

Advocating for Accountability:  
Civic-State Interactions to Protect Refugees  
in South Africa

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**ADVOCATING FOR ACCOUNTABILITY:  
CIVIC-STATE INTERACTIONS TO PROTECT  
REFUGEES IN SOUTH AFRICA**

**Jeff Handmaker**



Antwerp – Oxford – Portland

Cover photographs © Jacob van Garderen, from left to right: taken 30 March 2007 in Somaliland / Northern Somalia, on the road to Berbera; taken 26 July 2008 group of refugees, who were also xenophobia victims and later arrested and threatened with deportation, camped on the R28 highway near Lindela Deportation Centre. Middle photo taken 24 May 2008 during an anti-xenophobia protest march in the Hillbrow neighbourhood of Johannesburg.

Jeff Handmaker  
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## CHAPTER 1

### INTRODUCTION

Between June and July 1952, around ten thousand South Africans participated in numerous demonstrations around the country to mark the 300-year anniversary since the Dutch trader Jan van Riebeeck established a colony in the Cape of Good Hope.<sup>1</sup> The demonstrators were protesting against the apartheid government's 'pass laws', which required black South Africans to live and work in inferior areas of the country and under oppressive conditions, solely on the basis of their race. Marking the beginning of a decades-long 'Campaign of Defiance Against Unjust Laws' (defiance campaign) by the African National Congress, the demonstrations were aimed at advocating the accountability of the South African government to all the people of South Africa. By exercising their civic agency to defy unjust laws, the demonstrators insisted, to South Africa and to the world, that the government be held accountable to national and universal human rights norms that the white minority regime recognised for white South Africans, but not for the black majority.

Accordingly, the defiance campaign was directed not only at the government and people of South Africa. It was also addressed to other countries and the United Nations, which had passed the Universal Declaration of Human Rights four years earlier (South Africa had abstained from voting). However unrealistic the prospects were at the time, advocating for accountability through the defiance campaign raised consciousness, or at least hope, in South Africa and around the world, that apartheid could eventually be defeated. The campaign provided considerable moral backing to various grassroots civic groups and eventually liberal civic organisations, many of which used the legal system to advocate for accountability, making legal-political claims against the government's unjust policies. The experiences of the anti-apartheid movement against South Africa provide a powerful illustration of

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<sup>1</sup> The demonstrations, well documented in the magazine *Drum*, responded to an earlier, highly symbolic demonstration on 6 April 1952, which was exactly three hundred years to the day since the Dutch trader Van Riebeeck and other white settlers were recorded to have landed on the Cape Peninsula.

how national and trans-national *civic actors*<sup>2</sup> can, in general, mobilise and influence government and inter-governmental institutions to hold states accountable for their human rights obligations and in particular their obligations to promote, protect and fulfil human rights.<sup>3</sup>

This book discusses the dynamics of civic-state interactions aimed at the state or government's<sup>4</sup> obligations to promote, protect and fulfil human rights. Through the lens of refugee rights advocacy in South Africa in the early years of its post-1994 period of democracy, this book examines and explains the circumstances under which civic-state interactions can lead to structural change, and what these interactions can teach us about the potential of civic society<sup>5</sup> to realise rights in general.

Mass action in South Africa during the defiance campaign of the 1950s drew on a significant historical moment, which is difficult to compare with other moments. Furthermore, this mass action precipitated other civic or government responses. In 1952, the decision to organise a mass action was motivated by the three-hundred-year anniversary of colonial domination in South Africa, and the then-limited options available for civic actors to hold the government accountable. Although progressive political change came much later, for numerous reasons, the defiance campaign served as an important reference point for civic action, as civic resistance to the apartheid regime continued for four more decades until democratic elections in 1994. However, the emergence of a democratic, accountable government in South Africa, which was framed by a progressive constitution, did not mark the end of public protest. The country's embracing of a democratic, accountable, constitutional culture gave rise to different kinds of human rights claims, including refugee rights claims.

In Pretoria, in June and July 1996, several hundred refugees gathered on the lawns in front of the historic Union Buildings, where the office of the President was located, to demand social assistance. After having begun their protest in front of the regional offices of the United Nations High Commissioner for Refugees (UNHCR), the refugees had decided to direct their protest against the government of South Af-

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<sup>2</sup> The term 'civic actor' that is used throughout this book designates various individuals, NGOs, scholars, practitioners and activists, engaged in promoting state compliance, and/or confronting states, with their human rights obligations. The defining characteristic of civic actors is that they are *non-state* and *non-governmental* actors. This book is *not*, however, a study of civic actor *types*, but rather the types of – strategic – choices and interactions they make, mostly in relation to the state.

<sup>3</sup> (Thorn 2006); (Fieldhouse 2005); (Love 1985); (Atkinson 1992); (Mandela 1994), *passim*.

<sup>4</sup> The terms 'state' and 'government' are used interchangeably throughout this book, in the understanding that a government is the representative of the state at a particular moment, but that government inherits the responsibilities of previous governments through the international law principle of state succession.

<sup>5</sup> The terms 'civic society' and 'civil society' have been used interchangeably (the latter term more commonly in contemporary literature). In this book, the term 'civic society' is preferred, reflecting both the broad diversity of non-state perspectives, and an assumption that non-state actors need not always be 'civil'.



rica as well. The demonstrators were advocating for the accountability of both the United Nations and the government of South Africa towards meeting their demands for better treatment. The protest generated attention from the local and national media, but the South African government had not yet responded to the refugees' demands for better treatment. Civic organisations, and the South African public in general, had responded mostly with surprise rather than solidarity.

The demonstration had taken place at a key historical moment. South Africa had recently acceded to the policies of the United Nations and African Refugee Conventions, but had not yet developed a permanent policy on refugees. Some assistance was being provided through NGOs in regional offices, but this was far from adequate. Rather than being offered the opportunity for dialogue, the protestors were told that their presence on government property was illegal, and that they would be forcibly evicted if they did not move their makeshift camps. The UNHCR refused to intervene.

The protest had generated national (and even some international) attention and reactions, including from well-known international human rights organisations such as Amnesty International and Human Rights Watch, who began to advocate the accountability of South Africa to protect refugees according to its constitution and its international legal obligations. Meanwhile, a priest from the South African Catholic Bishops Organisation, a national church-based NGO, and his colleagues organised emergency accommodation at the city cathedral, and later formed a 'temporary' tent camp on a patch of church-owned land in Ga'Rankuwa.

The protest in July 1996 created a greater consciousness in South Africa regarding the plight of refugees, and precipitated other forms of civic organisation. Following the protest, South African NGOs began to engage more with the government and the UNHCR on their responsibilities towards refugees. Legal advice projects were set up to inform asylum seekers about their rights, particularly in terms of the asylum determination procedure that had recently been established to evaluate whether they fulfilled the conditions for legal status as refugees. Training programmes were also established to inform police officers, NGOs, church groups, lawyers, judges and others on refugee matters. From committees formed within the tent camp in Ga'Rankuwa, refugee leaders went on to form organisations that became the basis of the Co-ordinating Body of Refugee Communities (CBRC), a refugee-led NGO advocating for accountability of the South African government and public to respect the rights of refugees. Two months after the demonstration, various civic actors formed what became the National Consortium on Refugee Affairs (NCRA), a national platform of South African NGOs and organisations representing refugee communities that would jointly advocate the accountability of the government to promote, protect and fulfil refugees' rights.

The refugee-led protest that took place in 1996 in South Africa occurred within a specific historical context that shaped the structural conditions through which civic actors would later advocate for change. However, the strategies and means

were by no means unique. Historically, human rights claims around the world have drawn on similar processes.

For example, at almost exactly the same time in July 1996, on another continent, a group of Palestinians were protesting their forced eviction and the destruction of their homes in East Jerusalem.<sup>6</sup> The forced removal of Palestinian residents of East Jerusalem was the most recent chapter in a decades-long struggle by forcibly displaced Palestinians to advocate the accountability of the government of Israel in recognising their residence and property rights.<sup>7</sup> The outcome of the protest contributed to a series of ‘popular conferences’, and eventually led to the founding of the international Right of Return Coalition and Badil Resource Centre on Palestinian Residency and Refugee Rights, a research and legal advocacy NGO based in the occupied city of Bethlehem. Both the Coalition and Badil work closely with United Nations (UN) organisations, including the UN Relief and Works Agency (UNRWA), the Office for the Co-ordination of Humanitarian Affairs (OCHA) and other international organisations, to advocate for accountability by raising awareness about the political circumstances in which they provided humanitarian assistance, and subsequently became involved in a growing debate on Palestinian refugee rights. Finally, Palestinians and Israelis who possessed Israeli citizenship, who also formed organisations to raise awareness and launch legal claims, advocated for accountability through the Israeli courts and the United Nations institutions, insisting on the return of lands and property confiscated over a period of several decades.<sup>8</sup>

While efforts to advocate for accountability at different historical moments in South Africa and in historical Palestine occurred separately of one another, and arose from very different circumstances, they are comparable in at least two important respects that are reflected upon in this book. Firstly, these examples suggest that civic efforts to hold government accountable are both structurally conditioned and actively informed by specific historical events. Secondly, they reveal the potential of legal and other forms of civic advocacy to hold states accountable through co-operative or confrontational interactions within the framework of both national and international institutions.

This introductory chapter first presents the justification for and relevance of this book in the context of a primary tension faced by civic human rights advocates, namely the lack of critical analyses on how civic advocacy has the potential to hold states accountable to human rights norms. This chapter then presents and justifies the relevance of the book’s core research question and analytical approach. Next, three theoretical propositions are presented, reinforced by the book’s core concepts.

<sup>6</sup> Documented in (Abunimah 2006), *passim*. I use this example because I am familiar with it, and because there are a growing number of scholarly comparisons between the past situation in South Africa and that of present-day Israel/Palestine. However, this book does not seek to develop these comparisons.

<sup>7</sup> (Dajani 2005); (Masalha 2003), *passim*.

<sup>8</sup> (Bronstein 2005), *passim*.

