



Fédération internationale des ligues des droits de l'Homme

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الفدرالية الدولية لحقوق الانسان

Surplus People?

Undocumented and other vulnerable migrants in South Africa

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Executive Summary

As growing domestic and international concerns have been expressed regarding the human rights situation of undocumented and other vulnerable migrants in South Africa, FIDH conducted an international fact-finding mission from 26 February to 5 March 2007 to examine the legal and policy framework applying to their entry and stay as well as their actual working and living conditions.

The working definition of undocumented migrants chosen by the mission is a very broad one: it includes any person living and working in South Africa who does not have a proper legal status. Hence, this report emphasizes the situation of undocumented migrants that range from waged-workers, circular and seasonal workers, migrants who are self-employed, refugees, asylum seekers and the children of those migrants.

The report reveals that even though both international (UN Convention on the rights of all migrant workers and members of their families) and South African law (2002 Immigration Act and 1998 Refugees Act) provide for a wide protection of the human rights of migrants, undocumented migrants - who represent around 500 000 persons - are amongst the most exposed to human rights violations and have the least legal protection and support to defend their rights. Most of them come from SADC countries. The highest numbers come from Mozambique, Zimbabwe and Lesotho, with an increase of Zimbabweans in recent years due to the political situation in this country.

The report highlights the widespread and continuous problems faced by asylum-seekers and refugees throughout the asylum application process. On entry in South Africa, would-be asylum-seekers may inform immigration officers of their intention of applying for asylum. They should then be granted a temporary permit, under which they have to report within two weeks to a refugee reception office in order to apply. However, many would-be asylum-seekers are not aware of this possibility, are afraid that immigration or police officers at the border may harass them, turn them away, immediately arrest and deport them, illegally detain them or extort money from them. More generally, migrants face with many obstacles through the lengthy and costly immigration process which prevent them from conforming with some provisions of the immigration acts. A significant number therefore enter South Africa illegally. FIDH came to the conclusion that this

situation exposes them to the risks of being exploited by smugglers and fellow migrants, of suffering physical hardships or being arrested by the police.

Indeed, our interviews have pointed out the fact that migrants, even documented ones, live in permanent insecurity. Police control and harassment is a common experience among foreign migrants. ID control are frequent and may come with police officers asking for bribes or sexual favours, extorting money or goods, inflicting verbal or physical abuse. Migrants run the risk of being arbitrarily arrested and detained, including for longer periods than authorised by law. The report focuses on the conditions of detention at the Lindela repatriation centre, a facility located near Johannesburg, dedicated to the detention of undocumented migrants awaiting for deportation and which has been denounced by human rights defenders for the many abuses and undignified conditions inflicted to detainees since its opening in 1998. Some migrants are also faced with hasty deportation at the country borders without adequate verification of their legal status and with police violence. FIDH considers that those practices clearly violate migrants rights to dignity, personal security and property.

Documented and undocumented migrants are also exposed to exploitation at work. This report confirms that many of them are paid below the legal minimum wage, work for longer hours than authorised by law, without obtaining necessary break and leave with no or limited access to compensation for injuries and occupational hazards and diseases, etc. This strengthens migrant workers' vulnerability because of their precarious legal situation. Most of the time, undocumented migrants, will not claim their rights nor seek redress as this would expose them to the risk of being arrested and deported. Unfortunately, inspections conducted by the Department of Labour remain rare and only occasionally lead to imposing penalties on the employer. There are therefore no strong disincentives for employers to continue using, and abusing, foreign migrant workforce, particularly undocumented.

Women, who come in growing numbers to South Africa and who are mostly employed in agriculture, domestic work, services and trade, are particularly exposed to exploitation at work. They are confronted with sexual

abuse and health risks. While acts of violence against all women are widespread in the country, migrant women are much more exposed to rape and domestic violence, with the lack of an effective State policy to prevent and combat such violence. There is also a growing number of children entering South Africa through the Zimbabwean and Mozambican border posts, who seem to be staying in border areas, working on farms, in informal trade, etc.

According to numerous accounts, migrants find it hard to access health services and facilities, even for emergency cases. They may be faced with medical staff who keep them waiting for abnormal lengths of time, provide them with exams and treatment which are below the minimum standards, verbally abuse them, treat them with little sensitivity and attention to their pain or specific conditions, have them pay outpatient fees, or deny them access to hospitals either straightforwardly or on the claim that they do not have adequate documentation. Housing is often another difficult aspect of migrants' life. Many migrants live in particularly precarious conditions, with little space, little or no comfort and privacy, sometimes no or little access to water, electricity, heating and other facilities. Access to education is similarly very limited. Even documented migrant workers, refugees and asylum-seekers are often unable to enrol their children in public schools on the claim that they do not have adequate documentation.

The lack of effective remedies, whether administrative or legal, is also a major factor preventing migrants from defending their rights, expose violations and seek redress. In principle, administrative and legal remedies are open to migrants, including vulnerable groups such as undocumented migrants, refugees or asylum-seekers. However, most migrants are not aware that these remedies exist and are available to them or fear to be reported to law-enforcing personnel. Government approach also tends to give precedence to migration laws over labour and social laws, so that undocumented migrants whose rights have been violated find it hard to get redress.

The South African migration policy remains geared towards security concerns and population control, based on the premise that considerable numbers of economic migrants want to come and stay in the country and that large numbers of them are "illegal" migrants. FIDH considers that such vision does not take into account the fact that a large majority of migrants enter South Africa legally and that a number of them are cross-border traders,

seasonal, circular or temporary migrants. This focus on migration control tends to criminalise migrants and fuels xenophobia.

The interviews conducted during our mission have shown how prevalent xenophobic feelings are amongst the population, mostly directed at Black Africans and mostly based on the vision that migrants (should they be documented or not) are linked with or even responsible for social ills and crimes. Xenophobia within the police is not limited to feelings or attitudes but also translates into extortion, abuse and physical violence. In the media, the treatment of migration issues tends to promote a largely negative representation of migration and foreign migrants. While the situation has greatly improved over the past decade, some daily papers continue to spread a dramatic and negative image of migration to South Africa. Many migrants recount xenophobia as a daily experience, in the shape of discrimination in access to shops, jobs or services, verbal abuse, etc.

In order to prevent and redress current and future human rights violations on migrants, FIDH urges the South African authorities to:

- ratify the two major international human rights instruments it has not yet adhered to: the International Covenant on Economic, Social and Cultural Rights and the International Convention on the rights of migrant workers and members of their families;
- ratify the SADC Protocol on the Facilitation of Movement of Persons, signed in 2005;
- respect the solution on migration adopted by the African Commission on Human and Peoples' rights at its 42nd Ordinary Session held in Brazzaville, Congo, from 14-28 November 2007;
- ensure that, in the hierarchy of law, provisions of the Bill of Rights and labour law protecting migrants rights are not subordinated to immigration law;
- ensure respect for due process and migrants' rights and dignity throughout arrest, detention and deportation. In particular, the government should put an end to hasty deportation done at the borders or within the country without adequate verification of the legal status of those arrested and which may contravene South Africa's obligation of 'non-refoulement';

- improve conditions of detention at Lindela repatriation centre and in other detention facilities, in particular in terms of ill-treatment, access to information and legal aid, and access to food and healthcare. To promptly carry out independent investigation of all allegations of ill-treatments of non-citizens;

- develop inspections of workplaces (through hiring more labour inspectors and capacity-building) in order to enforce respect of basic labour rights and standards to the benefit of the entire workforce; reinforce sanctions against employers who contravene labour standards and publicise the sanctions;

- develop information materials and set up information desks (e.g. at the main border posts, in refugee reception offices, city councils, etc.) for migrants to know about their rights and available remedies;

- develop research and mechanisms to better know and understand the various types of migration and their impact on South African economy and society in order to have the elements for designing and implementing a coherent and relevant migration policy;

- provide widespread training on migrants' rights and against xenophobia to police services, immigration services, public health and education services and local administrations and to publicly and explicitly condemn and sanction xenophobic behaviours and incidents committed both by public servants and the communities. In this regard, FIDH calls upon the Human Rights Commission and concerned civil society organisations to reactivate and scale up the anti-xenophobia campaign;

- maintain constant dialogue with neighbouring countries and develop an integrated SADC (Southern African Development Community) vision in order to better manage migration flows at regional level.

- invite Mr Bahame Tom Mukirya NYANDUGA, Special Rapporteur on Refugees and Displaced Persons in Africa to visit South Africa.

Introduction

Since its transition to democracy, South Africa has found its place again in the concert of nations; its diversified and growing economy, as well as its political stability, have attracted many migrants from the continent and further afield. Alongside increasing numbers of people in search of asylum, the bulk of these migrants are looking for jobs and revenues. The majority are staying and working in South Africa regularly, but there is an increase in migrants either entering the country and/or working without the required documents. Despite the dearth of reliable sources, academic estimates range around 500 000 irregular migrants for a population of 47 millions¹.

As growing domestic and international concerns have been expressed regarding the human rights situation of vulnerable migrants in South Africa, FIDH decided to conduct a fact-finding mission in order to examine the legal and policy framework applying to their entry and stay as well as their actual working and living conditions. The mission focused on undocumented migrant workers, as FIDH felt that this category, which is one of the main type of current migration trends to South Africa, is particularly vulnerable and its situation less documented and protected. This mission was designed as a first exploratory mission to draw an overview of the situation and identify the main issues at stake. It was based on a series of interviews with key governmental and non governmental players as well as with some migrants living in vulnerable conditions. The timing and framing of the mission did not aim at in-depth investigation or fieldwork; rather, the mission was conceived as a means for FIDH to study the situation of vulnerable migrants in South Africa, which has become one of the key destination for migrants from the continent and is of great relevance for FIDH numerous African member organisations. The objective of the mission further was to enter the debate on migrants' rights in South Africa, with a specific focus on undocumented and other vulnerable migrants.

The mission took place from 26 February to 5 March 2007 in Johannesburg and Pretoria (Gauteng). This area has historically been the main province of destination for internal and international migrants; it is the country's economic heart (including mines and industries) and the home of most public officials and many civil society organisations. FIDH delegates were Samira Trad, Director of Frontiers Association (Lebanon), Arnold Tsunga, Executive Director of

Zimbabwe Lawyers for Human Rights (Zimbabwe) and Véronique Rioufol, FIDH interim programme Officer on Globalisation and Human Rights.

The delegates met with the following persons:

- Government Officials:

Virgil Seafeld, Manager, Directorate on employment standards of the Department of Labour;

Andries Oosthuizen, Deputy Director and Anthony Sedwyn, Sub-Directorate on Migration, Refugees, IDP's and Human Security and Laura Domashile, Directorate on Economic, Social and Cultural Rights, including Vulnerable Groups, Department of Foreign Affairs;

- Independent Human Rights institutions:

Joyce Tlou, programme Coordinator of the Portfolio for non-nationals of the South African Human Rights Commission;

- NGOs:

Janet Love, National Director, Annette Reed, Director for Donor Liaison, Achmed Mayet, Attorney – Constitutional Unit, Naseema Fakir, Attorney, Legal Resources Centre (LRC),

Jacob van Garderen, Project Co-ordinator and David Cote, legal counsellor, Refugee and Migrant Rights Project of Lawyers for Human Rights (LHR)

Nkosilathi Tshuma, Projects Manager and Immanuel Hlabangana, Advocacy Manager, Crisis in Zimbabwe Coalition, Johannesburg Regional Office;

- Research and advocacy groups:

Loren Landau, Director and Ingrid Palmary, Researcher, Forced Migration Studies Programme (FMSP), University of the Witwatersrand;

Sally Peberdy, Project Manager and Ntombikayise Msibi, Researcher, Southern African Migration Project (SAMP), University of the Witwatersrand;

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Gayatri Singh, Researcher, School of Public Health,
University of the Witwatersrand;

- Unions: Mandla Rametsi, Deputy International Secretary of
the Congress of South African Trade Unions (COSATU);

- International Organisations: Hans-Petter Boe, Regional
Representative for Southern Africa of the International
Organization for Migration (IOM);

The mission also accompanied the Legal Resources Centre
in one of its regular visits to the Lindela repatriation centre,
near Johannesburg and conducted interviews with a dozen
of documented and undocumented migrants.

Contacts made with the National Immigration Branch of the
Department of Home Affairs did not lead to a meeting during
the time when the mission was in South Africa.

1. Crush, Williams and Peberdy, 'Migration in Southern Africa', 2005. See the bibliography at the end for full references.

Chapter 1: Brief background profile of undocumented migrants in South Africa

The working definition of undocumented migrants chosen by the mission is a very broad one: it includes any person living and working in South Africa who does not have a proper legal status. Hence, the mission was looking at the category of undocumented migrants that ranged from waged-workers, circular and seasonal workers; migrants who are self-employed, refugees, asylum seekers and the children of those migrants.

The mission did not look at the issue of trafficking.

In the South African context, the category of undocumented migrants² encompasses several groups even though it quickly appeared difficult for the mission delegates to strictly classify those migrants :

A- Economic migrants who work in the country in an irregular situation

They may be in an irregular situation, either because they entered the country illegally, because they stayed illegally after their permit expired, because they work on a residency permit which does not allow for the permit holder to work (e.g. study or visitor's permit) or because they entered or work with forged documents. To obtain a work permit, one must first find a job and usually has to apply from abroad; the prospective employer must provide a job description and show to the Department of Home Affairs (DHA) that "he or she has been unable to employ a person in the Republic with qualifications equivalent to those of the applicant"³. Many economic migrants do not even apply for work permits, as they know or hope they can find employment without being documented. Given the low skill jobs and sectors in which many of them work –e.g. domestic work, farming, mines, mechanics, small trade, etc. – it would be difficult to show that there is no qualified South Africans⁴. Some employers, in sectors such as farming, construction, services and other non-unionised sectors, explicitly express their preference for migrant workers who are considered to be more submissive⁵. Many migrants also ignore what are the specific requirements to stay and work in South Africa and are not aware or discouraged by the risks associated with irregular work and residence.

B- Registered refugees who were dispossessed of their refugee certificate or were unable to renew it.

This category is significant in South Africa. First, because it is not rare for refugees to have their certificate kept or destroyed by police officers, migration officials, etc.⁶ Second, it happens that legally registered refugees are accused of carrying counterfeit documents, as a result of minor inaccuracies in their personal information (name, birth date, etc)⁷. A third factor is that refugee certificates need to be renewed every two years and have to be renewed in the same office (the so-called 'refugees reception office' of which there are only 5 in the country) which first issued it. Some people are unable to find the resources or time to go all the way to a reception office which is far away from where they now live; others are in hospital, detention, etc. at the time when they should renew their refugee certificate. Finally, the government may decide to revoke the refugee status of a group of nationals, on the basis that the political situation in their country of origin does not anymore justify the need to find asylum abroad; it has thus adopted a cessation clause for refugees from Angola⁸.

C- Undocumented asylum seekers until they manage to properly register with the reception office and present a refugee claim

Here again the situation is not rare as the system in place for processing asylum applications is fraught with problems and totally overwhelmed. On arrival in South Africa, asylum seekers may get a (non renewable) 2-week permit to apply for refugee status. They then have to go to the reception office to be registered as asylum seekers and submit their application. It however often takes longer than 2 weeks as they commonly have to queue for weeks in front of the reception office before they actually get registered as asylum seekers. Moreover, there is currently a backlog of about 80 000 asylum applications to be processed⁹. As a result, asylum seekers generally wait 2 to 3 years and sometimes up to 5 years or more before a decision is made on their application. Many migrants, including economic migrants, apply for asylum as the status of asylum seekers and refugees allows them to work and study¹⁰. Because of the backlog in examining asylum applications, they can often work for a couple of years in a

regular situation. On the other hand, some potential asylum seekers never apply for asylum, either because they do not manage to go and queue, or because they fear to be arrested while waiting in front of the reception office. Some also believe that they are not eligible to refugee status¹¹.

For the purpose of this study, the mission chose to focus on the first of these “categories” of undocumented migrants – economic migrants who are working in an irregular situation – while acknowledging that it overlaps with the third category (asylum seekers while they are undocumented) and to a certain extent with the second category (registered refugees who become undocumented). These “categories” of migrants are of particular concern as they are amongst the most exposed to human rights violations and have the least legal protection and support to defend their rights. As highlighted during our meetings and interviews, they share common characteristics in terms of their human rights situation:

- they live in permanent insecurity: they are faced with police harassment and violence, including lack of physical security, intimacy, destruction of identity documents and properties, extortion of goods and money, bribery, etc.; they also run the risk of being arrested (including wrongfully), detained (including for longer periods than authorised by law) and deported.
- they lack access to information on the permit system, on the procedures and services involved. Language may be an additional difficulty as interpreters are rarely provided. Immigration officials may also provide wrong or misleading information and corruption is widespread.
- they are exposed to exploitation at work: many of them are paid below the legal minimum wage, work for longer hours than authorised by law, without obtaining necessary break and leave, with no or limited access to compensation for injuries and occupational hazards and diseases, etc.
- they have almost no access to health services for themselves and their family and to education for their children;
- they are subject to xenophobic attitudes and acts, which are widespread in South Africa.
- they are practically deprived of their freedom of movement.
- women, who come in growing numbers to South Africa, are particularly exposed to abuses and sexual abuse, exploitation at work, health risks, etc.
- they lack access to real and effective remedies to defend their rights, whether it be administrative remedies, courts or legal aid. In principle, these remedies are open to migrants, including vulnerable groups. However, most of them are not aware that these remedies exist and are available to them or fear to be reported to law-enforcing personnel.

These characteristics will be further examined below (section 4.1 Ongoing Human Rights Violations); they constitute clear violations of both South African and international human rights law.

The profile of undocumented workers is difficult to draw with precision, as they constitute a largely clandestine phenomenon. For a long time, statistics were at the core of the debate. While some public officials talked about a “flood of illegal aliens” overwhelming South Africa, and while many South Africans feel that foreigners compose a large part of the population, researchers have reached much smaller estimates. According to the Southern African Migration Project (SAMP) estimate in 2005, “South Africans believe that 25% of the population is foreign. The figure is probably closer to 3-5% with around 500,000 undocumented migrants”¹² for a population of 47 millions.

