," p 4.

⁹⁴ Ibid, p.4. The report goes on to note that "in the wake of recent popular revolutions triggered by flawed elections in Ukraine, Georgia and Kyrgyzstan and the condemnation Zimbabwe's elections produced in major Western capitals, the ruling party may have feared that its foreign critics would more actively pursue regime change in Harare and that the restive urban population would provide the tinder."

ZANU-PF is likely to have calculated that returning these people to their roots would once again bring them under the control of the ruling party. Additionally, with their businesses destroyed, with no other place to go, and with the slump in agricultural production in the rural areas, ZANU-PF will almost certainly have calculated that once returned to the rural areas they would be easier to control through the use of government-controlled food aid.⁹⁵

On June 22, 2005, just over a month into the evictions, Justice Minister Patrick Chinamasa told the Zimbabwean Parliament that the government would relocate people displaced by the evictions “back to where they come from.”⁹⁶ He said that the authorities had been urging urban internally displaced persons (IDPs) in the holding camps—closed camps where thousands of the evictees were taken—to go back to their country roots.⁹⁷ In December 2005 Human Rights Watch reported on how the Zimbabwean authorities used various methods to forcibly relocate people to the rural areas, including police violence and other forms of harassment and manipulation of food aid, to encourage people to leave the urban areas.⁹⁸

A secondary reason for ZANU-PF to carry out the evictions was to revive the agricultural sector that the government’s fast-track land reform had helped to destroy. On July 3, 2005, a senior official in the Ministry of Lands said that “our preoccupation now is to get the commercial agriculture farming sector working.”⁹⁹ A key element of such a policy would be to ensure a reliable supply of agricultural workers, leading Zimbabwe’s Deputy Minister of Local Government, Public Works and Urban Development Morris Sakabuya to describe the evictions as an attempt to “resuscitate rural areas.”¹⁰⁰

⁹⁵ On the long history of ZANU-PF’s politicisation of food aid, see Human Rights Watch, *All Over Again; The Politics of Food Assistance in Zimbabwe*, vol. 20 no. 2(A), August 2004, <http://www.hrw.org/reports/2008/zimbabwe0308/zimbabwe0308web.pdf>; Human Rights Watch, *Not Eligible: the Politicization of Food in Zimbabwe*, vol. 15 no. 17(A), October 2003, <http://www.hrw.org/reports/2003/zimbabwe1003/>.

⁹⁶ ICG, “Zimbabwe’s Operation Murambatsvina,” p. 5.

⁹⁷ *Ibid.*

⁹⁸ Human Rights Watch, *Evicted and Forsaken*, pp. 32-35.

⁹⁹ ICG, “Zimbabwe’s Operation Murambatsvina,” p. 5.

¹⁰⁰ *Ibid.*

A final ironic twist is that in carrying out the evictions, ZANU-PF invoked the very same laws the white minority government of Ian Smith had used in the 1970s and 1980s to demolish homes and prevent a possible uprising on behalf of majority rule in Zimbabwe, led by Robert Mugabe.

The Government's Failure to Assist People Targeted by the Evictions

In August 2005 the Zimbabwean government responded to the UN report by arguing that the government had put in place a plan (called "*Operation Gairkai/Hlalani Kuhle*" or "Better Life") to provide alternative accommodation to those affected by the evictions. The UN report had concluded that a total of 92,460 households were destroyed. In May 2006 the Zimbabwean government gave evidence to the African Commission on Human and Peoples' Rights, that 3,325 housing units had been completed and made available to those affected.¹⁰¹ This, however, still left 89,135 households with no alternative housing.¹⁰²

In 2007 UN-Habitat reported:

[A]t least 20 percent of the houses were earmarked for civil servants, police and soldiers, while some victims of Operation Murambatsvina were provided small plots of land without assistance with which to build homes. Furthermore, many of the homes designated as "built" are not finished, do not have water and sanitation facilities, and have not been allocated... Even if a victim of Operation Murambatsvina was able to access a home through the highly corrupt allocation process, the majority of victims would not be able to afford the homes.¹⁰³

In December 2005 and August 2006 Human Rights Watch reported on the Zimbabwean government's complete failure to respond to the needs of the 700,000 evictees it had displaced.¹⁰⁴ The government failed to recognize the scale of the crisis,

¹⁰¹ COHRE and ZHLR, "Operation Murambatsvina: A Crime Against Humanity," p. 22.

¹⁰² This was confirmed by UN-Habitat. UN-Habitat, "Forced Evictions – Toward Solutions?, Second Report of the Advisory Group on Forced Evictions to Executive Director of UN-Habitat," 2007, <http://www.unhabitat.org/pmss/getPage.asp?page=bookView&book=2353> (accessed March 6, 2008), p. 77.

¹⁰³ Ibid.

¹⁰⁴ Human Rights Watch, *Evicted and Forsaken*, pp. 15-37; and *No Bright Future*, pp. 23-28.

made no attempt to locate or register the evictees, provided them with no food, shelter, or other form of assistance, and provided no special assistance to particularly vulnerable groups such as people living with HIV or AIDS (PLWHA) and female-headed households.¹⁰⁵ Furthermore, the government obstructed the provision of international humanitarian assistance to the displaced evictees and even arrested those who had received such assistance from local and international agencies.¹⁰⁶ The 2005 report also documented how, in the absence of any other government assistance, the government's ban on informal trading made it impossible for those targeted by the evictions to help themselves.¹⁰⁷

Legality

The UN report rejected the Zimbabwean government's explanations for the evictions and concluded that *Operation Murambatsvina* had violated a wide range of the evictees' rights under the Zimbabwean Constitution and under international human rights and humanitarian law.¹⁰⁸

A legal opinion prepared by a leading UK barrister in cooperation with a Zimbabwean and an international NGO concludes that the Zimbabwean authorities may have committed a crime against humanity prosecutable under the Rome Statute of the International Criminal Court because of the way it carried out the evictions.¹⁰⁹

¹⁰⁵ Human Rights Watch, *Evicted and Forsaken*, pp. 16-21; and *No Bright Future*, pp. 24-30.

¹⁰⁶ Human Rights Watch, *Evicted and Forsaken*, pp. 21-24.

¹⁰⁷ Human Rights Watch, *Evicted and Forsaken*, pp. 31-32.

¹⁰⁸ UN, "Report of the Fact-Finding Mission," pp. 62-63.

¹⁰⁹ COHRE and ZHLR, "Operation Murambatsvina: A Crime Against Humanity."

VI. Fleeing Economic Deprivation

Zimbabwe was once one of the wealthiest countries in sub-Saharan Africa.¹¹⁰ Following independence, the government implemented a range of progressive social and economic policies, resulting in marked improvements in human development indicators. Life expectancy rose sharply from 45 years in 1960 to 59 years in 1987.¹¹¹

Political Repression, Including those Indirectly Affected by Mass Forced Evictions

Since the late 1990s, the Zimbabwean government has become increasingly more repressive under the long rule of President Robert Mugabe.¹¹² During elections, including those in March and June 2008, large numbers of political activists have been assaulted and displaced.¹¹³ The government's political repression has taken many other forms including policies resulting in the dislocation of hundreds of thousands of citizens, the seizure of commercial farms, and assaults on the informal trading sector. These policies have resulted in severe social and economic disruption for massive numbers of people.¹¹⁴

As noted in the previous section, the Zimbabwean government's campaign of forced evictions in 2005 destroyed tens of thousands of houses and thousands of informal business structures, leaving an estimated 700,000 people (or 6% of the Zimbabwean population) without homes, livelihood, or both.¹¹⁵ The UN report on the evictions found that a further 1,700,000 people were indirectly affected in a number of ways:

¹¹⁰ United Nations Development Program (UNDP), *Human Development Report 1990: Concept and Measurement of Human Development*. (New York, UNDP, 1990).

¹¹¹ World Bank, *World Development Report, 1999*, (New York: Oxford University Press, 1999).

¹¹² See reports referred to in footnote 22.

¹¹³ Human Rights Watch, *'Bullets for Each if You'; Bashing Dissent; All Over Again, Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe's Coming Elections*.

¹¹⁴ Human Rights Watch, *Fast Track Land Reform in Zimbabwe*, vol. 14, no. 1(A), March 2002, <http://www.hrw.org/reports/2002/zimbabwe/>; *'Clear the Filth': Mass Evictions and Demolitions in Zimbabwe, Zimbabwe: Evicted and Forsaken: Internally Displaced Persons in the Aftermath of Operation Murambatsvina; No Bright Future: Government Failures, Human Rights Abuses, and Squandered Progress in the Fight Against AIDS in Zimbabwe*.

¹¹⁵ UN, "Report of the Fact-Finding Mission to Zimbabwe."

[their] livelihoods are indirectly affected by, for example, loss of rental income and the disruption of highly integrated and complex networks involved in the supply chain of the informal economy [including] for example, transport and distribution services, suppliers of foodstuffs from rural areas and... suppliers of inputs to rural areas, formal and informal micro-credit institutions, and a wide range of part-time and casual labor.¹¹⁶

A government ban on informal trading made the suffering even worse.¹¹⁷

A Zimbabwean NGO community coordinator in Harare told Human Rights Watch about secondary displacement caused by the evictions. She said that she, like thousands of people like her, who lived in cottages that the authorities destroyed, also owned flats that they rented out. After their cottages were destroyed they were forced to return to their original flats and had to ask the people who had been renting to leave. Two-and-a-half years later thousands of these people are unable to find income because of the government's crackdown on informal trading, and are, therefore, homeless, sleeping in the open on wastelands, and often too weak or sick to even try to find alternative ways of making money.¹¹⁸

Testimony collected from Zimbabweans by Human Rights Watch in South Africa in October and November 2007 includes many stories from people who spoke of how the evictions affected the lives of family members in the rural areas who had been relying on the income from relatives informally trading in the urban areas, and who were made destitute after the evictions. Echoing many almost identical stories, a 25-year-old man from Harare told Human Rights Watch:

Before the tsunami I was working as a salesman. My income was supporting 17 relatives in the rural areas. I sent them food and money for fertilizer and seeds. The building I used to trade in was destroyed and it was impossible to get a trading license and so I had to stop

¹¹⁶ UN, "Report of the Fact-Finding Mission to Zimbabwe," pp. 33-34.

¹¹⁷ See below pp. 52-55.

¹¹⁸ Human Rights Watch interview, Harare, February 16, 2008.

trading. All my relatives suffered. Before the tsunami they ate three times a day. Afterwards they had no money for seeds and fertilizer and soon they ate only *sadza*¹¹⁹ and sometimes porridge in the morning. They were all hungry and so I came to South Africa.¹²⁰

Under refugee law (below, Chapter VII), Zimbabweans directly affected by the evictions can claim to have suffered persecution at the hands of the Zimbabwean authorities.

Zimbabweans indirectly affected by the evictions—hundreds of thousands living in the rural areas—cannot make such a claim. However, the suffering they faced as a result of the loss of income received from relatives in the cities was and remains real, causing breadwinners to come to South Africa to help their relatives survive the effect of the evictions.

Deterioration of the Economy Fuelled by Ban on Informal Trading

Zimbabwe has one of the world's "fastest shrinking economies" and, by far, the world's highest rate of inflation. The real gross domestic product has shrunk for nine consecutive years,¹²¹ and the engine of Zimbabwe's economy, agriculture, has contracted sharply.¹²² Between 1999 and 2004, maize production declined by over 60 percent¹²³ and in 2007 alone it fell by a further 40 percent.¹²⁴

Inflation in Zimbabwe in 2008 has been estimated at over 100,000 percent.¹²⁵ The proportion of the population living below the poverty line increased from 25 percent

¹¹⁹ "Sadza" is the Shona name for a cooked pulverized grain meal that is Zimbabwe's staple food.

¹²⁰ Human Rights Watch interview, Pretoria, November 1, 2007.

¹²¹ World Bank, "Zimbabwe: Country Brief," April 2006, <http://www.go.worldbank.org/RFP74M2PK1> (accessed March 28, 2008). According to the United Kingdom's Department for International Development (DFID), Zimbabwe's Real Gross Domestic Product has declined by over 35 percent in the last six years. DFID, "Zimbabwe Country Profile," <http://www.dfid.gov.uk/countries/africa/zimbabwe.asp> (accessed April 9, 2008).

¹²² According to DFID, agricultural production has plummeted in the last six years. DFID, "Zimbabwe Country Profile."

¹²³ World Bank, "Interim Strategy note for Zimbabwe," Country Department, August 31, 2005, <http://www.siteresources.worldbank.org/INTZIMBABWE/resources/ZIMBABWEISN.pdf> (accessed March 26, 2008).

¹²⁴ Maize production in early 2008 was down 40 percent on the previous year. "Heavy rains reduce seed hectareage in Zimbabwe," *African Agriculture*, February 5, 2008, <http://africanagriculture.blogspot.com/2008/02/heavy-rains-reduce-seed-maize-hectareage.html> (accessed April 9, 2008).

¹²⁵ Angus Shaw, "Zimbabwe inflation passes 100,000%, officials say," *The Guardian*, February 22, 2008, <http://www.guardian.co.uk/world/2008/feb/22/zimbabwe> (accessed April 7, 2008).

in 1990 to an estimated 70 percent in 2003 to 83 percent in 2007.¹²⁶ Unemployment was estimated at 80 percent in 2007.¹²⁷

With the collapse of much of Zimbabwe's formal economy, the informal economy expanded and by 2005 employed three to four times the number of people employed in the formal sector.¹²⁸ However, as part of its 2005 campaign of forced evictions officially aimed at sanitizing the cities of informal economic activity, the government targeted the informal sector, banning all informal trading. This has resulted in a severe crisis for individuals trying to make their living engaged in small enterprises and vending.

During the evictions alone, 32,538 small, micro- and medium-size enterprises were demolished, resulting in 97,614 persons losing their primary source of livelihood.¹²⁹ Despite the government's assertion that the demolitions affected only those workplaces operating illegally, vendors, market places, and small business areas across the country were targeted indiscriminately. During the operation, licensed traders were arrested and had their goods confiscated or destroyed, and legal vending sites were demolished.¹³⁰

After the evictions vendors were told they had to go through a "vetting" process to get new licenses. In order to be licensed (or re-licensed) vendors had to submit applications, be fingerprinted, and pay fees of US\$10 in May 2006.¹³¹ Reports by both Human Rights Watch¹³² and Amnesty International¹³³ document that the

¹²⁶ World Bank, "Interim Strategy note for Zimbabwe"; Agence France-Presse, "Zimbabwe inflation over 100,000 per cent," February 21, 2008, <http://www.smh.com.au/news/world/zimbabwe-inflation-over-100000-per-cent/2008/02/21/1203467216941.html> (accessed April 8, 2008). UNAIDS, "Zimbabwe Country Profile," December 2007, <http://www.unaids.org/en/CountryResponses/Countries/zimbabwe.asp> (accessed April 5, 2008).

¹²⁷ *The Economist*, "How to stay alive when it all runs out", July 12 2007, http://www.economist.com/world/africa/displaystory.cfm?story_id=9475943 (accessed April 5, 2008).

¹²⁸ Action Aid International, "Sectoral Impact of Operation Murambatsvina/Restore Order. An Analysis of Operation Murambatsvina," http://www.kubatana.net/html/archive/urbdev/050801aai.asp?sector=URBDEV&year=0&range_start=1, p. 45 (accessed April 7, 2008).

¹²⁹ Amnesty International, "Zimbabwe: No justice for the victims of forced evictions," September 6, 2006, <http://www.amnesty.org/en/library/info/AFR46/005/2006> (accessed March 22, 2008).

¹³⁰ Human Rights Watch, *No Bright Future*; Amnesty International, "Zimbabwe: No justice for the victims of forced evictions," <http://www.amnesty.org/en/library/asset/AFR46/005/2006/en/xj6145eBLYc> (accessed April 6, 2008), which refers to an August 2, 2005 Bulawayo High Court ruling that found that street vendors' stalls had been destroyed indiscriminately and that many street vendors had permits to trade.

¹³¹ Amnesty International, "Zimbabwe: No justice for victims of forced evictions."

¹³² Human Rights Watch, *No Bright Future*.

authorities granted or denied vending licenses based on political affiliation. Officials barred people who were not supporters of the ruling party, ZANU-PF, and gave preference to people with ZANU-PF affiliation.

In February 2008 Human Rights Watch interviewed people in Zimbabwe who continued to speak about the political bias in obtaining permission to work and trade. A 42-year-old woman explained how the destruction of her goods and the ban on informal trading had prevented her from making money to support her 10 children and six grandchildren who all lived with her in one room, but that ZANU-PF supporters were given the opportunities denied to her:

In 2005 I started making brooms. I sold them at a market stall. But then the government came and burned them all. I tried to get another stand from the city council. They said there were none available. I tried to start a co-op with some other people so we could all work together. I went back to the city council and they told us to pay Z\$200 million¹³⁴ but I can't. Other people get stands, if they are ZANU-PF. I just sit by the road. The police come two or three times a day. If they catch me I have to pay a fine and they take away all of my brooms. There are 17 of us living in one room—myself, my children, and grandchildren. Three of my grandchildren are orphans, and are HIV positive. I cannot afford their school fees and I struggle to pay for their medicine.¹³⁵

Zimbabweans who fled to South Africa gave similar accounts. A 43-year-old woman from Harare told Human Rights Watch how the lack of a ZANU-PF card made it impossible for her to obtain a trading license and left her without work or income:

They destroyed my cottage in Mabvuko. I tried to feed myself and my daughter and mother by selling cooking oil and soap in the Mabvuko market by the bus station. The police made it impossible, arresting and fining and beating us. Each time they caught us they stole our

¹³³ Amnesty International, "Zimbabwe: No justice for victims of forced evictions."

¹³⁴ About US\$26 in mid-February 2008.