The book's case study of refugee rights advocacy in South Africa – against which the theoretical propositions will be argued – is also introduced, illustrated by three examples of civic interactions to hold states accountable for their human rights obligations. Finally, this chapter explains the sources and methodology used in this research, followed by an overview of the book's structure.

## 1.1 ADDRESSING A PRIMARY TENSION IN HUMAN RIGHTS ADVOCACY

The idea that civic actors – and especially human rights advocates – should support a government as it moves in a progressive direction is in tension with the idea that civic advocates remain independent and retain their capacity to sanction governments when they violate human rights protection norms. This primary tension faced by civic actors who seek to hold states accountable conditions both the strategic choices they make and the interactions they undertake to change government policy. For example, a government's explicit promise to make domestic violence a criminal offence would be something that most human rights organisations would assist in, whether through the drafting of new legislation, the training of police officers or the monitoring of police practices. However, there may be instances in which domestic violence continues to be ignored by law enforcement officers. This has tended to be very widespread in South Africa and other countries in similar situations. In these circumstances a government that fails to live up to its obligations may need to be held publicly accountable in a national court of law, the media or the United Nations.

The reverse may also be true. The idea that organisations vigorously maintain their independence carries the danger that they hold the government to unrealistically high standards; they may become detached from the government's difficulties in trying to implement a policy, and miss out on opportunities to help the government live up to its human rights promises. For example, civic organisations that work with the legislature or departmental officials in lobbying for, and possibly co-drafting, a national law to criminalise domestic violence may ignore the realities of on-the-ground police work, or fail to appreciate the need for training of police officers. Consequently, the police may feel they have no obligation to enforce a law that fails to take their operational concerns into consideration, and may not feel prepared to handle such incidents in any event.

Resolving this principal tension in human rights advocacy requires different kinds of strategies; increasingly, these draw on global standards. In addressing this tension, I illustrate the dynamic nature of civic-state relationships by examining the internal and external factors that contribute to civic actors' success in holding states accountable.

### 1.1.1 Examining the strategic potential and pitfalls of civic-state interactions

This book critically examines the strategic potential of – and pitfalls awaiting – civic actors in advocating for accountability by holding a government to its national and international law obligations to protect the human rights of individuals, by way of co-operative and confrontational civic-state interactions. This is achieved by examining refugee protection in South Africa during a ten-year period, 1996 to 2006. Civic interactions aimed at holding the government of South Africa to its human rights promises to protect refugees, both in terms of the government's constitutional obligations, and more especially from the moment the government had acceded to both the United Nations and African regional conventions on refugees on 12 January 1996. The legal advocacy that took place in this ten-year period reflects an interesting interplay of individual and collective civic interactions with the government. This interplay has led to the following questions: How can the dynamics of civic interactions to advocate state accountability for promoting, protecting and fulfilling refugee rights in South Africa be strengthened; under what circumstances do civic-state interactions lead to structural change and what do these interactions teach us about the potential and pitfalls of realising rights in general?

Beyond the roles South African civic organisations fulfil in seeking to enhance refugee protection, what does the South African experience in advocating refugee rights tell us more generally about the potential space for enhancing human rights protection, both through co-operation and confrontation? How does this study illustrate the dangers of civic organisations becoming compromised or even co-opted, blunting their ability to hold government accountable? How do the experiences in South Africa relate to promoting global human rights protection efforts? Do these experiences confirm some universal lessons, or do they reflect the need for treating each case entirely separately?

The interplay between civic and state actors in advocating government accountability to refugees has not been adequately studied in a critical way. While there is a growing body of literature that explains the types of social movements and civic participation in human rights protection,<sup>9</sup> there are fewer efforts to critique the practice of civic interventions to advocate human rights. Those that have critiqued human rights advocacy have taken a global perspective,<sup>10</sup> although some are beginning to examine the practice of human rights in terms of its simultaneously global and local dimensions.<sup>11</sup>

In general, studies on the protection of human rights have tended to focus on the legal-normative perspective of rights claims – that is, the way society ought to be, as specified by the law – without addressing the social interplay between the civic

<sup>9</sup> (Tarrow 1998); (Meyer et al. 2002); (Diani and Mcadam 2003); (Welch 2001) and (Korey 2003), *passim*.

<sup>10</sup> However, see (Barnhizer 2001b), *passim*; (Mutua 2001: 151-159); (Mutua 2002), *passim* and (Keck and Sikkink 1998), *passim*.

<sup>11</sup> (Rajagopal 2003); (Merry 2006b) and (Goodale and Merry 2007).

actors who make these claims, and the government institutions that are obliged to answer them.<sup>12</sup> The degree to which accountability is claimed on the basis of social norms and on the relationships between various actors responsible for the legal and social protection of individuals is rarely addressed.<sup>13</sup> By extension, the potential of civic efforts to advocate state obligations to promote, protect and fulfil human rights, while maintaining a degree of civic independence, is also not adequately addressed. Finally, there have been few critical attempts to assess whether civic-state interactions are capable of achieving structural change, although Shirin Rai has usefully argued that, to be effective, civic actors wishing to change their social environment need to be more ‘deliberative’, reflecting on both the risks and the potential of a particular intervention.<sup>14</sup>

### 1.1.2 Human rights claims are both contested and interactional

Human rights are claimed through contestation and strategic interactions. Civic actors and governments have very different perspectives on their respective roles in the protection of human rights; civic actors tend to see their role as that of ‘watch-dog’, and see few limits to what they can accomplish in confronting governments and seeking to hold them accountable for their legal obligations to promote, protect and fulfil human rights. Some even perceive civic actors as central to change in the formation and monitoring of these legal obligations, either as active participants or as autonomous agents of civic power.<sup>15</sup> Meanwhile, governments, and especially democratically elected governments, tend to argue that legal obligations to realise human rights are important, but their implementation must be balanced with other interests; according to governments, forming human rights obligations may or may not include civic involvement.

An alternative approach, which this book examines, recognises that protecting human rights – whether through co-operative interactions or legal confrontations – is a contested process in which civic and state actors have particular motivations for producing a particular outcome. Legal process is not simply a product of static (albeit well-intentioned) norms and institutions, but a cultural system that, by definition, is subject to change. From this perspective, state accountability and civic advocacy are necessarily dialogic or interactional.

Furthermore, interventions to advocate government accountability in respect of their human rights commitments take place within a specific context, drawing on

<sup>12</sup> Scholarly work on the political and legal doctrinal aspects of human rights practice is still very significant, however, including Baehr and others’ work on the function of human rights in international relations; (P.R. Baehr 1994), (P.R. Baehr 1999); (P. Baehr et al. 1999); (P.R. Baehr and Gordonker 2005) and Ramcharan’s extensive work on the principle of legality and his critiques on the functioning of human rights institutions; (Ramcharan 1982); (Ramcharan 1988); (Ramcharan 2006) and (Ramcharan 2008).

<sup>13</sup> However, see (Verdirame and Harrell-Bond 2005), *passim*.

<sup>14</sup> (Rai 2008: 112-113).

<sup>15</sup> (Fowler and Biekart 2008) and (Bebbington et al. 2008), *passim*.

the combined participation of civic organisations that play a role in mediating between international human rights law and its expression in national legal norms. Fully understanding the interplay between civic actors and state institutions can explain which civic interventions have real influence in forming state policies, and how they can hold states accountable for these policies, without civic actors losing their critical independence; it has potentially far-reaching practical implications for ensuring effective human rights protection of all civic stakeholders, citizens and non-citizens alike.

Finally, the conceptual approach of this book can explain civic-state interactions to advocate state accountability both at different *times* – i.e. periods in a country's history – as well as in different *spaces*, both in relation to the type of right(s) being advocated as well as the geographical context in which civic-state interactions take place. In other words, the book's understanding of civic-state interactions has potentially universal application. Accordingly, it aims to engage a broad community of academics, human rights lawyers, NGOs and other civic actors in a critical discussion that questions the structural impact of civic interventions to hold governments accountable for their human rights commitments.

## 1.2 THEORISING CIVIC INTERACTIONS TO ADVOCATE STATE ACCOUNTABILITY

More than ten years after the demonstration at the Union Buildings in South Africa, this book tests three theoretical propositions (further developed in chapter two) to explain civic interactions to advocate state accountability. First, the book maintains that the capacity of civic actors to promote and impose state accountability is related to structural changes in the normative international and national legal framework. Second, boundaries that define the structural relationship between civic actors and the state shift in very specific ways that must be respected by civic actors (the agents) if they want to be strategic in their efforts to promote or enforce state accountability. Third, civic actors play a crucial role in mediating the translation of international legal norms into local contexts.

The first of these three theoretical propositions recognises the capacity of civic actors to advocate state accountability as the outcome of long-contested social justice claims by civic actors, with both global dimensions, in terms of what Ignatieff terms a 'human rights revolution',<sup>16</sup> and their local expressions, especially as reflected in terms of administrative law. Administrative law has been the principal instrument used by civic actors for *formally* holding democratic governments accountable to their obligations to protect human rights, although other sources of law are also used to protect human rights.<sup>17</sup>

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<sup>16</sup> (Ignatieff 1999), *passim*.

<sup>17</sup> For example, family law has been used to realise a state's obligations regarding protection of children; labour law has been used to realise women's equal right to work, and criminal law has been used to realise a state's obligations to punish individual perpetrators of international crimes.

As Abel's study of anti-apartheid legal struggles has illustrated, South Africa has historically been a place where law has been effectively wielded as both a 'shield' (to protect individuals against the abuses of the state, such as unlawful home demolitions and forced removals) and as a 'sword' (to advance individual and collective human rights, such as restitution of property).<sup>18</sup> Expanding the field of administrative law in South Africa has forced lawyers to be innovative, often coordinating their efforts with broad-based civic initiatives.<sup>19</sup> Beyond legal actions, civic participation has taken other forms, ranging from non-judicial forms of representation to collaboration with government, social and policy analysis, and mass mobilisation. In the area of human rights, civic interventions to advocate state accountability have successfully challenged outdated notions of state sovereignty, and enhanced civic capacity to invoke direct claims against states. In recent years, the role of civic advocacy in advocating the accountability of states to promote, protect and fulfil the human rights of refugees seems to have been especially productive, although this has not been critically evaluated.