Most migrants entering South Africa, both regularly and irregularly, come from countries of the Southern African Development Community (SADC). Highest numbers come from Mozambique, Zimbabwe and Lesotho, with an increase of Zimbabweans in recent years due to the political situation in their country. Between 1995 and 2004, the DHA deported between 135 000 and 185 000 migrants per year; above 90% of them originated from these 3 countries¹³. Many undocumented workers coming from the SADC region are seasonal workers, or come regularly to trade or work with no intention of settling in South Africa. Many enter the country legally, and overstay their permit or start working in contravention with their permit. This migration is based on a long history of regional labour migration to South Africa, mostly to the mines and farms. Increasingly, undocumented migrants also come from more distant countries such as the Democratic Republic of Congo, Burundi, Nigeria, Senegal, Cameroon or even from other continents such as Asia and Europe as the mission observed that there are also migrants from China, Pakistan, Nepal, Sri Lanka, Eastern Europe, etc.

A large majority of migrants coming to South Africa, including undocumented ones, come for economic reasons, in search of work and income (including trading)¹⁴. Their main sectors of employment are: farming, mining, domestic work, construction, private security, mechanics and small trade; few are also hired in the educational and medical sectors. Smaller numbers of people come to South Africa in search of asylum: there are currently only about 35 000 refugees and about 80 000 asylum seekers¹⁵. However, the number of asylum seekers is increasing both because migrants now come

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from more diverse countries (DRC, Chad, Burundi, etc.), because of the increase in applications from Zimbabweans, and because some economic migrants use the system as a means to stay legally in South Africa.

Most foreigners stay in the border areas, in particular to work on farms, or go to the main South African cities: Johannesburg, Cape Town, Pretoria, Durban, and increasingly Port Elizabeth and Bloemfontein. Some work on farms to earn a living before proceeding to the city. These cities are attractive because they are the main economic centres of the country and already have migrant communities; all but Bloemfontein also are the location of the five refugees reception offices. In Johannesburg, which had the highest proportion of foreigners, about 25% of the population in the inner city is foreign¹⁶.

There are growing numbers of women and children amongst undocumented migrants. Women migrants coming to work irregularly in South Africa may travel with a partner or a relative, or on their own. Although they have proportionally a higher level of education than men, they are more likely to work in less skilled and more informal activities as well as to become undocumented migrants. Their main areas of

employment are agriculture, domestic work, services and trade¹⁷. Some have become migrant workers to replace a male member of the household who could not anymore migrate as a result of retrenchments (e.g. in mining) or for health reasons (e.g. HIV/ Aids). Many female migrants from neighbouring countries are also engaged in circular trade, staying few weeks in South Africa to shop or trade, bringing home foodstuffs and other goods, thereby generating an income for their household and contributing to food security for their family and community¹⁸.

Little is known about the situation of children. According to recent studies, there is a growing number of children entering South Africa through the Zimbabwean and Mozambican border posts, both accompanied and unaccompanied; they seem to be staying in Gauteng and border areas, working on farms, in informal trade, etc. A 2003 study by Save the Children noted a visible increase in Zimbabwean children entering South Africa unaccompanied, as a result of economic crisis and drought¹⁹. Human Rights groups have expressed concern that undocumented children are treated like adults by law-enforcing personnel, in contravention of the South African Constitution and Child Care Act²⁰.

2. South African law refers to 'illegal foreigners' and some official documents use 'illegal aliens'; the mission prefers to use the phrase 'undocumented migrants' as this categorisation is more respectful of the human dignity and human rights of migrants as well as more accurate since, while certain actions may be illegal, no person may be as such 'illegal'.

3. Article 19 of the 2002 Immigration Act.

4. Interview with Loren Landau and Ingrid Palmay, Forced Migration Studies Programme, 1st March 2007.

5. Crush and Williams, 'Transnationalism and African Immigration to South Africa', 2002.

6. South African Human Rights Commission, 'Report into the Arrest and Detention Of Suspected Undocumented Migrants', 1999.

7. Interview with Jacob van Garderen and David Cote, Lawyers for Human Rights, 27 February 2007.

8. Interviews with Loren Landau and Ingrid Palmay, FMSP, 1st March 2007 and Hans-Petter Boe, IOM, 2 March 2007.

9. Interview with Hans-Petter Boe, IOM Regional Representative, 2 March 2007. The backlog used to be over 100 000 and was brought down by recent efforts of the Department of Home Affairs.

10. See below section "Lawful work in the current migration regime".

11. It has occasionally been the policy of the Department of Home Affairs to consider that Zimbabweans cannot qualify for refugee status because the situation of their country does not justify it. As a result, a number of asylum seekers from Zimbabwe were turned away or did not get a proper examination of their application. Some Zimbabweans still believe that they are legally excluded from applying.

12. in Crush, Williams and Peberdy, 'Migration in Southern Africa', 2005, p12-3. See also Landau, 'Migration Trends, Management and Governance Challenges', 2005; Waller, 'Irregular Migration to South Africa During the First Ten Years of Democracy', 2006; Crush and Williams, 'Making up the Numbers: Measuring "Illegal Immigration" to South Africa', 2001. Political and media numbers have often been between 2,5 and 5 millions, and as high up as 12 millions irregular migrants.

13. Waller, 'Irregular Migration to South Africa During the First Ten Years of Democracy', 2006.

14. Interviews with Loren Landau and Ingrid Palmay, FMSP, 1st March 2007 and with Sally Peberdy and Ntombikayise Msibi, SAMP, 2nd March 2007. See Crush, Williams and Peberdy, 'Migration in Southern Africa', 2005, pp 6-7.

15. Interviews with the Forced Migration Studies Programme, 1st March and IOM, 2 March 2007. Statistics from the DHA and UNHCR for 2005 were 29 700 refugees and about 140 000 asylum seekers (National Consortium for Refugee Rights, 2006).

16. Landau, 'Migration Trends, Management and Governance Challenges', 2005.

17. Crush, Williams and Peberdy, 'Migration in Southern Africa', 2005, p14-5.

18. Crush, Williams and Peberdy, 'Migration in Southern Africa', 2005; Crush and Williams, 'Transnationalism and African Immigration to South Africa', 2002; Dodson, 'Women on the Move: Gender and Cross-border Migration to South Africa', 1998.

19. Interview with Loren Landau and Ingrid Palmay, FMSP, 1st March 2007. According to IOM Regional Representative, 900 unaccompanied children entered South Africa at Breitbridge border post (between South Africa and Zimbabwe) in 2006; 400 did so for the sole months of January and February 2007 (interview, 2nd March 2007).

20. See in particular Lawyers for Human Rights, the Refugees Children Project, and the Centre for Child Law.

Chapter 2: Testimonies

While in South Africa, the mission met with a dozen of documented and undocumented migrants, both male and female, coming from different African countries. The first group was met in Lindela repatriation centre on 28 February 2007, where the mission went to accompany the Legal Resources Centre²¹. Interviews there were conducted in unfavourable conditions: detainees were kept behind glasses, there was no assistance of proper interpreters and the lack of separate closed rooms did not allow for sufficient intimacy. This visit nevertheless gave the mission an opportunity to have a glimpse at personal itineraries as well as conditions of arrest and detentions of detainees held in Lindela. Other migrants were met thanks to the assistance of NGOs and researchers interviewed by the mission²². They are all residents of Johannesburg. Interviews were conducted on 2nd and 3rd of March, 2007.

The following are excerpts from some of these interviews²³. While they do not claim to be a representative sample of vulnerable migrants' experiences in South Africa, they depict a range of situations and abuses which are corroborated by many other studies and testimonies.

A- Inmate at Lindela Centre, Male, 25 year old, from Burundi

I have been in South Africa for about a year. I came from Burundi with truck drivers, via Tanzania and Malawi and into Zimbabwe. I paid them small money to take me. The last driver left us in Zimbabwe close to the border with South Africa. We crossed the border at night with a group of 10 people, there were people from Zimbabwe, Mozambique, and others. We crossed on foot and swimming across the river; it was dangerous, there were animals. I paid the smuggler \$200 000 Zim dollars (equivalent to USD100 at the time of the interview and now equivalent to USD25).

Together with a group, I then made my way to Durban where my brother is staying. He has been in South Africa for many years. He is my older brother, he's 38 year old. He runs a hair salon in Durban. I stayed with him and worked for him as a hairdresser. I was working all day long, everyday except Sunday, from morning to night. Then I would make around 700 rands a month. We were staying in a room of about 7 square meter, the two of us. My brother was paying a rent, 1000 rands, to the "supervisor"

who owns the building; it's a 6th-floor building in Point district in Durban. The room had toilet inside, water in the kitchen and electricity. There were many other people staying in the building, both foreigners and citizens.

My brother has a refugee permit. I tried to go to home affairs to apply but every time there was too much queue so I was always sent back, people were telling me "come back tomorrow". I want to stay here. I first came from Bujumbura because I don't have anybody there and I wasn't working; there's nothing there. I was arrested on 29 November 2006, in my house. I was the only one to be arrested as my other friends were at work. I wasn't issued any warrant when I was arrested and the policemen forced me into the van. I phoned my brother from Lindela but he can't come, he says it's too far and he doesn't have money. I want to stay in South Africa, I have no family in Burundi.

B- Undocumented teacher, Female, 26 year old, from Zimbabwe

I have one baby boy who is one year old now. I was born in Plumtree. I moved and lived in Bulawayo in 2000. I arrived in South Africa in November 2006. I left Bulawayo to South Africa because the money I was earning was too little for me to take care of myself and my child. I was working as a teacher in a public primary school on the outskirts of Plumtree. I was teaching all the primary subjects and the curriculum. I was earning 3000 Zimbabwean dollars (equivalent to USD4). The working conditions of employment were difficult as I was earning well below the poverty datum line

So my brother just decided I should come to S.A. to try and search for green pastures. My brother lives in South Africa since 1997. He holds a Zimbabwean/South African passport which allows him to live in South Africa. I left my baby with my sister. I used my passport and a written letter from the head of the school I was working for. If you are a civil servant, you are allowed to cross the border using the pay slip and the letter from your employer. This is how I came. I came by land. I had my passport stamped from the two immigration borders. South Africa gave me one month visa as a visitor.

My visa expired and I could not renew it because this type of entry visa is not renewable as it is a temporary visa. I did

not try to obtain a different type of visa or residence permit because I was told by other people who have been living here that for me to obtain a work permit, I should have a valid visa (...) I am intending to regularize my legal status. I know of some channels, for example, if I have money I should go home and obtain from there a three months valid visa. I understand that if I do that I can obtain a work permit. (...)

I am working now as a teacher in a private school since February 2007. (...) The work conditions are bad. They pay me 350 Rand per month. No other allowances whatsoever. Because they say for the first two weeks of the months I was on probation and they do not pay for probation. They did not commit themselves to pay increase in coming months. I did not sign any contract. The working hours is 8 am to 2:30pm. But they only pay up to 1:30pm. I think the 3000 Zimbabwean dollars were far better than the 350 Rand I am getting now. Despite this situation I still prefer to remain in South Africa because I believe I can get better job and work conditions.

I have to send my baby back home at least 1000 rands. I have not been able to send this money so far. I do not know how they are surviving. My brother is married and cannot help me. He is self employed. I am sharing a bed in their flat. We are four in one room. Two in each bed. I pay 300 rands for that sharing bed. For now I have been depending on my brother to survive.

C- Inmate at Lindela Centre, Male, 33 year old, from Chad²⁴

I was born close to Moundou, in Chad. I left home in March 2005 because of the conflict between the Christians and the Muslims in my country. I left after being shot in the leg. My dad was killed in the mosque in 2003. I was working with my dad who had a small business. My three brothers were killed during the same week in 1987; my only sister fled and I don't know where she is.

I left, mostly on foot, to go to the Central African Republic. It took me a month to get there; the journey was hell. I then went to Congo and took a boat in Matadi. I climbed clandestinely onto the boat at night. I thought the boat was going to Europe, I wanted to go there as a refugee. When the boat landed in Durban, I didn't know in which country I was. I descended from the boat at night. I arrived in South Africa in March 2006.

At first, I didn't know what to do but I went to a church and they helped me. They gave me some food, some clothes, a little bit of money. For the first two weeks, I didn't work. Then I saw a small shoe-maker stall; I walked up to the owner and offered my service. I was the only person working with the boss; he was South African. The boss was paying me 200 rands a month; he was also giving me food and I stayed in his house. There was no electricity and no water in the house. We were using a candle and I was fetching water far away. That was in Isipingo district, quite close to the Durban city centre. I worked with him for 3 months then I was doing small shoe repair jobs and sleeping on the street.

I was arrested in Durban. I was on the street, talking with other people when the police came and checked our ID. I was detained in the police station for a week and then held in Westville jail, in Durban, for a month with other undocumented migrants. I was then sent to Lindela in July 2006. Since I arrived here, I never spoke to an immigration official nor to a lawyer. Sometimes the warden slap us, forcefully push you into a line or hurry you if they think you're taking too long. I have a bad growth on my head and terrible headaches, I saw the doctor and even went to Leratong hospital but all I ever got was panado [an analgesic]. I don't expect to be released. I don't want to go back to Chad as the war is still going on there. If I could I would stay in South Africa; I would like to put aside enough money to go to Europe as a refugee.

D- Undocumented teacher, Female, 39 year old, from Zimbabwe

I have worked 18 years as a teacher. The pay was very little – I couldn't manage to send my children to school. I have 2 children, 2 boys, of 12 and 5 years old. The inflation was so high. I came here because every time I got the pay I was not able to buy just a cake, just an ice cream for my children, goodies. Any new cloth was costing as much as my pay. (...)

I came by bus. I had a visa for civil servants to enter SA; it's valid for just one month. I took the bus from Bulawayo to Joburg. People at the border wanted a recent pay slip and I didn't have one, so I had to pay the drivers so that they talk to them, kind of bribery. I gave the drivers my passport and old payslip and 100 rands and they talked to them and the drivers came back with my passport stamped.(...)

I found a job in a factory. I worked there for a week packaging whisky and I was never paid. The owner of the factory, a woman, she said that the people to whom she was selling the goods hadn't paid her and that when they pay her she'll pay us. She said she would pay 75 rands per day as a wage. We were working from 8am to 6pm and then again from 7pm to 10pm. I worked also on Saturday and Sunday. I worked everyday that week up to 10pm. We were never paid. The majority of the people were foreigners from different countries. There was no break. When she was going for lunch break, she would lock the whole factory, she was locking us all inside for an hour, two hours. The factory was closed the whole day; it was so hot, we were sweating inside. What if it catches fire, we die inside? We didn't trust her when she said she would call to pay us later. And we understand that the factory is closed now. She took all the goods at night and emptied the factory. (...)

In November 2006, I went to Pretoria, asking for asylum. I arrived at 5am and queued up to when they were closing at 4pm. You go into the office, you give your name and they give you a piece of paper with your name and the date when to come back and they stamp it. The date for the appointment was after 4 months. When I went back, there was a notice saying that those who were given those waiting slips have to start all over again, because they're not valid. And people talking outside are saying Zimbabweans can't get asylum because there's no war in Zim; it's only people running away from poverty. That was during the first week of February. I stayed in the queue immediately and I slept in the queue. I was approached by somebody from Zim, saying that he can get me papers if I give him 200 rands, because he knows the people inside. So between four of us, we paid 50 rands each. I could see the guy was cheating us. I could see the office was about to close and he wasn't organising anything. So I asked to have my money back. Since then, I haven't had time to go back. (...)

E- Asylum-seeker, Male, 32 year old, from the Democratic Republic of Congo

From Chirundu, I proceeded to Beit Bridge border post (the Zimbabwean/South Africa) in the same truck and paid the driver 50USD. At Beitbridge, the driver simply gave me directions on what to do and where to go. When he finished his paperwork, he asked me to get into the truck and we drove across the border.

At the Messina post (the South African side of immigration), I immediately declared that I was coming to seek asylum and they gave me 14 days to stay. It took me a few hours to clear the immigration and I then looked for transport to come inside SA. I got a lift to Pretoria and was charged USD50. In Pretoria I met a Zambian man who was playing soccer for Kaizer juniors. He told me that Congolese people in Pretoria are found in the Yeovil area. Upon proceeding to the Yeovil area in Pretoria, I found that there was a place called The Reference (nicknamed The DRC Embassy).

I found myself lost with no help and I went to the Yaweshama Church and slept there after explaining to people I found there that I had no house. I had no blanket but I got food in the form of a slice of bread. In the morning, woke up and went back to The Reference. I met someone at The Reference who we were at the same school before in the DRC. I explained to him that I had just arrived and had no accommodation. He was very hesitant since he was staying with 8 colleagues in one room already. He went to consult with his friends and asked me to wait and around 7 pm, he came back and advised me that colleagues said that I should stay for one month and do the cooking and cleaning duties. I stayed there for two months and they showed me Chinese shops to get piece jobs.

I first had to get a S22 permit which the Chinese shop owner asked. In the two months I would wake up and walk the streets hoping to find a job at a Chinese owned shop. We were four people in the shop, one Zimbabwean, me from DRC, the shop owner and his sister. As for the Zimbabwean, I have no idea what his status was. At the Chinese shops I worked from Monday to Saturday selling Chinese goods, clothes, shoes, belts, rings, watches. The salary was R120 per week and a Zimbabwean colleague with whom I was working at the Chinese shop was earning R150 per week. I later established that the salary for this type of work according to labour law is supposed to be R350 per week. As for the working hours, I have no idea whether they complied with labour laws or not but I worked generally from 9am to 6pm with only 30 minutes break during the whole day.

After discovering that I had been exploited by the Chinese, I forgave them because I felt that they had really helped me during my hour of need and when I was very desperate. In any case, in our Congolese culture, people do not recover for such damages or losses.

I was obviously being under paid because I was desperate, had inferiority complex, lack of knowledge of the laws and I did not know the country. It was slavery. I did not have the right papers according to people as they felt I needed a work permit. Friends told me that I can not get employed in the absence of a work permit. I had no options. I thought it was better for me to be a domestic worker than a security guard as I was severely prejudiced and the job was dangerous since guards were being killed.

After three weeks of working, I started having accommodation problems which may have affected my work performance. I heard Chinese owner's sister stating something in a harsh voice to me. The owner said that she was complaining about my poor workmanship and he asked me to leave immediately.

I got another job at Carlotn Center and the shop owner was Congolese. She paid me R200 and gave me other benefits which made the pay more than R200. She bought food for me and provided me with transport and lunch. She gave me one hour lunch break. The hours of work were 8am – 5pm. I left this job in 2004 and started being a trader. I did not manage to get a nice place to place my wears for selling. I got a place in Jenniston which was very far and needed two taxis and it was costly. The good day averaged R130. Transports costs were R15 round trip. The transport costs were higher than any profits I made. So I stopped and met one Ann Beier who was an activist. We started motivation workshop with Ann Beier and one organisation heard about me and they wanted workers with French capabilities. We taught foreigners about HIV and AIDS since as foreigners we did not have enough access to information on the disease. We taught them about discrimination and stigmatisation. I then got a job on Community Aids Response. I work there as a volunteer from Monday to Friday 8-4pm as a non-South-African with no adequate papers to secure a decent job.