¹³⁵ Human Rights Watch interview, Harare, February 16, 2008.

goods. I tried to sell these things in a friend's backyard but the police always raided us. They beat me twice, in October 2005 and in January 2006. The first time they beat me with a *chambuka* (rubber whip) all over my body. The second time they beat me with an iron bar on my back and legs. It was impossible to get a trading license. The council gave out very few licenses. I was told that they were very expensive and that it was impossible to get one without a ZANU-PF card and proof of attending their meetings. After the second beating I knew I could not continue and had to leave, so I came to South Africa.¹³⁶

Food

The collapse in food production has caused a serious food deficit, affecting 4.1 million Zimbabweans (more than one-third of the population).¹³⁷ Until June 5, 2008, ongoing food assistance programs by international agencies such as the World Food Program were expected to meet all of the assessed needs in rural areas, though only one-third of the one million urban Zimbabweans estimated to be food insecure were receiving formal food assistance.¹³⁸ On June 4, 2008, the Zimbabwean authorities announced a complete halt to the work of all aid agencies in Zimbabwe, including those distributing emergency food rations, alleging that agencies had been using their programs to campaign for the opposition party.¹³⁹ This followed President Mugabe's announcement on May 29, 2008, that Zimbabwe had had to import 600,000 tons of maize to ease food shortages,¹⁴⁰ and warnings that in the coming 12 months Zimbabwe's cereal production will cover only 28 per cent of the populations' needs.¹⁴¹

¹³⁶ Human Rights Watch interview, Johannesburg, November 3, 2007.

¹³⁷ World Food Program (WFP), "More than one-third of Zimbabweans face food shortages," June 5, 2007, <http://www.wfp.org/english/?ModuleID=137&Key=2511> (accessed April 9, 2008).

¹³⁸ "Zimbabwe Food Security Alert - Urban food insecurity likely to worsen," *Famine Early Warning System (FEWS)*, January 17, 2008, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KKAA-7AY57Q?OpenDocument> (accessed March 29, 2008).

¹³⁹ Letter from Zimbabwean Minister of Public Service, Labor and Social Welfare to all private voluntary organizations and nongovernmental organizations, June 4, 2008. On file with Human Rights Watch.

¹⁴⁰ Nelson Banyana, "Mugabe says government imports maize to stave off hunger," *Reuters Africa*, May 29, 2008, <http://africa.reuters.com/wire/news/usnL29349903.html> (accessed May 31, 2008).

¹⁴¹ "FEWS Zimbabwe Food Security Alert 05 Jun 2008 - Zimbabwe faces major cereal deficits in year ahead," *Famine Early Warning System*, June 5, 2008, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/RMOI-7FBV6G?OpenDocument&rc=1&cc=zwe> (accessed June 5, 2008).

Human Rights Watch heard again and again how hunger compelled Zimbabweans to flee to South Africa. A 42-year-old widow with three children told a story similar to many others:

When they destroyed my cottage and stopped us from working I had no money for food or rent or school fees. We slept under the sky in a riverbed for two weeks and my children all became sick and hungry. We went to live with my mother in the rural areas for three months. There was no work and almost no food. We only ate porridge and a little *sadza*. Everyone in the village was already hungry and had no food for us. I left my children and tried for three weeks to sell vegetables... but the police stopped me. I was sleeping on the side of the street.... We were always hungry. We lived from day to day. I came to South Africa in July 2006 to find food for my children. I send back groceries and a little money every three months and now they can eat again.¹⁴²

In March 2008 Human Rights Watch reported on the politicization of agricultural equipment and political interference with food distribution carried out by Zimbabwe's Grain and Marketing Board. The report documents that the nongovernmental election monitoring organization Zimbabwe Electoral Support Network (ZESN), and organizations such as the Zimbabwe Peace Project (ZPP), have alleged political interference in the distribution of free agricultural equipment (under the government's farm mechanization program) and state subsidized maize and seed from the government's Grain and Marketing Board (GMB).¹⁴³ Such manipulation is not new to Zimbabwe. Human Rights Watch reports from 2003 and 2004 have documented how food assistance has been denied to suspected supporters of

¹⁴² Human Rights Watch interview, Pretoria, November 1, 2007.

¹⁴³ Human Rights Watch, *All Over Again*, which documents that on January 10, 2008, ZESN reported political interference in the government's farm mechanization program (funded by the Reserve Bank) to distribute free plows, donkey carts, seeds, and other equipment to farmers. ZESN also reported that in a number of provinces Zimbabwean farmers were forced to show loyalty to the ruling party by producing party cards to receive the equipment and seeds.

Zimbabwe's main opposition party and to residents of former commercial farms resettled under the country's "fast-track" land reform program.¹⁴⁴

Health and HIV/AIDS

Zimbabwe's economic collapse, its repressive political environment, and the mass forced evictions have also had an impact on the health sector generally and more specifically on people living with HIV and NGOs providing services to them.

As of December 2007 an estimated 1.7 million out of 13 million Zimbabweans were estimated to be living with HIV, and 20.1 percent of all 15 to 44 year olds were infected with the virus.¹⁴⁵ The epidemic has sharply increased the burden on the health care system. Over 70 percent of admissions to medical wards in Zimbabwe's major hospitals are patients with AIDS-related diseases.¹⁴⁶

About 1.7 million people are living with HIV in Zimbabwe, and only 8 percent of adults and 4 percent of pregnant women are receiving antiretroviral treatment (ART). Nearly 200,000 people died of AIDS in 2007.¹⁴⁷ Media reports have indicated that some Zimbabweans are turning to unproven herbal remedies and to neighboring countries because of their inability to access ART in the country.¹⁴⁸ The Zimbabwean authorities' decision of June 4, 2008 (see above), to halt the work of all aid agencies, including those providing health services, until further notice may have a devastating effect on those lucky enough to have accessed ART to date.

A 33-year-old HIV infected woman from Bulawayo told Human Rights Watch about the particular impact of the evictions and the economy on PLWHA:

¹⁴⁴ Human Rights Watch, *Not Eligible: The Politicization of Food in Zimbabwe, The Politics of Food Assistance in Zimbabwe*, Amnesty International, "Power and Hunger - violations of the right to food," October 2004, <http://www.amnesty.org/en/library/info/AFR46/026/2004> (accessed April 7, 2008).

¹⁴⁵ UNAIDS, "Zimbabwe Country Profile."

¹⁴⁶ UNAIDS, "Zimbabwe HIV Data, 2006," http://www.unaids.org/en/Regions_Countries/Countries/zimbabwe.asp (accessed March 27, 2008).

¹⁴⁷ UNAIDS, "Country Profile of Zimbabwe, 2007," <http://www.unaids.org/en/CountryResponses/Countries/zimbabwe.asp> (accessed 27 March 2008).

¹⁴⁸ Joseph Amon, "Dangerous Medicines: Unproven AIDS cures and counterfeit antiretroviral drugs," *Globalization and Health* 2008, 4:5doi:10.1186/1744-8603-4-5, <http://www.globalizationandhealth.com/content/4/1/5> (accessed April 28, 2007); Florence Panoussian, "Zimbabweans get life-saving AIDS drugs in neighbouring state," *Agence France Presse*, March 2, 2008, <http://nz.entertainment.yahoo.com/o80302/8/49ek.html> (accessed April 29, 2008).

I was diagnosed in July 2004 at Bulawayo Central Hospital. After the tsunami if I tried to sell anything the police harassed me and I couldn't support myself and five other relatives who all depended on me. We ate a lot less than before and I became weak... I was told I needed ARVs but that the clinics and hospitals in Bulawayo had run out. I was told to go to a private doctor but I did not have enough money. One of my children told me that I could maybe find ART in South Africa. I sold some furniture and in December 2006 I took a bus from Bulawayo to Beitbridge. I paid some guides to take me across the border and I took a bus from Musina to Johannesburg. I was too weak and sick to find work. I lived with another woman in a room who gave me vegetables and fruit and meat to eat and I got a little stronger. In July 2007 I went to Nazareth House and they gave me free ARTs immediately and told me to eat well. I was strong enough to do some domestic work and bought food with the money... I feel a lot better and I can work now. I am afraid of going back to Zimbabwe because there is no food or medication.¹⁴⁹

The health sector in general has been plagued with difficulties providing basic services. Shortages of key drugs and surgical supplies are frequent¹⁵⁰ and massive emigration of medical personnel has occurred. In March 2008 50 percent of health care positions, including 88 percent of primary health nurses, were vacant.¹⁵¹

The cost of health care has repeatedly increased with regular increases in health user fees and associated direct and indirect costs.¹⁵² A dramatic drop in a broad range of health indicators reflects reduced access to health care and the impact of the HIV/AIDS epidemic. Maternal mortality rose from 283 per 100,000 live births in

¹⁴⁹ Human Rights Watch interview, Johannesburg, November 8, 2007.

¹⁵⁰ Tererai Karimakwenda, "Zimbabwe: No Surgery at Parirenyatwa as Health Sector Continues to Deteriorate," *SW Radio Africa*, February 25, 2008, <http://allafrica.com/stories/200802260015.html> (accessed May 31, 2008).

¹⁵¹ UNICEF, "Zimbabwe in 2008," Unicef Humanitarian Action, www.unicef.org/haro8/files/haro8_Zimbabwe_countrychapter.pdf (accessed March 26, 2008).

¹⁵² Human Rights Watch, *No Bright Future*.

1994 to 1,100 per 100,000 live births in 2005,¹⁵³ and the life expectancy of a woman in Zimbabwe has fallen from 56 years in 1978 to 34 years in 2006.¹⁵⁴

A 62-year-old woman in Harare told Human Rights Watch:

Before the tsunami I lived in a cottage but it was demolished. There were four of us—me, my daughter and her two children. Now we live under plastic sheets. Without a house the rains destroy your stuff, the sun too. People steal things. I think we've been hardened by living outside, so maybe that means our bodies are stronger. But my 12-year-old granddaughter sometimes complains of chest pains. I think she has pneumonia, she has a bad cough. She was tested for HIV and was negative but she hasn't been tested for TB. I took her to the clinic in September. She had scabies. You pay for the registration but the drugs are not available. You have to go find them in a private pharmacy but no one can afford the prices at private pharmacies. When we first went to the doctor there were only a few scabs, but by the time I got the money, they were all over her body: on her stomach, the backs of her thighs, everywhere.¹⁵⁵

The 2007 Global Tuberculosis Control Report from the World Health Organization ranks Zimbabwe among 22 countries with the highest TB burden in the world.¹⁵⁶ Zimbabwe has six times more TB cases than it did 20 years ago, and an estimated two-thirds of Zimbabweans with TB are also infected with HIV. Because of the poor health infrastructure in Zimbabwe, little is currently known about the extent of multi-drug resistant TB (MDR-TB) cases, but the effectiveness of TB treatment (using

¹⁵³ Government of Zimbabwe, "Zimbabwe Millennium Development Goals, 2004 Progress Report," <http://www.millenniumcampaign.org/atf/cf/%7BD15FF017-0467-419B-823E-D6659E0CCD39%7D/2004%20ZMDG%20Report.pdf> (accessed March 28, 2008); World Bank, "Millennium Development Goals: Eradicating poverty and improving lives: 2006 World Development Indicators, 2006," <http://devdata.worldbank.org/wdi2006/contents/Foreword.htm> (accessed March 28, 2008).

¹⁵⁴ World Health Organization, "The World Health Report 1999 -making a difference, 1999," <http://www.who.int/whr/1999/en/> (accessed March 27, 2008); UNAIDS, "Zimbabwe Country Profile."

¹⁵⁵ Human Rights Watch interview, Harare, February 16, 2008.

¹⁵⁶ World Health Organization, "Global Tuberculosis Control Report, Surveillance, Planning, Financing," 2007, www.who.int/tb/publications/global_report/2007/pdf/full.pdf (accessed April 7, 2008).

directly observed therapy) is estimated to be less than 60 percent.¹⁵⁷ Overcrowded living conditions and malnutrition contribute to the spread of the disease and TB patients often fail to complete treatment because they cannot afford the transport costs to and from health centers.

At least 6 million people in Zimbabwe—about half the population—do not have access to clean water or sanitation.¹⁵⁸ Cholera outbreaks have repeatedly occurred in recent years, as the country's water and sanitation systems have broken down. In 2007 the collapse of Harare's largest sewage treatment plant resulted in the discharge of 72 megaliters of raw sewage into Mukuvisi River, a tributary of the Manyame River, which flows into Lake Chivero, Harare's chief source of drinking water.¹⁵⁹ In December 459 cases of cholera were reported in two high-density suburbs of Harare.¹⁶⁰ In Bulawayo 11 people died from cholera and more than 300 were hospitalized in 2007.¹⁶¹ Electric power outages and shortages of chemicals to treat water have interrupted water supplies and forced individuals to drink untreated, fecally contaminated water.

A young Zimbabwean woman in South Africa told Human Rights Watch that two people in her family had died in the past two years of TB. They died after they stopped taking medication because the family could not find enough food for them to help their bodies cope with the effect of the treatment. When a third relative fell sick with TB in 2006 she decided to try to save his life by leaving for South Africa to make money so she would be able to send food home.¹⁶²

¹⁵⁷ According to the WHO, countries should attain a 70 percent case detection rate and 85 percent treatment success. WHO found that Zimbabwe had a 41 percent case detection rate and a 54 percent treatment success rate.

"Zimbabwe: WHO Calls for Increased TB Testing, Counselling Services," *The Herald (Harare)*, March 31, 2008, <http://allafrica.com/stories/200803311024.html> (accessed April 28, 2008).

¹⁵⁸ "Cholera claims more lives in Harare," *Independent on-line*, March 6, 2008, http://www.iol.co.za/index.php?click_id=68&art_id=nw20080306090420390C720937&set_id= (accessed April 7, 2008).

¹⁵⁹ "Zimbabwe: Cholera strikes the capital," *IRIN Africa*, January 30, 2007, <http://www.irinnews.org/report.aspx?reportid=67912> (accessed March 27, 2008).

¹⁶⁰ "Zimbabwe Food Security Alert 17 January 2008: Urban food insecurity likely to worsen," *Famine Early Warning System Network*, January 17, 2008, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/KKAA-7AY57Q?OpenDocument> (accessed April 28, 2008).

¹⁶¹ "Zimbabwe: Engulfed By Sewage," *UN Integrated Regional Information Networks*, March 14, 2008, <http://allafrica.com/stories/200803140630.html> (accessed March 6, 2008).

¹⁶² Human Rights Watch interview, Johannesburg, November 7, 2007.

VII. International Refugee Law¹⁶³

Persecution of Zimbabweans Targeted by the Evictions

To successfully claim refugee status under the 1951 Refugee Convention, or the OAU Convention 1969, asylum seekers need to show that they cannot be sent back to their country because they have a well-founded fear of being persecuted on account of their “race, religion, nationality, membership of a particular social group or political opinion.”¹⁶⁴ The OAU Convention also considers a refugee to be “every person who, owing to... events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge.” Neither Refugee Convention defines the term “being persecuted,” but persecution is generally regarded as a “serious harm” that the government is responsible for causing or for being unwilling or unable to prevent. This definition can be summarized as “Persecution = Serious Harm + The Failure of State Protection.”¹⁶⁵

Zimbabweans who were targeted by the evictions have a strong claim of a well-founded fear of being persecuted. This is because their rights to shelter, work, food, and in many cases education and health care were, and continue to be violated to such an extent that they would suffer serious harm if returned to Zimbabwe, and because the Zimbabwean government, responsible for the original rights violations, continues to fail to protect them against the effects of those rights violations. Zimbabweans targeted by the evictions can argue that they will be persecuted because of the political threat they are perceived to pose and the “political opinion” which the Zimbabwean government thinks they had and still have.

¹⁶³ South Africa has ratified the 1951 UN Convention relating to the Status of Refugees (1951 Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954, and its 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force October 4, 1967, http://www.unhchr.ch/html/menu3/b/o_c_ref.htm (accessed March 13, 2008), and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), 1001 U.N.T.S. 45, entered into force June 20, 1974, http://www.africa-union.org/Official_documents/Treaties (accessed March 13, 2008). These treaties were formally acceded to in January 1996. S. 6 of South Africa’s 1998 Refugees Act states that that Act must be “interpreted and applied with due regard to” these treaties.

¹⁶⁴ Article 1(A)(2).

¹⁶⁵ This test was first set out by the Canadian Supreme Court in *Canada v Ward*, [1993] 2 S.C.R. 689 (S.C.C.) and was endorsed by the United Kingdom courts in *Islam and Shah v. SSHD*, [1999] 2 All ER 545, per Lord Hoffman (U.K. House of Lords, March 25, 1999).

To establish a refugee claim under the 1951 Refugee Convention, Zimbabweans affected by the evictions have to show three things:¹⁶⁶ (i) that they have good reason¹⁶⁷ for fearing serious harm if returned to Zimbabwe because the Zimbabwean government will fail to protect them against certain rights violations; (ii) that the Zimbabwean government regards them as having a “political opinion” and/or as members of a “particular social group”; and (iii) that their fear of being persecuted is *because* of their perceived “political opinion” and/or membership of a “particular social group.”

Zimbabweans Targeted by the Evictions Suffered Serious Harm

Zimbabweans targeted by the evictions suffered specific rights violations that caused “serious harm.” This harm continues to this day and into the foreseeable future because of a continued failure by the Zimbabwean government to end it.

Serious harm is caused by certain types of serious violations of internationally protected human rights, as set out in particular in the International Covenant on Civil and Political Rights (ICCPR),¹⁶⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁶⁹ and the African Charter on Human and Peoples’ Rights (African Charter).¹⁷⁰ Serious harm occurs either when the *core* of a right has been violated or when a number of *non-core* violations have the cumulative effect that leads to serious harm.¹⁷¹

¹⁶⁶ There is no international court or body that produces refugee law-based judgments that bind the Contracting Parties to the 1951 Convention. “Refugee law” is made up of the decisions of national courts in states all around the world who have signed the 1951 Convention. UNHCR also produces various types of documents which aim to guide those involved in assessing asylum seeker’s claims (civil servants, lawyers, judges). While they are useful in reinforcing legal arguments, these documents are not binding in law.

¹⁶⁷ A “well-founded fear” according to the 1951 Refugee Convention.

¹⁶⁸ International Covenant on Civil and Political Rights, 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, <http://www2.ohchr.org/english/law/ccpr.htm> (accessed March 19, 2008), ratified by Zimbabwe on August 13, 1991.

¹⁶⁹ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, <http://www2.ohchr.org/english/law/ESCR.htm> (accessed March 19, 2008), ratified by Zimbabwe on August 13, 1991.

¹⁷⁰ African (Banjul) Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986, <http://www1.umn.edu/humanrts/instate/z1afchar.htm> (accessed March 19, 2008), ratified by Zimbabwe on May 30, 1986.