Advocating for accountability to refugees is particularly suited to examining the relationship between global human rights norms and the national contexts in which they find expression. While the mechanisms and processes of advocating for accountability are principally located at the national level, the realisation of refugee rights is rooted in international enforcement mechanisms and the geo-politics of refugee protection. Civic actors who have sought to promote or enforce refugee rights in South Africa have to some extent appealed to these international mechanisms, either in international meetings or through the representatives of international organisations. Civic actors have also drawn on international refugee protection norms in making claims through administrative justice mechanisms, both internal (appealing to the administration itself) and external (on judicial review), as they have tested the limits of administrative and judicial review.

The second of these theoretical propositions that recognises boundaries as having shifted in very specific ways draws principally on Archer's approach to structure-agency relationships. According to this approach, state-created structures condition civic agency; at the same time, there is space for elaborating these state-created structures through the interplay that takes place between structure and agent.<sup>20</sup> By focussing on the interplay between structure and agency, the potential for interventions by civic actors to lead to structural change becomes clear. Inputs

<sup>18</sup> (Abel 1995), *passim*.

<sup>19</sup> In ('Minister of Health (and others) v. Treatment Action Campaign and Others' 2002), discussed in (Heywood 2002), the AIDS Law Project supported the Treatment Action Campaign (TAC) in bringing a case to force access to anti-retroviral drugs for HIV patients, a process that eventually resulted in the Constitutional Court finding in favour of the TAC. Other civic initiatives in South Africa have creatively utilised public administrative law and public international law, and have coordinated with civic groups and social movements to advocate for economic and social rights, including affordable access to water (Dugard 2007) and shelter (S. Wilson 2007).

<sup>20</sup> (Archer 1996), *passim*.



by civic organisations may be peripheral, particularly in the case of co-operative civic-state interactions, but they are by no means insignificant in seeking to press for greater state accountability, and even to hold a state to its national and international legal obligations.

This book will provide agency- and structure-based explanations for civic efforts in advocating for accountability, both in terms of socially enforceable norms and state-enforceable law. Agency-based explanations for civic participation in state-led policy and enforcement processes illustrate the aspirations of civic actors in seeking to influence the outcome of government policy or practice. While structure-based explanations define the boundaries of civic interaction, civic agents can advocate state accountability and engage with states in a way that still maintains a critical distance. Accordingly, civic actors are able to calculate the strategic prospects for advocating state accountability that can lead to lasting, structural change.

The third theoretical proposition draws principally on socio-legal theory in explaining the mediating role that civic actors fulfil in the translation of international legal norms into local contexts. Standard tools of legal analysis have provided a doctrinal approach to evaluating civic efforts to hold states accountable. As mentioned, public administrative law in particular has shown itself to be a flexible and potentially very productive instrument for holding governments accountable by measuring compliance with national law obligations, and, by extension, obligations contained in public international law.

On its own, however, legal analysis tends to be of limited value in explaining the highly contested space in which various civic actors have participated in the forming of human rights policies, as well as in promoting (and in some cases also participating in) their implementation. Socio-legal approaches provide an alternative means of explaining civic efforts to hold states accountable, building on well-developed methodologies.<sup>21</sup> This book draws principally on Merry's concept of 'translators' who fulfil a mediating role between international legal rules and their expression in the 'vernacular' form, or locally relevant context.<sup>22</sup>

Furthermore, the book draws on Kidder, who constructed an 'integrated theory of imposed law', which explained the significance of 'social distance' between the law maker (state or government) and the citizen (civic actor or civic organisation), as measured by divergences between their respective meanings, interests and political positions.<sup>23</sup> While Merry's concept explains the role of civic actors in mediating the relationship between international law and national law, Kidder's theory ex-

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<sup>21</sup> Socio-legal theory has drawn much inspiration from the earlier work of (Ehrlich 1936), who famously argued that 'law in the books' ought to be contrasted with what he termed 'living law'. Socio-legal theory has grown rapidly since the 1960s, with the work of (Nader 1964); (S.F. Moore 1978); (Cotterrell 1992), followed by the more recent work of (Griffiths 2003); (Merry 2006b); (Rajagopal 2003); (Barnhizer 2001a) and others.

<sup>22</sup> (Merry 2006b), *passim*.

<sup>23</sup> (Kidder 1979). (Rai 2008: 113) refers to the concept of 'political distance' in a similar way.



plains the nature of civic-state interactions, in which this mediation or translation of international law principally takes place.

### **1.3 THREE FORMS OF CIVIC-STATE INTERACTIONS FOR ADVOCATING FOR ACCOUNTABILITY TO REFUGEES**

This book's theoretical propositions are tested against three forms of civic-state interactions to advocate state accountability for refugee rights. It makes a distinction between co-operative forms of civic-state interactions, promoting state accountability in promoting, protecting and fulfilling its domestic and international legal obligations, and confrontational forms of civic interactions, for holding states accountable through the courts, sometimes together with non-legal civic confrontations.

The first form of co-operative civic-state interaction involved civic participation in a primarily South African government-led process to draft a refugee policy. This process of refugee policymaking took place mainly within a two-year period between 1996 and 1998, and involved multiple interactions between civic actors and the government. Two policy 'tracks' may be distinguished; the first led by the South African government, and the second led by civic actors, and which to some extent informed the first track. The product of this policymaking process was the Refugees Act of 1998.

The second form of co-operative civic-state interaction involved support by local and international civic organisations for the South African government in a programme to regularise the legal residential status of former Mozambican refugees, most of whom had arrived in South Africa in the 1980s – without formal recognition by South Africa – during the civil war in Mozambique. While a number of these refugees had participated in a UNHCR-led repatriation programme in the early 1990s, and many more were deported by the South African authorities, several hundred thousand former Mozambican refugees remained in South Africa without any form of legal documentation. The implementation of the programme to regularise their status took place between 1999 and 2000, and principally involved three South African organisations, as well as a Dutch NGO, which co-ordinated the project.

The third form of civic-state interaction involved confrontational civic advocacy in order to hold states accountable through legal actions that tested government decisions and their compliance with administrative and constitutional law. These legal actions included promoting access to a fair refugee status determination procedure as well as access to basic services, and challenging employment practices that discriminated against refugees. The legal actions were often undertaken in combination with other – non-legal – forms of confrontational civic advocacy.

Advocating for accountability may take many forms other than the three mentioned here, which were selected on the basis of the empirical evidence available. Furthermore, civic advocacy is not necessarily directed at the state that is violating

human rights; for example, the target could be journalists, employers or the general public. However, civic advocacy very often involves invoking global norms and ‘translating’ them into a locally relevant context. In advocating for accountability through legal means – whether through participation in a policymaking process or through litigation – constitutional and administrative law is the principal medium through which global norms are translated.

In applying the book’s theoretical propositions to these three forms of civic agency, I intend to argue that the implications of civic agency aimed at *promoting* state accountability through co-operative interactions are diverse, but do not necessarily lead to structural change; or if they do, it is rarely in a way that is devoid of compromise. Conversely, while there are only very limited mechanisms available to civic agents seeking to *enforce* state accountability (through confrontations), their potential to lead to structural change is significant, if used strategically.

#### 1.4 SOURCES, METHODS AND METHODOLOGY

The methodological starting point for this study was the approach, developed mainly by Rosalyn Higgins, that non-state actors are important participants in the forming, monitoring and invoking of international law. This legal approach corresponds to a political approach; as human rights have developed as a normative system, the power relationship between civic actors has shifted, creating possibilities for civic actors to hold states directly accountable through international and national mechanisms. In applying this methodological approach to a local context, I encountered literature from the area of socio-legal studies that provided less doctrinal and more sophisticated approaches to explaining how civic interventions play a role in forming normative obligations and holding states accountable to them, in particular Merry’s notion of global rules ‘translated’ into a locally relevant context. Finally, I adapted Archer’s analytical dualism approach to present structure- and agency-based arguments that explain the interplay and interactions between civic actors and various state-created structures.

These approaches were developed into three theoretical propositions that created a framework for analysing the empirical examples of co-operative and confrontational civic-state interactions, as seen through the lens of refugee rights advocacy in South Africa. The empirical data to illustrate the examples came from various primary and secondary sources, as explained in this section, and reinforced the conclusions that I came to in the final chapter of this book.

Being a participant in the first few years of the 1996-2006 period that this study examines, I was faced with exceptional access to the various civic actors engaged in advocating for accountability, and the ‘grey material’ they produced. I also gained unique insights into how civic actors use their agency to try and hold states accountable for their national and international obligations to protect refugees; insights that would have been difficult for an outside observer to obtain. However,

this close contact also presented methodological challenges, in that it was difficult to distance myself from the events that took place.

#### **1.4.1 Literature survey and grey material**

A survey was made of scholarly articles on administrative law in South Africa and international law, in particular with regard to the role of civic actors in international legal process. Surveys were also made of scholarly socio-legal work on legal pluralism and legal consciousness, as well as a more limited survey of structure-agency debates. Finally, surveys were made of scholarly work on civic advocacy, particularly on the promotion of states' human rights obligations. Additional literature came from South African and international non-governmental organisations.

In the rural province of Limpopo, a great deal of archival material came from the University of the Witwatersrand Refugee Research Programme (RRP), a rural-based research project. I reviewed material from the main areas of work done by the RRP from 1996 to 2002: voluntary return programmes, facilitated by RRP in conjunction with numerous other government agencies and non-governmental organisations; the regularisation of former Mozambican refugees; and a series of workshops organised on humanitarian alternatives to deportation.

In Durban, archival material, including minutes of meetings, was supplied by one of the founders of the Durban Refugee Forum, as well as by a founder of the Durban Refugee Service Providers Network. In Cape Town, numerous NGOs supplied material from their organisations, as well as reports and minutes, covering the work of the Cape Town Refugee Forum, now known as the Tutumike network. In Port Elizabeth, a more limited amount of documentation was obtained from NGOs. In Pretoria and Johannesburg, a great deal of material was obtained from Lawyers for Human Rights, as well as other NGOs in Gauteng Province. Numerous e-mails, mainly from the e-mail list-servers of SAIMMIG (set up by Professor Jonathan Klaaren of the University of the Witwatersrand), and the short-lived LHR-Refugees list, also clarified particular issues.