21. The mission particularly thanks the Legal Resources Centre for offering us this opportunity. At the time of our visit, LRC was going to Lindela to prepare affidavits to present a case challenging continuous detention over the 120-day limit, the lack of access to halal food for Muslim detainees and the lack of access to adequate medical treatment.

22. We wish to thank here the Crisis in Zimbabwe Coalition and Gayatri Singh for their valuable assistance.

23. Some of these interviews were undertaken in mixed French and English and have been translated for the report.

24. This interview was conducted with the assistance of another inmate, who was translating back in mixed French and English.

Chapter 3: Brief outline of the Legal Framework

A- The South African Legal Framework for Migration

1) A strong historical influence: the recent history of population control²⁵

Historically, South Africa put in place a set of legislation – known as “pass laws” – to regulate the movement of its non-white population, and link it with employment opportunities. The first regulations were adopted during colonial times: to control the whereabouts of the Khoi population, the law made it illegal for them to be unemployed and compelled them all to carry passes. In 1923, the Native Urban Areas Act was an important step in building this system of influx control. The Act established that urban areas were for ‘whites’ only and that all non-white adult men had to carry passes at all times to justify their presence in town. Anyone found without his pass could be arrested and sent to rural areas. This law created the conditions for the strict control of the movements of this population within the country, for constant coercion, and for the presence of a docile workforce only when and where it was needed.

This system was tightened under Apartheid with the adoption of the 1952 Pass Laws Act. The Act created a kind of internal passport for non-white South Africans and made it compulsory to carry it at all times. The pass contained information about the pass-holder (name, photo, fingerprints, etc.) and specified when and why s/he had asked to enter and stay in a given area, whether it was granted and for how long. It also included details of past employment, as well as comments from previous employers. Any government official could cancel the permission to enter a given area.

The Pass Laws Act was complemented in 1955 by the Natives (Urban Areas) Amendment Act, under which ‘rights of Africans to live in a town were confined to those who had been born there or had worked there for fifteen years or for ten years with a single employer. All others needed a permit to stay for longer than three days’ (Worden, 1994: 98).

Another complement was the creation of Labour Bureaux which aimed at recruiting workers in the ‘homelands’ and neighbouring countries and channelling them to where they were needed, in particular the mines. This system

meant in particular that workers were staying on their place of employment only as long as they were needed (e.g. only in season for farm work) and that their family could not stay with them. Identity controls were frequent: being in an area without a valid authorisation or being unable to present one’s pass was a criminal offence for which the person could be arrested and detained immediately. There were several hundreds of thousands of arrests and prosecutions per year under the pass laws, and as much as half a million per year between the mid-1960s and the mid-1970s. The pass laws were repealed in 1986.

From the 1960s, this tight system of internal population control was complemented by a similarly restrictive control of foreign migration, known as the ‘two gates’ policy. On the one hand, the Aliens Control Act almost prohibited the entry of non-white migrant workers; on the other hand, a set of bilateral agreements with neighbouring countries strictly organised the presence of the foreign workforce needed by some economic sectors such as mining or commercial farming.

The Aliens Control Act was first adopted in 1937 to restrict Jewish immigration to South Africa. Later versions of the Act in the 1960s and 1970s aimed at limiting the rights of aliens, reinforcing police controls at the border and internally, and organising arrest and deportation of irregular migrants. As a corollary, the Act characterised migrants who could apply for permanent residence as those who could be “readily assimilable by the white inhabitants”²⁶.

In the framework of bilateral agreements, such as those concluded with Mozambique, Lesotho or Swaziland, migration was based on a highly organised and repressive system: workers were recruited mostly through labour bureaux, on the basis of contracts specifying the contract length and place of employment, often providing accommodation in single-sex compound and compelling the worker to go back at the end of the contract. South African labour policy required that they be repatriated at least every two years (even if their contract was thereafter renewed). Like Black South African migrants, they could not bring their family to their place of work nor plan for long term settlement in urban areas. Contract workers were also compelled to have all valid documentation including their passport, work permit, vaccinations, and employment record book.

This history of control and coercion of migrants' movement and conditions of life is still a recent one. A number of laws and policies remained in place years into the new democracy. Thus, the new Immigration Act was adopted in 2002 and the first regulation recognising and protecting refugees was the Refugees Act adopted in 1998²⁷. Many commentators underline that this history may still inform some of the general orientations of South African migration policies as well as the behaviours of some public officials, in particular amongst the police and migration officers²⁸. It may also have an influence on the practices of some employers as well as on some attitudes of the public opinion.

2) Lawful work in the current migration system

The democratic regime established in 1994 progressively adopted new regulations to replace the old legal framework for migration. Today, conditions of entry and stay in South Africa are primarily defined by the 2002 Immigration Act and the 1998 Refugees Act and in reference to the 1996 Constitution²⁹. The 2002 Immigration Act, as amended in 2004, states the overall objectives of the migration policies, sets the various regimes for temporary and permanent residence and defines the means of enforcement and monitoring. It constitutes a clear break with the Aliens Control Act of the apartheid regime: it opens up the channels for non-nationals to become residents in South Africa, does not focus only on combating illegal migration and explicitly makes reference to the protection of migrants' rights³⁰.

Under the Immigration Act, there are many ways to obtain temporary residence in South Africa: for work, study, visiting, meeting relatives, applying for asylum, doing cross-border travels, etc. Obtaining a general work permit requires fulfilling the following conditions (section 19.2):

- the prospective employer is able to show evidence that "despite diligent search he or she has been unable to employ a person in the Republic with qualification or skills and experience equivalent to those of the applicant";

- "the terms and conditions under which [the prospective employer] intends to employ that foreigner, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens, taking into account applicable collective bargaining agreements and other applicable standards";

- the prospective employer "has agreed in writing to notify the Director-General when such foreigner is no longer employed or is employed in a different capacity or role.

The Act also establishes special work permits, which are easier to obtain, for specific professional categories or occupations which are lacking in South Africa ('quota work permit'), and for people with exceptional skills or qualifications ('exceptional skills work permit'). Finally, the Immigration Act also maintains the category of 'corporate work permit' (section 21). In this case, a corporate employer directly applies to the Department of Home Affairs to hire a number of foreigners, while depositing financial guarantees, ensuring that these foreign workers respect the migration regulations and providing details about their numbers and job descriptions. Under the Act, the government may further decide to waive or reduce certain requirements or conclude agreements with some foreign countries to make it easier for corporate employers from the mining or agricultural sector to use such permits to fulfil their workforce needs (section 21.4).

The Immigration Act therefore tries to strike the balance between the needs of the South African economy, in particular of highly skilled workers, the will to limit the inflows of largely unskilled migrant workers or economic refugees (both for security reasons and because of the high level of unemployment), and the concern that the working conditions of foreigners may undermine established labour standards and practices³¹. The Act however maintains the exceptional status of mining and agriculture in resorting to low-skills workers, including with the help of bilateral State agreements. Under the Act, only foreigners holding a (general or specific) work permit or a business permit, and those employed under a corporate work permit, may legally work in South Africa. Given the requisite that for a foreigner to be employed one has to show that nobody in South Africa has equivalent skills, qualifications or experiences, the bulk of migrant workers – mostly people originating from SADC and employed in low-skilled jobs in agriculture, services, mining, construction, etc. – cannot qualify for a general work permit. Only very few have the capital needed for obtaining a business permit, or the skills required to qualify for a quota or exceptional skills work permit.

Two other categories of migrants may however legally work in South Africa: first, cross-border traders, second, refugees and asylum-seekers. Cross-border traders, many of whom are women, represent a significant part of

regional migrants to South Africa³². Many come to buy products such as clothes, foodstuffs, or electronics to sell them back home; they sometimes bring crafts or other goods for sale in South Africa. They usually stay only for a couple of weeks. The Immigration Act introduced cross-border permits which allows multiple entries for “a foreigner who is a citizen or a resident of a prescribed foreign country with which the Republic shares a border” (section 24). However, this category of permits remains unsatisfactory as it does not mention the possibility for holders of such permits to trade. Besides, while the 2002 Immigration Act established that these permits could be granted even to people who did not hold a passport but were registered with the DHA, this possibility has been removed by the 2004 amendment of the Act. This is highly problematic as many citizens of neighbouring countries, in particular Zimbabwe, do not hold a passport, cannot obtain one promptly from their administration or cannot afford to pay for it. Another important limitation to the use of these permits is that their price is prohibitive for many traders and that they may not authorise long enough stays in South Africa³³.

The last category of people who may legally work is that of refugees and asylum-seekers. In conformity with international refugee law, national regulations allow refugees to study and work in South Africa³⁴. In the case of asylum-seekers, initial regulations adopted to implement the 1998 Refugees Act established a general prohibition to study and work. In 2000, the Standing Committee for Refugee Affairs, which is in charge of formulating procedures to grant asylum, supervising the work of the refugee reception offices and advising the Minister, made a first step towards reforming this legal regime. It indeed resolved that if the decision on an application for asylum is not taken within the normal legal limit of 180 days, the asylum-seeker could apply to the Standing Committee to lift the restriction on study and work. In a 2003 landmark case, *Minister of Home Affairs and Others v. Watchenuka and Another*, the Constitutional Court went one step further by challenging the blanket prohibition of study and work, even during the initial period of 180 days³⁵. It stated that “the Standing Committee’s general prohibition of employment and study for the first 180 days after a permit has been issued is in conflict with the Bill of Rights”. The Court added:

“Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that persons

happen to be in this country – for whatever reason – it must be respected, and is protected by s 10 of the Bill of Rights”.

The government thereafter amended its regulations to allow holders of asylum-seekers permit to work and study.

At regional level, South Africa is also engaged in negotiating particular conditions for entry and stay of nationals from neighbouring countries. It thus concluded bilateral agreements facilitating the entry of Mozambicans and Basotho, without however facilitating their access to work permits. As part of the South African Development Community (SADC), South Africa also adopted in August 2005 the Draft Protocol on the Facilitation of Movement of Persons³⁶ which aims at harmonising migration policies and legislation, and makes provision for the creation of a privileged treatment for SADC citizens. However, South Africa, like almost all SADC members, still has to ratify this Protocol to bring it into force. Besides, many observers underline that “as one of the more affluent SADC member states, South Africa has been a long-standing opponent of the free movement of people in the region”³⁷ and that security considerations prevail in regional discussions. As a result, the Protocol and other regional initiatives to harmonise regional legislation have aimed more at limiting migration flows than at facilitating it.

3) The legal regime for arrest, detention and deportation of undocumented migrants

In terms of the 2002 Immigration Act, as amended in 2004, two sections govern the arrest, detention and deportation of undocumented migrants: section 34 which makes provision for the ‘deportation and detention of illegal foreigners’ and section 41 on ‘identification’, i.e. the request made by a police or immigration officer for a person to state his/ her identity and legal status. The Act defines an ‘illegal foreigner’ as ‘a foreigner who is in the Republic in contravention of this Act’. In terms of section 34, ‘without the need for a warrant, an immigration officer may arrest an illegal foreigner’, whether inside the country or at ports of entry, ‘shall deport him or her’, and ‘may, pending his or her deportation, detain him or her’. The Act provides the following procedural guarantees to those arrested (section 34 (1) and 34 (2)):

- the decision to deport them and their right to appeal should be notified to them in writing;

- they may ask at any time for their detention to be confirmed by a warrant of Court, which if not issued within 48 hours, shall cause their immediate release;
- they should be informed of these rights upon arrest or immediately thereafter, if possible in a language they can understand;
- they may not be held in detention longer than 30 days without a warrant, and an additional period of 90 days with a warrant;
- they shall be detained in compliance with minimum prescribed standards protecting their dignity and relevant human rights;
- they may not be detained longer than 48 hours for purposes other than their deportation.

In addition, section 41 (1) provides that:

“When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody, without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34”.

This section lays the basis for random identity controls of foreigners and foreign-looking persons, as well as the possibility to interview them and take them into custody if they are thought – ‘on reasonable grounds’ – to be ‘illegal foreigners’. It has been criticised as establishing powers for immigration and police officers recalling those of police states and as entertaining an environment of suspicion against foreigners³⁸.

This environment of suspicion and control is reinforced by several other provisions, which call upon all organs of state and some other institutions ‘to ascertain the status or citizenship of the persons’ they are in contact with and to ‘report any illegal foreigner, or any person whose status or citizenship could not be ascertained’ (sections 44 and 45).

This means, in particular, that institutions such as hospitals or local councils shall enquire about the status of the people they serve, with the risk of suspending their service to them, or altering its quality, even though the Act provides that “such requirement shall not prevent the rendering of services to which illegal foreigners or foreigners are entitled under the Constitution or any law”. It also violates the constitutional right to privacy of both foreigners and South Africans, protected in section 14 of the Constitution. In the case of learning institutions, the situation is even more restrictive as the Act determines that “no learning institution shall knowingly provide training or instruction to (a) an illegal foreigner, (b) a foreigner whose status does not authorise him or her to receive such training or instruction (...)” (section 39). Furthermore, the Act tends to discourage engaging in relation or business with foreigners, for fear of being outlawed. It shifts the onus onto employers, learning institutions and hoteliers to prove that they did not know they were providing employment, instruction or accommodation to an illegal foreigner. Finally, the Act strongly condemns any action amounting to “aiding and abetting illegal foreigners” (section 42):

“Subject to this Act, and save for necessary humanitarian assistance, no person shall aid, abet, assist, enable or in any manner help (a) an illegal foreigner, or (b) a foreigner in respect of any matter, conduct or transaction which violates such foreigner’s status, when applicable”.

This includes providing instruction, entering into a business relationship, providing accommodation, etc. Such provisions participate in the ‘community-enforcement’ of South African migration policy, which shifts the focus of enforcement from border control to control by institutions and members of the community within the country. They tend to alienate, and even criminalise, undocumented migrants as people with whom it is unwelcome or even dangerous to have a relation. They also tend to outlaw those who would advocate on their behalf and to encourage xenophobia³⁹.

4) The precarious legal situation of some documented migrants

The focus on ‘illegal foreigners’ and the constant suspicion against them necessarily affect the living conditions of all foreigners, even documented migrants, making them the targets for police harassment and xenophobia. Further, the policy framework and practices in the field of migration are not conducive to the “normalisation” of the status of migrants and their integration in South African society.

Based on a vision geared towards controlling the entry and stay of migrants in the country rather than facilitating their contribution to South Africa and protecting their rights, they tend to maintain documented migrants in temporary status and even expose them to losing their status.

First, many documented migrants remain for very long periods on temporary permits. This is the case of many migrants on temporary work permit who, although they are entitled to applying for permanent residence after five years in the country, rarely do so. Apart from those who do not wish to relinquish their nationality, many do not know about this possibility and the procedure to apply, all the more as the DHA seems reluctant to publicise and promote this option⁴⁰. As a result, many migrant workers from SADC have spent many years in South Africa without ever getting the possibility to settle there with their family or to stay in the country once they are unemployed or retired. Similarly, refugees do not get a permanent refugee status; they have to apply every two years for its renewal. After 5 years in South Africa, they may also apply for permanent residence. There again few people know about or are able to go through the process. This means that if a documented worker later becomes unemployed or if a refugee stops being eligible for refugee status, s/he will then lose the legal right to stay in South Africa after many years. They will then be faced with the alternative either of leaving in the country in which they make their living, or of becoming undocumented.

Another factor maintaining these migrants in a precarious situation in South Africa is the fact that migration policies do not favour family reunification. No specific provision is made on that respect and the difficulties encountered when applying for visas as well as the pervasive xenophobia may discourage many. Besides, relatives coming on a relative's permit cannot work (section 18 of the Immigration Act) and will find it almost impossible to change the motive of their permit (e.g. from relative's to work permit) without going home first. Finally, as underlined by the Legal Resources Centre, "the Department [of Home Affairs] has recently decided that a foreigner cannot hold more than one permit at a time and that Refugees should not change their status or asylum seekers their permits if they marry South African citizens, or have children with South African citizens. Lately, it has become practically impossible for asylum seekers or refugees to change their status and apply for temporary or permanent residence"⁴¹.

Secondly, the very functioning of the Department of Home Affairs exposes some migrants to the risk of becoming undocumented. Thus, the permit for asylum-seekers is a

mere letter to be stamped every few months for extension; it can easily fall apart or be lost. For renewal of their permit, asylum-seekers and refugees have to go to the very reception offices to which they initially applied. Given that there are only five such offices in the whole country and that they may have moved, it becomes a lengthy and costly process for migrants who moved to a different part of the country to go back and renew it in good order. Cases have also been reported when police or immigration officers confiscated or destroyed the permits and personal documents of documented migrants, or arrested them on the allegation that they were carrying counterfeit documents. As a result, it is not uncommon for some documented migrants to become undocumented or to be arrested as 'illegal foreigners'.

B- The human rights of undocumented migrants

Both international and South African law provide for a wide protection of the human rights of migrants, including undocumented migrants and including in the area of social and economic rights. After examining the relevant international instruments, some of which have not yet been ratified by South Africa, this section will examine the protection enshrined in South African law, in particular in the 1996 Constitution, which is the cornerstone of the new democratic regime and ethos.

1) In international law

There is an important corpus of international laws protecting the human rights of migrants, refugees, and asylum seekers, including undocumented migrants. While international human rights law respects the sovereignty of the states in deciding to whom they grant authorisation of entry and stay on their territory, it seeks to ensure that migrants' fundamental rights are fully recognised and respected, even when they irregularly entered or stay in a country. Certain human rights are granted only to citizens (e.g. the right to vote) or citizens and permanent residents (e.g. the right to certain social benefits). However, most rights also apply to migrants, documented or not, by virtue of them being human beings and regardless of their legal status. International human rights law thus recognises most human rights to *everyone*, including documented and undocumented migrants, in particular⁴²:

- the right to life,
- the right to freedom and personal security,

- the right not to be tortured, enslaved, subjected to forced labour,
- the right to privacy,
- the right to family life,
- the right to the freedom of opinion and religion,
- the right not to be arbitrarily arrested and detained as well as rights during arrest and detention,
- the right to a fair trial and due process,
- the right to fair and decent conditions of work,
- the right to join trade unions or other associations,
- the right to adequate housing,
- the right to emergency healthcare,
- the right to education.