¹⁷¹ UNHCR recognizes the fact that an accumulation of rights violations can lead to persecution where individually those violations would not amount to persecution: “an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution

In the case of Zimbabweans claiming asylum in many countries worldwide over the past few years, examples of “core” civil and political rights violations have involved (fear of) killings, torture, rape, arbitrary detention, and inhuman and degrading treatment.¹⁷² However the evictions violated many core economic and social rights including the rights to shelter, work, food, and, in many cases, education, and health care. According to the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee), which reviews states’ compliance with the ICESCR, states have a number of *immediate binding* legal obligations with regards to economic and social rights: (i) a state can never discriminate nor justify discrimination, for example with reference to resources; (ii) states have a duty not to interfere directly or indirectly with the enjoyment of a right, including the obligation not to take “retrogressive steps” that destroy access to or enjoyment of a right; and (iii) states have a core obligation to ensure the satisfaction of minimum essential levels of each right.

The right to adequate housing

Forced evictions are the most obvious violation of a government’s obligations to ensure people’s right to shelter. The ESCR Committee defines forced evictions as, “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”¹⁷³ It says that forced evictions constitute “a gross violation of human rights,” and are “incompatible with the requirements of the Covenant [ICESCR].”¹⁷⁴ The African Commission on Human and People’s Rights has also affirmed that forced evictions

on ‘cumulative grounds.’” UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,” (UNHCR Handbook), 1992, www.unhcr.org/publ/PUBL/3d58e13b4.pdf (accessed April 7, 2008). In the case of people targeted by the evictions, a court could recognize that a non-core violation of the right to work (e.g. reduction of income to 50percent) and a non-core violation of the right to shelter (e.g. destroying one property which was used by the owner to gain income through renting it out and allowing the same owner’s second property to remain) together lead to serious harm. Also, such violations could lead to further core or non-core violations of other rights, such as the rights to adequate food, education, and/or health care.

¹⁷² See footnote 22 above.

¹⁷³ ESCR, General Comment No. 7, The Right to Adequate Housing (Art.11.1): Forced Evictions, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/959f71e476284596802564c3005d8d50?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/959f71e476284596802564c3005d8d50?Opendocument), para 3.

¹⁷⁴ ESCR General Comment No. 4, The Right to Adequate Housing (Art.11 (1)), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument), para 4. They are also incompatible with art. 17(1) of the ICCPR, which recognizes, among other things, the right to be protected against “arbitrary or unlawful interference” with one’s home.

are serious violations of the African Charter and draws on the ESCR Committee's characterization of forced evictions.¹⁷⁵

The destruction of people's homes during the evictions constituted "forced evictions" and, therefore, violated the core of the right to housing of people targeted by the evictions. The Zimbabwean government failed to provide appropriate forms of legal or other protection to those targeted by the evictions, putting it in clear violation of the right to adequate housing and the obligation not to carry out forced evictions. The testimonies of Zimbabweans targeted by the evictions show how government authorities destroyed their homes and provided no protection to the people displaced by the evictions, and how this continues to be the case two-and-a-half years after they took place.

Zimbabweans in South Africa, including this 35-year-old married woman with three children, told Human Rights Watch how the destruction of their property had left them homeless and destitute:

The five of us were living in a cottage in Glenora, Harare. My husband had a carpentry shop in the cottage. They destroyed everything, all the tools. We had nowhere to go. We slept outside for one week and then went to the rural areas to live with my parents. There was no work. With no house and no workshop for my husband I came to South Africa to find work.¹⁷⁶

Two-and-a-half years on the government has continued to fail to put an end to the effect of this violation, leading to continued serious harm. Even the most vulnerable people interviewed by Human Rights Watch in Zimbabwe have received no social assistance from the authorities and still live in precarious housing situations. A 62-year-old widow told of her continuing predicament two years after being evicted:

¹⁷⁵ African Commission on Human and Peoples' Rights, Decision 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights – Nigeria* (May 27, 2002), ACHPR/COMM/A044/1, paras. 60-63. The commission found that the combined effect of Articles 14 (right to property), 16 (right to health) and 18(1) (right to family) reads into the Charter a right to shelter or housing.

¹⁷⁶ Human Rights Watch interview, Kailitchi (Cape Town), October 25, 2007.

I lived for six weeks with other people in Mbare, under the tree of Stoddard hall where heroes are buried. They arrested people for staying outside so I asked a widow if I could stay in her courtyard, just inside the wall. I have some plastic sheets to cover myself if it rains. Now it's been over two years. I'm trying to find somewhere else to live. The landlord tells me that she only lets me live in her courtyard because she doesn't want to see me in the street. I am afraid she'll become tired of me. I go from house to house and ask if there is a room to rent but there is no space. I try to sell vegetables but the police stop me so I struggle to find food. If I have it I eat *sadza* and porridge in the morning. I have not had meat for two-and-a-half years.¹⁷⁷

Many people interviewed by Human Rights Watch spoke of the precariousness of their housing situation two-and-a-half years after the evictions. A 34-year-old man in one of Harare's suburbs took Human Rights Watch to see a location where 40 families had found temporary shelter in 2006 but who were now all being told to leave the area. He was living with his wife and 14-year-old daughter in an upside-down steel water tank:

After the tsunami I had to stop my work as a qualified mechanic. The cooperative's workshop was destroyed and the government said everyone had to register. I could not afford the registration fee. I had no money and could not pay rent anywhere. So we came to live in this water tank. If we are lucky we eat *sadza* two times a day and we are hungry. We have no money for anything else. In Congo where there is war people need food and shelter. Here in Zimbabwe we also need food and shelter.¹⁷⁸

¹⁷⁷ Human Rights Watch interview, Harare, February 16, 2008.

¹⁷⁸ Human Rights Watch interview, Harare, February 15, 2008.

The right to work

The ESCR Committee has said that the core of the right to work includes “the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity.”¹⁷⁹ Furthermore, a government violates its obligations when it “deni[es]... access to work to particular individuals or groups, whether such discrimination is based on legislation *or practice*.”¹⁸⁰ The committee notes that, “retrogressive measures taken in relation to the right to work are not permissible,” and that such measures include “denial of access to employment to particular individuals or groups, whether such discrimination is based on legislation *or practice or the adoption of policies* that are manifestly incompatible with international legal obligations relating to the right to work.”¹⁸¹

Therefore, a complete denial of the right to work, including denial based on policy or practice, involves a core violation. This can happen either as a result of the government specifically targeting a particular profession (discrimination), or through targeting the way of working if *under the circumstances that way of working is the only option available* to the person affected and, therefore, makes finding work virtually impossible.¹⁸²

Some courts have linked the denial of an opportunity to earn a livelihood with the right to life, saying that depending on the context such a denial “is the equivalent of

¹⁷⁹ ESCR, General Comment No. 18, The Right to Work, E/C.12/GC/18, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.GC.18.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.18.En?OpenDocument), para 31.

¹⁸⁰ ESCR, General Comment No. 18 para 32 (emphasis added). The South African Refugee Appeals Board (RAB) has recognized this in relation to Zimbabwean professionals prevented by the Zimbabwean authorities for political reasons from carrying out their work. The RAB held that due to his political affiliations with the opposition, the asylum applicant “would not easily, if at all, secure gainful employment as a chartered accountant.” RAB, Appeal Number 53/2005, 30 November 2004, cited in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007), p. 102.

¹⁸¹ ESCR, General Comment No. 18 para 34 (emphasis added).

¹⁸² Two UNHCR documents support this: (i) “Discrimination lead[ing] to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood...” amounts to persecution. UNHCR Handbook, para 54. (ii) “...examples of discrimination amounting to persecution would include, ... discrimination with consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn a livelihood...” UNHCR, “Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees,” <http://www.unhcr.org/doclist/publ/3d4a53ad4.html> (accessed December 9, 2007), para 17. An example of the “virtually impossible” scenario is an Australian decision where the court decided that a person who is denied employment in the public sector and in practice finds it virtually impossible to find employment in the private sector faces “a denial of the right to earn a living and constitutes persecution.” Reference V94/02820, Refugee Review Tribunal (Australia), October 6, 1995, p. 6. Cited in M. Foster, *International Refugee Law and Socio-Economic Rights*, p. 98.

a sentence to death by means of slow starvation.”¹⁸³ Others have referred both to the right to life and the right to health: “[a]n inability to earn a living or to find anywhere to live can result in destitution and at least potential damage to health and even life.”¹⁸⁴

Before carrying out the evictions, the Zimbabwean government was fully aware of the generally depressed economic conditions country-wide with which the victims of the evictions would have to cope. Given the dependency of the Zimbabwean economy on the informal sector, it is inevitable that the Zimbabwean authorities were aware that informal jobs in and around the urban areas were the only viable work opportunities for the people they targeted for eviction, and that after the evictions it would be impossible for them to find alternative work (and thereby access to adequate housing, food, health care, and education).

The testimony of those targeted by the evictions show how the evictions and the ban on informal trading combined to make finding work impossible. A 30-year-old woman from Glenore, Harare, explained how the ban on trading and the impossibility of obtaining a trading permit forced her to leave the city and to try, in vain, to survive in the rural areas:

Before the tsunami I was selling sweets, ice drinks and vegetables. I sold them at the corner of our house and at a market near the taxi stand in Glenore. My two sisters, my mother and my parents all depended on me. Afterwards I tried to continue but the police stopped me. They made me pay a fine each time and confiscated my goods. The nearest official trading post was 15 kilometers from Glenore and I couldn't afford the bus fare. I was told that I would have to pay every month for a permit. The cost was too high. Friends also told me that even if I had the money only people with ZANU-PF cars would get a permit. I went to stay with my mother's family in the rural areas but the village had run out of seeds and fertilizer because they used to buy it

¹⁸³ *Dunat v Hurney*, 297 F 2d 744 (3rd Cir. 1961).

¹⁸⁴ *Secretary of State for the Home Department v. Sijakovic*, Unreported, Immigration Appeal Tribunal, Appeal No. HX-58113-2000, May 1, 2001, para 16. Quoted in M. Foster, *International Refugee Law and Socio-Economic Rights*, p. 92.

with money sent back from their children in the cities. After the tsunami their children stopped sending money so there was no food and no work. Life was impossible there so I came to South Africa in January 2006.¹⁸⁵

A 41-year-old builder from Mutare described the effect of losing his home and his work and how, as a perceived supporter of the opposition, he was then unwelcome in the rural areas even as an internally displaced person (IDP) and was, therefore, unable to feed his family:

I was living in Mutare with my wife and two daughters who were going to school. I was a builder, working in the poor areas which were all destroyed. They destroyed my house and then there was no more work because all building work in those areas was then illegal. There was nowhere to live and nowhere to work so we went to the rural areas in Bikita District. There was no work there. No one had any money for seeds or fertilizer because no one was sending back money anymore from the city because of the tsunami. Even if we had had seeds and fertilizer I wouldn't have been able to plough the land. The village elders said that we were opposition supporters who had come from the cities to cause problems and they wanted us to leave. My daughters stopped going to secondary school because I could not pay the fees. My family was very hungry. They hardly ate anything. Since I have been working in South Africa in February 2006 I have sent them SAR700 (US\$110) and groceries every month. My daughters started going to school again in June 2006.¹⁸⁶

The authorities prevented people who stayed in the urban areas from surviving through even the most minimal or informal trading. A 32-year-old woman, the breadwinner for her mother, brother, and three children, said:

¹⁸⁵ Human Rights Watch interview, Kailitchi (Cape Town), October 27, 2007.

¹⁸⁶ Human Rights Watch interview, Pretoria, October 30, 2007.

Sometimes I try to sell vegetables at Glenview shopping center. It's hard to make money because everyone is doing the same and the police always chase us away. They take our vegetables and they arrest people. The last time I was arrested was a month ago. They fined me and took everything. My brother used to sell firewood but he was arrested so many times it was not worth it. After the tsunami most women cannot find money. Some, if they can't sell their vegetables, have no choice but to sell themselves. Or they try to leave the country.¹⁸⁷

Those who went to the rural areas say that there was no work to be found in those areas, a fact of which the Zimbabwean government would have been well aware before it carried out the evictions. A 24-year-old man from Harare told Human Rights Watch how the authorities forced him to the rural areas, where he could find no way to support his family:

Before the tsunami I was working as a trader at the Copacabana market in Harare. I supported many people including my brother who was diagnosed as HIV+ in September 2004. I paid for his drugs [ARVs]. When they destroyed all our stalls and stole my goods I had nothing left. I was one of the people taken to Caledonian Farm [a holding center] and I was not working. After two months they forced me to go back to the rural areas and there was no work there. I had no money and so my brother could not buy any more drugs. He was eating less and less because I had no money to buy him food. He got very weak and he died in March 2006.¹⁸⁸

The right to adequate food

The ESCR Committee has stated that the core of the right to adequate food includes “[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals... in ways that are sustainable and that do not interfere with the

¹⁸⁷ Human Rights Watch interview, Harare, February 16, 2008.

¹⁸⁸ Human Rights Watch interview, Pretoria, October 31, 2007.

enjoyment of other human rights.”¹⁸⁹ It also notes that, “States have a core obligation to take the necessary action to mitigate and alleviate hunger....”¹⁹⁰ Therefore, any deliberate government action that hinders or denies access to food “sufficient to satisfy the dietary needs” of an individual constitutes a core violation.

The right to food is also implicitly recognized in the African Charter, in such provisions as the right to life (Article 4), the right to health (Article 16), and the right to economic, social and cultural development (Article 22). The African Commission has ruled that “[t]he right to food is inseparably linked to the dignity of human beings and is, therefore, essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation.” The commission went on to state that both the African Charter and international law require and bind parties to the Charter to protect and improve existing food sources and to ensure access to adequate food for all citizens. It identifies the minimum core of the right to food as including an obligation not to destroy or contaminate food sources and not to prevent peoples’ efforts to feed themselves.¹⁹¹

The right to food is intimately connected to the right to work, as set out above. When the government acts in a way that violates the core of the right to work without putting in place alternative mechanisms (such as welfare support) to ensure that those affected can access food, the core of the right to food has also been violated.

The testimony of those targeted by the evictions show how the evictions and the ban on informal trading combined to make finding work, and, therefore, “sufficient” food, impossible. A 50-year-old woman in Harare told Human Rights Watch of the chronic hunger she and her family have experienced since being evicted:

I was living in a one-room cottage with my granddaughter. I worked in a clothes factory but it closed in 2004. Then I sold vegetables to survive. I paid for the rent and my granddaughter’s school fees and a

¹⁸⁹ ESCR, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 18, The Right to Adequate Food (Art.11), E/C.12/1999/5, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3d02758c707031d58025677f003b73b9?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3d02758c707031d58025677f003b73b9?Opendocument), para 8.

¹⁹⁰ ESCR, General Comment No. 12, para 6.

¹⁹¹ SERAC v Nigeria, para. 65.

little bit to eat. We were often hungry. Then they came and destroyed our room. I went with my granddaughter to live in the Roman Catholic Church in Mbare. They gave us a garage to share with one woman for three months and they gave us a little food. But then we had to leave. We lived on empty land near the church for one week and then we found an open space near a road where I sold firewood. We slept under blankets in the open. We worked in a maize field and made a little money. I bought plastic sheets and made a small tent. I still live there now. The sun has broken the plastic and the rain comes through. My granddaughter stopped going to school in January 2006. We had almost no food. For some months a charity called ZIMPRO gave me some food which helped us to survive. We are always hungry. Three months ago my granddaughter found a place to stay with a family. She comes to see me every morning and says “Gogo [grandmother], why don’t you leave here” and I say “where can I go?”¹⁹²

The right to health

The ESCR Committee has said that the core of the right to health includes ensuring non-discriminatory access to health facilities, especially for vulnerable or marginalized groups, the equitable distribution of all health facilities, goods and services, providing essential drugs, access to the minimum essential food which is nutritionally adequate and safe, access to basic shelter, housing and sanitation, an adequate supply of safe and potable water, prevention, treatment and control of epidemic and endemic diseases, and provision of education and access to information for important health problems.¹⁹³

In drawing attention to the combined role played by food, water, and housing in ensuring adequate health, the ESCR Committee is stressing the interdependence of economic and social rights. In other words, when a government violates the right to housing or food, it is also contributing toward a possible violation of the right to health.

¹⁹² Human Rights Watch interview, Harare, February 16, 2008.

¹⁹³ ESCR, General Comment No. 14, para 43.

People targeted by the evictions saw their right to health care seriously affected, both because of the resultant loss of income and because of the government's failure to put in place additional social welfare support and to implement an effective user fee exemption program. This must be understood within the broader context of the Zimbabwean government's more generalized failure to ensure the progressive realization of the right to health.¹⁹⁴

A 55-year-old woman in Harare showed Human Rights Watch the death certificates of her husband and five siblings who had all died from HIV. She said she had two cottages destroyed by the evictions, reducing her income and ability to care for her extended family:

I take care of my mother, seven nieces and seven grandchildren. I went to the office of social welfare last year and they said they would only waive health fees if you were older than 60. They told me to go and find work. I have high blood pressure. My whole body aches. I can't go to the doctor—I don't have the money.¹⁹⁵

In 2006 Human Rights Watch reported on how the evictions had made PLWHA even more vulnerable, leading to a loss of income and, therefore, lack of access to fee-based health care.¹⁹⁶ As set out above, in February 2008 PLWHA told Human Rights Watch how the evictions and the ongoing ban on informal trading had continued to make their access to care precarious and at times impossible.¹⁹⁷

¹⁹⁴ Human Rights Watch reported on this generalized failure in 2006. High user fees for health services and the collapse of the system of social welfare exemptions for health fees have resulted in thousands of individuals living with acute and chronic health care needs being turned away from the health care that they are entitled to, and that the government of Zimbabwe has committed itself to provide. Zimbabwe's social welfare programs, designed to provide exemptions for people unable to pay for medical care and education, fail to protect vulnerable people, such as those living with HIV/AIDS. Obstacles to obtaining exemptions include extensive documentation requirements, inconsistent and arbitrary assessment of applicants, failure to provide information on exemption criteria to those who might qualify, and geographic variations in the availability of exemptions. The government's failure to recognize and respond to the collapse of the water system has led to acute health crises (such as cholera) and imperiled the health of children, and individuals with chronic health conditions, including immune suppression. Human Rights Watch, *No Bright Future*.

¹⁹⁵ Human Rights Watch interview, Harare, February 16, 2008.

¹⁹⁶ Human Rights Watch, *No Bright Future*. The report noted how in Hatcliffe Extension, Harare, a clinic running a free ART and opportunistic infection treatment program under the St. Dominican Sisters was destroyed. The Sisters were forced out of the area, the program was disrupted and as a result a number of PLWHA on the treatment program were initially unable to access treatment. Others were unable to join the program because the Sisters scaled down their operations. p. 26.

¹⁹⁷ See above, Chapter VI.