Finally, newspaper stories in the South African and international media were drawn upon, many of them archived by the Institute for Contemporary History at Free State University in Potchefstroom, and the Southern African Migration Programme (SAMP) of the South African NGO, the Institute for Democracy in South Africa (IDASA), and Queens University in Canada.

#### **1.4.2 Interviews, primary sources and personal observations**

To confirm written assertions contained in the secondary data, between February and May 2006 I conducted thirty-five individual, semi-structured interviews with refugee advocacy organisations, academics, lawyers, refugee-led organisations, government officials and UNHCR employees. The interviews took place in Johannesburg, Pretoria, Durban, East London, Port Elizabeth and Cape Town. Further-

more, I facilitated a focus group discussion of twenty refugees in Port Elizabeth. A handful of other unstructured follow-up interviews took place at various stages during the field research.

The numerous primary sources drawn upon for this study include legislation by the South African government, as well as regulations, circulars, passport control instructions and other policy documents from the Department of Home Affairs. Policy documents were also obtained from the South African Police Services as well as the municipal governments of Cape Town and Johannesburg. The UNHCR supplied policy documents, some of which are now accessible through the *Refworld* section of their website.

This book also draws on much personal observation from working as a legal advocate in South Africa, particularly in the years 1996-1998. For a short time in 1993, and later from 1996 until the beginning of 2000, I was employed by LHR, in large part to establish a project focusing on refugees. I helped establish the Refugee Rights Project, now called the Refugee and Migrants' Rights Project, established in 1996, which has since become one of the leading NGOs advocating government accountability for the rights of migrants and refugees in South Africa. Following the success of the Refugee Rights Consortium in 1996, LHR co-founded the National Consortium on Refugee Affairs (NCRA) network, with a small grant from the (then) EU Foundation for Human Rights in South Africa.<sup>24</sup> LHR co-ordinated the NCRA from 1997 until the network became an independent NGO in 2000. I was co-ordinator of these two initiatives in their early days, employed in various capacities between June 1996 and July 1998, and afterwards in an associate capacity until January 2000.

Furthermore, while at the Forced Migration Studies Programme (FMSP) at the University of the Witwatersrand in Johannesburg, South Africa from January to June 2006, I participated in two research projects. The first was the New African Cities Project, a survey of 800 households in central Johannesburg, with respondents including South Africans and persons of Mozambican, Congolese and Somali nationality. The second was a project commissioned by Atlantic Philanthropies to evaluate the priorities, gaps and weaknesses in the migration and refugees sector.

### 1.4.3 Challenges of assessment

Explaining the role of civic actors in the development, implementation and enforcement of the South African government's refugee policy was made particularly challenging because of two ethical considerations.

The first ethical consideration faced in writing this book was that I focused mainly on South African organisations that have represented the interests of refugees, and did not adequately document the extensive (and largely ignored) roles

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<sup>24</sup> The NCRA reformed in 2007 to become the Consortium on Refugees and Migrants in South Africa (CoRMSA).

played by refugees and asylum seekers themselves in advocating for accountability.<sup>25</sup> To avoid an overly ambitious study, I deliberately chose to focus on the South African civic actors, and especially those with a legal advocacy perspective, in order to critically appreciate how these particular actors engaged strategically with a democratic state in advocating a sensitive human rights issue. While it was acknowledged that alliances between South African refugee-led organisations could lead to some impressive outcomes, this study did not have the space to examine these relationships in much depth.

The second ethical consideration in undertaking this study related to my personal involvement in certain events that took place during the period of study, 1996 to 2006. As a participant in the early stages of the development of a refugee rights policy in South Africa, and later as a researcher, I had exceptional access to the actors involved in framing a refugee policy and associated documentation.<sup>26</sup> There was a generally high level of trust among those I interviewed in order to develop the picture of discussions on refugee rights policy in South Africa that began to emerge in earnest from 1996 onwards. Like Belvedere, I also believe strongly that my direct involvement has been of tremendous benefit to this study in that I was able to make more informed decisions about what aspects of refugee rights advocacy in South Africa were most likely to illustrate and answer the book's central research question.<sup>27</sup>

However, the disadvantages in having been engaged in the subject of my study as a participant – in the early stages of refugee policy development and implementation – are also important to note. While objectivity is difficult, if not impossible for any researcher, it is particularly difficult where one has participated in some of the events being reflected upon.<sup>28</sup> There may, for example, be dual pressures on the researcher to take a position that is policy-relevant, while also meeting the very real needs of those who are the subject of the research.<sup>29</sup> I made it clear to those I interviewed that this was not my principal intention, although I hoped that the findings and conclusions contained in this book would be of use to practitioners. In other words, while a subjective perspective may make one more sensitive to the topic being represented and the actors involved, inevitably it also leads one to make judgements. Given this dilemma, I have scrupulously avoided labelling the 'rightness' or 'wrongness' of certain approaches, but have attempted to explain their im-

<sup>25</sup> (Merry 2007) makes this observation, referring to a pioneering study by (Malkki 1996). (Harrell-Bond 1986) and (Verdirame and Harrell-Bond 2005) have also made this observation. This is certainly an important area for future research. However, see (Amisi and Ballard 2005), who studied the role of Congolese in South Africa, advocating for rights on behalf of their community.

<sup>26</sup> I was not, however, directly involved in the implementation of the regularisation programme for Mozambican refugees, nor was I directly involved in the litigation that is described in chapter six.

<sup>27</sup> (Belvedere 2006: 22-26) acknowledged that she was similarly involved in events she later analysed in her PhD thesis.

<sup>28</sup> (Cooke and Kothari 2001).

<sup>29</sup> (Jacobsen and Landau 2003).

pact instead. Furthermore, I based my conclusions on South Africa's explicit normative commitments, as well as written documentation and interviews.

## 1.5 OVERVIEW OF THE BOOK

The book is divided into seven chapters, including this introduction. In Chapter one, the book's central research question is revealed: How can the dynamics of civic interactions for advocating a state's accountability for promoting, protecting and fulfilling refugee rights in South Africa be strengthened; under what circumstances do civic-state interactions lead to structural change and what do these interactions teach us about the potential and pitfalls of realising rights in general? In explaining the dynamics of civic interventions to hold the South African state accountable to its national and international law obligations to protect refugees, I take three illustrations of civic interactions to promote state accountability to explain co-operative measures by civic actors to promote state accountability, and confrontational measures by civic actors to hold states directly accountable.

Chapter two presents the book's conceptual framework. Three theoretical propositions are presented that explain certain social, political and legal aspects of civic-state interactions. Social explanations include the types of agency that civic actors employ in seeking to hold states socially and legally accountable. Structure and agency-based explanations draw on Archer's analytical dualism approach, which (1) considers state-created structures to be the products of specific historical events; (2) postulates that these structures condition civic agency in its interactions with the state; and (3) asserts that through civic-state interactions, there is the possibility of structural elaboration (or structural change). The concept of the capacity of civic-state interactions to lead to structural change meshes well with Merry's explanation of civic actors as 'translators' of global rules into their local vernacular contexts.<sup>30</sup> Social explanations also draw upon Kidder's interactional approach, which considers externally imposed law to be the external norms and principles 'that increase(s) the power of external legal actors to offer alternatives (and) thereby increases the vulnerability of the internal system'.<sup>31</sup> The degree of 'externalisation' or social distance between the lawmaker, for example an administrative official, and the civic actor making a claim, may be illustrated by a divergence in meanings, interests and political positions.

Political explanations show the space for civic advocacy as being the outcome of juridical, advocacy and enforcement revolutions. This political analysis includes an assessment of the relationship between, and specific roles of, three key South African institutions. These are: the Department of Home Affairs, which is responsible for immigration and border policy enforcement, as well as refugee status determination; the Portfolio Committee on Home Affairs in Parliament; and the so-called

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<sup>30</sup> (Merry 2006b), *passim*.

<sup>31</sup> (Kidder 1979: 297).

‘section nine institutions’,<sup>32</sup> particularly the South African Human Rights Commission.

Legal explanations draw, firstly, on Higgins’ notion of civic actor participation in international legal process that eliminates the need for a subject/object distinction. Furthermore, expanded possibilities in the exercise of administrative review, which emerged from the post-1994 democratic and constitutional dispensations (as described above) have made it possible for civic actors to hold the South African government directly accountable, in particular in terms of Article 33 of South Africa’s constitution. This has been reinforced by the Promotion of the Administration of Justice Act 2000 and public law jurisprudence. I reflect on developments in South African constitutional and administrative law, drawing on the work of Jonathan Klaaren and Cora Hoexter. This study reflects on the three main types of sanction available to resolve administrative law disputes, namely: judgements, court-ordered settlements and (structural) interdicts.

Chapter three traces the history of legal advocacy in South Africa, particularly pertaining to refugee protection. It puts the book’s study of civic advocacy for refugees into context by explaining the history of South Africa’s migration policy, and in particular the four pillars upon which it was based prior to 1994. This is followed by a history of civic advocacy in South Africa, which eventually became organised to protect refugee rights. The significance of post-1994 dispensations, and in particular the emergence of South Africa’s constitution and its provision for unprecedented powers of judicial review, is explained. Finally, this chapter explains how this history of migration and civic advocacy involved well-co-ordinated civic structures to assist refugees and asylum seekers and to lobby for their protection.

Chapter four offers the first illustration of civic-state interactions through *civic involvement* in the development of South Africa’s refugee policy, culminating in the Refugees Act of 1998. This illustration shows how the policy emerged from competing forces within government and among civic actors. The chapter also explains how refugee policy process fell into two distinct ‘tracks’, one of which led to the Refugees Act of 1998. Though the other did not, it did provide important secondary input to the 1998 Act. Both tracks illustrate, in different ways, how civic actors compromised in favour of, or resisted against, initiatives to change government-led efforts to reform its policy.