The main universal instrument protecting specifically migrants' rights is the Convention on the rights of all migrant workers and members of their families, adopted by the United Nations in 1990⁴³. It codifies in a single instrument the rights of migrant workers throughout the whole process of migration, from their state of origin, through states of transit and into host states. It sets out the minimum legal requirements that these states must observe concerning migrant workers, to respect their civil and political rights, as well as their economic, social and cultural rights. The Convention does confer specific rights on documented migrant workers, such as access to social services, unemployment benefit, participation in the public affairs in their state of origin, freedom to choose their occupation, etc. It also sets out core rights for both documented and undocumented migrant workers, including the right to life, the freedom of opinion, the right to a fair trial, a treatment equal to that of nationals in matters of working conditions, the freedom of association, the right to urgent medical care and a treatment equal to that of nationals for children's access to education (articles 8-35). Regretfully, South Africa has not yet ratified, nor even signed, this essential Convention.

Apart from the Convention on the rights of migrant workers, the six other fundamental human rights treaties adopted by the UN to develop on the 1948 Universal Declaration of

Human Rights also confer rights on migrants. These treaties are: the *Covenant on civil and political rights*; the *Covenant on economic, social and cultural rights*; the *Convention on the rights of the child*; the *Convention on the elimination of all forms of racial discrimination*; the *Convention against torture*; and the *Convention on the elimination of all forms of discrimination against women*. All of them but the Covenant on economic, social and cultural rights have been ratified by South Africa and therefore confer rights to all persons living under its jurisdiction. In its recent review of the South African situation, the Committee against Torture thus recalled the applicability of the Convention to migrants and indicated:

"The Committee is concerned with the difficulties affecting documented and undocumented non-citizens detained under the immigration law and awaiting deportation in repatriation centers, who are unable to contest the validity of their detention or claim asylum or refugee status and without access to legal aid. The Committee is also concerned about allegations of ill-treatment, harassment and extortion of non-citizens by law enforcement personnel as well as with the absence of an oversight mechanism for those centres and with the lack of investigation of those allegations (articles 3, 2, 12, 13 and 16)"⁴⁴.

The non-ratification of the Covenant on economic, social and cultural rights is an important setback to human rights protection in South Africa, as it limits international protection for such important rights as the rights to health, education or food and undermines the indivisibility of all human rights.

Since 1996, South Africa is also a party to the African Charter on Human and People's Rights. It is thereby bound to respect *every individual's* right to life and physical integrity (art. 4), dignity and freedom from torture, exploitation and degrading treatments (art. 5), liberty and personal security (art. 6), fair trial (art. 7), freedom of conscience and religion (art. 8), right of information (art. 9) and to free association (art. 10) in the limits set by law, right to property (art. 14), right to work under equitable and satisfactory conditions (art. 15), right to enjoy the best attainable state of physical and mental health (art. 16), right to education (art. 17), and right to family life (art. 18). These rights largely correspond to those conferred by the UN human rights treaties. They constitute binding obligations for the South African state.

Finally, an essential part of the international body of law protecting the rights of migrant workers lies in the conventions adopted by the International Labour Organisation (ILO). South Africa ratified ILO eight main conventions protecting

fundamental principles and rights at work: the freedom of association and collective bargaining, the elimination of forced and compulsory labour, the elimination of discrimination in respect of employment and occupation, and the abolition of child labour⁴⁵. These conventions also apply to migrant workers, including undocumented ones⁴⁶. While it ratified all eight fundamental conventions, South Africa regrettably did not ratify any of the ILO Conventions dealing specifically with migrant workers. The cornerstone of this corpus of ILO conventions is the *1949 Migration for Employment Convention (Revised) no. 97*. The latter provides for access to health care for migrant workers and their families, equal treatment with nationals in the matter of remuneration, social security, taxes etc., the facilitating of transfers of revenue to their country of origin, the prohibition of expulsion for workers who have been granted permanent right to remain, etc. It was supplemented in 1975 by *the Migrant Workers (Supplementary Provisions) Convention no. 143* which establishes that “Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers” (article 1).

The Convention also states that “the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit” (article 8). It further condemns the employment of migrant workers in abusive conditions (especially the trafficking of workers), extends provisions in the matter of equality of opportunity and levels of pay with nationals, and makes it easier for families to be reunited where the workers’ situation is regular. Other conventions have a specific bearing on the matter of social security for refugees and asylum seekers⁴⁷. As with the UN Convention on the rights of migrant workers and the International Covenant on economic, social and cultural rights, it is an essential step for South Africa to ratify these ILO Conventions, in order to reinforce human rights protection with regard to both documented and undocumented migrant workers.

2) In South African Law

Product of the anti-apartheid struggle and foundation of the new democracy, the *1996 Constitution* defines the Bill of Rights as the cornerstone of the new regime. It embodies a broad and progressive conception of human rights, providing important protection not only for civil and political rights but also for economic, social, and cultural rights. It also resorts to a universal language, based on the conception that “South Africa belongs to all who live in it” (preamble) and that the Bill

of Rights “enshrines the rights of all people in our country” (Chapter 2). Most rights are thus formulated as belonging to “everyone”, except for few rights reserved to citizens only (e.g. the right to vote, the right to form a political party, the right to a passport, the right to choose one’s profession). All other rights apply to “everyone”, and benefit therefore to foreign residents, including documented migrant workers and refugees. It may be argued that most of these rights also apply to undocumented migrants, for instance the freedom of expression (section 16), the right to fair labour conditions or to join a trade union (s. 23), the right to healthy environment (s. 24), the right to information (s. 32). There is however no unified doctrine nor consistent jurisprudence on the matter. For a smaller number of these rights, it is already widely recognised that they do apply to undocumented migrants, either because they are fundamental rights inherent to human dignity or because the Constitution specifically provides that “no one” may be excluded from their scope. These rights are:

- equality before the law and non-discrimination (s. 9)
- the right to human dignity (s. 10);
- the right to life (s. 11);
- the right to freedom and security of the person (s. 12);
- the right to be exempt from slavery, servitude and forced labour (s. 13);
- the right not to be arbitrarily deprived of one’s property (s. 25);
- the right not to be evicted (s. 26);
- the right to emergency medical treatment (s. 27);
- the rights of detained persons (s. 35.2).

Besides the Constitution, major labour laws would also apply to undocumented migrants as they do not make explicit distinction between citizens or permanent residents and others (temporary residents and undocumented workers). It is the case in particular of the 1995 *Labour Relations Act* which makes provision for fair labour practice, the right to join a trade union, the right to collective bargaining and the right to strike; of the 1997 *Basic Conditions of Employment Act*, which regulates working hours, leave, remuneration, termination of contract and certain minimum wages; of the 1998 *Employment Equity Act* which prohibits unfair discrimination;

or of the 1993 *Occupational Health and Safety Act* and the 1993 *Compensation for Occupational Injuries and Diseases Act*⁴⁸. In practice however, there is a lack of effective mechanisms and remedies to realise and protect these rights.

The *Immigration Act* itself provides a general – albeit vague – recognition of the human rights of migrants, both documented and undocumented. Apart from the preamble, its section 44 explicitly recognises that while organs of the state should inquire about the legal status of the persons they provide services to, and report ‘illegal foreigners’ to the Department of Home Affairs, “such requirement shall not prevent the rendering of services to which illegal foreigners or foreigners are entitled under the Constitution or any law”.

On numerous occasions, the Constitutional Court and other courts re-asserted the human rights of non-nationals living in South Africa. Not for profit organisations such as Lawyers for Human Rights, the Legal Resources Centre and the Wits Law Clinic, as well as the Human Rights Commission have consistently used strategic litigation to defend these rights and extend their realisation. Most cases have to do with the rights of refugees and asylum-seekers, in particular with regard to their conditions of arrest and detention and to the processing of asylum applications. Besides the *Watchenuka* case mentioned above, important cases include the following:

- in 1999, the Human Rights Commission acted against the Minister of Home Affairs to obtain the release of refugees who were unlawfully detained for over 120 days at Lindela repatriation centre. The Pretoria High Court granted the urgent release of those refugees and ordered the Department of Home Affairs to regularly report on the persons detained in Lindela (providing details of name, origin, length of detention, etc.)⁴⁹.

- in 2003, Lawyers for Human Rights assisted a group of individuals and a refugee organisation in challenging the Private Security Industry Regulation Act which excludes refugees from working in the private security industry, on the basis that it infringes on their rights to non-discrimination and dignity. In its 206 decision, the Constitutional Court found that the Act constituted a narrow screening scheme rather than a blanket ban on the registration of refugees as private security providers, hence did not violate their right to equality. It underlined that refugees could seek for an exemption under the Act, in order to be allowed to work in the private security sector⁵⁰.

- in 2004, in a landmark decision, the Constitutional Court

rejected the government's argument that persons illegally in the country had no rights and were protected only by international law. It specifically indicated that the right to freedom and personal security (s. 12) and the rights of detained persons are integral to the values of the Constitution and cannot be denied to undocumented migrants⁵¹.

- in 2004, the Centre for Child Law and Lawyers for Human Rights brought an urgent application on behalf of undocumented unaccompanied foreign children who were detained in Lindela repatriation centre, together with adults, and were facing imminent deportation. The Court granted an interdict of deportation and appointed a curator *ad litem* for the children. It rejected government's argument that the Child Care Act do not apply to unaccompanied foreign children and prohibited the Department of Home Affairs to detain any further children in Lindela⁵².

- in 2005, the Legal Resources Centre (LRC) brought an application on behalf of a group of asylum seekers to compel the Cape Town refugee reception office to process applications within reasonable time and in line with national and international refugee law. In its decision, the Constitutional Court found that the policy and practice of the reception office was inconsistent with the rights to human dignity, freedom and personal security of undocumented migrants. It ordered the Department of Home Affairs to report back on improvements⁵³.

- A similar application was made by the Somali Refugee Forum against the Department of Home Affairs and reception offices in Gauteng. The High Court ordered the Department to hire more staff and increase their productivity, to extend office hours, to re-open the reception office in Johannesburg and to appoint an independent expert to make recommendations on ways to improve the processing capacities of the Department, within cost limits⁵⁴.

- A group of disabled refugees and two refugee organisations, assisted by LHR, challenged the constitutionality of the exclusion of refugees from disability grants. As a result, the government adopted in 2006 a Social Assistance Plan for Refugees, which provides refugees with disability grants of the same value as those of citizens⁵⁵.

- The Wits Law Clinic recently acted on behalf of seven Zimbabwean seeking to apply for asylum in order to challenge the functioning of the application process. The High Court declared unlawful both the method of ‘pre-screening’ (a form aimed at determining who may or may not apply for asylum)

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and the creation of 'appointment slips', which give a date when the application for an asylum-seeker permit will be registered (often 6 months to a year later –in contravention with the legal maximum of processing the application within 6 months). The Court stated such malfunctioning resulted in asylum-seekers facing "arrest, detention, deportation (to countries where they face persecution) and other violations of statutory and other constitutional rights' whereas the Bill of Rights 'applied to all persons within South Africa's borders'. The Department of Home Affairs appealed⁵⁶.

25. See Worden, 1994; Sparks, 1997; Crush, '1996; Crush, 1997; Crush, 2000; Posel, 2003; South African Government Information: <http://www.info.gov.za/aboutsa/history.htm>; Wikipedia: http://en.wikipedia.org/wiki/Pass_laws.

26. quoted in Klaaren, 'Post-Apartheid Citizenship in South Africa', 1999.

27. Under Apartheid, South Africa did not have legislation providing protection to asylum seekers and refugees and did not agree to the presence of a UNHCR office on its territory.

28. Algotsson and Klaaren, 'Policing Migration', 2003; Landau, 'Migration Trends, Management and Governance Challenges', 2005; Landau, Ramjathan-Keogh and Singh, 'Xenophobia in South Africa and Problems related to it', 2005; Williams, Crush and Nicholson 'The UN Convention on the Rights of Migrant Workers', 2006.

29. The 2002 Immigration Act is available at : http://www.dha.gov.za/legislation_admin.asp ; the 2004 Immigration Amendment Act at: http://www.dha.gov.za/documents/Immigration_Act%2019%202004.pdf ; the Refugees Act at: www.home-affairs.gov.za/raab.asp ; and the Constitution at: <http://www.info.gov.za/documents/constitution/index.htm>.

30. The preamble of the amended Act thus states as part of the finalities of the new system of migration control :

“(l) immigration control is performed within the highest applicable standards of human rights protection;

(m) xenophobia is prevented and countered;

(n) a human rights based culture of enforcement is promoted;

(o) the international obligations of the Republic are complied with; and

(p) civil society is educated on the rights of foreigners and refugees”.

31. The preamble thus expresses two other finalities of the new system of migration control as being that:

“(b) security conditions are fully satisfied and the State retains control over the immigration of foreigners to the Republic ; (...)

(i) the contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers (...)”.

32. According to a recent study of the Southern African Migration Project conducted at major border posts with all South African neighbours except Namibia and Botswana: “of the 6 millions border crossings in a year, 30-50% are by small –scale traders” (reported in the Financial Mail, 'Immigration : what it's doing to South Africa', 16 February 2007, p36).

33. Lefko-Everett, 'Visa cost a major hurdle for cross-border traders', in Crossings, SAMP, January 2007, pp 10-11.

34. There however remains some limitations. Thus the 2001 Private Security Industry Act reserves employment in the sector to citizens/residents. Some organisations defending refugees challenged this situation on the basis of refugees' rights to non-discrimination and dignity (*Union of Refugee Women and Fourteen Others v Private Security Industry Regulatory Authority* (Case No. 35986/2003), Transvaal Provincial Division (10 May 2006)). The private security sector is one of the key sector of employment for many refugees and asylum-seekers.

35. See *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) (28 November 2003). See: <http://www.constitutionalcourt.org.za> and <http://www.lhr.org.za/projects/refugee/judgements.html>

36. See : http://www.sadc.int/english/documents/legal/protocols/facilitation_of_movement.php#article31

37. Williams and Carr, 'How far is SA willing to go on free movement of persons in SADC ?', in Crossings, South African immigration reform, vol. 8, n°1, January 2007, published by the Southern African Migration Project.

38. See Southern African Migration Project, 'The New South African Immigration Bill: A Legal Analysis', 2001.

39. Ibid. See also Landau, Ramjathan-Keogh and Singh, 'Xenophobia in South Africa', 2005.

40. Interview with Loren Landau and Ingrid Palmay, FMSP, 1st March 2007.

41. See: http://www.lrc.org.za/Focus_Areas/refugee.asp

42. See International Catholic Migration Commission, Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: A Do-It-Yourself Kit, March 2006 ; International NGO Platform on the Migrant Workers' Convention, A Guide for Non-Governmental Organisations on the Implementation of the UN Migrant Workers' Convention, August 2005; Platform for International Cooperation on Undocumented Migrants, 'Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework', March 2007.

43. See: <http://www.ohchr.org/english/law/cmw.htm>

44. Committee against Torture, Consideration of reports submitted by State Parties under Article 19 of the Convention, conclusions and recommendations of the Committee against Torture – South Africa, 37th session, 6-24 November 2006, CAT/C/ZAF/CO/1, available at: <http://www.ohchr.org/english/bodies/cat/cats37.htm>

45. The eight ILO fundamental conventions are: the *Forced Labour Convention* (No. 29), the *Freedom of Association and Protection of the Right to Organise Convention* (No. 87), the *Right to Organise and Collective Bargaining Convention* (No. 98), the *Equal Remuneration Convention* (No. 100), the *Abolition of Forced Labour Convention* (No. 105), the *Discrimination (Employment and Occupation) Convention* (No. 111), the *Minimum Age Convention* (No. 138), the *Worst Forms of Child Labour Convention* (No. 182). See : <http://www.ilo.org/public/english/standards/norm/introduction/what.htm>

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46. In a ruling regarding a Complaint against the Government of Spain presented by the Spanish General Union of Workers, the ILO expert committee thus reaffirmed that the right to organise and strike, freedom of assembly and association and the right to demonstrate and collective bargaining are applicable to all workers, without distinction whatsoever. See PICUM, 'Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework', March 2007, p20.
47. See the 1962 *Equality of Treatment (Social Security) Convention*, no.118 and the 1982 *Maintenance of Social Security Rights Convention*, no. 157. See: <http://www.ilo.org/ilolex/english/convdisp1.htm>
48. Williams, Crush and Nicholson, 'The UN Convention on the Rights of Migrant Workers: the Ratification Non-Debate', 2006. See also the ILO Natlex database:
http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=ZAF&p_classification=17&p_origin=SUBJECT
49. *South African Human Rights Commission and Forty Others v. Minister of Home Affairs and Dyambu (Pty) Ltd.*, case no. 28367/99, Witwatersrand High Court. See : <http://wwwserver.law.wits.ac.za/clinic/past.htm>
50. *Union of Refugee Women and Fourteen Others v Private Security Industry Regulatory Authority* (Case No. 35986/2003), Transvaal Provincial Division (10 May 2006). See : <http://www.lhr.org.za/projects/refugee/judgements.html> and <http://www.constitutionalcourt.org.za>
51. *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125, Constitutional Court (CCT 18/03, 9 March 2004), See : <http://www.lhr.org.za/projects/refugee/judgements.html> and <http://www.constitutionalcourt.org.za>
52. *Centre for Child Law and Another (Lawyers for Human Rights) v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) (13 September 2004). See: http://www.childlawsa.com/case_04.html
53. *Kiliko and Others v Minister of Home Affairs and Others*, 2006 (4) SA 114, Constitutional Court. See : http://www.lrc.org.za/Focus_Areas/refugee.asp and <http://www.constitutionalcourt.org.za>
54. *Somali Refugee Forum and Another v. the Minister of Home Affairs and Others*, High Court, 2005, Case No. 32849/2005 See: <http://www.lhr.org.za/projects/litigation/cases.html>
55. See: <http://www.lhr.org.za/projects/litigation/cases.html>
56. See: http://www.lrc.org.za/Articles/Articles_Detail.asp?art_ID=280

Chapter 4: Summary of key findings

A- Ongoing human rights violations

1) Malfunctioning and abuses in the asylum application system

Our interviews as well as numerous reports – from NGOs and the Public Protector – and press articles point to the widespread and continuous problems faced by asylum-seekers and refugees throughout the asylum application process⁵⁷. Issues range from lengthy and inadequate processing of asylum applications and upfront rejections of certain would-be asylum-seekers to widespread corruption and verbal and physical abuse by immigration officers, police officers and private security guards.