The evictions, and the lack of subsequent steps to mitigate their impact, have constituted a clear retrogressive step in the realization of the right to health and, therefore, a clear violation of the right to health.

The right to education

The right to free and compulsory primary education is an immediately binding obligation on all states party to the ICESCR. The ESCR Committee has stated that the core of the right to education includes an “obligation to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis...”¹⁹⁸

Some courts have ruled that denial of the fundamental right to primary school education amounts to persecution.¹⁹⁹ Under the principle set out above that a number of *non-core* violations of rights may have a cumulative effect that leads to serious harm, asylum adjudicators may also consider that deprivation of education in conjunction with a number of other violations of economic and social rights cumulatively constitutes persecution.

The testimony of those targeted by the evictions show how the evictions and the ban on informal trading led to a loss of work and income which meant that many parents were no longer able to pay for their children’s school fees. A 47-year-old man told Human Rights Watch:

I was living with my wife and four children, age 15, seven, four, and two, in a cottage in Porta Farm near Harare. I was a basket weaver and I was paying the school fees for my eldest two. They destroyed my cottage and my business, everything. I had no more money and my two daughters stopped going to school immediately. The police took us to the Caledonia Farm transit camp. There was no work there and there was no work in the rural areas and so I came to South Africa. My wife

¹⁹⁸ ESCR, Implementation of the International Covenant on Economic, Social and Cultural Rights, The Right to Education (Art.13), E/C.12/1999/10, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument), para 57.

¹⁹⁹ A number of such cases are cited in M. Foster, International Refugee Law and Socio-Economic Rights, p. 216 at note 270.

and children still live in the camp now. I send enough money back to help them with food but my daughters still aren't going to school.²⁰⁰

Summary of ongoing serious harm

In carrying out the evictions, the Zimbabwean government violated the core of a number of economic and social rights.²⁰¹ Both individually and cumulatively these violations led to serious harm. To this day, the Zimbabwean government has failed to address these violations.

The act of evicting the urban poor living in high-density suburbs, therefore, involved a violation of rights leading to serious harm and amounts to a failure of state protection. Equally, the failure by the Zimbabwean government to address the effects of these violations is an ongoing violation of these rights.

Showing that Zimbabweans Targeted by the Evictions were Viewed as Having a “Political Opinion”

The serious harm suffered by Zimbabweans targeted by the evictions was caused and continues to this day because they fall within one or two of the five protected grounds mentioned in the 1951 Refugee Convention: race, religion, nationality, membership of a particular social group, or political opinion. Zimbabweans evictees were targeted because of their “political opinion.” They, therefore, fear persecution on the grounds of a “political opinion.”

Refugee law does not require that a refugee actually has a political opinion. It is enough if the agent of persecution attributes (or imputes) an opinion to the refugee, even if incorrectly. Because it may be difficult for a refugee to provide direct evidence of what the agent of persecution thinks or believes, a decision-maker must look at all the circumstances.²⁰² Because the political opinion at issue can be imputed to the

²⁰⁰ Human Rights Watch interview, Pretoria, November 1, 2007.

²⁰¹ Regarding the cumulative effect of economic and social rights violations, the ESCR Committee has said that “a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is... failing to discharge its obligations under the Covenant.” ESCR, General Comment No. 3, para 10.

²⁰² *Canada (Attorney General) v Ward* [1993] 2 Supreme Court Reports (Canada) 689, 746-747 (SC:Can).

refugee, it is enough for the agent of persecution to believe that the person is an actual or potential threat to its power.²⁰³

While there is no evidence of how many of the 700,000 people directly targeted by the evictions supported the opposition, or how many had a political opinion about Zimbabwe's ruling party or government, to establish a fear of persecution on account of a "political opinion" under refugee law it is enough to show that the persecutor, in this case the government, imputed to the urban poor living in high-density suburbs either an opinion that was generally opposed to ZANU-PF and/or active support for the Zimbabwean opposition.

As noted in Chapter V of this report, which examined the political context of the forced evictions beyond the reasons nominally provided by the government for them, the circumstances of the evictions suggest that at least one of the reasons why they took place was because ZANU-PF was concerned about a potential uprising in urban areas against the government which would have challenged the government's power.

Showing that Zimbabweans Targeted by the Evictions Fear Persecution Because of their Perceived "Political Opinion"

Finally, Zimbabwean asylum seekers targeted by the evictions fear persecution "for reasons of" their political opinion. Their fear of suffering serious harm is connected to the Zimbabwean government's belief that they hold opinions that threaten the government's power.

There are three ways in which they may successfully argue that they fear serious harm on return to their country because of their political opinion: (i) they could provide direct evidence of the government's deliberate failure to protect them against serious harm for that reason; (ii) they could provide circumstantial evidence that the government's failure to protect them for that reason was intentional; or (iii) without having to prove the government's reason for the evictions, they could argue that the government *in fact* seriously harmed them or failed to protect them against

²⁰³ Ibid, p. 747.

being persecuted, simply by virtue of the fact that they were viewed as having a political opinion.²⁰⁴

One element of direct evidence that the Zimbabwean government intended to persecute the people whom it forcefully evicted for reasons of their political opinion and/or social group membership is suggested by the name of the campaign itself: “*Operation Murambatsvina*” (“Operation Clear the Filth”). This was a dehumanizing and prejudicial characterization of those being evicted that indicates the government’s perception of them as sharing a common negative characteristic. Indirect evidence would suggest that the urban poor living in high-density suburbs were at particular risk of being targeted by the government and that the severity of the harm suffered, which completely destroyed the evictees’ ability to survive in the urban centers, was in the government’s political interest. This is because the circumstantial evidence, as set out in Chapter V of this report, suggests that the government undertook these actions to strengthen itself and to weaken its actual, perceived, or potential opponents.

In relation to both the direct and indirect evidence approaches, refugee law recognizes that if a government has a number of reasons for acting in a way that causes serious harm, it is enough if one of those reasons relates to the person’s political opinion (or any of the other three categories listed in the Convention). In addition, that reason does not have to be the main reason why the government acted in the way it did. It simply has to be one of the reasons.²⁰⁵ In the case of the Zimbabwean government this means, for example, that if one reason for the evictions really was to “clean the cities,” and a second reason was that it would get rid of potential political opposition, then this second reason is enough for a person affected by the evictions to argue that she was persecuted because of her political opinion.

²⁰⁴ This third approach is known in refugee law as “the predicament approach” because it looks at the predicament in which the asylum seeker finds herself and not at the intentions of the persecutor.

²⁰⁵ In addition to courts worldwide accepting this rule, UNHCR has also accepted that this is the correct application of refugee law. See UNHCR, “Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,” 2002, para 20; and UNHCR, “Guidelines on International Protection No. 7: The application of Article 1(A)(2) of the 1951 Convention and/or Protocol relating to the status of refugees to the victims of trafficking and persons at risk of being trafficked,” 2006, para 29. Both documents available at www.unhcr.org/doclist/publ/3d4a53ad4.html (accessed April 8, 2008). See also, James C Hathaway, “The Michigan Guidelines on Nexus to a Convention Ground,” 2001, <http://www.refugee.org.nz/Michigan.html> (accessed April 8, 2008), paras 6 to 14.

Finally, the third way in which Zimbabweans targeted by *Operation Murambatsvina* can make their case is to ask an adjudicator to look at the situation from the victim's point of view. Under this approach, the key issue in determining whether a person is "being persecuted" is the predicament of the victim and the need for a remedy, not the intent of the persecutor.

If, for example, the Zimbabwean government stated that its reason for forcibly evicting the urban poor living in high-density suburbs was to provide for the greater good of orderly and clean cities and not to harm anyone, but its actions nevertheless did, in fact, disproportionately harm those who were members of this particular social group and/or who were imputed to be opponents of the government, then they could argue that they qualify as having "been persecuted."²⁰⁶

Other Considerations under Refugee Law Affecting Claims of Zimbabweans Targeted by the Evictions

Adjudicators considering claims by Zimbabweans targeted by the evictions will need to consider three further points under refugee law.

Mixed motives

A person claiming asylum may have many reasons for leaving her country. Having economic or personal reasons for leaving does not prevent her from making a successful refugee claim. The only requirement in refugee law is that the person fears return on at least one of the five protected grounds. This fear need not be the central reason for the unwillingness or inability to return.

In virtually all cases, people targeted by the evictions have "mixed motives" for leaving and for not wanting to return to Zimbabwe. The poor economic conditions in Zimbabwe and the desire to find work in South Africa are obvious and central motives for many of the evictees, as they are for hundreds of thousands of other Zimbabweans in South Africa. The existence of other motives, including closely

²⁰⁶ A comparable "predicament analysis" would grant refugee status to a gay man whose government involuntarily commits him to a mental hospital to "cure" him of his homosexuality or to a woman whose family members subject their unwilling sister or daughter to genital mutilation without any intension of punishment, but rather thinking they are helping her by preparing her to be an obedient wife.

related economic ones, should not, however, have any bearing on the validity of a refugee claim.

Although a decision-maker or a court in South Africa may find it “difficult to separate the [serious harm] effects of persecutory behavior from the impact of a generally depressed or poor economy,”²⁰⁷ the adjudicator should focus on the connection (or nexus) between the serious harm suffered and the real or imputed political opinion and/or membership in the particular social group of the asylum seeker in question. If this connection is present, then that distinguishes the asylum seeker’s particular circumstances from the generalized suffering faced by the Zimbabwean population.

Once this harm has been identified and connected to the individual’s identity or beliefs, her asylum claim can be successful regardless of her other motivations.

Voluntary re-establishment in country where persecution was feared

As shown by the testimonies, many documented and undocumented Zimbabweans in South Africa regularly move back and forth between Zimbabwe and South Africa to take essential foodstuffs and money to their families. Refugee law allows Zimbabwean refugees and asylum seekers to briefly return to Zimbabwe and then come back to South Africa without losing their refugee or asylum-seeker status.

The 1951 Convention states that the Convention “shall cease to apply to [a] person... if... he has *voluntarily re-established* himself in the country which he left or outside which he remained owing to fear of persecution.”²⁰⁸ Refugee law states that voluntary establishment is not the same thing as simply returning. This means that recognized refugees can return to their home country for brief periods of time and should not have their refugee status revoked simply because they have stepped across the border.

UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* states that, “[v]oluntary re-establishment... is to be understood as return to the

²⁰⁷ M. Foster, *International Refugee Law and Socio-Economic Rights*, p. 254.

²⁰⁸ Article 1(C)(4) (emphasis added). As a matter of law, Article 1(C), as one of the “cessation” Articles, applies to people who have already been recognized as refugees under Article 1(A)(2).

country of nationality.... with a view to *permanently residing* there. *A temporary visit by a refugee to his former home country... does not constitute “re-establishment” and will not involve loss of refugee status”* (emphasis added).²⁰⁹

UNHCR explicitly recognizes that in some cases governments do not agree and that they consider that such people lose their refugee status. UNHCR states that, “[c]ases of this kind should be judged on their individual merits. Visiting an old or sick parent will have a different bearing on the refugee’s relation to his... country than regular visits to that country spent on holidays or for the purpose of establishing business relations.”²¹⁰

As UNHCR suggests, to understand whether a refugee remains at risk of persecution in his country of origin despite briefly returning home, courts should look at each case individually. They should look at the nature of the risk that was part of the original asylum claim and at what the person does when he is back in his country of origin. They should also look at the broad situation in the country of origin.

Nature of risk: the nature of the risk in the original asylum claim affects how a decision-maker looks at the fact that a refugee returned briefly to her country. For example, if a refugee claimed that she was afraid of being detained and tortured by police because of her high political profile, then returning to the country, even if only for a few days, will be extremely risky. In such a case returning suggests that she no longer fears persecution. On the other hand, if a refugee claims that the risk of persecution relates to a denial, on political grounds, of access to food aid then a return to the country for even a few weeks is clearly far less risky than in the first example.

Activity upon return: what the person does when he goes back is equally important. For example, if a person who says he is well known and fears arrest by the police

²⁰⁹ UNHCR Handbook, para 134.

²¹⁰ UNHCR Handbook, para 125. An expert roundtable convened by UNHCR broadly endorsed a conclusion that if a refugee is involved in “brief but repeated visits... to the State of origin..., visits [that] may be for family, political or economic reasons or a combination” of those reasons then “so long as the visits are of short duration and the refugee’s primary residence remains the asylum State” there has been no re-establishment. Erika Feller, Volker Turk and Frances Nicholson, eds., *Refugee Protection in International Law*, p. 529. In summary, the experts concluded that “re-establishment denotes transfer of primary residence... rather than brief visits.” Ibid, p. 541.

goes to the capital city and meets with fellow political activists and shows his face in public, this suggests that he no longer fears persecution. Similarly, if that same person goes back for two days in order to visit a dying relative and keeps a low profile, this suggests that he continues to fear persecution.

For people targeted by the evictions, the nature of the risk is the ongoing violation of their economic and social rights to shelter, livelihood, and food. Brief returns to Zimbabwe are, therefore, not risky and are not evidence that they no longer fear persecution. As noted in the testimony, the reason they return is usually to make sure that their family can receive the food or money that they have earned in South Africa. This coping mechanism reinforces their very argument for refugee status, namely that the serious harm that they and their families have suffered involves violations of their core economic and social rights.

Split families

In most of the interviews Human Rights Watch conducted with people targeted by the evictions only one or two of the family members—the breadwinners—had come to South Africa while the rest of the family often remained in Zimbabwe. For two reasons this should not affect the asylum claim of the breadwinners who left.

First, through finding work and returning to Zimbabwe for short periods of time these breadwinners are trying to help themselves and their families cope with the effects of the persecution (ongoing violations of a series of economic and social rights). In other words, their role as breadwinners and their activity in South Africa helps to reinforce their claim of suffering serious harm (related to their right to shelter, work, and food) as a result of being targeted by the evictions.

Second, the border area between Zimbabwe and South Africa is dangerous with many reports of rape, extortion, and theft.²¹¹ Many people targeted by the evictions take the risk of entering South Africa through an informal border crossing.²¹² Women, children, the sick, and the elderly will understandably only take this dangerous

²¹¹ See Chapter IX of this report.

²¹² Human Rights Watch interviews with Zimbabweans in Cape Town, Johannesburg, and Pretoria, October-November 2007.

journey as a last option, while able-bodied men, better able to defend themselves against criminals operating on the border, are more likely to cross into South Africa.

Finally, Zimbabweans know very well that there is little protection for them in South Africa: people sleep in the open, in crowded rooms, and with no guarantee of work or education. The May 2008 violence against foreigners in South Africa underlines the precariousness and vulnerability of Zimbabweans' position in South Africa. As a result, the best way for the more vulnerable family members to cope with the effects of the evictions is to remain in Zimbabwe. Moving to South Africa is a last resort.

Dealing with Potentially High Numbers of Asylum Claims by People Targeted by the Evictions

Almost 40 per cent of the 99 Zimbabweans interviewed by Human Rights Watch in Cape Town, Johannesburg, and Pretoria in October and November 2007 were directly targeted by the evictions. Given that up to 700,000 people are estimated to have been directly targeted by the evictions, it is possible that tens of thousands of such people are in South Africa. Most will have strong claims for asylum.

On the one hand, South Africa has clear obligations under refugee law to ensure that these claims are fairly adjudicated on a case-by-case basis that looks closely at the evidence of each claim. On the other hand, the potentially high number of claims means that the asylum system, already under pressure, will have difficulties in responding to this challenge.

One way of addressing this challenge will be to adopt this report's recommendation for a "temporary immigration exemption status for Zimbabweans." However, if this recommendation is not implemented, special procedures may have to be implemented to deal with such claims. Although all Refugee Status Determination Officers should be trained in the applicable law, such procedures could take the form of a specially created team of Refugee Status Determination Officers in all of South Africa's five Refugee Reception Offices, who will have the specific task (and expertise required) to review such claims.

VIII. Failings in the Asylum and Deportation Systems Leading to *Refoulement* of Zimbabweans

Overview

In late 2005 Human Rights Watch reported on the failings of South Africa's asylum system.²¹³ The report described how the system prevents many asylum seekers from lodging their claims, how it fails to efficiently and fairly adjudicate claims, and how its failure to respect asylum seekers' rights to documentation confirming their status creates a general sense of insecurity and leads to arbitrary arrest, detention, and unlawful deportation.

Throughout 2006 and 2007 South African civil society closely monitored, advocated, negotiated, and litigated to try to improve various aspects of the struggling asylum system. Despite these efforts, the South African government continues to violate asylum seekers' procedural rights, including their right to adequate documentation confirming their status, and their right to have their substantive claims properly adjudicated.²¹⁴

An important part of the ongoing challenges faced by the system is the continuous massive backlog of cases. Despite two initiatives which have attempted to reduce this number, any progress made risks being rendered meaningless by the number of recent new applications and the asylum system's incapacity to process them. With a new backlog of over 100,000 cases, there is little hope that the asylum system will be able to respond to the significant challenges it faces.

Under South African and international law it is unlawful to deport anyone who has expressed an intention to claim asylum or anyone who has already made an asylum

²¹³ Human Rights Watch, *Living on the Margins*. The report documents how the South African authorities have failed across the board to ensure respect for the legally binding procedures governing asylum applications as set out in the 1998 Refugees Act.

²¹⁴ Violations of asylum seekers' rights continue despite the fact that the public prosecutor issued a damning report to the DHA and South African Parliament in October 2004 condemning the numerous shortcomings in the asylum system and making recommendations to improve the system. For a helpful review of the prosecutor's report, of the government's failure two years after the report to implement key recommendations, and of litigation brought by legal-aid NGOs to force government action, see NCRA, "Refugee Protection," pp. 9-15.

claim. Deporting asylum seekers violates the most fundamental principle of refugee law, the principle of *non-refoulement*. A person's right not to be *refouled* is the right not to be forcibly returned to a place where she would face a threat of persecution or a real risk of torture or cruel, inhuman or degrading treatment or punishment.²¹⁵

In 2005 UNHCR told Human Rights Watch that asylum seekers and refugees had been deported out of the Lindela Repatriation Centre because staff working there were unaware of procedures and standards that govern the legal status of refugees and asylum seekers.²¹⁶

A leading South African report of 2007 concluded that the South African deportation system continued to be dysfunctional, violating a wide range of procedural rights and leading to the unlawful detention and deportation of asylum seekers.²¹⁷ Many of the deportation system's failings can be traced back directly to the failings of the asylum system.²¹⁸ Little has changed since then.

