HUMAN RIGHTS WATCH

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Ms. Phumzile Mlambo-Ngcuka
Deputy President
The Republic of South Africa

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Sent via facsimile

Dear Ms. Mlambo-Ngcuka:

Human Rights Watch is pleased to have the opportunity to submit this letter for your consideration. We write to strongly encourage you to consider and remedy deficiencies in the delivery of life-saving Anti-Retroviral Therapy (ART) to non-citizen and mobile populations in South Africa.

A recent Human Rights Watch report, *Neighbors in Need: Zimbabweans Seeking Refuge in South Africa*,[i] detailed the vulnerability of the Zimbabweans who have fled persecution and repression in that country and live in insecurity and uncertainty—overwhelmingly without legal status—in South Africa. In addition to facing risk of arrest, deportation, and refoulement (unlawful return), HIV positive members of this population have been confronted with an inability to access free ART at government clinics. While commending the government of South Africa on increasing provision of free ART to citizens and on adopting a policy of access for non-citizens, Human Rights Watch hopes that this letter will alert the South African government to the continuing need to ensure the access of Zimbabweans and other non-citizens within South Africa's borders, especially those without legal documentation, to free ART.

Furthermore, Human Rights Watch encourages the government of South Africa to participate with the Southern African Development Community (SADC) in a proposal to The Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) to address continuity of ART care for migrant and mobile populations through a broad multi-country approach. Despite the long recognition of the role of migration in the spread of HIV, states and the international community have thus far largely failed to deliver treatment services to meet the unique needs of mobile populations.

1. *South Africa Must Ensure that Zimbabweans and Other Non-Citizens in South Africa Have Access to ART*

By the beginning of 2008, an estimated one to 1.5 million Zimbabweans lived in South Africa, predominantly without legal immigration status.[ii] Unlike previous migration between the two countries, in which Zimbabweans migrated circularly for economic reasons and typically held legal work or trading permits, the movement of undocumented migrants between 2005 and 2008 has been increasingly motivated by the persecution of Zimbabweans under the Mugabe regime in the form of arbitrary arrest and detention, torture, and beatings, and government-orchestrated violence in the wake of the March 29,

2008 elections.[iii] Many HIV positive Zimbabwean immigrants to South Africa also have reported that they were unable to access desperately needed ART in Zimbabwe.[iv]

Under the South African Constitution, individuals with irregular legal status are still accorded a wide range of human rights,[v] including the rights to access to emergency and basic health care.[vi] The emergency health care constitutionally available free of charge to all individuals residing in South Africa includes ART for people infected with HIV, following a September 2007 Department of Health directive.[vii]

However, Human Rights Watch is concerned, based on interviews with Zimbabweans detailed in *Neighbors in Need* and on independent media and non-governmental organization (NGO) reports, that Zimbabweans and other non-South African citizens present in South Africa may not be receiving emergency medical care, including ART, in accordance with the South African Constitution and government policy. Despite positive developments, asylum seekers have confronted continuing difficulties accessing ART.[viii] Human rights organizations and journalists have also noted verbal abuse, sub-standard treatment, insensitivity by providers, unusually long wait times, and outright denial of services facing migrants seeking health care.[ix] Undocumented Zimbabweans in need of health care have overwhelmed South African charities and churches,[x] turned away from government clinics when unable to present citizenship papers.

Despite the September 2007 Department of Health directive, media reports as recent as July 2008 describe the gap between South Africa's inclusive policies and the reality of access to health care for refugees, asylum seekers, and especially undocumented migrants. Some public clinics reportedly still demand a South African identification document before offering health care, denying treatment for lack of identification papers.[xi] Spokespeople for the Office of the United Nations High Commissioner for Refugees and Médécins Sans Frontières confirmed in July 2008 that they had observed cases of foreign nationals discriminated against and refused treatment by health workers unaware of the law.[xii] Recent research from the University of Witwatersrand has corroborated that non-citizens in need of ART report more challenges accessing ART than citizens. This research further suggests that National Department of Health policies are not uniformly applied in public institutions, and that non-citizen referrals out of the public sector have led to the creation of a "dual-health care system, public and non-governmental, providing ART through separate routes" to citizens and non-citizens.[xiii]

Human Rights Watch strongly recommends that the South African government take immediate steps to ensure that Zimbabweans and other non-citizens in South Africa are granted access to free, life-saving ART on the same basis as citizens. Additionally, clear directives to all health workers and creation of a national budget for these services will help to guarantee this access.