On entry in South Africa, would-be asylum-seekers may inform immigration officers of their intention of applying for asylum. They should then be granted a temporary permit, under which they have to report within two weeks to a refugee reception office in order to apply. However, many would-be asylum-seekers are not aware of this possibility, are afraid that immigration or police officer at the border may harass them, turn them away, immediately arrest them and deport them, illegally detain them or extort money from them. A significant number therefore enter South Africa illegally, which exposes them to the risks of being exploited by smugglers and fellow migrants, arrested by the police, or of suffering physical hardships (e.g. when crossing the crocodile infested Limpopo river).

Refugee reception offices are the only place where would-be asylum-seekers, asylum-seekers and refugees may apply to obtain an initial asylum-seeker permit and a refugee permit, as well as to renew or extend their permit or to change its purpose (e.g. from refugee to work permit). There are only 5 reception offices in the entire country, in Cape Town, Pretoria, Johannesburg, Durban and Port Elizabeth. This contributes to concentrating refugee migrants in these areas. The inadequacy of the reception offices is clearly shown by the backlog which is currently still about 80 000 applications. Capacity is all the more lacking as these offices are inadequately staffed – insufficient staff number, frequent vacancies, lack of training – and under-equipped (number and quality of computers, printers, cameras, etc.). In a recent court case, the judge thus noted that, with only 12 reception officers in the Johannesburg office, “this means that in a week only about 420 applications can be

processed, while about 900 new asylum-seekers visit that office every week. This means 500 new applicants a week are being turned away and added to the backlog”⁵⁸. The capacity of the reception offices has not significantly increased nor improved over the past years, despite successive court orders and out of court settlements⁵⁹, and despite the implementation by the Department of Home Affairs of its new ‘Turnaround Strategy’ since 2005.

The capacity issue has direct repercussions on the rights of asylum-seekers and refugees. It means that people often have to queue for days before being attended to, arriving very early in the morning or even staying overnight in front of the office, with no protection from the weather and no proper sanitary facilities. Most have to come multiple times before being let in and some have to wait six months to a year before receiving an asylum-seeker permit. Meanwhile they are left with no valid documentation, which exposes them to being arrested and deported and/or to police harassment and extortion. They thereafter often have to wait another year or more for their asylum application to be processed and their refugee permit to be granted or denied. This is unlawful in terms of the 1998 Refugee Act which stipulates that applicants have to receive an asylum-seeker permit on their first reception and that the determination of the refugee status thereafter has to be processed within six months. The incapacity problem also creates opportunities for unlawful procedures and abuses.

Thus, reception officers have set up ad hoc ways to deal with the overcrowding. Some refer to an informal list of ‘non refugee producing countries’, which they use to directly turn away applicants from certain countries or to examine very arbitrarily and summarily their applications. Some use ‘pre-screening’ forms to conduct a summary consideration of certain asylum applications and to turn down some of them. Some give priority access to women or people from specific countries. Some hand out ‘appointment slips’ which give would-be asylum-seekers a later date when to apply for their asylum-seeker permit (often several months later). All of these procedures are unlawful and have repeatedly been declared so in court. They violate in particular asylum-seekers’ rights to have their case examined individually and in-depth, and to have adequate temporary permits. The Department of Home Affairs adopted measures to improve this service. So far to little avail. It appears that there are no real effective domestic remedies for asylum seekers in South Africa.

Such a malfunctioning refugee and asylum system is problematic as it opens the door to the development of parallel operations based on bribery and corruption. Many people applying for asylum have to pay, small or large amounts of money, to enter the reception office, to be helped by an interpreter, to be attended to by a reception officer, to get an appointment slip, to have their fingerprints and photo taken, to obtain a permit, etc. Reports have highlighted the existence of networks involving 'officially recognised' interpreters, security guards, reception officers and a variety of 'agents' offering their services outside the buildings. In a recent investigation at the Cape Town refugee office, an undercover journalist managed to buy an appointment slip for 150 rands and an asylum-seeker permit for 800 rands⁶⁰. The Forced Migration Studies Programme also found indications of widespread corruption during a research conducted in 2004-5 at the Johannesburg reception office⁶¹.

While waiting in line or being in the reception office, persons applying for asylum are also sometimes subjected to verbal abuse (shouts, insults, demeaning comments) and even physical abuse (being forcefully pushed in line, rare instances when the police or security guards used whips for 'crowd control'). They are sometimes threatened to be handed over to the police if they do not 'behave'. In its 2005 report, the Public Protector found that security personnel used "mechanisms of crowd control unbecoming of treatment of members of the public"⁶².

The overcrowding and malfunctioning of the asylum system partly finds its cause in the overall framework of the migration policy. Indeed, access to permits, in particular to work permits, is largely restricted and out of reach for most economic migrants and the focus of the policy is on catching and deporting undocumented migrants. As a result, many economic migrants divert the asylum system from its original purpose in order to obtain asylum-seeker and refugee permits which make it lawful to stay and work in the country. With the current processing time, they may thus have permits in order for up to several years. Some may even abuse the system by applying several times to different refugee offices, and remain undetected due to the lack of proper record-keeping and centralised database.

2) Widespread violations linked with arrest, detention and deportation

Police control and harassment is a common experience amongst foreign migrants, even documented ones. The focus on control and deportation of 'illegal foreigners' mean

that ID control are frequent, in particular in certain areas of town, for street vendors, etc. Interviews and reports indicate that ID control may come with police officers asking for bribes or sexual favours, extorting money or goods, inflicting verbal or physical abuse⁶³. It also happens that police officers confiscate or tear up IDs and permits, do not recognise certain permits (in particular asylum-seekers permits) as valid documents or consider that they are forged⁶⁴. These practices clearly contravene migrants rights to dignity, personal security and property, as enshrined in the Bill of Rights and in international law, as well as South African regulations governing police practices.

Human rights violations during arrests are also frequent. It is not rare for police officers to arrest somebody on mere suspicion that s/he is undocumented. As a result, it happens that documented migrants and even South Africans are arrested and held in custody until a relative brings a proof of their legal status. In 2002, the Department of Home Affairs set up new guidelines for arrest which request arresting officers to have reasonable grounds that the person is indeed undocumented and to provide the Department elements justifying the arrest, and demonstrating that the person had been provided an opportunity to prove her/ his legal status⁶⁵. These principles are too often violated: people may be arrested without reasonable grounds to suspect they are undocumented; their documents may not be considered (at all or as valid); sometimes a whole group is arrested and taken into custody before any attempt is made to check, individually, their legal status; they may not be told why they are arrested nor given an opportunity to prove their status or contact a relative. On the borders, some migrants are arrested and deported before they can prove their legal status, or apply for asylum, thus violating South Africa's national and international obligation of 'non-refoulement'. As noted in a recent research conducted by the Wits Forced Migration Studies Programme and Lawyers for Human Rights, "those arrested for immigration offences – or otherwise determined to be *persona non grata* – enter a privatised realm of law enforcement existing largely outside of government regulation and public observation. Without some form of outside assistance it can be extremely difficult to secure a person's release from arrest and detention"⁶⁶.

Migrants arrested for lack of valid documents are detained until their deportation at the 'Lindela repatriation centre', located near Johannesburg. Those arrested in other parts

of the country are first detained (often for days or weeks) in local prisons, where they are sometimes kept with people convicted of criminal offences, until they are taken to Lindela. Lindela is a facility dedicated to the detention of undocumented migrants awaiting deportation. It is run by a private company, Bosasa, along the lines of a high-security prison; it has a capacity of 4 000 detainees. Since its opening in 1998, Lindela has been denounced by human rights advocates for the many abuses and undignified conditions inflicted to detainees. While the situation has improved over the past few years, thanks to the monitoring of NGOs and the Human Rights Commission, to court orders, to media attention and to international reports⁶⁷, human rights violations remain widespread at Lindela.

Thus, a number of inmates have been at Lindela for months, well over the 120-day limit set by section 34 of the Immigration Act. They are often not informed of their rights to ask for their detention to be confirmed by court and to appeal and have little or no access to legal aid and interpreters. A number of those held at Lindela are lawful refugees and asylum-seekers; there have even been cases of South Africans detained at and deported from Lindela. Would-be asylum-seekers are not either given an opportunity to contact the Department of Home Affairs and apply for asylum.

Conditions of detention are clearly below minimum standards defined by South African and international law to “[protect] their dignity and relevant human rights” (section 34, Immigration Act). Inmates have no or insufficient access to phone calls and visitations. The food they receive is not sufficient neither in quantity nor in nutritional quality. At times, the centre exceeds its capacity of 4 000 people⁶⁸. Sick and vulnerable detainees are not properly attended: the main medical response seems to be the delivery of the same analgesic for all, on an on and off basis; access to adequate treatment is insufficient, although there is a clinic inside the centre and the possibility to send inmates to the nearby Leralong hospital; instances of deaths have been reported.

There are also regular reports of security guards inflicting ill-treatment such as interruption of sleep, physical abuse, extortion and bribery. While the Human Rights Commission and a group of NGOs, including Lawyers for Human Rights, the Pentecostal Refugee Ministry and the Legal Resources Centre, are engaged in monitoring conditions of detention at Lindela, their means and resources are insufficient to ensure an in-depth and

continuous monitoring. Women migrants are seen as more vulnerable to abuses in deportation centres. According to SAMP's studies, many migrant women arrested and detained at Lindela shared the same experiences: “neglect, abuse, poor treatment, solicitation of both monetary bribes and sex exchange for being released from the facility” was part of their day-to-day⁶⁹.

Although the Department of Home Affairs and Bosasa committed to a number of changes and improvements, these are far from being always fully implemented.

From Lindela, detainees are deported, mostly by train to the Zimbabwean and Mozambican borders. The Department of Home Affairs thus deported between 150 000 and 185 000 persons per year between 1995 and 2004; deportations reached close to 210 000 in 2005 and over 165 000 for the sole period between January and August 2006⁷⁰. Those deported do not get the opportunity to collect their belongings or the wages which they are owed before deportation. Over the past years, it has been highlighted that a large number of those deported returned to South Africa immediately after deportation, in what is called the ‘revolving door syndrome’.

3) Exploitation at work and violations of labour rights

Many foreign migrants working in South Africa experience abuses and human rights violations in the workplace. It is mostly true of undocumented workers, even though even documented ones are not exempt. A first issue is for them to procure employment in good conditions. Some employers do not recognise asylum-seeker and refugee permits as valid documents for work and therefore refuse to hire them. Many qualified workers (e.g. nurses, teachers, engineers, lawyers, etc.) also find it difficult to have their qualifications recognised by the South African Qualifications Authority, as it is a costly and timely process.

Most vulnerable foreign workers experience regular violations of their labour rights⁷¹. They often work long hours, working 8 hours or more per day, sometimes up to 7 days a week; they may also have no breaks or very short breaks. Some do obtain paid sick leave or maternity leave, and are made to work even on certain public holidays or Sundays.

In addition, migrant workers are often paid little, and less than the minimum wage or than South Africans doing

equivalent work. Thus, the experienced Zimbabwean teachers we interviewed, whether documented or undocumented, were paid between 600 and 800 rands per month, and one as little as 350 rands, when teachers in government schools often start at 2 000 rands per month or more. This is in clear violation of South Africa's obligations enshrined in the Constitution – sections 9 and 23 of the Bill of Rights on non-discrimination and the right to fair labour conditions – and labour laws, in particular the 1997 Basic Conditions of Employment Act. It also contravenes international rights protected in articles 2.2 (non-discrimination) and 7 (right to just and favourable conditions of work) of the Convention on Economic, Social and Cultural Rights and articles 7 (non-discrimination) and 25 (equality of treatment with nationals with regard to remuneration and working conditions) of the Convention on the rights of migrant workers. Some migrant workers are also paid on a daily basis or by the piece, as a means to reduce their wage. They are not always paid their overtime or their probation period, and sometimes they are paid with delay or receive payment of only part of their wage or even nothing at all. Some employers also unilaterally and unlawfully decide to deduct money from their wage, because they provide food or lodging or because the workers arrived late, made mistakes, etc. Although they are officially entitled to unemployment insurance and compensation of occupational injuries, which the law provides to all workers, in practice they never have access to these benefits.

In a recent report on migrant workers working on farms at the border with Zimbabwe and Mozambique, Human Rights Watch thus showed that violations of basic labour rights are widespread, for both documented and undocumented workers. Export-producing farms are more likely to respect these rights than smaller farms; while they tend to comply with the minimum wage, payment of overtime, sick leave and annual leave remains rare. HRW also underlined the difficulty for migrant workers to obtain payment of compensation for injuries. It is indeed government's policy to pay work-related compensations into a bank account but banks generally refuse to open accounts for foreigners, even documented ones. The report also highlights several instances of workplace violence, wherein migrants were physically abused by their employer, the foreman or private security officials of the farm⁷².

It is important to note that bad labour conditions are not specific to foreign migrant workers; many South African

workers experience low wages, long hours, strenuous work, and undignified conditions at the workplace. However, undocumented migrant workers tend to be more exposed to such violations since they are often employed in low-skill positions, in dirty, dangerous and difficult jobs in agriculture, mining, construction, private security, etc. They are often all the more vulnerable as they are likely to occupy the lowest end of the scale and to have more precarious contracts, working by the piece, on seasonal or temporary contracts, or for subcontractors⁷³. They are therefore likely to have less favourable working conditions than other workers, in particular South Africans, and more frequent periods of unemployment.

Above all, migrant workers, particularly undocumented ones, are more vulnerable to abuses at work because of their precarious legal situation. Most of the time, they will not claim their rights nor seek redress as this would expose them to the risk of being arrested and deported (see below on the lack of effective remedies). Some employers deliberately seek undocumented migrants, who are considered to be more 'docile' and 'hard-worker'. In some instances, employers threaten to report them to the police if they do not 'behave' or if they seek redress for an abuse. In rare but regular cases, employers in commercial agriculture and construction even reported their workers to immigration officers just before payday⁷⁴.

These practices all contravene migrant workers' rights to just and favourable conditions of work, to social security, to an adequate standard of living, and to a healthy environment, guaranteed in South Africa's Bill of Rights and labour laws as well as in international human rights treaties, such as ILO Conventions, the Covenant on economic, social and cultural rights and the Convention on the protection of the rights of all migrant workers. Unfortunately, inspections conducted by the Department of labour remain rare and rarely lead to imposing penalties on the employer. There are therefore no strong disincentives for employers to continue using, and abusing, foreign migrant workforce, particularly undocumented.

4) Obstacles to access other economic and social rights: health, education and housing

As noted above, both the South African constitution and international human rights law recognise a number of economic and social rights to migrants, including undocumented ones. In practice, however, migrants working in South Africa have no or very little access to these rights.

Access to health is a case in point. Under the constitution, “no one may be refused emergency medical treatment” (section 27.3). The Convention on the rights of all migrant workers and their families further specifies that “migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment” (art. 28). According to numerous accounts, however, migrants find it hard to access health services and facilities, even for emergency cases. They may be faced with medical staff who keep them waiting for abnormal length of time, provide them with exams and treatment which are below the minimum standards, verbally abuse them, attend them in a South African language they may not understand, treat them with little sensitivity and attention to their pain or specific conditions, have them pay outpatient fees, or deny them access to hospitals either straightforwardly or on the claim that they do not have adequate documentation⁷⁵.

In an extreme case, “a pregnant Somali woman was refused service on the grounds that (a) delivery, unless problematic, did not constitute an emergency and (b), she could not pay the additional fee levied on foreigners (which, as a refugee, she is not required to pay). As a result, she ultimately delivered the child on the pavement outside the hospital, only to have it die a few weeks later. This is an extreme example, but speaks to broader patterns of exclusion from effective protection” (Landau, 2006). For non-emergency cases, most migrants are reluctant to go to hospitals, which they see as linked to official institutions, hence that may be unsympathetic to them or may even report undocumented migrants to law-enforcing officers. As a result, most of them prefer to go to private doctors, in particular those from the same national origin or working with migrant communities. Many migrants also do not consult doctors at all or do not follow adequate treatment, for lack of knowledge or money. This situation exposes them, as well as the South African population, to heightened health risks.

Access to education is similarly very limited. Even documented migrant workers, refugees and asylum-seekers are often unable to enrol their children in public schools on the claim that they do not have adequate documentation. Some schools also insist on parents paying school fees, even when they clearly cannot afford

to, in contradiction with an explicit guideline of the Department of education⁷⁶. Due to their limited financial means, most vulnerable migrants cannot afford to pay schooling in public schools (books, uniforms, etc.) and even less so in private schools. One of the documented migrant woman interviewed by the mission was asked to produce a study permit to register her 8 year old child in a government school; the study permit costs 300 rands, school fees cost 1 000 rands per term⁷⁷. As for unaccompanied children who came undocumented to South Africa, most of them work to make a living and/ or live on the street; very few are referred to Child’s courts and social educators and are given access to schooling.

Housing is often another difficult aspect of migrants’ life. Many migrants live in particularly precarious conditions, with little space, little or no comfort and privacy, sometimes no or little access to water, electricity, heating and other facilities. Many are housed by relatives or friends or sublet a small room or living space; some are accommodated by their employers (in particular amongst farmworkers, domestic workers, mineworkers). The rents they pay are often abusive and consume a significant part of their income. Thus, in some of the cases reported to us, an undocumented migrant woman working in Johannesburg is paying 600 rands per month for a ‘private’ room which is actually just a balcony closed off and turned into a separate room⁷⁸. Two brothers from Burundi, one with refugee status, the other undocumented, paid 1000 rands per month for a 7 m² room with toilet inside, a kitchen corner, running water and electricity in a 6th floor building in Point district in Durban. Another undocumented worker living in Durban was accommodated by the shoe-maker who had hired him; they were living without electricity and he had to go fetch water far away. When they cannot find work or do not earn enough, some migrant workers end up sleeping in the street, in church courtyards, at bus stations, etc. where they are exposed to insecurity and bad weather conditions. As highlighted by HRW in its latest reports, the living conditions of farmworkers, although the same for both foreign and South African workers, are also far below the minimum standards of decent living conditions⁷⁹.