Chapter five presents the second illustration of civic-state interactions, drawing on similar theoretical positions to those used in the previous chapter. This chapter reviews *civic collaboration* in the implementation of a project to regularise the legal status of former Mozambican refugees from 2000 to 2002. This project involved multiple civic actors, national and international, as well as national and provincial

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<sup>32</sup> Section nine of the (South African Constitution 1996) provides for the establishment of institutions to monitor the government’s compliance with the provisions of the Constitution, and to hold the government horizontally accountable by conducting investigations, holding public hearings, and producing reports that show areas where the government falls short.



government officials. The chapter presents illustrative examples in which civic agency was severely constrained, and indeed badly compromised, by state-created structural factors that were ineffectively addressed by the participating civic actors.

Chapter six presents the third illustration of civic-state interactions, exploring civic efforts to hold the South African government directly accountable to its national and international obligations. This chapter demonstrates the dynamic nature in which human rights are mobilised and claimed through legal and administrative structures. It surveys key cases during a ten-year period of litigating refugee rights via administrative channels in the Department of Home Affairs, and through the South African courts, by way of administrative and judicial review. I argue that the use of public administrative law is, essentially, the only formal means of holding states accountable. Further, brief examples show other confrontational advocacy strategies, namely public shaming and mass mobilisation.

Chapter seven brings the narrative of legal advocacy in South Africa full circle. It addresses the underlying normative question addressed in this book, namely how the dynamics of civic interactions in advocating state accountability for promoting, protecting and fulfilling refugee rights in South Africa could be strengthened; the circumstances under which civic-state interactions lead to structural change; and what these interactions teach us about their potential to realise rights in general. Weaknesses in the structural base of government institutions and the normative framework, as well as in the agency base of civic advocacy, will be subjected to critical examination, though the emphasis will be on structure-based change. Furthermore, the concluding chapter shows that while the situation in South Africa is in many respects unique, drawing on a long heritage of civic resistance and confrontational advocacy, the experiences of refugee rights advocacy in South Africa are relevant to global refugee protection studies generally, and can serve as general, instructive examples of civic efforts to protect human rights.



## CHAPTER 2

### ADVOCATING FOR ACCOUNTABILITY THROUGH CIVIC INTERACTIONS

#### 2.1 OVERVIEW

Civic interactions to advocate for accountability (what might be called civic agency) for a state's obligations to promote, protect and fulfil human rights obligations principally take two forms: co-operative and confrontational. Co-operative civic interactions aim to promote state accountability by having civic actors work together with government structures in an advisory or facilitative role. Confrontational civic interactions aim to hold states directly accountable for their human rights obligations, primarily by way of legal intervention, but also through public shaming and mass mobilisation.

Civic agency is not unbounded in its interaction with state structures. Indeed, state-prescribed structures condition civic agency in civic efforts to influence the formation of law, to participate in the implementation of law and to advocate the enforcement of law. Civic interactions do not necessarily alter the relationship between state and civic actors, although they do clarify the roles of both, aimed respectively at promoting a more credible government and at preserving a critical civic society. In some cases, interactions between civic actors and state structures can lead to structural change, or what Archer regards as structural 'elaboration'.<sup>1</sup> Both civic and state actors can benefit from a more sophisticated understanding of the nature of these boundaries and by acknowledging the state's central role as holder of legal or social obligations.

While the impact of civic interactions in influencing state behaviour should not be exaggerated, such interactions can still be highly significant. Understanding why some interactions have more impact than others can serve as an important means of clarifying the potential impact and limitations of civic participation in the formation, implementation and invoking of human rights policies, as it does in the study of civic advocacy for refugees in South Africa. A clearer understanding of the dynamics observed in the course of civic-state interactions can also help civic actors

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<sup>1</sup> (Archer 1996).

determine how their roles might be strengthened. In this chapter, I first explain the capacity of civic actors to co-operate with – or confront – states with their obligations to protect human rights, which are derived from international and national norms, as well as being the product of a ‘human rights revolution’. I then explain the importance of recognising structural boundaries, how this recognition conditions civic agency, and what the implications are for civic legitimacy. Finally, I explain how civic actors translate global human rights into their locally relevant contexts, which have the potential to lead to structural change. These three dimensions of civic advocacy – capacity, structural conditioning and the potential of civic actors to contribute to structural change – are framed by Archer’s analytical dualism approach, and have guided me in the formulation of three theoretical propositions.

### 2.1.1 Exercising civic capacity: shifts in the political context

As Valerie Hunt has emphasised, ‘context matters because context frames how an issue is understood’,<sup>2</sup> and shifts in a political context are shaped by specific historical circumstances. The political context of human rights and social justice struggles invariably has both international and national dimensions. National human rights struggles draw inspiration from international human rights norms and support from international solidarity movements, while the development of international human rights norms is informed by experiences at the national level. As the political context shifts in these multi-dimensional social justice struggles – for example, as an authoritarian regime gives way to a just alternative – civic actors that once had more legitimacy than the government they confronted may shift their focus to supporting government when it acquires structures for enhancing democratic accountability.

Human rights are the product of groundbreaking institutional and normative developments originating from the end of the Second World War, in particular from the creation of the United Nations and the capacity of civic actors to participate in international policymaking processes and to enforce direct claims against states for their violation of individual and collective rights. At the national level, human rights are promoted, for example through participation in the process of law-making. They are enforced through court challenges, either as a ‘shield’ to protect individuals against governments that violate human rights, or as a ‘sword’ to advance human rights.<sup>3</sup>

As a truly global phenomenon that addresses many levels of state responsibility, and involves states, international organisations and civic actors, the field of refugee rights provides good examples of multi-dimensional social justice struggles. International treaties prescribe the principal human rights that refugees have, including the right to ‘seek and enjoy’ asylum from persecution, while demanding that states

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<sup>2</sup> (Hunt 2005: 14).

<sup>3</sup> (Abel 1995), *passim*.

are primarily responsible for protecting these rights.<sup>4</sup> While states are the most important source of protection for refugees, they are also the principal perpetrators of the violations of rights that cause people to become refugees.<sup>5</sup> The United Nations High Commissioner for Refugees (UNHCR), the principal international agency established to monitor states' compliance with the international treaties protecting refugees, has also intervened in the protection of refugees, through diplomacy, assistance to states and humanitarian assistance.<sup>6</sup> And finally, civic actors actively participate in policymaking processes at the international and national level, support states in meeting their human rights obligations towards refugees, and challenge states to respect their human rights obligations to refugees.<sup>7</sup>

### 2.1.2 Structural boundaries and the issue of legitimacy

How do civic organisations – translators of global rights into their locally relevant contexts – derive their legal, political and social legitimacy to advocate on behalf of a marginalised community, as was the case in the study of civic advocacy for refugees in South Africa examined in this book? Civic organisations often define their legitimacy with reference to presumed and often self-defined constituencies. Development theory and practice still tends to define the legitimacy, or 'credit-worthiness', of these organisations in a highly technocratic way, on the basis of so-called 'best practice'. Is the legitimacy of civic actors principally derived from being 'accountable' representatives of a certain civic political landscape,<sup>8</sup> in representing civic 'alternatives' to mainstream, state-led development approaches?<sup>9</sup> Should civic actors be seen as independent of government, as being the primary generators of what some refer to as 'civic driven change'?<sup>10</sup>

When assessing the protection of human rights and the advocating of accountability, it is generally assumed that the roles of civic actors are 'important'. However, few studies have been undertaken to assess their effectiveness in holding states accountable. Most assessments of civic human rights advocacy are descriptive accounts of civic actors' contributions, and are mainly at the level of global advocacy.<sup>11</sup> My approach is somewhat different. I believe that the legitimacy of civic actors, vis-à-vis their constituencies and in relation to other civic actors, is derived from the structural changes that take place as the result of civic-state interactions performed to advocate human rights and hold states accountable. These

4 Of particular note are: (Convention Relating to the Status of Refugees 1951); (OAU Refugee Convention 1969).

5 (Bayefsky and Fitzpatrick 2000).

6 (Loescher 2001); (Steiner et al. 2003).

7 (Ferris 1993).

8 (Jordan and Tuijl 2006).

9 (Bebbington et al. 2008).

10 (Fowler and Biekart 2008).

11 (Korey 2003); (Welch 1995); (Welch 2001); (Keck and Sikkink 1998); (Weiss and Gordenker 1996).

structural changes come about either through co-operative endeavours, involving civic actors and a government that is willing to move in a more progressive direction, or through confrontational measures by civic actors.

The legitimacy of civic advocacy, therefore, relates to whether a particular strategic interaction has the capacity to deliver structural change. Some civic interactions require a certain distance or high level of autonomy from government, whereas other interactions require a very close relationship. In most cases, it will be necessary to interact with state-created structures. For example, ending the detention of refugees could be achieved by changing legislation (requiring a close collaboration with lawmakers), by bringing a case through the court system, or by a public campaign to shame the government on its treatment of refugees. It may also require a combination of these strategies. Ending the corrupt practices of government officials responsible for handling immigration matters, for instance, may require an aggressive campaign of public shaming through the media. By contrast, promoting education and awareness could be achieved by working closely with individual law enforcement officials, as well as with local and national government.<sup>12</sup>

Once again, the field of refugee rights presents an instructive study in examining the relationship between global rules and their translation in a national context. As Tazreiter argued in her comparative study of the German and Australian refugee policy regimes, refugee policy is very much the outcome of a political process which, though guided by international rules, often leaves room for interpretation.<sup>13</sup>

As Tazreiter does, I conclude that civic participation in making human rights claims against the state on behalf of refugees has social implications for both refugees and the citizens of the host country in which they claim asylum, and creates attendant obligations on the part of the state.<sup>14</sup> I would agree that the role of civic actors in this process has had a 'marked impact',<sup>15</sup> but there are diverse explanations for this. I am more reluctant to conclude that the interventions of civic actors necessarily determine state behaviour, what Fowler and colleagues describe as 'civic-driven change'.<sup>16</sup> Yet I do share Shirin Rai's argument, that interactions by civic actors with state representatives in seeking to bring about change are most strategic when they involve a conscious 'risk assessment'.<sup>17</sup> Furthermore, most changes that take place over a longer period of time are subject to multiple causes, and usually follow repeated civic interactions; in other words, change is both structural and cumulative in nature, and cannot be ascribed to a single actor.