2. *South Africa Should Participate with SADC in a Regional Global Fund Proposal to Address Continuity of ART Treatment for Migrant and Mobile Populations*

UNAIDS has called for measures ensuring that "sending, transit and receiving countries have joint/tripartite health access programmes in place to address all possible time and place points on the moving continuum for citizens/migrant workers, including pre-departure, the migration itself, the initial period of adaptation, successful adaptation, return migration, and reintegration into the original community."[xiv] Human Rights Watch recommends that the South African government participate with SADC in a joint proposal to the Global Fund to request funding for the creation of a comprehensive cross-border system of ART care for migrant and mobile populations. A broad-based initiative is necessary to create absent mechanisms for providing continuous ART treatment to migrant and mobile populations in South Africa and neighboring countries.

As a practical matter, migration and mobility between member states of SADC is frequent. More than 16 million Africans are migrants.[xv] Forty-six percent of South Africans live in rural communities where employment-based

circular migration is common.[xvi] Women have increasingly become migrants in Southern Africa, representing an estimated 47 percent of migrants in the region in 2007.[xvii] While South Africa is home to the largest population of foreign-born individuals, in 2005 the proportions of foreign-born individuals in Namibia, Botswana, Swaziland, and Zimbabwe were all greater than that of South Africa.[xviii] HIV prevalence among communities where migration is the norm has been estimated to be very high. A study of HIV prevalence in one such rural population in KwaZulu-Natal, South Africa found that HIV prevalence for residents peaked at 51 percent among women aged 25-29 years old. Non-residents (migrants who return periodically to households in the area) were at even higher risk of HIV, with HIV prevalence peaking at 63 percent among non-resident women aged 25-29 years.[xix]

The international community has long been aware of the connection between migration and the spread of HIV/AIDS.[xx] Recent studies have further demonstrated the unique health needs of mobile populations and the impact of changes in social and cultural practices on health.[xxi] However, adequate cross-border treatment mechanisms are not in place. UNAIDS has reported that migrant workers return to their home countries for reasons including financial conditions, lack of legal immigration status, and poor health, especially HIV/AIDS.[xxii] Interruptions in ART, a course of treatment which must be taken continuously, can lead to illness, development of drug resistance, and death. South African NGOs have documented cases in which HIV positive migrants have begun ART in their country of origin but have had to discontinue treatment because of a refusal of treatment in South African clinics.[xxiii] Scholars have thus called for special provision in the regional rollout of ART for circular and contract migrant workers in order to maintain their ART treatment course across borders.[xxiv]

Anecdotal evidence suggests that cross-border mechanisms for tuberculosis treatment, as well, are desperately needed. A Zimbabwean man who is a legal resident of Botswana is currently being held in a maximum security Botswana prison pending deportation proceedings without treatment for his Multi-Drug Resistant tuberculosis (MDR-TB). The legality of this deportation, the human rights and public health implications of deportation of an MDR-TB patient to Zimbabwe—where there is no realistic hope of treatment and a significant risk that the disease will spread—and the inappropriate incarceration of this patient in a prison (which will likely lead to MDR-TB spreading within the prison) rather than in an isolation ward all highlight the importance of establishing cross-border mechanisms for care.

In addition to the concerns detailed above, as a matter of human rights law, South Africa and other SADC nations must ensure that health care information, essential medicines, and services are provided to migrants (including non-citizens and non-residents) without discrimination. All individuals, regardless of immigration status, have the right to enjoy the highest attainable standard of health and to nondiscrimination and equality before the law. These rights are enshrined in international and regional treaties to which South Africa and SADC member states are a party and which South Africa has incorporated into its domestic law, as well as by the South African Constitution. These include the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, as well as the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and Peoples' Rights.[xxv]