Access to key social and economic rights for migrants depends to a larger or lesser extent on government policies and practices. Many migrants seem reluctant to go and seek services from public institutions. Part of it may stem from the provision of the Immigration Act asking state organs to report undocumented migrants to home affairs officials and the broader feeling that public institutions are

part of the official system of migration control. It may also stem from the behaviours and attitudes of civil servants and public employees, many of whom have a “gatekeeper’s attitude”, sometimes coupled with xenophobia: on the premise that social goods and services are scarce and insufficient to fulfil the needs of South Africans, many take it upon themselves to deny or limit migrants’ access to these essential services. This attitude often stems from a lack of awareness regarding the rights of the different categories of migrants (refugees, asylum seekers, documented and undocumented workers) enshrined in the South African Constitution and legislation as well as in international law. The mission therefore particularly acclaims the positive step taken by the Department of Health, in ordering that public health facilities should provide comprehensive treatment to all eligible patients, regardless of their nationality and legal status, mentioning explicitly that ‘patients should not be denied ART [anti-retroviral treatment] because they do not have an ID’⁸⁰.

5) Insufficient and ineffective access to remedies for vulnerable migrants

A major factor preventing migrants to defend their human rights is the lack of effective remedies, whether administrative or legal, to expose violations and seek redress.

At a first level, migrants lack support and help from civil society organisations to know and defend their rights. Workers unions, such as the main Confederation of South African Trade Union (COSATU), are open to the membership of all workers and defend the rights of all workers, regardless of their nationality and legal status⁸¹. In certain unions, such as the National Union of Mineworkers (NUM), (im)migrant workers constitute a significant part of the membership and the union acted to defend their rights and specific needs. Currently, trade unions and particularly COSATU are not in the forefront in the defence of migrant workers rights. COSATU stated that today it acts on behalf of individual migrant workers or sectors which employ a lot of them (e.g solidarity strike in 2006 with employees of the private security sector⁸²). COSATU is also actively engaged in favour of non-discrimination in the implementation of labour standards, against the casualisation of labour and against xenophobia, which are common features of migrant workers’ living and working conditions. It has however not developed any particular campaign or programme to

defend and further migrant workers’ rights.

In the realm of NGOs, migrants may find a number of services and support, from provision of food and medicines, health services and vocational training, to voluntary interpretation, legal aid or advocacy⁸³. Most of these NGOs however operate in the major urban centres of the country and focus on supporting refugees and asylum-seekers. Less work is done to support undocumented migrants, in particular with regard to their social and economic rights.

Administrative remedies are in place to enable users to appeal a decision or lodge a complaint against different public services and their employees, such as police officers, immigration officers, etc. Some of these procedures are internal to a Department, others are external- the main administrative remedies are the following:

- the Human Rights Commission which investigates individual and systemic violations of human rights, as protected by the Bill of Rights, and seeks to provide redress and to resolve disputes⁸⁴;
- the Public Protector who investigates cases of maladministration and improper conduct by a person performing a public function and makes recommendation for redress⁸⁵;
- the Independent Complaints Directorate responsible for investigating complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS), and the Municipal Police Service (MPS)⁸⁶;
- labour centres and the Commission for conciliation, mediation and arbitration which hear employees’ complaints about violations of their labour rights by their employers⁸⁷.

In addition, a number of administrations – e.g. the department of labour, the public protector, provincial administrations, etc. – have set up helplines, which people can phone to expose their situation and ask for support and protection of their rights.

In principle, all of these remedies are open to migrants, including vulnerable groups such as undocumented migrants, refugees or asylum-seekers. However, most

migrants are not aware that these remedies exist and are available to them or fear to be reported to law-enforcing personnel. Government approach also tends to give precedence to migration laws over labour and social laws, so that undocumented migrants whose rights have been violated find it hard to get redress. As indicated by the representative of the Department of Labour:

“Even the undocumented migrant workers are covered by our legislation, *but obviously that's in theory* because in practice it becomes difficult for an undocumented migrant workers to access specific remedies (...) The problem is specifically about undocumented migrants. There are two pieces of different legislations that cover them: the immigration legislation and the labour legislation, and there is in a sense a contradiction in terms. It's at that level that workers are unable to access the protection that our legislation provides (...) Undocumented migrant workers have themselves the perception that they can't access their rights, they have the fear that the immigration system will take them out of the country”⁸⁸. (emphasis added)

Thus, the human rights of migrants in South Africa too often remain theoretical, for lack of effective means to have them respected and implemented. In order for the rights of all, including non-citizens to be better respected, existing procedures and remedies should not ask people to state their legal status, as state organs otherwise have the obligations to report undocumented migrants. Besides, the various departments should more actively reach out to migrants and inform them of their rights and of existing remedies, for instance by setting up information desk at refugee reception offices or Lindela, by developing awareness-raising campaigns directed at migrants or sectors with large numbers of migrants (e.g. commercial farms at the borders), by developing materials and helplines in languages understandable by migrants, etc.

Finally, departments should seek to develop their own inspectorate functions, e.g. for the SAPS and Department of Home Affairs to address corruption, for the Department of Labour to inspect and prosecute employers for violations of the labour legislation and the Bill of Rights. Currently, there are only 137 labour centres in the country, each of them with an inspectorate division. However, the framework is primarily self-regulatory: inspectors will first seek to obtain compliance through voluntary undertaking. Besides, labour inspectors are far from being enough to conduct regular and in-depth inspections. Administrative

sanctions and penalties imposed to employers and public officials should also be sufficiently severe and publicised so as to deter others.

Legal remedies are also little accessible to migrants. Most of them are not aware of the various legal procedures, do not have financial means to pay for private lawyers and do not have access to legal aid. Few non-governmental organisations, such as Lawyers for Human Rights, the Wits Law Clinic or the Legal Resources Centre, carry out impressive work to defend individual cases, sue government officials and advance migrants rights through strategic litigation. Their capacity to deal with enough quantities to make a decisive impact is however limited and they struggle to cover even for just the most grievous and solid cases.

Most cases so far have thus also focused on refugees and, to a lesser extent, asylum-seekers as well as on political and civil rights such as the right to life, freedom or personal safety, which offer more widely accepted legal ground. Cases aiming at defending undocumented workers or migrants' social and economic rights are much fewer and less likely to succeed. As highlighted in some of our interviews with human rights defenders, courts are generally unsympathetic to undocumented workers.

Some magistrates are not familiar with immigration and refugee law and tend to be unsympathetic to undocumented migrants on the basis that they are in contravention with migration laws. As a result, even when the Department of Home Affairs or another department is in breach of the law, there seems to be a perception of guilt against undocumented migrants and it is difficult to obtain a positive decision in their favour⁸⁹.

As noted above, thanks to the activism of human rights defenders, there have nevertheless been numerous cases and positive court orders to uphold the human rights of migrants. These have in general led to improve the individual situation of groups of migrants, and have sometimes contributed to set up public policies and practices which better respect their rights, for instance with regard to the monitoring of conditions of detention in Lindela. Overall, they have however fell short of bringing effective and consistent improvements. Thus, in spite of court interdicts, the Department of Home Affairs continues to deport migrants without respecting due process, to use 'appointment slips' and to take months in processing refugee applications.

Similarly, despite numerous reports and complaints, corruption and abuse remain widespread amongst police and immigration officers. Commenting on the functioning of the asylum procedures, the representative of the Human Rights Commission thus noted: "the Department of Home Affairs is operating with impunity. The law is there, litigation is done, there are court orders, but the Department of Home Affairs ignores them, it's not followed or just for those who sued them"⁹⁰. This situation points to difficulties and resistance within the government and public administrations to really engage in transformation and to adopt a perspective on migration policy geared towards human rights rather than enforcement and control.

B- Systemic factors

1) The prevalence of xenophobia

In nowadays South Africa, xenophobia is widespread and has a systemic character. A number of recent studies and surveys have shown how prevalent xenophobic feelings are amongst the population. The Forced Migration Studies Programme thus summarises the main data, on the basis of a survey they conducted in 2003 and a survey realised by the Southern African Migration Project in 1998⁹¹:

- '25% of south Africans nationally favour a total ban on immigration and migration, considerably more than in other countries of the region (Crush, 2000);

- 20% of South Africans feel that everyone from neighbouring countries living in South Africa (legally or not) should be sent home (op. cit.);

- in a 1998 survey, SAMP found that 87% of South Africans felt that the country was letting in too many foreigners (op. cit.);

- in a Wits University survey, 64,8% thought it would be a positive thing if most of the African refugees and immigrants left the country. By contrast, few see ridding the country of its white population as a priority'.

Although there are many examples of good community relationship and successful integration of migrants in different parts of the country, these statistics do reveal how pervasive intolerance and xenophobia are within the population and point to the relatively high part of the population wishing a tightening of migration flows to South Africa. This xenophobia is mostly directed at Black Africans

and mostly based on the vision that migrants are linked with or even responsible for social ills and crimes. Derogatory words and abusive language are commonly used to talk to/ about African migrants, first of which 'makwerekwere', a Bantu word which designates a sort of parasitic insect. Popular stereotypes take it that many African migrants are engaged in violent and criminal activities, that 'all Nigerians are drug-dealers' and 'all Mozambicans are car-thieves'. They also portray African migrants as abusing health services and housing subsidies, taking away jobs from South Africans, spreading diseases (in particular HIV/Aids). There is also a widespread belief that most migrants are illegally in the country (with a worrying blur between the notions of 'illegality' and 'criminality'). Many also think that a large numbers of refugees are not genuine.

Strikingly, xenophobic feelings and attitudes are also visible and spread in the public realm, through the discourse of certain politicians, within the police, in the media and in some popular music songs⁹². One of the most famous proponent of xenophobic discourse was the former Minister of Home Affairs, and leader of the Inkhata Freedom Party, Mr. Buthelezi. According to two famous statements, the first from Mr Buthelezi, the second from Mr Masetlha, ANC's former Director General of Home Affairs⁹³:

'The employment of illegal immigrants is unpatriotic because it deprives South Africans of jobs and that the rising level of immigrants has awesome implications for the RDP [Reconstruction and Development Programme put in place in 1994 to promote economic growth and social redistribution] as they will be absorbing unacceptable proportions of housing subsidies and adding to the difficulties we will be experiencing in health care'

'Approximately 90% of foreign person who are in RSA [the Republic of South Africa] with fraudulent documents, i.e. either citizenship or migration documents, are involved in other crimes as well.... it's quicker to charge these criminals for their false documentation and then to deport them than to pursue the long route in respect of the other crimes that are committed'.

While none of the major political parties has ever taken overt xenophobic stances or condoned xenophobia, various politicians, both at national and local levels made xenophobic statements, using derogatory language or scape-goating foreigners for some social problems. Such

discourse may contribute to fuel xenophobic feelings within the general population; it may also encourage public officials acting under their authority to endorse xenophobic attitudes or to publicly voice them. Law-enforcing personnel are particularly at stakes. According to a study conducted by the Centre for the Study of Violence and Reconciliation in 2004 on the police services in the Johannesburg area, 87% of the police think that most undocumented immigrants in Johannesburg are involved in crime⁹⁴. This perception is more widespread among the lower ranks (92%) than among commanding officers (61,5% of the superintendents). Reports indicate that xenophobia within the police is not limited to feelings or attitudes but also translates into extortion (according to Landau, some police officers view migrants as 'mobile ATMs'⁹⁵), abuse (e.g. prolonged detention, destruction of documents, etc.) and physical violence. In the media, the treatment of migration issues tends to promote a largely negative and unanalytical representation of migration and foreign migrants and to favour dramatic stories⁹⁶. While the situation has greatly improved over the past decade, some daily papers, such as the Daily Sun, continue to spread a dramatic and negative image of migration to South Africa⁹⁷.

Popular xenophobia takes many different shapes. As highlighted in many reports and confirmed in our interviews, many migrants recount it as a daily experience, in the shape of discrimination in access to shops, jobs or services, exclusion from interpersonal relations or community life, verbal abuse, etc. In recurrent occasions during the past 15 years, it has taken more extreme forms, of violent collective reactions against foreigners. Thus, one township in Johannesburg and one in Cape Town passed a resolution or organised a collective campaign to rid the township of all foreigners and prevent them from returning⁹⁸. In other cases, violent demonstrations or riots stormed groups of foreigners. In 1997, South Africans street-traders protested violently in Johannesburg against the competition of foreign hawkers, attacking some of them and destroying some stalls. In August 2006, in Mashipumelele township, near Cape Town, a mob attacked shops owned by Somalis, looted and burnt down some of them, and forced tens of Somalis to flee the township. The number of Somalis killed in similar incidents around Cape Town is estimated around 40 for 2006⁹⁹. Just before the mission arrived in South Africa, the Motherwell township in Port Elizabeth also experienced a large-scale incident of mob violence: over a hundred Somali-owned shops were looted, some were burned down, over 400

Somali residents, most of them refugees, were forced to flee and settle in a different location. Reports indicate that the police did not actively intervene to prevent the looting, and that some police officers may even have taken part in it¹⁰⁰.

In 1998, the Human Rights Commission, together with UNHCR and a range of civil society organisations, engaged actively in the 'Roll Back Xenophobia Campaign' aimed at fighting xenophobia and at promoting tolerance and awareness of refugees' and migrants' rights. It was directed at the general public, the media, the police and other public officials through public events, trainings, dissemination of materials, etc. It contributed to awareness-raising and transformation in discourse and attitudes towards foreigners. Positive changes have been noted in particular with regard to the media¹⁰¹. However, the campaign seems not to have been widespread, sustained and consistent enough and its impact remains limited in some of the key sectors. Thus, Masuku notes that in the police services of the Johannesburg area, officers in services tasked with 'important' work, in particular crime intelligence and crime prevention units, as well as under-staffed units are less likely to attend trainings aimed at raising awareness about diversity issues and at informing about migrants' rights¹⁰². In its 2005-6 report, the Department of Home Affairs relates that quite a small number (157) immigration officers took part in awareness-raising programmes about xenophobia. The mission is also concerned that public efforts to fight xenophobia within the population and public officials may be undermined by existing discourses from high-level politicians and public officials, which give acceptability to such feelings and attitudes. These efforts are also likely undermined by the focus of migration politics on control and repression of migrants, in particular of undocumented migrants, which puts the emphasis on policing of the migrant population and fuels the confusion between illegality and criminality.

2) A migration policy geared towards security concerns and population control

Migration policy in post-apartheid South Africa remains geared towards security concerns and population control. It is based on the premise that considerable numbers of economic migrants want to come and stay in the country and that large numbers of them are 'illegal' migrants. Such vision marginalises the fact that a large majority of migrants enter South Africa legally and that a number of them are cross-border traders, seasonal, circular or

temporary migrants who do not wish to settle in South Africa but only to live and work there for some time to earn a living and possibly send money back home. Another premise of the current migration policy is that South African borders are impossible to monitor, because of their length and geographic features, and that enforcement of the migration law should therefore take place at community level, where migrants live, work and study¹⁰³. This approach has resulted in the current migration regulations and policy which focus on:

- fighting illegal migration, mostly through arrest and deportation, both at the borders and inside the country;
- rendering the country inhospitable for undocumented migrants so that they do not wish to come or stay in South Africa¹⁰⁴. This implies controlling their access to jobs, housing, public services, etc. It is expected that the combination of deportation and inhospitality will deter further undocumented migrants.
- restricting access to temporary residence for economic migrants by making relevant permits difficult to obtain, limiting their duration and strictly linking it with an economic activity, and making it difficult to shift from one type of permit to another.

This system is one of population control rather than population management. As analysed by Landau (2005: 11): "in both principle and practice, South Africa's immigration policy continues to be strongly influenced by the control ethos that shaped the pre-1994 regime. The focus on identity documents, detention, and deportation is illustrative of this, as is the need for asylum seekers and refugees to report regularly to designated reception offices".

This focus is manifest in the Immigration Act and other relevant regulations where protecting the human rights of migrants as well as planning for their entry and integration in South African economy and society only come as secondary objectives. It also appears in the way migration functions are organised: the Department of Home Affairs is the key service, with limited role for the Department of Labour; the main tasks are about issuing documents and controlling entry and residence; and the police services play a central role for enforcement. In terms of resources as well, a large portion of immigration means are allocated to the activities of detention and deportation. Thus, the annual cost of running the Lindela detention centre is 52

millions rands, when the overall budget of the Department for immigration control is 188,7 millions and for refugee affairs 4,8 millions for the budgetary year 2006-7¹⁰⁵. Finally, the focus on population control and security concerns is manifest in the symbolic images used by high-level officials with regard to immigration: South Africa as 'heaven' for millions of migrants, inflated migration numbers, the promotion of deportation statistics, Lindela as cornerstone of the migration system, the smuggler figure, networks of trafficking and criminal gangs, etc. All these images point to undocumented migrants as a priority issue and to government determination and efforts to arrest and deport them.

This focus on population control is complemented by the enforcement role of the police and the tendency to confuse undocumented migrants and criminals. The police services play a key role in enforcing immigration law, as support for and complement to the action of immigration officials who are less numerous and have limited means. But the action of the police has meant that enforcement has been directed primarily, and almost exclusively, at migrants themselves, with relatively limited controls aimed for instance at employers. This control takes the form of stop and search, identity control, arrest and custody of undocumented migrants or of all those suspected to be so; the control mostly takes place in the street, in public transports, or in houses. The police sometimes conduct raids in areas where many migrants live to control larger number of migrants, who are arrested collectively and brought to the police station before their legal status is examined¹⁰⁶.

Reports indicate that identity controls and arrests of undocumented migrants is an easy way used by some police officers to boost the statistics of arrests. Arresting undocumented migrants is all the more favoured since many police officers believe that most of them are involved in criminal activities. It further increases their legitimacy in the eye of the South African population. This creates an incentive for the police and make undocumented migrants an easy target for arrest, but also harassment and extortion. It also creates confusion between illegality and criminality, all the more as police statistics do not always differentiate the reasons for arrest¹⁰⁷. Further confusion is created by large scale operations which are officially designed as anti-crime raids, but actually target criminals.

The infamous 'Operation crackdown', started in 2000, was meant to rid South African streets of certain criminal

activities. In Johannesburg, it was concentrated in those areas where most African immigrants are staying. The police made very little effort to differentiate during arrests between those who had a residence permit and those who did not; many refugees, documented workers or even South Africans were arrested in the process. For the sole year 2002, over 54 000 persons were arrested as part of this Operation. The communication around the Operation contributed to the image that many migrants are involved in crime and that criminal activities are led by foreigners¹⁰⁸.