Ongoing Failings in South Africa's Asylum System Contributing to a Generalized High Risk of *Refoulement*

Entry into South Africa and risk of refoulement from the border areas

Zimbabwe shares 225 kilometers of porous border with South Africa. The vast majority of Zimbabweans claiming asylum in South Africa enter the country overland. Because of the limited choice of roads, they mostly enter through or near the Beitbridge-Musina border post, passing either through the official border post or through an informal border crossing. In both cases Zimbabweans prefer not to claim

²¹⁵ Art. 33(1) of the 1951 Refugee Convention: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This is reiterated in s. 2 of the 1998 Refugees Act. The prohibition of *refoulement* is so fundamental that it is a rule of customary international law. (Customary international law is defined as the general and consistent practice of states followed by them out of a sense of legal obligation). ExCom General Conclusion No. 25 on International Protection, 1982, <http://www.unhcr.org/excom/EXCOM/3ae68c434c.html> (accessed April 7, 2008). For more recent joint UNHCR and academic endorsement of the principle, see "Summary Conclusions of Expert Roundtable, University of Cambridge, July 2001", <http://www.unhcr.org/publ/PUBL/419c76592.pdf> (accessed March 14, 2008).

²¹⁶ Human Rights Watch, *Living on the Margins*, p. 45.

²¹⁷ South African civil society concluded in 2007 that the current state of the asylum system means that asylum seekers and refugees are being (unlawfully) deported. CRMSA, "Protecting Refugees," p. 33.

²¹⁸ The main written material covering the 2006-2007 period is: CRMSA, "Protecting Refugees"; NCRA, "Refugee Protection"; Lee Anne de la Hunt and William Kerfoot, "Due Process in Asylum Determination in South Africa from a Practitioner's Perspective," in Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren, eds, *Advancing Refugee Protection in South Africa*, which helpfully summarizes the weakness of the system over the past 10 years.

asylum at the border,²¹⁹ but instead lodge their claims directly at one of South Africa's five Refugee Reception Offices (offices) in Cape Town, Durban, Johannesburg,²²⁰ Port Elizabeth, or Pretoria.²²¹

South African law provides that asylum seekers can apply for asylum by claiming asylum either at a border post or after apprehension by police, military, or immigration authorities,²²² in which case immigration officials should issue them with a non-renewable 14-day asylum transit permit,²²³ during which time they should officially register their claim at one of the five offices in-country. Alternatively, the law allows border crossers who have not claimed at the border and who are not apprehended to apply "without delay" directly at one of the five offices.²²⁴

This system is designed to ensure that people wishing to claim asylum, whether entering the country through a formal border post or not, are given an official document (the 14-day asylum transit permit) which protects them against arrest and deportation until they have lodged their asylum claim at one of the five offices.

²¹⁹ Although there is no clearly identified reason for this, anecdotal evidence suggests that Zimbabweans prefer not to claim asylum at the Beitbridge-Musina border post because they fear Zimbabwean secret service agents who are believed to be in high numbers at Beitbridge (on the Zimbabwean side of the border) and in Musina (on the South African side of the border).

²²⁰ The Johannesburg office has had a number of difficulties. The Rosettenville branch of the office was closed between April 2005 and January 2006. Following successful litigation, it re-opened in January 2006. In March 2007 the Crown Mines branch was opened and in October 2007 the Rosettenville branch closed for good. The instability of this office has added to capacity problems, above all in the Pretoria office located 60 kilometers from Johannesburg, which has had to take over the cases that would otherwise have been processed in the Johannesburg office.

²²¹ According to the DHA, between January 1 and June 30, 2007, one Zimbabwean national claimed asylum at the Beitbridge border post. DHA Press Statement by Chief Directorate Communication, "Zimbabwean Nationals Entering South Africa," August 1, 2007, http://www.dha.gov.za/media_releases.asp?id=419 (accessed April 4, 2008). Confusingly, the same press release stated that on the basis of the Beitbridge border post statistics, "virtually no people from Zimbabwe have applied for asylum in this country," despite the fact that DHA statistics, referred to above, show that 44,423 Zimbabweans claimed asylum in South African between 1 January 2005 and 31 December 2007.

²²² Referring to people who have entered South Africa through an informal border crossing, regulation 2(2) of Refugee Regulations No. R366 adopted under the 1998 Refugees Act, states that "any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application [for asylum at one of the Refugee reception Offices], but indicates an intention to apply for asylum shall be issued with a... permit valid for 14 days within which [time] they must approach a Refugee Reception Office to complete an asylum application." This is in line with Article 31 of the 1951 Refugee Convention which prohibits states from penalizing refugees for entering their territory without passing through official border points.

²²³ Also known as a "section 23 permit" because it is described in s. 23 of the 2002 Immigration Act (as amended by s. 24 of the 2004 Immigration Amendment Act). This section only refers to such permits being granted "at a port of entry," i.e. at a formally recognized border crossing. Regulation 2(2) of Refugee Regulations No. R366 adopted under the 1998 Refugees Act allows for such a permit to be issued anywhere inside the country.

²²⁴ S. 21(1) of the 1998 Refugees Act says that "an application for asylum must be made in person... to a Refugee Reception Officer at any Refugee Reception Office."

Despite this system, recent reports have documented that Zimbabweans in the border areas, particularly in and around Musina, who intend to claim asylum in-country face serious violations of their rights, including arbitrary arrest, detention, and unlawful deportation constituting *refoulement*.²²⁵

Zimbabweans' efforts to seek asylum are sometimes thwarted because many immigration officials and the police are insufficiently trained in basic refugee law and related procedures; ad hoc, fast-track deportations in the border region also limit Zimbabweans' opportunities to claim asylum.²²⁶ Border police sometimes view legal procedures as too cumbersome and time-consuming or irrelevant given what they consider to be the more pressing priority of protecting the border.²²⁷

This climate is undoubtedly reinforced by government language, as reflected in the comments made by border officials at the border noted earlier,²²⁸ that Zimbabweans cannot possibly have valid asylum claims.

Absent proper training and clear directions to officials working in the border areas on basic refugee law and on how Zimbabweans can lodge asylum claims, such unlawful arrest, detention, and deportation in the border areas will continue. Given that many Zimbabweans wishing to claim asylum in-country—including thousands targeted by *Operation Murambatsvina*—have potentially valid refugee claims, current deportation practices in the border areas will inevitably involve numerous violations of the principle of *non-refoulement*.

Obstacles to Gaining Access to the Asylum Procedure and Risk of *Refoulement* In-Country

Obstacles to gaining initial access to Refugee Reception Offices

Once in-country, asylum seekers should register their claim without delay at one of the five Refugee Reception Offices. If, as explained above, a border guard or

²²⁵ CRMSA, "Protecting Refugees," p. 32. South Africa's ongoing unlawful deportation practices, in Musina and elsewhere, will be looked in more detail in later sections.

²²⁶ CRMSA, "Protecting Refugees," p. 25.

²²⁷ Ibid. A 2007 workshop in Musina involving police officers, immigration officials, social workers, and lawyers highlighted these issues. CRMSA, "Protecting Refugees," p. 26.

²²⁸ See Chapter IV, p. 25.

immigration official has issued them with an asylum transit permit, they should apply for asylum at one of these offices within 14 days.

Refugee Reception Officers (RROs) who work in the five offices issue “asylum seeker permits.”²²⁹ Valid for renewable three month periods,²³⁰ these permits are far more than just a piece of paper: they give asylum seekers legal status in South Africa, protecting them from arbitrary arrest, detention, and deportation, and entitling them to work and study in South Africa.²³¹

However, many Zimbabweans find it impossible to obtain their asylum seeker permit within the allotted time period of the 14-day asylum transit permit. This is because of the lengthy queues and other difficulties they face when trying to enter Refugee Reception Offices, problems that have existed and have not improved for a number of years.²³² Access is particularly difficult in the Pretoria and Johannesburg offices, where Zimbabweans are only admitted on Thursdays and Fridays.²³³ If the 14 days have expired and they do not have an asylum seeker permit, they become undocumented and, therefore, “illegal foreigners.” They are then liable to arrest and

²²⁹ Also known as a “section 22 permit” because it is described in s. 22 of the 1998 Refugees Act. If passed into law, the 2008 Refugees Amendment Bill would abolish the position of Refugee Reception Officer and only a small number of their tasks would be given to Refugee Status Determination Officers. The bill and criticism of the bill’s failure to reallocate most of their tasks can be found in “Parliamentary Monitoring Group’s Summary of Public Hearings on the Refugees Amendment Bill,” <http://www.pmg.org.za/report/20080325-refugees-amendment-bill-public-hearings> (accessed April 3, 2008).

²³⁰ The three-month period is not prescribed in any law or regulation. Different offices issue the permits for different periods of time on an ad hoc basis. The average length is three months. Human Rights Watch email exchange with Legal Advice NGO, March 18, 2008.

²³¹ However, the Refugee Reception Offices still use an old asylum seeker permit form which states “employment and work prohibited.” These permits were designed before South African lawyers successfully challenged this prohibition in court in 2003. Since the lifting of the prohibition, the DHA has failed to produce new standard forms confirming that employment and work is permitted. Instead RROs have been manually crossing out the word “prohibited” and adding the word “granted.” When asylum seekers then show the form to prospective employers and education institutions they are accused of having changed the words themselves and are, therefore, denied access to work and study. Human Rights Watch interviews with NGOs in Johannesburg, October 2007.

²³² CRMSA, “Protecting Refugees,” p. 28. The report confirms that corruption continues to be a serious problem at the queuing stage of the application process with people not working for the DHA taking bribes to guarantee access to the inside of the offices. The report notes that “these agents often appear to work in collusion with Departmental officials.” For an overview of the numbers of asylum seekers trying to gain access to offices and the low numbers who manage to get access at any give time, see NCRA, “Refugee Protection,” pp. 13-15. See also, Civil Society Written Submission, “The Documented Experiences of Refugees,” pp. 17-19. For recent reporting on the conditions outside the Cape Town office, see South African groups have for many years documented the notorious difficulties of gaining access to these offices, which have also been the subject of litigation. Joint Submission to SANAC Plenary, “Vulnerable groups: refugees, asylum seekers, and undocumented persons,” pp. 6-7.

²³³ This ad hoc practice of specific intake days based on applicants’ country of origin applies to all nationalities but is particularly obstructive for Zimbabweans who end up in particularly long queues due to their high numbers. Human Rights Watch email exchange with Legal Advice NGO, March 18, 2008.

deportation.²³⁴ Similarly, if a person has entered the country through an informal border crossing, manages to reach one of the five offices without being stopped by the police (and, therefore, does not have a 14-day asylum transit permit) but is then unable to get inside the office, they also become an “illegal foreigner,” liable to arrest and deportation.

As in the case of Zimbabweans wishing to claim asylum being deported from the border areas soon after they have entered the country, the same happens to Zimbabweans who manage to reach the gates of the Refugee Reception Offices but are unable to get inside to register their claims; the police then arrest them for being “undocumented.”

A Department of Home Affairs (DHA)-funded study estimated in September 2007 that 470 asylum seekers were being “turned away” every day at the five Refugee Reception Offices.²³⁵

The South African authorities are bound to ensure that asylum seekers can access the documentation to which they are entitled under the Refugees Act. The South African Constitution provides that everyone has the right to access administrative procedures that are “reasonable and procedurally fair,” and that national legislation, in this case the Refugees Act, must give effect to this right.²³⁶ However, as explained above, the procedures in (and adopted under) the Refugees Act are not being enforced. In failing to enforce applicable procedures the South African authorities are directly responsible for heightening the risk of *refoulement* of Zimbabwean asylum seekers.

²³⁴ S. 23(2) of the 2002 Immigration Act, as amended by the 2004 Immigration Amendment Act.

²³⁵ AT Kearney, “Transforming the Department of Home Affairs, Refugee Affairs,” September 2007, not available online, on file with Human Rights Watch, p. 18.

²³⁶ S. 33(1): “everyone has the right to administrative action that is lawful, reasonable and procedurally fair.” S. 33(3): “national legislation must... give effect to these rights and must... promote and efficient administration.”

Obstacles to receiving an asylum seeker permit even after lodging an asylum claim

The law provides that an RRO “must” issue an asylum seeker with an asylum seeker permit.²³⁷ For a number of years the Refugee Directorate failed in many cases to issue these permits, but rather issued “appointment slips” which required the person to return to the same office after anything from a few days to six months.²³⁸ This practice was successfully challenged in court,²³⁹ but was replaced by an even more questionable practice of “verbal appointments,” which are given to the vast majority of applicants in place of the asylum seeker permit to which they are entitled by law.²⁴⁰

Currently, South Africa has one official detention center, The Lindela Repatriation Center, where “illegal foreigners” are detained while awaiting deportation.²⁴¹ Officials at the center, located 30 kilometers from Johannesburg, have said that they do not recognize the validity of any document other than the asylum seeker permit.²⁴² Therefore, an asylum seeker with only a “verbal appointment” who is transferred to Lindela will likely be deported, an act that violates the prohibition on *refoulement*.²⁴³

Obstacles to gaining subsequent access to Refugee Reception Offices

When asylum seekers are given an asylum seeker’s permit with an expiration date (usually after three months) or a “verbal appointment” to return, they must return to any of the five Refugee Reception Offices on the correct date. If they do not do so, they become undocumented and liable to arrest and deportation. However, instead of gaining rapid access to the offices, they must once again stand in the standard

²³⁷ Section 22(1) of the 1998 Refugees Act.

²³⁸ NCRA, “Refugee Protection,” p. 16.

²³⁹ *Tafira v Minister of Home Affairs and others*, High Court of South Africa, Transvaal Provincial Division Case No: 12960/2006. On file with Human Rights Watch.

²⁴⁰ This was confirmed in interviews with legal practitioners in Johannesburg. Human Rights Watch interviews, October 2007.

²⁴¹ Under s. 34(5) of the 2002 Immigration Act, the Director General designates locations where “illegal foreigners” may be detained pending deportation. The Lindela Repatriation Center, sometimes also referred to as a “holding facility,” is the only center that has been officially designated by the Director General.

²⁴² NCRA, “Refugee Protection,” p. 21.

²⁴³ CRMSA, “Protecting Rights,” p. 32. Although the DHA has said that it is trying to educate its law enforcement partners on the validity of appointment slips (now replaced by “verbal appointments”), despite such slips having no basis in law, its message has not filtered through to the ground where arrests and deportation take place. NCRA, “Refugee Protection,” p. 22.

queues, together with new claimants. Human Rights Watch heard from numerous Zimbabweans that they had repeatedly tried to renew their permits, but that because of the length of queues they had been unable to get into the offices, even after standing and sleeping in line for 24 hours or more.²⁴⁴

Aside from the cost and time involved in reaching one of the offices, many Zimbabweans cannot afford to lose a precious day's work or even a job because of being absent from work for an entire day, especially if there is no guarantee that they will gain access to the office at the end of the wait. In such cases they become undocumented and through no fault of their own run the risk of arrest and deportation.

The South African authorities have an obligation to ensure that asylum seekers can renew their documentation without facing unfair procedural obstacles. By failing to put in place efficient procedures, they heighten the risk of *refoulement* of Zimbabwean asylum seekers.

Obstacles to Gaining Access to Refugee Status Determination: Delays in Processing Claims, Low Quality Decision-Making, and Limits to Appeals System Resulting in Risk of *Refoulement*

The 1998 Refugees Act provides that a Refugee Status Determination Officer (RSDO) will promptly review an asylum claim lodged with an RRO. However, there is an ongoing shortage of RSDOs; the DHA-funded study said that the government needed at least another 100 RSDOs in 2007 for its asylum system to function properly whilst a separate independent study accepted by the DHA says a further 180 are needed.²⁴⁵ This shortage continues to lead to long delays—measured in years rather than months—before an RSDO reviews an asylum claim.²⁴⁶ While the claim is pending,

²⁴⁴ Human Rights Watch interviews in Johannesburg, November 3-7, 2007. See also, Civil Society Written Submission, "The Documented Experiences of Refugees," p. 18.

²⁴⁵ AT Kearney, "Transforming the Department of Home Affairs," p. 8. An independent process engineer, contracted by the DHA in December 2006 to review the state of the asylum system concluded that an additional 180 RSDOs are needed. IQ Business Group, "Report on the Process Engineering Findings and Recommendations related to the Processing and Adjudication of Applications for Asylum received by Refugee Reception Offices," February 1, 2007, on file with Human Rights Watch, p. 55.

²⁴⁶ In 2003 the average waiting time was 18 months. See National Baseline Survey, 2003. Many applicants are known to wait for years before a decision is taken. Given that only 10 percent of the total new applications received in 2005 and 2006 were processed at the initial stage in each of those years, this trend is likely to continue. DHA, "Annual Report, 2006," and DHA,

asylum seekers with asylum seeker permits or with verbal appointments must return regularly to the office to renew their permit or verbal appointment. On each occasion they face the same obstacles, constantly running the risk of becoming undocumented because of difficulties in gaining access to the office.

Refugee law is complex and requires well-trained officials who are able to judge the applicant's story against applicable refugee and human rights law. Because South Africa's asylum system does not provide asylum seekers with legal aid, the vast majority of asylum seekers do not have a lawyer. Without a lawyer to help focus their client's testimony, all asylum seekers, including Zimbabweans targeted by *Operation Murambatsvina* wishing to claim asylum, are fully reliant on well-trained RSDOs who should ask the correct questions to understand whether or not the asylum seeker can qualify for refugee status. RSDOs also need complete, accurate, and up-to-date information on the conditions in the asylum seeker's country to help them assess whether the individual's statements fit with the political, social, and economic conditions in the claimant's country of origin. UNHCR confirmed that in November 2007 RSDOs still had no systematic access to reliable country information.²⁴⁷

The quality of RSDO decisions is poor. Applicants are often interviewed with badly trained or no interpreters present. Many decisions are taken hastily with written reasons for rejection of the claim using irrelevant, arbitrary, and pro-forma language or reasoning with no basis in law. There continue to be reports of third parties taking money in the queues outside the offices and paying bribes to RSDOs to accept claims.²⁴⁸

The Chair of the Refugee Appeals Board confirmed that the quality of RSDO decisions is very low with most RSDOs having at most a law degree and a two-week crash course in refugee law.²⁴⁹ UNHCR confirmed that RSDOs do not receive regular training,

"Annual Report, 2007." The independent process engineer report concluded that the average output of an RSDO per day is 1.5 adjudications. IQ Business Group, "Report on the Process Engineering Findings," p. 30.