South Africa is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which 11 other SADC states have either acceded to or ratified.[xxvi] That Covenant guarantees the right of everyone to the highest attainable standard of health, and requires states to take steps individually and through international cooperation to progressively realize this right via the prevention, treatment, and control of diseases and the creation of conditions to assure medical service and attention to all.[xxvii] According to the Economic, Social and Cultural Rights Committee, the Covenant's corresponding monitoring body, States must guarantee certain core obligations as part of the right to health, including ensuring nondiscriminatory access to health facilities, particularly for vulnerable or marginalized groups; providing essential drugs; ensuring equitable distribution of all health facilities, goods and services; adopting and implementing a national public

health strategy and plan of action with clear benchmarks and deadlines; and taking measures to prevent, treat and control epidemic and endemic diseases.[xxviii]

South Africa and 12 other SADC member nations also are states party to the Convention on the Elimination of Racial Discrimination.[xxix] The Committee on the Elimination of Racial Discrimination, the oversight body under the treaty, in 2004 reminded states, including South Africa, of their obligations to non-citizens.[xxx] The Committee noted that no distinctions permitted on grounds of citizenship should "detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights."[xxxi] They recalled that while some rights "such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law."[xxxii] To this end, the Committee called on all states parties to adopt measures including those that would:

- Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.[xxxiii]
- Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services.[xxxiv]

The right of non-citizens to health care in South Africa is threatened by the Refugee Amendment Bill currently before Parliament, which explicitly excludes the existing right to health for documented refugees. However, the benefits of offering free anti-retroviral drugs to all members of a population, documented and undocumented, cannot be overstated. Making free ART available in rural settings has been proven to lead to a reversal in adult mortality rates from AIDS at the population level.[xxxv] Human Rights Watch strongly encourages South Africa to realize its commitment to guaranteeing free ART to migrants within its borders through increased funding and health worker directives against discrimination and, along with SADC, to apply for funding to take decisive and concerted action to become a leader in the creation of cross-border treatment systems for migrant and mobile populations.

We thank you for the opportunity to express these concerns to you, and hope that our recommendations may be of assistance in addressing this important issue.

Yours sincerely,

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Joseph Amon, PhD MSPH
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Human Rights Watch