The mission expresses concern at how prevalent the focus on migration control and security concerns is within South African migration policy. This indeed threatens respect and protection of the human rights of migrants, whether undocumented or documented. Arrest and deportation are sometimes done hastily, or without respecting due process and legal requirements regarding the protection of the human dignity and human rights of those deported. As noted above, there are also numerous reports of widespread abuse, mostly committed by the police and immigration officials, during arrest, detention and deportation. This approach also encourages the population and public officials to view undocumented migrants primarily as persons who breach the law, to a certain extent legitimising disrespect for their dignity and rights and making them the primary cause of migration problems, when other categories such as employers, traffickers and corrupt officials are only occasionally put in the spotlight.

Finally, this focus on migration control tends to criminalise migrants and fuels xenophobia, hence abuses experienced by migrants, irrespective of their legal status. The mission is also concerned that the prevalent feeling amongst South African officials seem to be that 'there is no alternative' to this policy while, besides the threats it poses to the human rights of migrants, there are also questions as to the efficiency of such a policy. Indeed, both the control of entry and the deterrence policy seem to have limited results: the number of migrants who enter South Africa continue to grow despite border controls, arrests and deportation as well as the awareness amongst many migrants and would-be migrants of the internal context of employment shortage, police harassment and xenophobia. Besides, as noted in several studies, a number of those deported re-enter the country almost immediately. This relative lack of efficiency is all the more problematic given the cost of implementation of the immigration system.

Finally, the malfunctioning of the system also artificially

increases the scope of the problem: making it easier for cross-border traders or SADC seasonal workers to obtain temporary permits would significantly reduce the number of undocumented migrants; processing refugee applications within reasonable time would also limit the possibility for economic migrants to divert the system from its actual purpose.

3) Putting migrants' rights on the agenda: a sensitive issue

As underlined in most of our interviews, South Africa is a country faced with many domestic challenges, in particular in terms of development and social equity. Unemployment affects about 40% of the active population, and as much as 80% in some areas; while the GDP is significant, there remains huge disparities within the country; 18% of the adult population is illiterate and 11% of the children do not go to primary school; 12% of the population does not have a sustainable and safe access to water; HIV prevalence is 19% within the population between 15 and 49 year old; about a third of the urban population lives in slums¹⁰⁹. In this context, a number of situations experienced by migrants are not exceptional by South African standards: living in cramped places, with no running water and long distances to work; being underpaid and made to work long hours or in difficult conditions; being subjected to police harassment when street-vending; being unable to afford proper healthcare or to have to go without food for a day; falling victim of thieves or other crimes – all of these features are shared with part of the South African underclass. It also means that government officials and services openly admit that defending and promoting migrants' rights is not a priority for them, and may not even be on their agenda¹¹⁰.

Some civil society organisations, unions and NGOs, defending social justice and human rights in South Africa may not feel either in a position to defend migrants, other than marginally. Thus, asked about recommendations for improving the conditions of migrant workers in South Africa, the COSATU representative suggests a number of actions and concludes "... but COSATU can't demonstrate against the government every day to defend the rights of foreigners, we have other issues to take care of"¹¹¹.

Some public officials and civil society organisations may even prefer to downplay the issue of migration, and singularly that of migrants' rights, for fear of the negative

reaction of the population. A (perhaps significant) part of the population could indeed be reluctant or hostile, considering that promoting migrants' rights is inadequate/illegitimate given that they are viewed as threatening South African security, and competing for access to already insufficient jobs and essential services and as being mostly 'illegals'/ criminals. Commenting on abuses experienced by migrant farmworkers in terms of their living and working conditions, the representative of the Human Rights Commission thus notes: "South African farmworkers are facing the same problems, with double problems for undocumented migrant workers who are even more vulnerable. The Human Rights Commission has done public hearings on [migrant] farmworkers, but the Commission is aware of the risk of backlash with people saying that we're only taking care of foreigners"¹¹².

Officials met by the mission thus insist on the distinction between documented and undocumented migrants, and the diverse sets of rights attached to the different categories of migrants: refugees, asylum seekers, workers on temporary permits, undocumented migrants. A number of human rights group also chose to focus their work on refugees and asylum seekers whose rights have better legal protection and are more widely recognised. The mission thus views positively the fact that some of the organisations we met indicated that they are evolving towards advocating more on behalf of undocumented migrants as well, or that they intend to do so¹¹³.

While taking into good consideration the South African context, the mission indeed sees it as key issue for government and civil society to actively and publicly engage for the defence and promotion of migrants' rights, including those of undocumented migrants. Not respecting nor promoting the rights of migrants has direct consequences on their living and working conditions, personal security and freedom, and on their human dignity. It also has long term implications for South African population and the country as a whole as it may undermine¹¹⁴:

- the universality of human rights

Disrespecting the human rights of migrants is a first encroachment on the universality of the rights enshrined in the Constitution and international law; conversely, realising these rights for the migrant population which is one of the most vulnerable categories in contemporary South Africa is a litmus test for the new democracy and its central

reference to a broad and universal conception of human rights.

- the rule of law

Currently, the government does not impose the implementation of some of its own labour regulations and constitutional provisions applicable to migrants. It thereby undermines the scope and effectiveness of these legal provisions. Moreover, as noted above, there are, within the administration implementing the migration system, pockets of corruption, extortion and ill-treatment which undermine the rule of law and the constitution of law-abiding and accountable public services. The current migration system also encourages smuggling, undocumented work, and abuse of the asylum application process.

- the general interest of the overall population

Guaranteeing migrants' rights may directly serve the overall interest of the population. Thus, providing migrants with a minimum access to healthcare makes it possible to limit the spread of certain diseases to curtail public health risks. Similarly, fighting against exploitation of migrants by employers contributes to preserving existing labour standards, in terms of pay, working hours, or benefits. Giving access to school to migrants' children favours their integration in South African society and increases the overall education level of the population.

- migrants' positive contribution to South African society and economy

Migrants, whether documented or undocumented, have much to contribute to South African economy and society, in terms of skills, investment, economic growth, cultural diversity, integration with the rest of the continent, etc. Although sketchy, a number of studies already point to the positive contribution of migrants to the South African economy¹¹⁵. Thus according to an upcoming SAMP research, cross-border traders shoppers spent an estimated 10 billions rands in South Africa in 2005¹¹⁶.

- South Africa's international image and relationships with foreign, in particular African/ neighbouring, countries

The widespread violations of migrants' rights, in particular in terms of arrest, detention and deportation as well as in terms of working conditions, affect South Africa's international image as one of the cornerstones of

democracy and human rights in the world and on the continent. As noted above, given that a large number of migrants come from the SADC region and the rest of Africa, these violations may create tensions with other governments concerned by the fate of their nationals living in South Africa and spread distrust of South Africa amongst their population.

4) Regional dimension

There is little or no doubt that South Africa is the strongest economy on the African continent. It is the *de facto* leader in southern Africa that is looked up to by Southern African citizens to show leadership in respect for human rights and adherence to the international standards and norms as contained in international human rights instruments but also as contained in the instruments and protocols that SADC states are developing. At the UN level South Africa always take *de facto* leadership in representing the Africa group position on issues of geopolitical interests. Being the last of the frontline states to gain independence and because of its history of fighting against racial domination and hatred, South Africa is expected to demonstrate leadership in observance of human rights. It is also expected to be the vanguard in the democratisation of the Southern African region.

SADC has also been moving towards economic integration with South Africa wanting to take up a leading role in this process. The argument in this section would be about how South Africa's attitude with regard to the migrants from the SADC region and indeed the African region does not necessarily contribute to regional stability and development. I do not have enough knowledge and clear vision about SADC/ African politics to write this section but I thought, Arnold, that you would like to have such an argument here. The few points I could think about are: If anything it encourages regional leaders to develop strong feelings of nationalism and a culture of intolerance to regional demands for accountability in the manner that SADC states are governing their own citizens. Yet during the mission it was quite clear that one of the major push factors that have resulted in serious migration has been poor governance in some SADC states like Zimbabwe, DRC, Angola etc. Not only does

South Africa have pull factors, it also increases push factors in the region when its migration policies are not integrated into an overall SADC initiative to develop better good governance and democracy to create general conditions for SADC states to enter into a path for sustainable development as envisaged under New Economic Partnership for Africa's Development (NEPAD) which South Africa spearheaded. In reality its migration policy is consistent with a negative vision of economic development of South Africa that subordinates other countries of the region to the needs of the South African economy the emphasis being that other states bring resources as inputs to South Africa and they (other African countries) constituting market opportunities for South Africa's products. Trade imbalances as well as socio-economic inequalities are increasing. In such a framework, it is not surprising that workers and traders will continue to be attracted to South Africa. For example it was generally the view of Zimbabwe's migrants that South Africa does not play a positive or adequate role in stabilising the Zimbabwe crisis and also that

South Africa does not play a progressive role with regard to the free movement of persons within SADC, blocking and delaying the adoption of the relevant SADC Protocol and watering down its content.

There was a feeling in South Africa that the policy of mounting entry barriers for migrants into South Africa especially from Zimbabwe was necessary as a strategy to stem the tide of flow of human traffic into South Africa. As a result, there are prohibitive application fees imposed for visa requirements for Zimbabweans who want to travel to South Africa. The travel documents e.g passport are not easily available in Zimbabwe due to shortages of foreign currency. Yet during the study it became obvious that South Africa has concluded bilateral agreements with Mozambique and Lesotho to facilitate entry permits which have not resulted in huge waves of people coming from these 2 countries into South Africa. It was fairly obvious to the study therefore that the current policies are based on perceptual factors and not on any empirical research or understanding of the levels of migration, the trends, reasons and impact of migration.

57. Interviews with Lawyers for Human Rights, the Legal Resources Centre, the Human Rights Commission, the Forced Migration Studies Programme, the Southern African Migration Project and migrants. See: National Consortium for Refugee Rights, 'Refugee Protection in South Africa 2006', 2006; FMSP, 'Crossing Borders, Accessing Rights, and Detention: Asylum and Refugee Protection in South Africa', 2005; Human Rights Commission, 'Report into the arrest and detention of suspected undocumented migrants', 1999 and 'Lindela at the Crossroads', 2000; Public Protector of South Africa, 'Report on an Investigation into Allegations of Undue Delay, Unlawful and Improper

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58. Quoted in 'Home Affairs to appeal refugee ruling', Pretoria News, January 2007, available at : http://www.lrc.org.za/Articles/Articles_Detail.asp?art_ID=280
59. See for instance *Kiliko and Others v Minister of Home Affairs and Others, 2006 and Somali Refugee Forum and Another v. the Minister of Home Affairs and Others, 2005.*
60. Vusumuzi Ka Nzapheza, 'Cape Times probe exposes Home Affairs scam to sell permits to asylum seekers', Cape Times, 26 June 2007, available at : http://www.int.iol.co.za/index.php?set_id=1&click_id=3015&art_id=vn20070626035248334C168960
61. in 'Crossing Borders, Accessing Rights, and Detention: Asylum and Refugee Protection in South Africa', July 2005.
62. Public Protector of South Africa, 'Report on an Investigation into Allegations of Undue Delay, Unlawful and Improper Conduct and Prejudice in the Rendering of Services at Braamfontein Refugee Reception Office', 2005.
63. Interviews with Lawyers for Human Rights, 27 February 2007 ; Gayatri Singh, School of Public Health, Wits University, 1st March 2007 ; Loren Landau and Ingrid Palmay, FMSP, 1st March 2007. See Forced Migration Studies Programme, 'Crossing Borders, Accessing Rights, and Detention: Asylum and Refugee Protection in South Africa', 2005; Lawyers for human Rights and others, 'The documented experiences of refugees, deportees and asylum seekers in South Africa: a Zimbabwean case study', 2006; Human Rights Commission, 'Report into the Arrest and Detention Of Suspected Undocumented Migrants', 1999 and 'Lindela at the Crossroads for Detention and Repatriation', 2000.
64. Interview with Lawyers for Human Rights, 27 February 2007 ; Algotsson and Klaaren, 'Policing Migration: Immigration Enforcement and Human Rights in South Africa'.
65. Algotsson and Klaaren, *ibid*, p6.
66. in 'Crossing Borders, Accessing Rights, and Detention: Asylum and Refugee Protection in South Africa', July 2005, p69.
67. See Human Rights Commission, 'Report into the Arrest and Detention Of Suspected Undocumented Migrants', 1999 and 'Lindela at the Crossroads for Detention and Repatriation', 2000. See also FMSP, 'Crossing Borders, Accessing Rights and Detention', 2005; LHR and others 'The documented experiences of refugees, deportees and asylum-seekers in South Africa: a Zimbabwean case study', 2006; National Consortium for Refugee Affairs, 'Refugee Protection in South Africa, 2006', 2006; UN Committee against Torture, Conclusions and recommendations on South Africa, 2006. LHR, LRC and the Wits Law Clinic also engaged in litigation to improve these conditions: see *South African Human Rights Commission and Forty Others v. Minister of Home Affairs and Dyambu, 1999; Centre for Child Law and Another (Lawyers for Human Rights) v Minister of Home Affairs and Others, 2005.*
68. At the time of our visit, there were around 3 800 inmates in Lindela.
69. Kate LEFKO-EVERETT, 'Voices from the margins: migrant women's experiences in Southern Africa', Southern African Migration Project (SAMP), 2007, p. 50.
70. Department of Home Affairs, Report 2005-2006, for the 2005 statistics; Department of Home Affairs, Deportation Statistics January – August 2006, available online at : http://home-affairs.pwv.gov.za/dir_diportation.asp
71. Interviews with the Legal Resources Centre, Forced Migration Studies Programme, Gayatri Singh, COSATU, Southern African Migration Project, Department of Labour. See Rogerson, 'Building Skills: Cross-border Migrants and the South African Construction Industry', 1999; Crush, Mather, Mathebula, Lincoln, Maririke and Ulicki, 'Borderline Farming: Foreign Migrants in South African Commercial Agriculture', 2000; Peberdy and Dinat, 'Migration and Domestic Work in South Africa: Worlds of Work, Health and Mobility in Johannesburg', 2005; Human Rights Watch, "Keep Your Head Down": Unprotected Migrants in South Africa, February 2007.
72. Human Rights Watch, *ibid.*, pp 79-106.
73. In his research on the construction sector in Johannesburg, Rogerson (1999) thus showed that in well-established construction companies there are 2 groups: 'first, there is a core of skilled construction workers working on a relative secure and long-term basis. Second, there are groups of casual or temporary labourers hired on short-term contracts, often as general labourers [rather than as specialised painters, tilers, etc.] . The proportion of international migrants is highest among temporary employees'.
74. Interviews with the Legal Resources Centre, 26 February 2007, Sally Peberdy and Ntombi Msibi, 2 March 2007 and with Virgil Seafield, Department of Labour, 5 March 2007.
75. Interview with Gayatri Singh, School of Public Health, 1st March 2007. See also Landau, 'Discrimination and Development', 2006 and Khadidja Magardie, 'We don't treat foreigners', Mail and Guardian, 25 September 2000.
76. Landau, 'Discrimination and Development?: Migration, Urbanisation and Sustainable Livelihoods', 2006, p9.
77. Interview on 3 March 2007 with a Zimbabwean documented teacher, married to an engineer, also from Zimbabwe, who has been working regularly in South Africa since 2004.
78. Interview with Gayatri Singh, School of Public Health, Wits University, 1st March 2007.
79. See HRW, *ibid*, 2007 pp 107-8.
80. See the media note on the website of Lawyers for Human Rights : 'The Dept of Health confirms that persons do not require an identity document in order to access Anti Retroviral Treatment', 26 February 2007: <http://www.lhr.org.za/press/20070215.tif>
81. Interview with Mandla Rametsi, Deputy International Secretary of COSATU, 1st March 2007. See COSATU, Constitution, as amended by the 9th national Congress in 2006. See <http://www.cosatu.org.za>
82. Interview with COSATU, 1st March 2007.
83. See Palmay, 'Recommendations on Atlantic Philanthropies' funding for the migration and human rights sector: Priorities, gaps and weaknesses in the sector', 2006.
84. See <http://www.sahrc.org.za>
85. See <http://www.publicprotector.org>
86. See <http://www.icd.gov.za>
87. See <http://www.ccma.org.za>
88. Interview with the representative of the Department of Labour, 5 March 2007. We heard a similar analysis from the representative of COSATU.