²⁴⁷ Human Rights Watch interview with Abel Mbilinyi, deputy representative for UNHCR in South Africa, Pretoria, October 31, 2007. UNHCR offered to assist to set up such a unit but the DHA wanted it to be a fully government-run unit, which it said it would set up at some point in 2008.

²⁴⁸ All points in this paragraph are reported in CRMSA, "Protecting Refugees," p. 29.

²⁴⁹ Human Rights Watch interview with Tjerk Damstra, Refugees Appeal Board (RAB), Pretoria, October 18, 2007. Mr Damstra repeated this point during his submission to the Home Affairs Committee on 25 March 2008: Parliamentary Monitoring Group, "Summary of Public Hearings."

which contributes to questionable decision-making, and that the very few RSDOs with good skills rapidly move on to other jobs.²⁵⁰

Human Rights Watch randomly reviewed four RSDO decisions from 2007 and confirmed that they were of extremely low quality with almost no use of law.²⁵¹ RSDOs are presently unable to deal with even the most straightforward of cases involving, for example, claims of torture or other forms of ill-treatment motivated by political reasons such as membership of opposition parties. Even more challenging are cases involving more complex claims, such as those that can be made by Zimbabweans targeted by *Operation Murambatsvina*. In the absence of lawyers and competent and well-supported RSDOs, claims such as those relating to Murambatsvina will almost certainly be rejected.²⁵²

The South African asylum system has a functioning appeals system.²⁵³ However, for two reasons few asylum applicants with rejected cases are able to meaningfully access the system or to access it at all.

First, few applicants are able to find a lawyer to help them with an appeal.²⁵⁴ This is because there is no functioning government-funded legal aid system in place for asylum applications and there are only a limited number of asylum law practitioners who provide free or low-cost legal aid services.²⁵⁵ This will either dissuade asylum seekers from lodging an appeal or, if they do appeal, will lead to them representing their own case. Not being lawyers, such appeals will inevitably be extremely weak.²⁵⁶

²⁵⁰ Human Rights Watch interview with Abel Mbilinyi, October 31, 2007.

²⁵¹ Cases held on file at the Wits Law Clinic at Wits University, Johannesburg, reviewed October 2007.

²⁵² See J. Klaaren and C. Sprigman, "Refugee Status Determination procedures in South African Law," in Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren, eds., *Advancing Refugee Protection*.

²⁵³ If, under s. 25(1) of the 1998 Refugees Act, the RSDO rejects the claim as "manifestly unfounded, abusive or fraudulent" (claims that are deemed to be clearly false), the file is transferred to the "Standing Committee for Refugee Affairs" for review. If the committee also rejects the case, the applicant can appeal to the Refugees Appeal Board (RAB). If the RSDO rejects the claim without calling it "manifestly unfounded," the claimant can appeal directly to the RAB. Under South Africa's Refugees Amendment Bill, due to be approved by Parliament in 2008, the Standing Committee and the RAB will be merged into a Refugee Appeals Authority which will hear all appeals lodged by asylum seekers with claims rejected by RSDOs.

²⁵⁴ Approximately 5 percent of asylum seekers appealing to the Refugee Appeals Board have a lawyer. Human Rights Watch interview with RAB, Pretoria, October 18, 2007.

²⁵⁵ South Africa's Legal Aid Board, www.legal-aid.co.za/, is mandated to assist asylum seekers but does not provide such assistance. Lawyers for Human Rights are considering establishing a training programme for Legal Aid lawyers. Human Rights Watch email exchange with LHR, March 18, 2008.

²⁵⁶ This was confirmed during Human Rights Watch interviews with members of the Refugee Appeal Board, Pretoria, October 18, 2007. In 2005 Human Rights Watch conducted interviews with lawyers at the Witwatersrand University Law Clinic who stated

Second, a combination of the high number of rejected claims combined with the low capacity of the Refugee Appeals Board means that cases take a long time to be heard, leaving the asylum applicant in a situation of long-term legal insecurity.²⁵⁷ This again deters people from lodging an appeal.

The combination of low-quality decision-making leading to mistaken rejection of claims and the barriers to lodging an appeal mean that there is a considerable risk that Zimbabweans with valid asylum claims end up rejected and deported to Zimbabwe, thus constituting *refoulement*.

Clearing the Backlog and Coping with New Applications: the Asylum System under Continuous Stress

The Second²⁵⁸ Backlog Project

The ongoing dysfunction of South Africa's asylum system is exacerbated by the increasing number of cases the system is struggling to process. With the recent influx of Zimbabweans entering South Africa and a parallel increase in Zimbabwean asylum applications, the system has been even more strained. Until the asylum system is able to find a way of dealing more efficiently with its caseload, the obstacles faced by Zimbabwean asylum seekers and the related risk of *refoulement* will continue.

In March 2006 the DHA announced the creation of a second "Backlog Project" designed to clear 111,153 cases that had accumulated in the asylum system before August 1, 2005.²⁵⁹ The project has been running separately from the main asylum

that although many asylum seekers do appeal, the majority do not have access to legal representation because they are unaware of their right to have a lawyer or cannot afford a lawyer or do not know how or where to find free or low-cost legal assistance. Human Rights Watch, *Living on the Margins*, p. 28.

²⁵⁷ The Refugee Appeals Board currently has four members who hear cases and who between them heard 827 cases between April 1, 2006, and March 31, 2007. DHA, "Annual Report, 2007."

²⁵⁸ South Africa's First Backlog Project was carried out in 2000 and 2001.

²⁵⁹ "Statement by acting deputy director-general: National Immigration Branch on the Refugee Backlog Project, Pretoria, April 20, 2006, <http://www.dha.gov.za/speeches.asp?id=157>. The project covered cases that had been lodged between 1 April 1998 and 31 July 2005. Broad structural concerns with the way in which the project was conceived can be found in NCRA, "Refugee Protection," pp. 31-34. For a very helpful overview of both backlog initiatives, see J. Handmaker, "Starting with a Clean Slate? Efforts to Deal with Asylum Application Backlogs in South Africa," in Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren, eds., *Advancing Refugee Protection*.

system which has continued to receive new applications lodged on or after August 1, 2005.

In September 2007 the DHA announced that 76,400 pre-August 1, 2005 cases remained to be dealt under the Second Backlog Project.²⁶⁰ Human Rights Watch obtained statistics showing that the Second Backlog Project adjudicated 43,116 cases between September 1, 2005, and March 31, 2008. Since then the DHA has made no further formal statement on progress made in reducing this backlog.²⁶¹ However, on April 16, 2008, the South African delegation at the UN's Human Rights Council's review of South Africa's human rights record stated that, "[t]he backlog has been reduced to 8,000 at present."²⁶² And on May 29, 2008, the minister of home affairs informed a legal aid NGO that all applications dealt with under the Second Backlog Project "have been dealt with except for the appeals against decisions of the Refugee Status Determination Officers."²⁶³

The challenge of new asylum applications and a new backlog

In addition to the challenges faced by the asylum system in clearing the pre-August 1, 2005 cases in the Second Backlog Project, the rest of South Africa's asylum system is struggling to cope with the number of asylum applications lodged on or after August 1, 2005. This has been openly acknowledged by the DHA's Director-General.²⁶⁴

²⁶⁰ DHA, "Statement on the Home Affairs Director General's First 100 Days In Office," September 4, 2007, http://www.home-affairs.gov.za/media_releases.asp?id=426 (accessed April 9, 2008). The consultancy firm AT Kearny that has been contracted by the DHA to carry out a Turnaround Strategy reported in September 2007 that by 1 April 2007 the backlog project had processed 34,700 cases (or 31 percent of the total of 111,153 cases). AT Kearney, "Transforming the Department of Home Affairs," p. 7. In September 2007 the DHA also announced an initiative aimed at cutting the number of cases to be dealt with by the Second Backlog Project, effectively requiring all people who had made asylum applications between 1 April 1998 and 31 July 2005 and whose status had not yet been finalized to resubmit their claim by 31 October 2007. DHA, Public Announcement to Refugees in the Refugee Backlog Project, August 15, 2007, http://llnw.creamermedia.co.za/articles/attachments/07765_notice1008.pdf (accessed April 23, 2008). The DHA said that a failure to resubmit the claim would lead to the DHA "revok[ing] their... permits and all those applicants will be declared illegal in the country." DHA, "Statement on the Home Affairs Director General's First 100 Days In Office." At the time of publication the DHA had released no statistics on how many people resubmitted their claims.

²⁶¹ Statistics obtained informally by Human Rights Watch. On file with Human Rights Watch.

²⁶² UN Human Rights Council, Working Group on the Universal Periodic Review, report of the Working Group on the Universal Periodic Review, South Africa, A/HRC/WG.6/1/ZAF/4, April 18, 2008, <http://portal.ohchr.org/portal/page/portal/UPR/1session/South%20Africa> (accessed April 25, 2008 with username "hrc extranet" and password "1session").

²⁶³ Letter from the Minister of Home Affairs to the South African Legal Resources Centre, May 29, 2008.

²⁶⁴ On September 4, 2007, the Home Affairs Director-General made a statement conflating statistics from the Second Backlog Project (covering claims made before 1 August 2005) and statistics on new claims made on or after 1 August 2005. He said that "76,400 applications [are]... still being processed, with the assumption that the majority have not been submitted by genuine

Between August 1, 2005, and December 31, 2005, approximately 19,715 new asylum applications were lodged. Of these, 1,960 were dealt with at the initial (RSDO) stage, leaving 17,775 cases pending at year's end.²⁶⁵ Between January 1, 2006, and December 31, 2006, 53,361 new asylum applications were lodged with 5,432 initial decisions made during the same period.²⁶⁶ There were 45,673 new asylum applications in 2007. That year, 5,879 cases were processed at the initial stage.²⁶⁷ This means that between August 1, 2005, and December 31, 2007, 118,749 new asylum applications were lodged and 13,271 initial decisions taken, leaving a total of 105,478 asylum cases that were lodged on or after 1 August 2005 pending at the end of 2007.

The number of Zimbabweans claiming asylum

A total of 44,423 Zimbabweans claimed asylum in South Africa between 2005 and 2007 (In 2004, 2005, and 2006, 241 Zimbabweans were recognized to be refugees).²⁶⁸ Zimbabweans comprised one-third of all applications in 2006 and 2007.²⁶⁹

Interviews conducted by Human Rights Watch revealed that many Zimbabweans claim asylum as the only way to regularize their stay and work legally in South Africa.²⁷⁰ If the South African authorities were to adopt Human Rights Watch's proposal in Chapter IX of this report to introduce a "temporary immigration exemption status for Zimbabweans," many of these claims would no longer be made,

asylum seekers. At the same time the backlog in refugee processing has grown by 30 percent from 76 000 to 144 000 despite concerted efforts to reduce it." DHA, "Statement on the Home Affairs Director General's First 100 Days In Office."

²⁶⁵ According to figures from the DHA, 47,322 new asylum applications were made between April 1, 2005, and March 31, 2006 (or an average of 3,943 applications per month). DHA, "Annual Report 2006." Therefore, a rough figure for new applications between August 1, 2005, and December 31, 2005 (five months), is 19,715. During the same period (April 1, 2005, to March 31, 2006) the DHA records 4,713 initial decisions being taken (or an average of 392 per month). Therefore, a rough figure for initial decisions between August 1, 2005, and December 31, 2005 (five months), period is 1,960.

²⁶⁶ UNHCR, "Statistical Yearbook 2006, Statistical Annex," <http://www.unhcr.org/statistics/STATISTICS/478cda572.html> (accessed March 15, 2008). Overlapping statistics from the DHA for the period April 1, 2006, to March 31, 2007, record 44,212 new asylum claims. No statistics were given for the number of initial decisions. DHA, "Annual Report 2006-2007."

²⁶⁷ UNHCR, "South Africa gets 45,673 asylum seekers in 2007."

²⁶⁸ See above, page 33, footnote 38. The low recognition rates may in large part be due to the low number of applications processed each year by the asylum system. Between 1 April 2005 and 31 March 2006, 4,713 applications were "finalized." DHA, "Annual Report 2005-2006," p. 52. There are no statistics available for the year 1 April 2006-31 March 2007 as the DHA has discontinued its practice of reporting on the total number of applications "finalized." Instead it now records the total number of applications "received." DHA, "Annual Report 2006-2007," p. 51.

²⁶⁹ See above, page 31.

²⁷⁰ Human Rights Watch interviews, Cape Town, Johannesburg, and Pretoria, October and November 2007.

thus freeing up capacity within the asylum system. This would enable Zimbabweans targeted by *Operation Murambatsvina* to make their claims for asylum. The number of such claims might be high, but many such claimants might choose not to lodge asylum claims if the South African authorities provided them with a form of temporary status.

Effect of numbers on the asylum system

The pressure created by the numbers affects the entire asylum system. It affects procedural matters such as asylum seeker permits and access to the five offices. It also affects the speed and quality with which the small number of RROs and RSDOs process claims. Consequently, many Zimbabwean asylum seekers are currently at risk of *refoulement*.

The DHA’s “Turnaround Strategy” and Improving the Asylum System

In 2004 the DHA launched a “Turnaround Strategy” designed to improve service delivery in all of the DHA’s departments, including the National Immigration Branch’s five directorates. One of these is the Refugee Affairs Directorate.²⁷¹

In November 2005 the Pretoria High Court ordered the DHA to commission an independent review of the asylum system and to report back to the Court on its progress in implementing any recommendations made by the review. A draft report was issued in February 2007 and recommended far-reaching reforms in all areas including staffing, information technology capacity, infrastructure, and processes.²⁷² Most notably it recommended that the DHA recruit an additional 180 Refugee Status Determination Officers and 24 Refugee Reception Officers to ensure that the government complies with its national and international legal obligations.

In September 2007 the company leading the Turnaround Strategy reported that the DHA Minister had accepted the recommendations made and set out a broad plan for

²⁷¹ For a helpful overview of the aims of the Turnaround Strategy as it affects the asylum system, see NCRA, “Refugee Protection,” p. 7.

²⁷² CRMSA, “Protecting Refugees,” pp. 22-23. The report is referred to above: IQ Business Group, “Report on the Process Engineering Findings.” A final formal public report was never published and at the time of publication the DHA has not reported back to the court.

implementing them.²⁷³ The report noted that as of September 2007 extremely little progress had been made.²⁷⁴ According to the most recent public update by the DHA, minor improvements have been made to the asylum system.²⁷⁵ A number of RSDOs have been recruited, though they have yet to be trained,²⁷⁶ and 17 new senior staff appointments have been made.²⁷⁷ Unless the strategy makes significant and unexpectedly rapid progress in the second half of 2008, the asylum system will continue to expose Zimbabwean asylum seekers to a high risk of being subjected to *refoulement*.

Deportation Practice Leading to Generalized Risk of *Refoulement*

The law relating to detention and deportation of suspected “illegal foreigners”

Under South African law, immigration officials have the right to arrest, detain, and deport “illegal foreigners.”²⁷⁸ People are “illegal foreigners” if they are “in contravention” of the 2002 Immigration Act.²⁷⁹ Foreign nationals “contravene” the act if they do not have a valid permit to be in South Africa.²⁸⁰

A person who has expressed a wish to apply for asylum or who has already applied for asylum cannot be an “illegal foreigner.” The law guarantees all individuals expressing a wish to apply for asylum the right to be given time to gain access to one of the five Refugee Reception Offices.²⁸¹ The law also explicitly protects those who have already applied for asylum: “[N]o proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if... such person has applied for asylum... until a decision has been made on the application.”²⁸²

²⁷³ AT Kearney, “Transforming the Department of Home Affairs,” p. 9.

²⁷⁴ Ibid, pp. 11-14.

²⁷⁵ DHA, “Building the New Home Affairs: Transformation Progress Report, Briefing to the Portfolio Committee,” November 2007, <http://www.archive.pmg.org.za/briefings/briefings.php?id=384> (accessed March 7, 2008).

²⁷⁶ Human Rights Watch email exchanges with South Africa asylum practitioners, April 2008.

²⁷⁷ Letter from the Minister of Home Affairs to the South African Legal Resources Centre, May 29, 2008.

²⁷⁸ S. 32(2), 2002 Immigration Act.

²⁷⁹ S. 1(1)(viii), 2002 Immigration Act.

²⁸⁰ S. 9(4), 2002 Immigration Act.

²⁸¹ See above, p. 84.

²⁸² S. 21(4), 1998 Refugee Act.

Immigration officials and police officers are authorized to require anyone in South Africa to identify himself as a citizen, permanent resident, or non-national. If they have “reasonable grounds” to conclude that the person is not entitled to be in South Africa, they “may take [the] person into custody without a warrant and if necessary may detain him... until.... [his] status... is ascertained.”²⁸³

Because asylum seekers cannot lawfully be deported, they must be released immediately if the questioning establishes that they are asylum seekers.

If the immigration officials decide that the person is an “illegal foreigner” they must arrest the person and may detain her pending deportation.²⁸⁴ While awaiting deportation South African law provides that detainees have a number of rights, including the right to receive a written decision confirming the planned deportation, the right to appeal against the decision, the right to ask for a court to confirm the validity of the decision, and the right to be informed of these rights.²⁸⁵ If after 30 days the person is still in detention only a court can authorize a further period of detention, which cannot exceed 60 days (i.e. a maximum total of 90 days).²⁸⁶ There are clear minimum standards that regulate the living conditions of “illegal foreigners” detained pending deportation.²⁸⁷

Detention and deportation practice relating to suspected “illegal foreigners”

In 2005 Human Rights Watch reported on a number of violations of the law. These included unlawful detention of asylum seekers by police officers beyond the maximum 48-hour period, often caused by a failure of communication between police officers and immigration officials who failed to establish the asylum seekers’ status; unnecessary detention of asylum seekers at Lindela caused by police having no option but to take suspected “illegal foreigners” to Lindela in the absence of

²⁸³ S. 41 of the 2002 Immigration Act must be read with Regulation 32 of the 2005 Immigration Regulations which sets out the three ways in which an official can verify someone’s identity. “Taking a person into custody” and “arresting” a person has the same effect (deprivation of liberty) but is different as a matter of law. Police officers do not have powers of arrest of non-nationals unless they are suspected of having committed a criminal offense. S. 34(1) of the 2002 Immigration Act gives immigration officials the power of “arrest” only after they have established that someone is an “illegal foreigner” (someone in breach of any part of the 2002 Act).

²⁸⁴ S. 34(1), 2002 Immigration Act.

²⁸⁵ S. 8 and ss. 34(1)(a), (b) and (c), 2002 Immigration Act.