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<sup>12</sup> For example, as confirmed by the ('Braamfontein Statement' 1998), various civic organisations have worked closely together with the South African Human Rights Commission, police and immigration officials and local and national government departments in a campaign to 'roll back xenophobia'.

<sup>13</sup> (Tazreiter 2004).

<sup>14</sup> (Tazreiter 2004: 57-81).

<sup>15</sup> (Tazreiter 2004: 58-59).

<sup>16</sup> (Fowler and Biekart 2008).

<sup>17</sup> (Rai 2008).

### 2.1.3 Civic participants as translators

Can local and transnational civic participation in the realisation of rights be theorised? Groundbreaking research by Risse, Ropp, Sikkink and others on transnational civic mobilising or ‘socialisation’ of international human rights norms in domestic politics provides a partial explanation.<sup>18</sup> For example, Risse and Sikkink’s notion of the ‘spiral model’, which proposes a five-phase spectrum for analysing human rights mobilisation, from a state of repression, to a state that consistently applies the rules for human rights protection, explains how human rights become structurally incorporated into a state’s norms and institutions through trans-national civic interactions.<sup>19</sup>

Merry contends that it is possible to characterise the interface between global and local legal, social and political cultures in terms of three broad processes with *transnational* elements: consensus-building, program transplants and localisation of knowledge.<sup>20</sup> While I agree with this contention, Merry also argues that human rights form a voluntary, non-enforceable system, which is ‘adopted, rather than imposed’.<sup>21</sup> While this may explain the potential of co-operative interventions by civic actors to lead to structural change where the state is encouraged to meet its obligations voluntarily, it does not adequately explain the potential for confrontational civic interventions to do the same. There are opportunities, though limited, at both international and national levels for civic actors to confront states in meeting their international human rights obligations. Consequently, as will be elaborated in more detail below, I also draw on Kidder’s integrated theory of ‘imposed law’, which provides a structure-based explanation of how the imposition of law by civic agents can achieve ‘structural elaboration’, which, according to Archer, takes place in a structurally conditioned, historically specific context.<sup>22</sup>

Fowler argues that there is an inter-dependent, though relatively fluid, relationship between the civic agents of change and the structures in which change takes place, and that this relationship is very complex and context-specific.<sup>23</sup> While I do not dispute that structural incorporation of human rights norms is possible, or that such an inter-dependent, ‘complex’ relationship exists, I tend to agree with Merry, who argues that the complex nature of these interactions is precisely why it is worthwhile focusing on ‘specific places where transnational flows are happening’.<sup>24</sup> This is especially important when civic participation is subject to diverse global

<sup>18</sup> (Risse et al. 1999).

<sup>19</sup> (Risse and Sikkink 1999: 17-37), although (Black 1999) has urged caution in treating countries such as South Africa as an archetypal representation of the model. He argues (page 79) that the spiral model can explain both the emergence of socially progressive policies as well as how a human rights struggle can become ‘de-radicalised’ by over-reliance on a liberal rights framework.

<sup>20</sup> (Merry 2006b: 19-20).

<sup>21</sup> (Merry 2006b: 225).

<sup>22</sup> (Archer 1996).

<sup>23</sup> (Fowler 2007).

<sup>24</sup> (Merry 2006b).

(transnational) as well as local (national) pressures and, correspondingly, multiple layers of interaction. While Merry focused her study on the concept of gender violence, albeit in different national and local contexts, her theory is also applicable to other rights issues.

For all the institutions examined in this study, strategic efforts by civic actors to hold the state accountable, both horizontally (indirectly promoting institutional accountability through ‘self-correcting’ mechanisms) and vertically (accountability as a direct consequence of civic interventions), will be measured against externally grounded reasons for each actor’s interest in the outcome of a given interaction.

#### **2.1.4 Three theoretical propositions**

Assessing the nature, context and legitimacy of civic-state interactions to hold states accountable has led me to three theoretical propositions, which are discussed in the remainder of this chapter. Firstly, the capacity of civic actors to promote and impose state accountability is shaped by developments in the normative international and national legal framework. Civic participation in legal process therefore requires clarity regarding the roles and responsibilities of civic and government actors, and the establishing of a nexus between international law and domestic public law. Secondly, boundaries that define the structural relationship between civic actors and the state have shifted in very specific ways that must be respected by civic actors (agents) if they want to be strategic in their efforts to promote or enforce state accountability. Strategically, this demands a clear appreciation by civic agents of the structural conditioning that takes place in any civic-state interaction, as well as a critical assessment of the possibilities for civic agency to achieve structural elaboration, through legal translation and/or legal imposition. Thirdly, civic actors play a crucial role in mediating the translation of international legal norms into local contexts in a narrow, but significant, space. Holding states accountable involves the state voluntarily changing its behaviour on the basis of international obligations, often at the insistence, and sometimes with the assistance, of civic actors. Being a structurally conditioned relationship, the interplay between civic and state actors, and their corresponding motivations, can be explained in terms of divergences in meanings, interests and political positions.

### **2.2 THE CAPACITY OF CIVIC ACTORS TO HOLD STATES ACCOUNTABLE IS A PRODUCT OF STRUCTURAL CHANGES**

The first theoretical proposition I discuss in this book is this: *the capacity of civic actors to promote and impose state accountability is shaped by structural changes in the normative international and national legal framework*. At the global level, these structural changes can be seen as the product of a significant ‘human rights revolution’, according to Ignatieff, involving extensive participation by civic and

state actors.<sup>25</sup> At the national level of policymaking and enforcement, implementation often derives from multiple legal systems.

The international legal context has nurtured a steadily evolving field for making human rights claims; it has also provided an important primary legal, social and political normative context in which contemporary national human rights claims have taken place. While this book focuses principally on the national dimension of civic promotion and enforcement of state accountability, such interactions do not take place in a vacuum. The cumulative efforts of civic struggles to hold states accountable have not only emerged over a long period of time; they have also cut across multiple legal boundaries. In international law, clarification on individual and collective (civic) legal capacity owes a great deal to Rosalyn Higgins' concept of civic actor participation in international legal process eliminating the need for a subject/object distinction.<sup>26</sup> Individual and collective civic actor participation in international legal process includes the forming of state obligations as well as monitoring state compliance, and in some cases, even launching direct claims against the state to promote and enforce its legal obligations.

In demanding compliance from the state by challenging and discouraging improper official behaviour, civic actors have progressively invoked national legal institutions, leading to the possibility that international human rights could be enforced in a national legal context. In South Africa, human rights claims by way of administrative review, practically non-existent prior to the 1994 democratic and constitutional dispensations, are now a visible part of public law. The guarantee of just administrative action and the concept of 'justiciable rights' contained in section 33 of South Africa's constitution have made it possible to launch direct civic challenges against the government of South Africa. This has been reinforced by the Promotion of the Administration of Justice Act 2000 and public law jurisprudence in South Africa's courts. With the courts' willingness to negotiate what Klaaren and others have termed a 'delicate balance' in the relationship between judicial and executive powers,<sup>27</sup> civic actors have been able to sanction government successfully through court-ordered settlements, structural interdicts and judicial orders.

<sup>25</sup> (Ignatieff 1999). In 1998 and 2001, the United Nations made great fanfare about, respectively, the fifty-year anniversaries of the Universal Declaration of Human Rights and the Convention Relating to the Status of Refugees, reiterating global commitments to human rights and protection against oppressive regimes. For the commemoration of the 1951 Convention, the UN invited civic experts and organisations to make contributions to the Global Consultations on International Protection. This, in turn, led to an Agenda for Protection, which was ceremoniously adopted by the second-ever Ministerial Meeting of State Parties to the Refugee Convention, the first meeting having taken place fifty years earlier.

<sup>26</sup> (Higgins 1994).

<sup>27</sup> (Klaaren 2006b).

### 2.2.1 Human rights revolutions: a historical context

From a global perspective, civic advocating of state accountability has taken place in what Ignatieff has termed a historically significant human rights revolution, with juridical, advocacy and enforcement dimensions.<sup>28</sup> Accordingly, making a claim against a state has become possible, regardless of national boundaries, and not only by government-appointed officials or elected representatives, but also by civic actors, both as individuals and as part of collectivities. This revolution, which has had wide-ranging implications for the relationship between civic actors and the state, took place in two distinct phases. The first phase of the revolution, which took place between 1945 and 1951, involved four key, normative developments in international law. The second phase, which took place in the 1960s, consolidated the international human rights regime and created binding enforcement mechanisms that were accessible to civic actors.

The first normative development was the establishment of the United Nations as an internally accountable, supranational institution. In 1945, in the aftermath of the horrors of the Second World War, the United Nations was founded with a clear human rights mission. The United Nations Charter stated in its preamble:

We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends ... to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims.<sup>29</sup>

The second normative development came a short time afterwards, in 1948, when the UN Charter was joined by the equally historic Universal Declaration of Human Rights. The Declaration, which became the founding document of a global ‘human rights charter’, affirmed the important role of non-state actors as recipients of rights and as participants in the process of claiming those rights. The UN General Assembly proclaimed the Declaration as:

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>30</sup>

<sup>28</sup> (Ignatieff 1999) and (Ignatieff and Gutmann 2001).

<sup>29</sup> (UN Charter 1945: Preamble). Note that the “peoples” clearly referred to states.

<sup>30</sup> (Universal Declaration of Human Rights 1948: Preamble).



Both the UN Charter and the Universal Declaration of Human Rights were passed in the post-war context of a world deeply traumatised by violent conflict and large-scale reconstruction. These documents were complemented a year later by a third normative development: the consolidation of laws governing the conduct of war and treatment of civilians in armed conflict, contained in the 1949 Geneva Conventions on the laws of war. The Geneva Conventions governed the humanitarian treatment of civilians and combatants in times of conflict. They built on earlier efforts, in particular the Hague Conventions of 1899 and 1907, to govern the actions of combatants during armed conflict. Together, these instruments have laid the basis for an international regime of individual accountability for perpetrators of war crimes.