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89. Interviews with Jacob van Garderen, Lawyers for Human Rights, 27 February 2007 as well as with Loren Landau and Ingrid Palmay, Forced Migration Studies Programme, 1st March 2007.
90. Interview with Joyce Tlou, programme coordinator of the portfolio for non-nationals, South African Human Rights Commission, 2 March 2007.
91. in Landau, Ramjathan-Keogh and Singh, 'Xenophobia in South Africa and Problems Related to It', Forced Migration Studies Programme, January 2005. The two surveys mentioned here are reported in: Crush J., 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa', *International Migration*, Vol. 38, 2000, 103-131; and Landau L. and Jacobsen J., 'Refugees in the New Johannesburg', *Forced Migration Review*, Vol. 19, 2004, 44-46. See also Crush and Pendleton, 'Regionalizing Xenophobia? Citizen Attitudes to Immigration and Refugee Policy in Southern Africa', 2004
92. The popular Kwaito group Boom Shaka thus had a song entitled "Makwerekwere". The Human Rights Commission happened to take position to denounce certain songs with a xenophobic content or undertone.
93. The first quote is cited in Landau, Ramjathan-Keogh and Singh,, *op. cit.* p6 (and was taken from Reitzes, Alien Issues, Indicators South Africa, Vol 12, 1994); the second is cited in Crush and Peberdy, 'Criminal Tendencies: Immigrants and Illegality in South Africa', 2002, p1.
94. In Masuku T., 'Targeting Foreigners: Xenophobia among Johannesburg's police', March 2006, p21
95. Landau, Ramjathan-Keogh, Singh, 'Xenophobia in south Africa', 2005, p29
96. Interview with Sally Peberdy and Ntombikayise Msibi, Southern African Migration Project, 2nd March 2007. See McDonald and Jacobs, 'Understanding Press Coverage of Cross-Border Migration in Southern Africa since 2000', 2005; and Danso and McDonald, 'Writing Xenophobia: Immigration and the Press in Post-Apartheid South Africa', 2000.
97. Interview with Joyce Tlou, programme coordinator of the portfolio for non-nationals, South African Human Rights Commission, 2 March 2007.
98. See Landau L., Ramjathan-Keogh K. and Singh G., 'Xenophobia in South Africa and Problems Related to It', 2005, p30.
99. See Los Angeles Times, 'Somalis in South Africa targeted by mobs', 1st November 2006 and Baltimore Sun, 'Rising tide of xenophobia', 27 November 2006.
100. Interview with Loren Landau and Ingrid Palmay, Forced Migration Studies Programme, 1st March 2007. See Landau L. and Haithar H., 'Somalis are easy prey', Mail and Guardian, March 2 to 8, 2007.
101. Interviews with Joyce Tlou, South African Human Rights Commission, 2nd March 2007 as well as with Sally Peberdy and Ntombikayise Msibi, Southern African Migration Project, 2nd March 2007.
102. Masuku, *op. cit.*
103. Vigneswaran, 'In Direct Control?', *op. cit.*
104. In the first version of the Immigration Bill, one of the objectives of the migration policy thus read as "promoting a climate within the Republic which encourages illegal foreigners to depart voluntarily".
105. The annual cost of Lindela is cited in Landau, Ramjathan-Keogh and Singh,*op. cit.* ; the 2006-7 budget of the Department of Home Affairs is presented in the Department of Home Affairs, Strategic Plan 2006-7 and 2008-9, April 2006, p25
106. See for instance SABC News, Immigrants nabbed in predawn raid, 26 November 2006.
107. Masuku, *op. cit.*; Landau, Ramjathan-Keogh and Singh, *op. cit.*
108. Algotsson and Klaaren, 'Policing Migration', *op. cit.* and Vigneswaran, 'In Direct Control?', *op. cit.*
109. These statistics come from the UNDP Human Development Report 2006, available at: <http://hdr.undp.org> ; most figures are for the year 2004. The statistic on the percentage of the population living in slum is for the year 2001 and comes from the UN-Habitat website : <http://www.unchs.org/categories.asp?catid=234>. The percentage of urban population was 59% in 2004 (UNDP, *op. cit.*)
110. Interviews with Virgil Seafeld, Department of Labour, 5 March 2007 ; with Andries Oosthuizen and Anthony Sedwyn., Sub-Directorate on Migration, Refugees, IDP's and Human Security, Department of Foreign Affairs, 2nd March 2007; and with Joyce Tlou, Human Rights Commission, 2nd March 2007.
111. Interview with Mandla Rametsi, COSATU, 1st March 2007.
112. Interview with Joyce Tlou, South African Human Rights Commission, 2nd March 2007. A similar view was expressed by Loren Landau during the interview with the FMSP: "There is a disincentive to facilitate refugees into the system. It would be very unpopular even if it were more in line with human rights".
113. Interview with Lawyers for Human Rights, 27 February 2007: LHR is gradually opening its activities to undocumented migrants and issues beyond detention monitoring, which it is prevented from doing more for lack of funding; the National Consortium for Refugee Affairs will extend its mandate to include issues of migrant workers. Similar conclusions are reached by Ingrid Palmay, 'Recommendations on Atlantic Philantropies' funding for the migration and human rights sector', 2006.
114. On these aspects, see also Landau, 'Democracy and Discrimination', 2004.
115. Interview with SAMP, 2nd March 2007. See Landau, 'Democracy and Discrimination', 2004, p11; Strategic Business Partnerships, 'Cross-border African shoppers and traders in South Africa : findings from an SBP survey', January 2006.
116. Cited in Financial Mail, 'Immigration : what it's doing to South Africa', 16 February 2007, p36.

Conclusion and recommendations

A- To reinforce a human rights-based legal framework

In order to prevent and redress current and future human rights violations, FIDH urges the South African government to:

- ratify the two major international human rights instruments it has not yet adhered to: the International Covenant on Economic, Social and Cultural Rights and the International Convention on the rights of migrant workers and members of their families;

- ratify key conventions of the International Labour Organisation providing specific protection to migrants workers, none of which have already been ratified: the 1949 Migration for Employment Convention (Revised) no. 97; the 1975 Migrant Workers (Supplementary Provisions) Convention no. 143; the 1962 Equality of Treatment (Social Security) Convention no.118; and the 1982 Maintenance of Social Security Rights Convention, no. 157;

- ratify the SADC Protocol on the Facilitation of Movement of Persons, signed in 2005;

- review the existing immigration law in order to reform various procedures so as to reduce undocumented entry and stay, without threatening South Africa's security or society:

1. ease the process whereby smaller employers may apply to hire migrant workers;

2. facilitate entry and temporary stay for SADC nationals (easier process for application and renewal of permits, lower fees, issuing permits at the border, possibility of applying for a different type of permit without leaving South Africa, etc.);

3. make it easier for foreigners to become permanent residents or naturalised citizens;

- review the existing immigration law to suspend the provision requiring organs of the state to report on undocumented workers to whom they provide services;

- ensure that, in the hierarchy of law, provisions of the Bill of Rights and labour law protecting migrants rights are not subordinated to immigration law.

B- To fight against ongoing human rights violations

FIDH urges the South African government to:

- ensure respect for due process and migrants' rights and dignity throughout arrest, detention and deportation. In particular, the government should put an end to hasty deportation done at the borders or within the country without adequate verification of the legal status of those arrested and which may contravene South Africa's obligation of '*non-refoulement*';

- improve conditions of detention at Lindela repatriation centre and in other detention facilities, in particular in terms of ill-treatment, access to information, to legal aid, to food and healthcare and fight against harassment and sexual abuse migrant women are subjected to.

- support the development of independent monitoring in Lindela and other detention facilities; reinforce the accountability of private companies and police services managing these facilities.

actively fight corruption networks and practices of extortion and abuses within the Department of Home Affairs, at border posts, in refugees reception offices and other locations. Severely sanction those convicted and publicise the sanctions.

- actively fight corruption networks and practices of extortion and abuses within the South African Police Services. Severely sanction those convicted and publicise the sanctions. More generally, reinforce the accountability of the police for violations of migrants' rights.

- develop inspections of workplaces (through hiring more labour inspectors and capacity-building) in order to enforce respect of basic labour rights and standards to the benefit of the entire workforce; reinforce sanctions against employers who contravene labour standards and publicise the sanctions.

- circulate explicit department's notice to public health and education services not to ask for ID and/ or proof of legal status to provide emergency healthcare or register children in primary school. Further guarantee access for the different categories of migrants to the rights guaranteed by the constitution and international law.

- develop information materials and set up information desks (e.g. at the main border posts, in refugee reception offices, city councils, etc.) for migrants to know about their rights and available remedies.

- set up administrative remedies which do not require to state one's legal status and/ or provide protection mechanisms for migrants reporting abuses they suffered at the hands of police or immigration officers, employers, etc.

FIDH further calls upon South African courts to:

- fully use the provisions of the Constitution, national legislations as well as international law to protect migrants' rights;

- ensure that their decisions are respected and implemented by the various Departments, by using follow-up mechanisms such as structured interdict.

Finally, FIDH encourages South African civil society organisations to:

- develop their activities in the area of undocumented migrants' rights and of migrants economic and social rights;

- develop strategies to defend and promote migrants' rights, in complement to strategic litigation, by strengthening in particular advocacy and campaign work.

C- To raise awareness about migrants' rights and counter xenophobia

FIDH urges the South African government to:

- develop research and public education on the number and categories of migrants coming to South Africa, to provide a widely-accepted overview of who is in South Africa and the reasons for their stay, as well as their role and place in South African economy and society;

- provide widespread training on migrants' rights and

against xenophobia to police services, immigration services, public health and education services and local administrations;

- publicly and explicitly condemn and sanction xenophobic behaviours and incidents committed both by public servants and the communities;

- document and publicise the many facets of migrants' positive contribution to South African society and economy;

FIDH calls upon the Human Rights Commission and concerned civil society organisations to reactivate and scale up the anti-xenophobia campaign.

D- To break with the control ethos in migration policy and develop management approaches

- set up an independent committee, composed of the Department of Home Affairs, the Department of Labour, the Department of Foreign Affairs, the Human Rights Commission, NGOs, unions, and migrants' representatives, to review the current migration policy and to make recommendations

- assess the efficiency of the current system of arrest, detention and deportation, with reference to both its outcomes, cost-effectiveness and human rights violations it generates

- develop research and mechanisms to better know and understand the various types of migration and their impact on South African economy and society in order to have the elements for designing and implementing a coherent and relevant migration policy;

- assert, already in public discourse, and whenever possible through allocation of resources as well, government should strive to realise and defend migrants' social and economic rights

- reinforce the role and responsibilities of municipal and provincial governments in managing the flows and living conditions of migrants.

- maintain constant dialogue with neighbouring countries and develop an integrated SADC vision in order to better manage migration flows at regional level.

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FIDH represents 155 Human Rights organisations

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ALBANIA - ALBANIAN HUMAN RIGHTS GROUP
ALGERIE - LIGUE ALGERIENNE DE DEFENSE DES DROITS DE L'HOMME
ALGERIE - LIGUE ALGERIENNE DES DROITS DE L'HOMME
ALLEMAGNE - INTERNATIONALE LIGA FÜR MENSCHENRECHTE
ARGENTINA - CENTRO DE ESTUDIOS LEGALES Y SOCIALES
ARGENTINA - COMITE DE ACCION JURIDICA
ARGENTINA - LIGA ARGENTINA POR LOS DERECHOS DEL HOMBRE
ARMENIA - CIVIL SOCIETY INSTITUTE
AUTRICHE - OSTERREICHISCHE LIGA FÜR MENSCHENRECHTE
AZERBAIJAN - HUMAN RIGHTS CENTER OF AZERBAIJAN
BAHRAIN - BAHRAIN CENTER FOR HUMAN RIGHTS
BAHRAIN - BAHRAIN HUMAN RIGHTS SOCIETY
BANGLADESH - ODHIKAR
BELARUS - HUMAN RIGHTS CENTER VIASNA
BELGIQUE - LIGUE DES DROITS DE L'HOMME
BELGIQUE - LIGA VOOR MENSCHENRECHTEN
BENIN - LIGUE POUR LA DEFENSE DES DROITS DE L'HOMME
BHUTAN - PEOPLE'S FORUM FOR HUMAN RIGHTS IN BHUTAN
BOLIVIE - ASAMBLEA PERMANENTE DE LOS DERECHOS HUMANOS DE BOLIVIA
BOTSWANA - THE BOTSWANA CENTRE FOR HUMAN RIGHTS - DITSHWANELO
BRASIL - CENTRO DE JUSTICA GLOBAL
BRASIL - MOVIMENTO NACIONAL DE DIREITOS HUMANOS
BURKINA - MOUVEMENT BURKINABE DES DROITS DE L'HOMME & DES PEUPLES
BURUNDI - LIGUE BURUNDAISE DES DROITS DE L'HOMME
CAMBODGE - LIGUE CAMBODGIENNE DE DEFENSE DES DROITS DE L'HOMME
CAMBODIA - CAMBODIAN HUMAN RIGHTS AND DEVELOPMENT ASSOCIATION
CAMEROUN - LIGUE CAMEROUNAISE DES DROITS DE L'HOMME
CAMEROUN - MAISON DES DROITS DE L'HOMME
CANADA - LIGUE DES DROITS ET DES LIBERTES DU QUEBEC
CHILE - CORPORACION DE PROMOCION Y DEFENSA DE LOS DERECHOS DEL PUEBLO
CHINA - HUMAN RIGHTS IN CHINA
COLOMBIA - ORGANIZACION FEMININA POPULAR
COLOMBIA - COMITE PERMANENTE POR LA DEFENSA DE LOS DERECHOS HUMANOS

COLOMBIA - CORPORACION COLECTIVO DE ABOGADOS
COLOMBIA - INSTITUTO LATINO AMERICANO DE SERVICIOS LEGALES ALTERNATIVOS
CONGO - OBSERVATOIRE CONGOLAIS DES DROITS DE L'HOMME
COSTA RICA - ASOCIACION SERVICIOS DE PROMOCION LABORAL
COTE D'IVOIRE - MOUVEMENT IVOIRIEN DES DROITS DE L'HOMME
COTE D'IVOIRE - LIGUE IVOIRIENNE DES DROITS DE L'HOMME
CROATIE - CIVIC COMMITTEE FOR HUMAN RIGHTS
CUBA - COMISION CUBANA DE DERECHOS HUMANOS Y RECONCILIACION NACIONAL
DJIBOUTI - LIGUE DJIBOUTIENNE DES DROITS HUMAINS
ECUADOR - CENTRO DE DERECHOS ECONOMICOS Y SOCIALES
ECUADOR - COMISION ECUMENICA DE DERECHOS HUMANOS
ECUADOR - FUNDACION REGIONAL DE ASESORIA EN DERECHOS HUMANOS
EGYPT - EGYPTIAN ORGANIZATION FOR HUMAN RIGHTS
EGYPT - HUMAN RIGHTS ASSOCIATION FOR THE ASSISTANCE OF PRISONNERS
EL SALVADOR - COMISION DE DERECHOS HUMANOS DE EL SALVADOR
ESPAÑA - ASOCIACION PRO DERECHOS HUMANOS
ESPAÑA - FEDERACION DE ASOCIACIONES DE DEFENSA Y DE PROMOCION DE LOS DERECHOS HUMANOS
ETHIOPIAN - ETHIOPIAN HUMAN RIGHTS COUNCIL
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FINLANDE - FINNISH LEAGUE FOR HUMAN RIGHTS
FRANCE - LIGUE DES DROITS DE L'HOMME ET DU CITOYEN
GEORGIE - HUMAN RIGHTS CENTER
GRECE - LIGUE HELLENIQUE DES DROITS DE L'HOMME
GUATEMALA - CENTRO PARA LA ACCION LEGAL EN DERECHOS HUMANOS
GUATEMALA - COMISION DE DERECHOS HUMANOS DE GUATEMALA
GUINEE - ORGANISATION GUINEENNE POUR LA DEFENSE DES DROITS DE L'HOMME
GUINEE-BISSAU - LIGA GUINEENSE DOS DIREITOS DO HOMEM
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HAITI - CENTRE OCEANÉNIQUE DES DROITS DE L'HOMME

HAITI - RÉSEAU NATIONAL DE DÉFENSE DES DROITS HUMAINS
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ISRAEL - ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL
ISRAEL - BTSELEM
ISRAEL - PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL
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ITALIA - UNIONE FORENSE PER LA TUTELA DEI DIRITTI DELL'UOMO
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JORDAN - JORDAN SOCIETY FOR HUMAN RIGHTS
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LEBANON - FOUNDATION FOR HUMAN AND HUMANITARIAN RIGHTS IN LEBANON
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LIBAN - ASSOCIATION LIBANAISE DES DROITS DE L'HOMME
LIBERIA - LIBERIA WATCH FOR HUMAN RIGHTS
LIBYA - LIBYAN LEAGUE FOR HUMAN RIGHTS
LITHUANIAN - LITHUANIAN HUMAN RIGHTS LEAGUE
MALAYSIE - SUARAM
MALI - ASSOCIATION MALIENNE DES DROITS DE L'HOMME
MALTE - MALTA ASSOCIATION OF HUMAN RIGHTS
MAROC - ASSOCIATION MAROCAINE DES DROITS HUMAINS
MAROC - ORGANISATION MAROCAINE DES DROITS HUMAINS
MAURITANIE - ASSOCIATION MAURITANIEENNE DES DROITS DE L'HOMME
MEXICO - COMISION MEXICANA DE DEFENSA Y PROMOCION DE LOS

DERECHOS HUMANOS
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OCCUPIED PALESTINIAN TERRITORIES - PALESTINIAN CENTRE FOR HUMAN RIGHTS
PAKISTAN - HUMAN RIGHTS COMMISSION OF PAKISTAN
PANAMA - CENTRO DE CAPACITACION SOCIAL
PERU - ASOCIACION PRO DERECHOS HUMANOS
PERU - CENTRO DE ASESORIA LABORAL
PHILIPPINE - PHILIPPINE ALLIANCE OF HUMAN RIGHTS ADVOCATES
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RÉPUBLIQUE CENTRAFRICAINE - LIGUE CENTRAFRICAINE DES DROITS DE L'HOMME
RÉPUBLIQUE CENTRAFRICAINE - ORGANISATION POUR LA COMPASSION ET LE DÉVELOPPEMENT DES FAMILLES EN DÉTRESSE
RÉPUBLIQUE DOMINICAINE - COMISION NACIONAL DE LOS DERECHOS HUMANOS
RÉPUBLIQUE TCHÈQUE - HUMAN RIGHTS LEAGUE
ROUMANIE - LIGUE POUR LA DEFENSE DES DROITS DE L'HOMME
RUSSIA - CITIZEN'S WATCH
RUSSIA - MOSCOW RESEARCH CENTER FOR HUMAN RIGHTS
RWANDA - ASSOCIATION POUR LA DEFENSE DES DROITS DES PERSONNES ET LIBERTES PUBLIQUES

RWANDA - COLLECTIF DES LIGUES POUR LA DEFENSE DES DROITS DE L'HOMME
RWANDA - LIGUE RWANDAISE POUR LA PROMOTION ET LA DEFENSE DES DROITS DE L'HOMME
SENEGAL - RENCONTRE AFRICAINE POUR LA DEFENSE DES DROITS DE L'HOMME
SENEGAL - ORGANISATION NATIONALE DES DROITS DE L'HOMME
SERBIE - CENTER FOR PEACE AND DEMOCRACY DEVELOPMENT
SUDAN - SUDAN HUMAN RIGHTS ORGANISATION
SUDAN - SUDAN ORGANISATION AGAINST TORTURE
SUISSE - LIGUE SUISSE DES DROITS DE L'HOMME
SYRIA - DAMASCUS CENTER FOR HUMAN RIGHTS STUDIES
SYRIE - COMITE POUR LA DEFENSE DES DROITS DE L'HOMME EN SYRIE
TAIWAN - TAIWAN ALLIANCE FOR HUMAN RIGHTS
TANZANIA - THE LEGAL & HUMAN RIGHTS CENTRE
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TCHAD - LIGUE TCHADIENNE DES DROITS DE L'HOMME
THAILAND - UNION FOR CIVIL LIBERTY
TOGO - LIGUE TOGOLAISE DES DROITS DE L'HOMME
TUNISIE - ASSOCIATION TUNISIENNE DES FEMMES DÉMOCRATES
TUNISIE - CONSEIL NATIONAL POUR LES LIBERTES EN TUNISIE
TUNISIE - LIGUE TUNISIENNE DES DROITS DE L'HOMME
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TURKEY - INSAN HAKLARI DERNEGI / ANKARA
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UZBEKISTAN - LEGAL AID SOCIETY
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 Tél. : (33-1) 43 55 25 18 / Fax : (33-1) 43 55 18 80
 E-mail : fidh@fidh.org
 Site Internet : <http://www.fidh.org>

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