²⁸⁶ S. 34(1)(d), 2002 Immigration Act. See also, s. 29(1) 1998 Refugees Act.

²⁸⁷ S. 34(1)(e), 2002 Immigration Act and s.28(5)/Annex B to the 2005 Immigration Regulations.

cooperation from immigration officials;²⁸⁸ unlawful detention of asylum seekers beyond the 30 day limit; and instances, confirmed by UNHCR, of *refoulement* of asylum seekers and refugees from Lindela.²⁸⁹

In 2006 and 2007 the situation did not improve, with numerous legal-aid service providers reporting the following:

- refugees and asylum seekers being held in detention facilities for having expired permits which they had tried, unsuccessfully, to renew;
- despite being in possession of valid documents, asylum-seekers being unlawfully arrested and detained;
- asylum seekers with “appointment slips” (now replaced by “verbal appointments”) being detained because police and immigration officials did not recognize such slips as valid documents;
- detainees being asked to pay bribes in order to secure their release;
- detainees not being adequately informed of their basic procedural basic rights;²⁹⁰ and
- suspected “illegal foreigners” being unnecessarily transferred because of ineffective verification procedures due to the absence of a comprehensive electronic database recording the name and personal details of people who have claimed asylum in South Africa.²⁹¹

In addition to the regularly documented breach of minimum living standards at Lindela,²⁹² the UN Human Rights Council received a report from the UN in April 2008

²⁸⁸ For a detailed analysis of the lack of communication, cooperation and coordination between the police and immigration officers when dealing with transfers of suspected “illegal foreigners” from the police to immigration officials, see NCRA, “Refugee Protection,” pp. 21-23.

²⁸⁹ Human Rights Watch, *Living in the Margins*, p. 41.

²⁹⁰ CRMSA, “Protecting Refugees,” p. 32. On the specific experiences of lawyers working with Lawyers for Human Rights at Lindela, see L. Landau, “Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy,” *Journal of Refugee Studies*, vol. 19 no. 3, September 2006, pp. 308-327, <http://jrs.oxfordjournals.org/cgi/reprint/19/3/308> (accessed March 18, 2008). On bribes at Lindela, see Civil Society Written Submission, “The Undocumented Experiences of Refugees,” p. 20.

²⁹¹ Human Rights Watch interviews with asylum practitioners and advocates, Johannesburg, October 2007.

²⁹² For example, CRMSA, “Protecting Refugees,” p. 32; and Civil Society Written Submission, “The Undocumented Experiences of Refugees,” pp. 24-25. Human Rights Watch interviews in October 2007 with a leading public litigation organization in Johannesburg established that living conditions continue to be sub-standard. Under South African law, the South African

setting out numerous consistent allegations of ongoing rights violations taking place at Lindela, including *refoulement*. These include “allegations of ill-treatment, including extortion of documented and undocumented non-citizens by law enforcement officials.”²⁹³ The UN report noted that in 2006 the UN Working Group on Arbitrary Detention concluded that:

Many foreigners were deprived of their liberty: some with legal residence papers, some seeking asylum and claiming they had been arbitrarily arrested by police officers, ill-treated, not able to contest the validity of their detention and that they could subsequently be expelled from the country with no form of review or recourse... It was also concerned with the numerous cases of police arresting legally established foreigners, throwing out their residence papers and putting them in custody or even handing them to immigration authorities for forced deportation.²⁹⁴

The UN Working Group’s reference to police officers “throwing out” residence papers is echoed in a 2006 survey which reported that of 59 interviewees, 65 percent said that having showed their asylum seeker permits to police who had stopped them, they were told to pay a bribe to ensure that their papers would not be torn up.²⁹⁵

Most serious of all are reports that in 2007 many Zimbabweans in the immediate border areas were being taken to a detention facility in Musina, on the South Africa-Zimbabwe border. The facility is located on a military base previously used by the South African National Defense Forces (SANDF), and is being run by the South African Police Services (SAPS).²⁹⁶ Most Zimbabweans were deported within hours or days by the police without immigration officials verifying their legal status and

authorities are bound to comply with basic minimum standards of detention for immigration-related detainees. Annex B to Immigration Regulations 2005.

²⁹³ Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1, A/HRC/WG.6/1/ZAF/2, 11 April 2008, http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/A_HRC_WG6_1_ZAF_2_E.pdf (accessed April 12, 2008), para 20.

²⁹⁴ *Ibid*, para 21.

²⁹⁵ Civil Society Written Submission, “The Documented Experiences of Refugees,” p. 20.

²⁹⁶ Forced Migration Studies Program, “Facts or Fiction?” p. 6. A new detention facility is being built on the same base and is due to be completed by the end of 2008. Human rights Watch confidential interview with South African NGO, April 2008.

without being informed of their rights to appeal the decision to deport them,²⁹⁷ a clear breach of the Immigration and Refugee Acts.²⁹⁸ These practices have reportedly continued in 2008.²⁹⁹ Numerous civil society organizations have been refused access to the detention facility.³⁰⁰ UNHCR has also repeatedly been refused access.³⁰¹

The lawyers reporting on these violations hear about them through their regular contact with detained clients. When they are able to identify individuals who wish to claim asylum and, therefore, have been unlawfully arrested and detained, they have usually been able to secure their release relatively easily. However, given the small number of legal service providers, the large number of detainees, and the insufficient access to detention facilities to monitor detention and deportation practice, there is serious concern that the vast majority of people who are unlawfully detained are not detected and, therefore, end up being unlawfully deported.³⁰² In the case of refugees and asylum seekers, such deportation constitutes *refoulement*.

Likely Number of Zimbabwean Deportees in 2007

The number of Zimbabweans deported from South Africa in 2006 and 2007 is high. There are no official statistics available and even official statistics do not reflect the

²⁹⁷ CRMSA, "Protecting Refugees," p. 32. According to Legal Advice NGOs interviewed in Johannesburg by Human Rights Watch, this detention center is treated as "an extension" of the nearby Musina police station. However, the center has not been officially designated as a center where "illegal foreigners" may be detained pending deportation.

²⁹⁸ Only immigration officials have the power to deport a suspected people found to be "illegal foreigners." S. 34(1), 2002 Immigration Act. If the police believe someone is an illegal foreigner, they must transfer that person to immigration officials within 48 hours or release them. S. 34(2), 2002 Immigration Act. S. 36(1) of the 2002 Immigration Act, the DHA (and thereby the Immigration Directorate) is given powers to control the entry and exit of people through South Africa's borders. The DHA can ask for the assistance of other departments and government bodies, including the South African Police Service (SAPS) and the South African National Defense Force (SANDF), but such assistance does not extend to taking substantive decisions on a person's legal status, only to carrying out functional tasks such as transporting deportees. Immigration officials can verify a person's status anywhere. It does not have to be done in a detention centre. The Immigration Inspectorate has recognized this and has issued a directive to immigration officers requiring that verification of identity be conducted before a person is detained. NCRA, "Refugee Protection," p. 23.

²⁹⁹ Human Rights Watch confidential email exchange with South African asylum specialist, March 18, 2007.

³⁰⁰ CoRMSA, "Newsletter No. 9," April 8, 2008, <http://www.cormsa.org.za/news.php> (accessed May 31, 2008), p.6. See also, Joint Submission to SANAC Plenary, "Vulnerable groups: refugees, asylum seekers, and undocumented persons," pp. 9-11.

³⁰¹ Ibid.

³⁰² CRMSA, "Protecting Refugees," pp. 32-33. The report notes that in 2007 non-nationals are increasingly being held at a number of prisons that are not designated by the director general of the National Immigration Branch as centers to hold people being detained for immigration offenses. In addition to the detention center in Musina, the report cites the prisons at Pollsmoor (Western Cape) and Westville (KwaZulu-Natal).

true picture, given the amount of rapid informal deportation that takes place between South Africa (Musina) and Zimbabwe (Beitbridge).³⁰³

Human Rights Watch has informally obtained DHA statistics for the calendar year 2006 which state that of the 165,270 deportations officially carried out by the South African authorities, a little less than half, 81,289, were of Zimbabweans.

Other statistics indicate that in 2007 this number doubled. Between June 1, 2006, and May 31, 2007, the International Organization for Migration (IOM) office in Beitbridge, Zimbabwe, registered 163,240 Zimbabwean deportees.³⁰⁴ Between 1 January and 30 June 2007, the IOM registered 102,413 deportees.³⁰⁵ The South African Police's Communications Officer in Musina told the Red Cross that between March and July 2007 the number of deportees had tripled (from 6,500 a month in the months before March 2007) to 18,000 a month.³⁰⁶ Over 12 months this would lead to a total of 216,000 deportations. The 18,000 figure matches almost exactly the figures made public by the IOM Beitbridge office in Zimbabwe across the border from Musina, which stated in July 2007 that it had been receiving 17,000 deportees a month.³⁰⁷

In October-November 2007 many Zimbabweans told Human Rights Watch that they had been deported more than once in the past year. Such deportees are counted at least twice in the statistics.³⁰⁸

³⁰³ CRMSA, "Protecting Refugees," p. 32.

³⁰⁴ IOM, "Annex 3.08 to IOM Statistics on Deportees, September 2006-May 2007." On file with Human Rights Watch.

³⁰⁵ Centre for Development and Enterprise, "Migration from Zimbabwe: Numbers, Needs and Policy Options," April 2008, http://www.cde.org.za/article.php?a_id=280 (accessed April 8, 2008), p. 5.

³⁰⁶ South African Red Cross, "Rapid Assessment."

³⁰⁷ Andre Meldrum, "Refugees Flood from Zimbabwe," *The Guardian*, July 1, 2007, <http://www.guardian.co.uk/zimbabwe/article/0,,2115989,00.html> (accessed March 8, 2008).

³⁰⁸ Zimbabweans returning to South Africa immediately after they have been deported is not a new phenomenon. Southern African Migration Policy (SAMP), "Making Up the Numbers: Measuring 'Illegal Immigration' to South Africa," Migration Policy Brief No. 3 (SAMP 2001), p. 12. For this and other SAMP publications, <http://www.queensu.ca/samp/sampresources/samppublications/> (accessed March 10, 2008).

IX. Adopting a Broad-Based Approach to Zimbabweans in South Africa: Allowing Entry, Regularizing Status, Ending Deportations and Granting the Right to Work

Overview of Need and Reasons for Broad-Based Approach

The estimated one million Zimbabweans in South Africa cannot be described as voluntary economic migrants. As the testimonies presented in this report document, Zimbabweans are coming to South Africa out of desperation and as a last option to cope with the crisis in their country. Their movement can and should be described as involuntary. Official recognition by governments and international actors of the involuntary nature of Zimbabwean's displacement into South Africa (and other neighbors) is a necessary step to determine the most effective response to their presence in South Africa.³⁰⁹

Presently Zimbabweans have limited opportunity to lawfully enter and stay in South Africa. Some manage to obtain visitors' permits, a small number obtain one of four types of work-related permits and some claim asylum. However, the vast majority, in the hundreds of thousands, continue to enter South Africa irregularly and have no legal status.

The South African authorities should adopt a broad-based approach to Zimbabweans' presence in South Africa. This should allow Zimbabweans to enter South Africa, temporarily regularize the status of all Zimbabweans present in South Africa for a reviewable period of time, provide for an end to deportations of Zimbabweans, and provide all Zimbabweans in South Africa with the right to work during that period.

There are at least eight reasons for such an approach.

³⁰⁹ UNHCR's Executive Committee has noted that "the underlying causes of large-scale involuntary population displacements are complex and interrelated and encompass gross violations of human rights, including in armed conflict, *poverty and economic disruption*, political conflicts, ethnic and inter-communal tensions and environmental degradation" (emphasis added). UNHCR Executive Committee, "Conclusion on Comprehensive and Regional Approaches within a Protection Framework," No. 80 (XLVII), (1996), <http://www.unhcr.org/excom/EXCOM/3ae68c6e24.html> (accessed April 21, 2008).

First, *regularization would respect South Africa's legal obligations.* Many Zimbabwean asylum seekers in South Africa do not get the protection to which they are entitled under South African and international refugee law. There is no short term prospect of substantial improvements in the asylum and deportation systems. Consequently, Zimbabwean asylum seekers will continue to face the risk of being subjected to *refoulement*. These include those seeking asylum as a result of the government's campaign of political violence and repression against opposition supporters following the March 2008 elections and people targeted by *Operation Murambatsvina*, if they claim asylum in the future. Because the current asylum and deportation systems currently fail to adequately identify and protect many Zimbabwean asylum seekers, the only way to end their unlawful deportation and to ensure South Africa respects its obligations under international law is to end deportation of all Zimbabweans.

Second, *regularization would unburden the asylum system of unnecessary claims.* South Africa's dysfunctional asylum system is overburdened by tens of thousands of claims made by Zimbabweans who are desperate to work. Although many, including those targeted by the 2005 evictions, may have valid asylum claims, others may use the asylum system as the only way to regularize their legal status and to have the right to work in South Africa. Regularizing Zimbabweans' status and giving them the right to work would help reduce the number of unnecessary claims in the asylum system and would thereby help the government to guarantee protection for those with valid claims.

Third, *regularization would protect Zimbabweans during entry and stay in South Africa, including against xenophobic violence at the hands of South African citizens.* In 2007 there were increasing reports of Zimbabweans falling victims to serious criminal offences during informal border crossings at the hands of violent Zimbabwean people smugglers known as *maguma guma*, including many instances of rape.³¹⁰ Once inside South Africa, Zimbabweans' undocumented status exposes

³¹⁰ In late 2006 the IOM reported that 8 percent of deported Zimbabweans interviewed in November told IOM that they had suffered some kind of sexual assault either during the border crossing from Zimbabwe to South Africa or during deportation. The report does not break down this percent into non-sexual physical assaults and sexual assaults. Unknown individuals are reported to have committed 57 percent of non-sexual assaults during the crossing from Zimbabwe into South Africa while the South African police or military are reported as having committed the remainder. The IOM report does not report sexual assaults having been committed by the South African police or military. As a result all sexual assaults are presumed to have been

them to violence at the hands of South African citizens who almost certainly believe that their vulnerable victims won't report them to the police. As noted above, the wave of violence against Zimbabwean and other foreign nationals that swept South Africa in May 2008 and which left at least 62 people dead, 670 injured, and over 100,000 displaced,³¹¹ follows in the wake of many isolated incidents of similar violence that have taken place throughout 2007 and early 2008.³¹² Zimbabwean's undocumented status also exposes them to exploitation by employers and to harassment by the South African police.³¹³ In summary, helping Zimbabweans enter through formal border crossings would attenuate predatory practices at the border. Ensuring that Zimbabweans were documented and could work would significantly reduce their vulnerability to xenophobic violence at the hands of criminals, to exploitation by employers, and to corrupt police practices.

Fourth, *regularization would offset the cost to the South African taxpayer of ineffective deportation and wasteful use of police resources.* The South African authorities have openly recognized that deporting Zimbabweans “doesn't work,”³¹⁴ and that the presence of Zimbabweans in South Africa is “something [South Africans] have to live with.”³¹⁵ The vast majority of undocumented Zimbabweans are not identified or deported and those who are—up to 200,000 a year or more—return to South Africa within days or weeks.³¹⁶ In the absence of building “a Great Wall of

committed by criminals during the border crossing. IOM “Beitbridge Second Migration Survey,” p. 10. In mid-2007 IOM Beitbridge told South African researchers that they were recording a high number of incidents of rape of Zimbabwean women on the border, some of whom had filed rape charges at the IOM office. FMSP, “Facts or Fiction?” pp. 7-9.

³¹¹ On May 30, 2008, the South African police confirmed 62 people had died and 670 had been injured in the violence. Reuters Foundation, “S. Africa violence toll rises to 62,” May 31, 2008, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/RMOI-7F6KB4?OpenDocument&rc=1&cc=zaf> (accessed Jun 1, 2008). UNHCR have confirmed that an estimated 100,000 people were displaced. UNHCR, “South Africa: UNHCR aid provided to displaced,” Briefing Notes, May 30, 2008, <http://www.unhcr.org/news/NEWS/483fef5b2.html> (accessed May 31, 2008).

³¹² For overviews of reports of violence against Zimbabweans by South African citizens that took place before May 2008, see CRMSA, “Protecting Refugees,” pp. 50-51; and FIDH, “Surplus People?” pp. 34-35. In April 2008 CoRMSA reported on a number of serious incidents involving killings of foreign nationals and burning of their property, summarizing the situation as follows: “In the first three months of the year, community attacks characterized by mob violence have taken place on foreign nationals in Gauteng, North West, Free State, the Eastern Cape and the Western Cape resulting in the loss of many lives and destruction of many people's property.” CoRMSA, “Newsletter No. 9,” p.1.

³¹³ For examples of arbitrary arrest, intimidation and requests for bribes by South African police, see Civil Society Written Submission, “The Undocumented Experiences of Refugees,” pp. 20-24.

³¹⁴ The South African Minister of Home Affairs has recognized that deporting Zimbabweans does not work and is a waste of resources: “Mapisa-Nqakula says it is a waste of money to keep deporting people as the majority of them return within a few days.” *SABC News*, “SA seeks solution to deal with Zim citizen influx,” August 28, 2007, www.sabcnews.com/africa/southern_africa/0,2172,154857,00.html (accessed March 15, 2008).

³¹⁵ “Mbeki: Zimbabweans here to stay.”

³¹⁶ IOM in Beitbridge, Zimbabwe, reports that 48 percent of Zimbabweans interviewed post deportation in November 2006 told IOM that they intended to return without documents to South Africa within three months. IOM, “Beitbridge Migration Survey,

China between South Africa and Zimbabwe to stop people walking across,”³¹⁷ South Africa will continue to fruitlessly spend huge sums of money and large amounts of police resources on deporting Zimbabweans.

Fifth, regularization would provide data on hundreds of thousands of undocumented Zimbabweans. Because the vast majority of Zimbabweans enter the country without a visa, the South African authorities have no data on them, including data on identity and places of residence and work. Facilitating documented entry would be in the government’s interest: it would know how many people were in the country, who they are, and where they live and work. In the event of problems that may arise or upon expiration of their temporary status, the government would be able to identify people it registers under the proposed scheme.

Sixth, regularization would plug the gaps in the skilled labor market and ensure a level playing field for South African workers in the unskilled labor market.