[i] Human Rights Watch, *Neighbors in Need: Zimbabweans Seeking Refuge in South Africa*, June 2008.
[ii] Ibid., p. 23.
[iii] Ibid., p. 27-28.
[iv] Ibid., p. 29.
[v] Constitution of the Republic of South Africa, 1996, section 7(1), http://www.info.gov.za/documents/constitution/index.htm (accessed August 25, 2008).
[vi] Ibid., section 27.
[vii] Department of Health, Revenue Directive by Department of Health to all Provincial Health Managers and HIV/AIDS Directorates, September 17, 2007, on file with Human Rights Watch.
[viii] Consortium for Refugees and Migrants in S. Africa (CRMSA), Protecting Refugees and Asylum Seekers in S. Africa, 2007; see also Joint Submission to the South African National AIDS Council (SANAC) Plenary, Vulnerable Groups: Refugees, Asylum Seekers, and Undocumented Persons—the Health Situation of Vulnerable Groups in South Africa, 7-8, 2008, http://www.pmg.org.za/files/docs/080326sanac.pdf (accessed August 25, 2008).
[ix] Federation International des Droits de L'Homme (FIDH), Surplus People? Undocumented and Other Vulnerable Migrants in S. Africa 31, 2008, http://www.fidh.org/spip.php?article5166 (accessed August 25, 2008).
[x] Human Rights Watch, *Neighbors in Need*, note 1, page 36.
[xi] Inter Press Service, "Q & A: Denying Antiretrovirals to Migrants Hurts Us All: Interview with Joanna Vearey, Forced Migration Project, Univ. of Witwatersrand," IPS, July 15, 2008, http://ipsnews.net/news.asp?idnews=43191 (accessed August 25, 2008). See also Treatment Action Campaign, Equal Treatment: Welcome to S. Africa? A Special Report on the Systematic Abuse of Immigrants, June 2008, http://www.tac.org.za/community/files/file/et25.pdf (accessed August 25, 2008); Irin Plus News, "South Africa-Zimbabwe: No Documents? No Treatment," March 28, 2008, http://www.plusnews.org/Report.aspx?ReportId=7749 (accessed August 25, 2008).
[xii] Kristin Palitza, "Health-South Africa: Refugees Denied Access to Health Care," IPS, July 1, 2008, http://ipsnews.net/africa/nota.asp?idnews=43029 (accessed August 25, 2008).
[xiii] Joanna Vearey, "The Right to Health: Assessing Non-Citizen Access to Antiretroviral Treatment in Inner-City Johannesburg," AAAO Newsletter, May 29, 2008, http://www.redribbon.co.za/home/default.asp (accessed August 25, 2008).
[xiv] UNAIDS, Migrants' Right to Health v. 39, 2001, http://data.unaids.org/Publications/IRC-pub02/jc519-migrantsrighttohealth_en.pdf (accessed August 25, 2008).
[xv] UN International Research and Training Institute for the Advancement of Women (UN-INSTRAW), Gender, Migration and Remittances in Selected SADC Countries: Preliminary Findings 10, 2007, http://www.un-instraw.org/ (accessed August 25, 2008).
[xvi] Tanya Welz et al., *Continued Very High Prevalence of HIV Infection in Rural KwaZulu-Natal, South Africa: A Population-Based Longitudinal Study*, 21 AIDS 1467, 1471, 2007, citing Statistics South Africa, Census 2001, 2003, http://www.statssa.gov.za/census01/html/default.asp (accessed August 25, 2008); M. Lurie, *Migration and AIDS in Southern Africa: A Review*, 96 S. Africa J. Sci., pp. 343-347, 2000.
[xvii] UN-INSTRAW, Gender, Migration and Remittances in Selected SADC Countries, 2007, note 15, p. 7.
[xviii] Ibid., p. 17.
[xix] Welz, *Continued Very High Prevalence of HIV Infection in Rural KwaZulu-Natal, South Africa*, 2007, note 16, p. 1469.
[xx] See, e.g., Prerna Banati, *Risk Amplification: HIV in Migrant Communities*, 24 Dev. S. Africa 205-223, 2007; UN-INSTRAW, Gender, Migration and Remittances in Selected SADC Countries, 2007, note 15, p. 50.
[xxi] Banati, *Risk Amplification: HIV in Migrant Communities*, 2007, note 20, p. 210 and 214.
[xxii] UNAIDS, Migrants' Right to Health, 2001, note 14, p. 8.
[xxiii] Palitza, "Health-South Africa: Refugees Denied Access to Health Care," note 12.
[xxiv] UN-INSTRAW, Gender, Migration and Remittances in Selected SADC Countries, 2007, note 15, p. 52.
[xxv] The right to the health is recognized by articles 11.1(f) and 12 of the Convention on the Elimination of Discrimination Against Women, article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 24 of the Convention on the Rights of the Child, and article 16 of the African Charter on Human and People's Rights.
[xxvi] The International Covenant on Economic, Social and Cultural Rights has been ratified or acceded to by 11 SADC member countries, including Angola, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi,

Mauritius, Namibia, the Kingdom of Swaziland, Tanzania, Zambia, and Zimbabwe. Office of the UN High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, 2004, http://www.unhchr.ch/pdf/report.pdf (accessed August 25, 2008).

[xxvii] International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), art. 2.

[xxviii] Committee on Economic Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, 2000.

[xxix] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), entered into force January 4, 1969, ratified by South Africa on December 10, 1998. The International Convention on the Elimination of All Forms of Racial Discrimination has been ratified or acceded to by 13 SADC member countries, including Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, the Kingdom of Swaziland, Tanzania, Zambia, and Zimbabwe. Office of the U. N. High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, 2004, note 26.

[xxx] Committee on the Elimination of Racial Discrimination, General Recommendation No.30: Discrimination Against Non Citizens, 2004.

[xxxi] Ibid., para. 2.

[xxxii] Ibid., para. 3.

[xxxiii] Ibid., para. 29.

[xxxiv] Ibid., para. 36.

[xxxv] Andreas Jahn, "Population-Level Effect of HIV on Adult Mortality and Early Evidence of Reversal After Introduction of Antiretroviral Therapy in Malawi," 371 The Lancet 1603, 2008.