The fourth normative development came in 1951, with the United Nations Convention Relating to the Status of Refugees; this was the direct successor to the International Refugee Organisation, which had co-ordinated efforts to assist hundreds of thousands of forcibly displaced and/or stateless persons. Following the 1951 Convention, the General Assembly established the Office of the UNHCR, referred to earlier, which was given an explicit mandate to protect the rights of refugees. One of the principal roles accorded to the UNHCR was to monitor states' compliance with their responsibilities under the 1951 Convention.

This initial civic protection charter thus comprised four main components: *global governance*, *human rights protection standards* in times of conflict and peace, *humanitarian protection standards* in times of conflict, and the *protection of individuals and groups* whose rights were, or were potentially, at risk of being violated. This intensive period of six years of human rights and humanitarian policy-making was a truly collective effort, described by Eleanor Roosevelt as the product of a 'curious grapevine' of interests that involved extensive participation by states as well as civic actors.<sup>31</sup> Civic actors were especially active in framing the language contained in the Universal Declaration of Human Rights. Meanwhile, regional human rights conventions emerged in Europe, Latin America, and eventually in Africa as well.

The second phase of this revolution, which began in the 1960s, at the United Nations and in different regions of the world, produced covenants on civil and political rights, as well as on economic, social and cultural rights. However, for decades the Cold War dynamic blocked international consensus on these rights. States tended to favour one set of rights over the other, which impeded their effective implementation. A Protocol that extended the provisions of the 1951 Refugee Convention to the rest of the world was agreed in 1967.<sup>32</sup> Other international treaties came into being, accompanied by administrative structures that banned racial discrimination, as well as torture and inhuman and degrading punishment or treatment. Treaties also

<sup>31</sup> (Korey 2003).

<sup>32</sup> The 1951 Convention Relating to the Status of Refugees had originally only been envisaged for refugees in Europe.

emerged to promote women and children's rights. As Welch and Korey have argued, civic actors played important roles in the development of these human rights instruments, in the same way they contributed to the Universal Declaration of Human Rights.<sup>33</sup>

Changes have also occurred within the domestic legal systems of states, both in the industrialised global North and the newly-liberated global South, especially following the end of the Cold War. States have ratified so-called Optional Protocols to international human rights treaties, which have made rendered these treaties directly enforceable in a country's national court system. These normative developments have been accompanied by a growing consciousness among civic actors, and especially lawyers, about the utility of drawing on international human rights obligations in domestic legal argumentation. A further change has been the weakening of the nation-state as notions of state sovereignty have become challenged by the porous nature of borders, universally binding legal principles and the hegemonic nature of global economic relations. Spurred on by this globalisation of human rights norms, states have gradually permitted direct challenges to their human rights commitments by civic actors.

The human rights revolution, according to Ignatieff and others,<sup>34</sup> has been groundbreaking for human rights advocates in three significant areas. In each of these areas, individuals and civic organisations have played key roles: (1) in the forming of juridical standards, (2) in human rights advocacy, and (3) in human rights enforcement.<sup>35</sup>

The 'juridical revolution' represents not only the norms that have been created to protect both majority and minority interests, but also the capacity to hold states accountable to these norms by way of 'naming and shaming', and in some cases, by mechanisms to enforce certain norms against states.

Guidelines and enforceable norms that can (in some cases) be invoked against states owe much to the efforts of individuals and civic organisations who have precipitated an 'advocacy revolution'. International NGOs such as Amnesty International and Human Rights Watch have been amongst the most prominent, but smaller international and national NGOs have also played key roles. The efforts of civic organisations have complemented the work of the United Nations High Commissioner for Human Rights.

They have also assisted the review mechanisms of various treaty bodies established to review a state's compliance with a particular Convention, and have contributed to the work of various independent experts or 'special rapporteurs' on a wide range of human rights issues. Furthermore, civic organisations have contributed to the work of the permanent Human Rights Council, formerly the Human Rights Commission, empowered to publicly review state behaviour. In all these

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<sup>33</sup> (Korey 2003) and (Welch 2001).

<sup>34</sup> See also (Donnelly 1989); (Risse et al. 1999) and (Korey 2003).

<sup>35</sup> (Ignatieff 1999: 10-11).

mechanisms, civic participation has been widely recognised as having been key to their functioning, in particular the receiving of complaints against states that are parties to a particular Convention.<sup>36</sup>

The ‘enforcement revolution’ refers to the capacity of states to be held directly accountable by civic actors through the individual right to petition, including the use of mechanisms established by individual human rights treaty bodies, which may include bodies established on a regional basis. States can also be held indirectly accountable through the prosecution of individual holders of public office in *ad hoc* criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>37</sup> In 2002, the International Criminal Court was established by 120 member states, following a drafting process that was led mainly by ‘southern’ countries, and which received much input from civic organisations. The Court is intended to receive complaints against individuals for international crimes,<sup>38</sup> and operates in a complementary fashion alongside state-based mechanisms that permit the prosecution of individual violators of international crimes by way of the Universal Jurisdiction Principle.

As Ignatieff observes, ‘these three aspects ... have given human rights real power in the international political arena’.<sup>39</sup> This human rights revolution has indeed provided myriad possibilities, to individuals and collectivities, for enforcing international human rights standards, even by way of directly invoking human rights against a state. Individuals and collectivities no longer rely merely on the benevolence of states, but have begun to claim rights through domestic and international mechanisms, against states and even private parties.

The Refugees Convention, in particular, has provided an important base of protection for individuals suffering actual or threatened violations of their human rights. The Convention incorporated the principle of *non-refoulement*. Now considered a principle of international customary law, and therefore binding on all states, this principle prohibits a state from returning a person with a well-founded fear of persecution to a country where they would suffer such persecution or other serious violations of human rights. The principle therefore operates both as some guarantee of protection against tyranny, and as legally enforceable rights against a state that has violated the principle.

### **2.2.2 International law as process: individual and collective civic actor participation**

Since the 1960s, Rosalyn Higgins has been advocating a practical approach to understanding the nature and function of international law. Rather than a system of

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<sup>36</sup> (Korey 2003).

<sup>37</sup> (Klip and Sluiter 1999).

<sup>38</sup> (Glasius 2006).

<sup>39</sup> (Ignatieff 1999: 11).

rigid rules characterised by an erroneous subject/object distinction,<sup>40</sup> she argued that international law ought to be seen more appropriately as a process in which multiple stakeholders fulfil overlapping functions. To a sociologist, anthropologist or political scientist, such an explanation may seem starkly obvious, but for decades, international lawyers had stubbornly refused to abandon what Higgins aptly referred to as a self-imposed ‘intellectual prison’.<sup>41</sup>

As Higgins argues, the ‘key to admission’ in the international legal system by both states and international organisations is ‘pragmatism’,<sup>42</sup> whereby active membership and participation is more decisive a factor than specific recognition by other states. By the same token, the participation of civic actors also reflects a pragmatic choice by states and international organisations to permit individuals and collectivities ever-greater access to, and participation in, international decision-making processes.

Ultimately, as Higgins acknowledges, the respective functions of state and civic actor participants in international decision-making processes are determined by matters of procedure that relate to what Higgins identifies as the ‘realities of power’.<sup>43</sup> Since civic actors – as legal ‘individuals’ – are participants in international law alongside states and international organisations, and are the principal beneficiaries of human rights, the process of articulating human rights claims is a matter of ‘according priority to the decision-making process’.<sup>44</sup> Goodwin-Gill locates this discussion in the context of refugee law standards, which he explains have been the outcome of a ‘process of interaction’ in which ‘the status of the refugee has developed from the beneficiary of a paternalistic system of certification to the

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<sup>40</sup> (Brownlie 2003: 430-432) argued that the object theory was harshly criticised around the time of the 1949 Reparations Case as ‘illogical’, ‘unreal’, ‘immoral’, based on ‘erroneous premises’ and, perhaps most significantly, ‘not concordant with practice itself’. Brownlie later stated (p. 65) that ‘at the same time to classify the individual as a subject of the law is unhelpful, since this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject’.

<sup>41</sup> (Higgins 1994). (Manner 1952) had provoked a decades-long debate by stipulating not only that individuals did not benefit from rights and duties under the law, but also that states alone were empowered to protect their interests. The debate was picked up in the 1970s when (Obilade 1974: 90) argued that, through various international law developments, including the law of war, human rights, *jus cogens* and treaty references, individuals had been ‘transformed to a subject of rights and duties in international law’. Obilade was supported by (Paras 1975: 42), who argued that individuals had acquired a ‘new status in international law’. The debate continued into the 1990s, with (Fraidenraij 1998), taking the ambiguous position that the acquiring of ‘international status ... is still very limited’. He then later qualified this as ‘a changing position’ (Ibid, at 481). While further contributions cannot be ruled out, (Orakhelashvili 2001), to my mind, concluded the debate, referring to Higgins and arguing that the status of individuals as having capacity in international law was ‘superfluous’ in light of the fact that individuals have already long enjoyed protection in terms of human rights.

<sup>42</sup> (Higgins 1994: 42).

<sup>43</sup> (Higgins 1994: 53).

<sup>44</sup> (Higgins 1994: 104).

claimant of rights'.<sup>45</sup>

As discussed in the next sections, during the course of the last few decades, civic actors, through both single-handed and collective efforts, have increasingly been engaged in closing the gaps in rights protection, participating in international legal process. In doing so, they have fulfilled various roles. Firstly, civic actors have helped frame the content of rights in international law by participating in international policy-making processes, and have monitored the enforcement of rights. Secondly, they have made direct claims against states through increased possibilities of *locus standi* (the right to represent a case before the courts), particularly through the regional systems. Thirdly, civic actors have clarified their roles and responsibilities vis-à-vis other participants in international legal process. These roles have, in turn, strengthened the linkages between international legal norms and claims at the domestic level.