Regularizing their entry and stay in South Africa would help the authorities more easily identify Zimbabweans who can plug the well-documented gaps in both the skilled and unskilled South African labor market. The skilled labor market includes shortages of teachers and nurses.³¹⁸ The unskilled sector has a constant need for farm laborers and construction-site workers. Zimbabweans, many of whom work for less than the minimum wage in these two sectors, are often accused in the media of taking away jobs from South African workers. Some are undocumented and fall victim to farmers wanting to hire cheap labor with which South African nationals cannot compete.³¹⁹ Regularizing their stay would help the authorities to enforce employers’ minimum-wage obligations and create a level playing field on which South African nationals would not be disadvantaged when competing for jobs.

results from the second survey of deportees receiving humanitarian assistance in Beitbridge, Zimbabwe, 8-28 November 2006.” On file with Human Rights Watch. The South African Red Cross, reporting in August 2007, says that the IOM told it that this now stood at 70 percent. South African Red Cross, “Rapid Assessment in Musina and Johannesburg,” p. 4.

³¹⁷ “Mbeki: Zimbabweans here to stay.”

³¹⁸ The types of skilled professions for which there are shortages in South Africa are listed on the DHA’s quota work permit’s schedule: http://www.home-affairs.gov.za/documents/Schedule_list.pdf (accessed March 17, 2008).

³¹⁹ On undocumented Zimbabweans working on farms and the general problem of farm workers being paid less than the minimum wage, see Human Rights Watch, *Keep Your Head Down*, pp. 55-59 and 79-86, and *Unprotected Migrants*, pp. 38-41.

Seventh, *regularization leading to the right to work would address Zimbabweans' humanitarian needs in South Africa that would reduce the pressure on South African social assistance programs.* Because of their undocumented status, Zimbabweans in South Africa are often unable to find or keep jobs, increasing their own humanitarian needs. Granting Zimbabweans the right to work in South Africa would help them fend for themselves, which would in turn reduce the number of desperate Zimbabweans seeking help from South Africa's social assistance programs.

Finally, *regularization leading to the right to work would help Zimbabweans support desperate families remaining in Zimbabwe, thereby possibly reducing the number of Zimbabweans fleeing their country for South Africa.* Human Rights Watch's research shows that most Zimbabweans are not coming to South Africa because they want to immigrate permanently but because it is the only way for them to help themselves and their families survive in Zimbabwe. The right to work would enable Zimbabweans to send desperately needed basic foodstuffs to their families in Zimbabwe. This, in turn, would possibly reduce the number of Zimbabweans, especially the most vulnerable—children, the elderly, PLWHA—coming to South Africa.

Current Options Available to Zimbabweans for Regularizing their Status in South Africa

Aside from claiming asylum which leads to an asylum seeker's permit, Zimbabweans' only other option to lawfully enter and remain in South Africa is to obtain a temporary residence permit.

Sections 11-24 of the 2002 Immigration Act set out the different types of temporary residence permits.³²⁰ The permits most likely to be held by unskilled or semi-skilled Zimbabweans are: visitors permit (s. 11) or permits granted to them under the corporate permit system (s. 21). Zimbabweans with specific skills who are able to fulfil the formal requirements can apply for quota work permits or general work permits (s. 19). The relatively limited number of Zimbabweans regularly trading in the border areas can apply for cross-border permits (s.24).

³²⁰ Section 10 of the 2002 Immigration Act states that "a foreigner may enter and sojourn" in South Africa "only if in possession of a temporary residence" and that sections 11-24 set out the types of "temporary residences" available.

According to the 2002 Immigration Act and its regulations, foreign nationals must present a passport in order to obtain any of these permits. Many Zimbabweans do not have a passport. Since December 2006 the number without a passport has increased because the Zimbabwean authorities ran out of funds for importing the specific paper required to produce them.³²¹ In 2007 the Zimbabwean authorities began to issue emergency travel documents (ETDs) in place of passports. There has been no official decision by the DHA to recognize an ETD as a valid alternative to a Zimbabwean passport. However, anecdotal information obtained by Human Rights Watch suggests that in some cases immigration authorities do accept ETDs.³²² In practice few Zimbabweans can enter under the temporary residence permit system.³²³ Most enter South Africa through informal border crossings or bribe immigration officials at the border; they enter without a permit and remain undocumented in South Africa.

Adopting a Broad-Based Approach

The South African government has a stark choice. It can either continue to try to ignore the reality of hundreds of thousands of undocumented Zimbabweans on its territory, allowing many to be mistreated by police, abused and exploited by employers, and hundreds of thousands to be removed haphazardly, arbitrarily, expensively and ineffectively, or it can choose to regularize their stay.

Given the large number of Zimbabweans believed to be in South Africa, the similar needs faced by all of them, and the operational challenges involved in any response,

³²¹ *IRIN News*, "Zimbabwe: No legal way out," December 7, 2006, www.irinnews.org/report.aspx?reportid=62376 (accessed March 22, 2008).

³²² Human Rights Watch, email exchange with South African refugee law practitioners, April 2008.

³²³ Most Zimbabweans coming to South Africa are skilled or semi-skilled. With a passport they can enter under the corporate permit system (s. 24, 2002 Immigration Act, Regulation 18, 2005 Immigration Regulations), to work on farms, or they enter on a three-month visitor's permit, which does not allow them to work. A visitor's permit involves a deposit of 2,060 South African Rand (SAR), approximately US\$250, which is prohibitively high for most. The small number of highly skilled Zimbabweans coming to South Africa can apply for a general work permit, in which case they must produce a signed contract of employment and a letter from the prospective South African employer explaining why a South African citizen could not fill the position. Regulation 16(4), 2005 Immigration Regulations. Alternatively they can apply for a quota work permit which is only available to people who fall within specific skilled professions identified by the DHA, such as economists, engineers, agricultural science technicians, and a limited number of teachers (1000). See the DHA's quota work permit schedule, referred to above. Finally, Zimbabweans who live, work, and trade in the immediate border areas can obtain cross-border permits. Regulation 21, 2005 Immigration Regulations.

Human Rights Watch believes that the government should adopt the simplest, fairest, and most expedient possible approach.³²⁴

There are three available options based on South African law if the government wants to adopt such an approach.

The first option would be for the government to use the 1998 Refugees Act to make an official one-off declaration that all Zimbabweans coming to South Africa are refugees. The 1998 Refugees Act adopted verbatim the refugee definition from the 1969 OAU Convention, which includes “every person who, owing to... *events seriously disturbing public order* in either part or the whole of his country of origin...is compelled to leave” (emphasis added).³²⁵ The Act also authorizes the minister of home affairs to declare that a given “group of persons” qualifies for refugee status.³²⁶ The government could, therefore, find that political and economic conditions in Zimbabwe constitute “an event seriously disturbing public order,” and declare Zimbabweans as a group to be refugees.³²⁷

Although a blanket refugee declaration would be straight forward, within existing South African law, and easily verifiable, the government would likely find the political ramifications of such a declaration daunting.³²⁸ It should be noted, however, that a senior South African official has publicly referred to Zimbabweans in South Africa as “refugees.”³²⁹ It should further be noted with respect to the possible political implications of such a declaration that the OAU Convention states, “The

³²⁴ For a comprehensive overview of the options available to the government, discussed at a meeting between the DHA, UN agencies, and South African civil society groups from the NGO and academic world, see FMSP, “Responding to Zimbabwean Migration in South Africa – Evaluating Options,” November 28, 2007, <http://migration.org.za/wp-content/uploads/2008/03/zimresponses07-11-27.pdf> (accessed March 18, 2008). Some of these options only cover specific groups such as facilitating the recruitment of the highly skilled.

³²⁵ S. 3(b), 1998 Refugees Act.

³²⁶ S. 35, 1998 Refugee Act.

³²⁷ No African government or court has ever explicitly used the “events seriously disturbing public order” phrase to declare a group of persons to be refugees. Micah Bond Rankin, “Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on,” UNHCR Working Paper No. 113, April 2005, <http://www.unhcr.org/research/RESEARCH/425f71a42.pdf> (accessed March 22, 2008).

³²⁸ Human Rights Watch, confidential interview with government official, Cape Town, October 2007.

³²⁹ *News 24*, “SA admits Zim refugee crisis,” August 2, 2007, http://www.news24.com/News24/Africa/Zimbabwe/0,,2-11-1662_2158024,00.html (accessed March 21, 2008). It reports that the deputy minister of foreign affairs said, “Clearly, we must do more to see what we can do to deal with this large influx of refugees.”

grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member state.”³³⁰

A second option would be for the government to use its membership of SADC (Southern African Development Community) to facilitate Zimbabweans’ entry into South Africa. SADC’s Protocol on the Facilitation of Movement of Persons aims, among other things, to establish harmonized entry requirements including a visa-free right of entry for 90 days per year.³³¹ South Africa has already taken steps toward this, allowing nationals from eight SADC countries to enter South Africa on 30-day free visas.³³² It has extended the full 90-day free visa option to Botswana nationals.³³³ South Africa could make a similar arrangement with Zimbabwe, whether for 30, 60, or 90 days. However, such visa-free entry would not give Zimbabweans the right to work, which is the most important part of any solution to be adopted.

Although the SADC protocol does aim to establish a harmonized approach that enables all SADC nationals to work in any SADC country,³³⁴ as SADC’s richest country South Africa is reluctant to take steps without other key countries such as Botswana, SADC’s second richest country, doing the same. Adopting this part of the protocol would, therefore, require prolonged SADC-wide negotiations. Although the process could be accelerated, it is not a short-term option with regard to Zimbabweans in South Africa.

The third option would be for the government to use discretionary powers under immigration law to grant Zimbabweans in South Africa a temporary immigration status, for a limited period of time, and under specific terms and conditions.

³³⁰ OAU Refugee Convention, Art. II.2.

³³¹ SADC has 13 members, nine of which (Botswana, the Democratic Republic of Congo, Lesotho, Namibia, Mozambique, South Africa, Swaziland, Tanzania and Zimbabwe) have signed the protocol. http://www.sadc.int/english/documents/legal/protocols/facilitation_of_movement.php (accessed March 21, 2008). The protocol will only enter into force 30 days after two thirds of SADC member states have ratified the protocol in accordance with their national constitutional procedures and have lodged their ratification documents with the SADC secretariat. At the time of writing, only Botswana, Mozambique, and Swaziland have done so.

³³² Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, and Zambia. In addition, Zimbabwean officials have visa-free entry into South Africa.

³³³ DHA Media Release, “South Africa and Mozambique sign a Visa Waiver Agreement,” April 15, 2005, http://home-affairs.pwv.gov.za/media_releases.asp?id=229 (accessed April 9, 2008).

³³⁴ Art. 3(c) of the SADC Protocol.

Although Human Rights Watch prefers the first option, because the political and economic crisis in Zimbabwe can indeed be accurately described as “events seriously affecting public order” that are producing refugees, the political obstacles for that option and the limitations (in terms of work authorization and timeliness) of the second option, lead us to urge the South African government to adopt the third option as the most pragmatic and expedient way to provide broad-based protection temporarily for Zimbabweans in South Africa.

Exercising Discretion to Adopt a Broad-Based Approach: a New “Temporary Immigration Exemption Status for Zimbabweans”

Basis in law and overview of a new temporary permit scheme for Zimbabweans

Under section 31(2)(b) of the 2002 Immigration Act, the minister of home affairs has discretionary power to exempt certain people from standard immigration procedures and “may under terms and conditions determined by him or her... grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision.”³³⁵

Under this provision, the minister could establish a new temporary permit scheme called “temporary immigration exemption status (TIES) for Zimbabweans.”³³⁶

The new TIES permit would identify “all Zimbabweans currently in South Africa or in Zimbabwe” as a “category of foreigners.” The “special circumstances” justifying the decision to use the exemption would be both the current post-election political crisis and economic situation in Zimbabwe and the need to temporarily regularize the undocumented status of the large numbers of Zimbabweans already present in South Africa. All Zimbabweans, whether already asylum seekers or in South Africa under a visitor’s or work permit, would have the right to apply for the new temporary permit.

³³⁵ S. 31(2)(b), 2002 Immigration Act.

³³⁶ The term is a proposal from Human Rights Watch and is not language contained in South African immigration legislation.

TIES would obviate the need for most Zimbabweans to apply for asylum. Based on Human Rights Watch interviews with Zimbabweans in South Africa, eligibility for temporary status that grants the right to work is likely to meet many of the needs of most Zimbabweans. The authorities could exercise their discretion to prevent a person from concurrently holding both TIES and the status of asylum seeker. Nonetheless, this would be on the understanding that a failed asylum applicant would still be eligible for TIES or that a TIES permit holder would be permitted to seek asylum upon the expiration of TIES if she had an individualized fear of persecution. The minister would set out procedures for facilitated (visa-free) entry into South Africa as well as for procedures to register Zimbabweans already in South Africa for TIES.

Section 31(2)(b) states that in granting an exemption the minister grants the “rights of permanent residence.” These are extensive³³⁷ and include the economic and social rights to housing assistance and to non-health-related social services such as food and social security.³³⁸ The minister could choose to exclude these latter rights on the grounds that it would be impossible for the South African government to extend these rights to up to one million people. She could, therefore, limit the rights granted under the new status to the right to work and to the rights that everyone present in South Africa has under South Africa’s Bill of Rights regardless of their legal status.³³⁹ The minister could justify not granting full permanent residence rights under the words “may under terms and conditions determined by her” in section 31(2)(b). In contrast, under South African law individuals recognized as refugees and granted asylum would enjoy the full range of rights in the Bill of Rights and would be entitled to apply for permanent residency status after five years.

Finally, the minister would make clear that as long as she has “good cause” provided under section 32(1)(b),³⁴⁰ she may at any time revoke the exemption that she has granted under section 31(2)(b). When TIES is withdrawn, the minister would

³³⁷ A “permanent resident” has all the rights of a South African citizen, as broadly set out in South Africa’s Bill of Rights, except for the right to vote in South African elections and the right to make use of a South African passport.

³³⁸ Ss. 26 and 27 set out the rights to housing and to health care, food, water, and social security.

³³⁹ These are the rights in sections 9-25, 27(3) and 28-35 of South Africa’s Bill of Rights.

³⁴⁰ S. 32(1)(b)(ii) provides that the minister “may... for good cause, withdraw such rights.”

have to justify her decision in writing with reference to the country conditions in Zimbabwe.

Details of a possible temporary immigration exemption status for Zimbabweans

Entry into South Africa and considerations for Zimbabweans already in South Africa

On arrival at the border,³⁴¹ Zimbabweans would have to prove their nationality by producing an identity document of some kind, whether an emergency travel document (issued in place of passports since December 2006) or some other kind of formal identity papers. They could be issued with a special temporary transit permit and would be told where to register in-country as a Zimbabwean in South Africa.

Zimbabweans already in South Africa would go directly to the registration centers. Zimbabweans in South Africa without identity papers proving their Zimbabwean nationality would have the option of proving their nationality in some other way, for example by answering a range of variable questions on Zimbabwe.³⁴²

Registration

Under the new TIES scheme, the DHA would set up special registration procedures in its offices in the country's main urban centers. Ideally these would involve computerized recording of each TIES applicant's registration. Upon registration each applicant would receive a TIES permit, preferably laminated to protect it from wear and tear, which would clearly state that the permit holder benefits from the "temporary immigration exemption status for Zimbabweans."³⁴³ The permit would make clear that the TIES permit holder is legally present in South Africa, cannot be deported, and has the right to work.

³⁴¹ According to official statistics recording entry at border posts, the vast majority of Zimbabweans cross into South Africa overland. Statistics South Africa, "Tourism and Migration." In December 2007 87 percent of Zimbabweans entering South Africa did so by road. Because it is impossible to enter informally through an airport, those entering South Africa through informal border crossings enter overland.

³⁴² Current asylum procedures (Form BI 1590) require applicants to answer a series of questions on the country of which they claim to be a citizen, including capital city, major cities, currency, languages spoken, religion, political parties and leaders, neighboring countries, description of the national flag and national anthem.

³⁴³ As noted in Chapter VII, many of the problems currently faced by asylum seekers in South Africa flow from the fact that there is no computer record of their application which could otherwise be easily accessed, for example in case of mistaken arrest, and from the fact that documentation proving asylum seeker status consists of a flimsy piece of paper which easily gets lost or destroyed.

Ending deportations of Zimbabweans

Given the current risk of *refoulement* that exists for Zimbabwean asylum seekers in South Africa, ending deportations of Zimbabweans is one of the most important priorities for the South African government. In setting up the TIES scheme, the authorities should announce an end to deportations of all TIES-registered Zimbabweans in South Africa. Zimbabweans who become “prohibited persons” or “undesirable persons” could be deported,³⁴⁴ unless the person is an asylum seeker or refugee, in which case the risk of persecution or a real risk of being returned to torture or cruel, inhuman, or degrading treatment must be taken into account as a barrier to deportation.³⁴⁵

The right to work

The centerpiece of TIES would be the right to work. The TIES permit would clearly indicate that the bearer is authorized to work. This would address Zimbabweans’ most urgent need to make enough money to support themselves and their families in Zimbabwe.

The South African authorities would almost certainly face criticism from various sides for granting the right to work on the grounds that this would take away jobs from South Africa’s 47.9 million residents³⁴⁶ who are already facing an unemployment rate of 23 percent.³⁴⁷

A government information campaign could inform South Africans that hundreds of thousands of Zimbabweans are already working without work permits in South Africa, and that officially granting them the right to work would help to regulate their access to the job market and help control wages, guaranteeing equal access to the job

³⁴⁴ Ss. 29 and 30, 2002 Immigration Act.

³⁴⁵ Art. 1(F) of the 1951 Refugee Convention makes clear that the only people who are not protected by the Convention are people who are known to have committed serious crimes such as war crimes or crimes against humanity. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, however, categorically prohibits the return of anyone to a place where torture is likely. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, http://www.unhchr.ch/html/menu3/b/h_cat39.htm (accessed 7 May, 2008).

³⁴⁶ Statistics South Africa, “Main Key Indicators,” <http://www.statssa.gov.za/keyindicators/keyindicators.asp> (accessed March 17, 2008).

³⁴⁷ The most recent comprehensive government survey concludes that unemployment fell to 23 percent in the third quarter of 2007. Statistics South Africa, “Labour Force Survey,” September 2007, <http://www.statssa.gov.za/publications/Po210/Po210September2007.pdf> (accessed May 31, 2008).

market for South Africans. It could also make clear that South Africa could use skilled Zimbabweans to fill its well-documented skills shortages, and that unskilled Zimbabweans working in the informal sector (domestic work, cleaning, street trading, small businesses such as internet cafes etc.) are not a threat to South African jobs, given that these jobs are overwhelmingly new jobs in an ever-expandable market.

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