#### *Civic framing and mobilising of rights through international institutions*

In the past few decades, individuals have played an increasingly prominent role in international processes that have framed the content and enforceability of rights in international law, both on their own and through civic society groups.<sup>46</sup> Korey has characterised this involvement by referring to the panoply of different actors, including state, UN and civic society representatives, who participate in both formalised processes and informal exchanges.<sup>47</sup> This may include involvement in national legislative processes and tribunals, as well as participation in international meetings and assistance in the work of the special rapporteurs. Human rights organisations operating at the international level have thus evolved, from being sources of information on international law standards and obligations to becoming actively engaged in norm-standard-setting processes.<sup>48</sup>

A far more contentious level of involvement has been the means by which civic actors mobilise rights, asserting them against states through various monitoring and enforcement mechanisms in international law. These mechanisms include the Human Rights Council (formerly Commission), Human Rights Committee, and various treaty body mechanisms, as well as the *ad hoc* international criminal tribunals established in the aftermath of violent conflicts, during which war crimes are alleged to have taken place. The work of these human rights mechanisms has been reinforced by the increasing attention paid to human rights by the International Court of Justice in its Judgements and Advisory Opinions.<sup>49</sup>

A good example of civic participation in these international processes and human rights mechanisms is the use of so-called shadow reports during the periodic

<sup>45</sup> (Goodwin-Gill 1999: 222) (emphasis added).

<sup>46</sup> A full examination of this is beyond the scope of this book, but studies include (Korey 2003); (Welch 1995); (Welch 2001); (Keck and Sikkink 1998); and (Weiss and Gordenker 1996).

<sup>47</sup> (Korey 2003).

<sup>48</sup> (Welch 2001: 87).

<sup>49</sup> (Zyberi 2008).

reviews of a state's compliance with a particular human rights treaty. These parallel reports, produced by civic actors, usually contain a very different narrative to that presented by the state. They question the validity of a state's assertion that it is in compliance with its treaty commitments. While the principal participants in these mechanisms are states, their effective functioning demands close involvement with civic organisations. The enforcement of a state's international law obligations is enabled by the mechanisms of individual petition against the state in an international court, otherwise known as individual *jus standi*.<sup>50</sup> Mole explains that to use this mechanism effectively demands sustained human rights advocacy, and litigation in particular.<sup>51</sup> Nevertheless, she is optimistic regarding individual legal personality, arguing that the development of individual *locus standi* has 'profoundly changed the relationship between the individual and international law'.<sup>52</sup>

Accordingly, civic actors have acquired a limited, though potentially significant, role in holding states accountable through claims lodged in international accountability mechanisms.<sup>53</sup> Direct claims, such as those made through international committees, hold states accountable; indirect claims, such as those made through an international criminal tribunal, hold the official representatives of states accountable for violating international law.

*Civic use of international courts, and the emergence of individual jus standi*

While committees, commissions and special rapporteurs often have ample latitude to address human rights issues, they rarely have the capacity – or 'teeth' – to enforce obligations against states. The only sanctions they tend to impose on states are made by way of observations and recommendations. Such sanctions may have influence,<sup>54</sup> but they are not legally binding. Courts, on the other hand, have the capacity to issue judgements, which, on the basis of consensus, are binding on the parties to a given dispute. While regionally-based international human rights mechanisms in Africa, Europe and Latin America offer significant possibilities for

<sup>50</sup> A detailed discussion of these mechanisms is beyond the scope of this book; suffice it to say that such mechanisms serve as a potentially powerful tool to secure state compliance when national accountability mechanisms fail. See in particular (Van Den Biesen et al. 2001) and (Zwanenburg 2004).

<sup>51</sup> (Mole 2000).

<sup>52</sup> (Mole 2000: 14).

<sup>53</sup> Individuals also assert their rights through human rights awareness campaigns, building a broader base of public support for another advocacy strategy. The impact of awareness campaigns is notoriously difficult to measure in isolation, and falls beyond the scope of this book.

<sup>54</sup> For example, according to (Odinkalu and Christensen 1998), (Ankumah 1996) and (Murray 2000), in the African regional human rights system, which arguably operates on the basis of consensus more than any other system, states tend to take observations and recommendations seriously when made by the ACHPR. Acknowledging this tendency, the ACHPR frequently appeals to states to cooperate with the Commission in order to promote 'African solutions for African problems'.

civic actors to lodge complaints against a state,<sup>55</sup> it is only the European Court of Human Rights (ECtHR) that permits a civic actor to invoke its authority directly, either as a directly interested party or as an *amicus curiae* (friend of the court). Alternatively, civic actors must invoke a ‘screening mechanism’, usually a Commission composed of state-appointed representatives, or obtain the assistance of a (third) member state.

Provided an applicant can satisfy the court that he or she has exhausted the possible remedies at the domestic level, the ECtHR permits civic actors unrestricted *jus standi* to bring cases directly to its attention.<sup>56</sup> Following the now groundbreaking *Lawless case*,<sup>57</sup> the Council of Europe finally agreed to extend the right of civic actors to approach the ECtHR directly by granting them full *jus standi* through Protocol No. 11, which came into being on 1 November 1998.<sup>58</sup> A similar development is emerging in the Inter-American system.<sup>59</sup>

Trindade refers to these developments as a ‘realization of international justice’,<sup>60</sup> while Plender and Mole argue that developments in case law, in national courts and in the ECtHR, ‘impose substantial restraints on the liberty of states’, particularly with regard to non-citizens – for example, refugees.<sup>61</sup> While Trindade argues that the international law of human rights is ‘grounded on fundamentally distinct premises’ and should be distinguished from the ordinary relations between states,<sup>62</sup> he

55 (Protocol to the Banjul Charter 1998), (Statute of the Inter-American Court of Human Rights 1979) and (European Convention on Human Rights 1950). The Inter-American system offers individuals limited *locus standi*. The African Court, however, only allows the Commission or a state to lodge a complaint (Protocol to the Banjul Charter 1998: Article 5(2)).

56 (Muchlinski 1985: 382) hoped fervently for this possibility in 1985, highlighting the ‘necessity for a fuller recognition of (individual) capacity’.

57 The (*Lawless Case* 1960) involved an application by an individual to make representations on his own behalf or through his legal representative. While stopping short of according individual capacity, the court nevertheless permitted a ‘measure of involvement’, as noted by (Muchlinski 1985: 378).

58 (Protocol 11 1998: Article 34) of the European Court of Human Rights provides that: ‘The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.’

59 Following the precedent set by the European Court of Human Rights, the Inter-American Court of Human Rights granted partial capacity to individuals to approach the court – a limited form of *locus standi* – once an application had been submitted by a member state. The (‘Rules of Procedure’ 2001: Article 23(21)) of the Inter-American Court of Human Rights provide that:

‘When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings.’

For claims by multiple alleged victims, Article 23(2) of the Rules provides that a ‘common intervenor’ be appointed to take legal actions on behalf of the group.

60 (Trindade 2003: 886) makes a distinction between *jus standi*, represented by Protocol No. 11, and *locus standi*, represented by the 2001 Rules of Court.

61 (Plender and Mole 2001: 105).

62 (Trindade 1999: 526).



also acknowledges that certain limitations exist that prevent civic actors from obtaining direct access to these systems, explained by his later *jus standi/locus standi* distinction.<sup>63</sup> In short, there is little doubt that the evolution of individual *locus standi* (the capacity to appear before a particular commission or court) and *jus standi* (to actually invoke its authority) represent the most significant developments in conferring upon civic actors the capacity to make claims in international law.

### *Participation in international legal process*

Recognition that civic actors can exercise some level of legal capacity in international legal process must be accompanied by a clear distinction between the roles and responsibilities of states, civic actors and the UN. On one hand it cannot be denied that civic actors, acting on their own and through collective efforts, increasingly fulfil important roles in areas that have traditionally been the sole responsibilities of states and international institutions.<sup>64</sup> International law (and its decision-making processes) requires the participation of a wide range of stakeholders. Each has overlapping responsibilities that relate to a shared interest, though the degrees of political power wielded by international organisations, states and civic actors are by no means equal. On the other hand, it is ultimately the state, and not civic actors, that is empowered and legally obliged to intervene or otherwise ensure the protection of individuals. Recognition that the responsibilities of states and non-states are fundamentally different is therefore important.

For example, civic actors participate actively in the protection of refugees, as noted by Anker, Ferris and others.<sup>65</sup> Civic actors assist government in developing national policies to protect refugees, they monitor a state's compliance with its obligations under international refugee treaties, and they participate actively in international meetings where the obligations of the state are being examined. Furthermore, civic actors train immigration officers, police, judges and other officials to promote better compliance with international and national laws for protecting refugees. But the role of civic actors and international organisations can also be damaging to refugee protection, particularly when they fulfil what are normally state functions, such as refugee status determination, as noted by Verdirame and Harrell-Bond.<sup>66</sup>

Consequently, seeing all stakeholders – the state, international organisations and civic actors – as *participants in international legal process* recognises that there are

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<sup>63</sup> (Trindade 1999: 538-542).

<sup>64</sup> For example, the ('LaGrand Case (Germany v. United States of America)' 1999), confirmed that individuals have a right to demand consular protection as nationals of their state. Some commentators, including (Tinta 2001), (Tams 2002) and (Spiermann 2003) have suggested that this amounts to a partial recognition that individuals fulfil roles in international legal process that were once the exclusive domain of states.

<sup>65</sup> (Anker et al. 1998: 299) and (Ferris 1993).

<sup>66</sup> (Verdirame and Harrell-Bond 2005: 87-90).



certain shared interests. At the same time, it is also important to maintain a distinction between public and private responsibilities.

As Higgins argues, international law and its decision-making institutions function partly because of the long-standing principle of consent, especially in relation to treaty obligations. Institutions function because of a widespread perception on the part of all participants, but particularly states, that there is an inherent interest in complying with international law, including human rights legislation.

While it is much easier to examine this shared stakeholder interest in the context of international politics, rather than international law, Slaughter argues that it is preferable to understand them as operating in tandem. In an attempt to build an ‘integrated theory of international law and international relations’, Slaughter argues that both ‘cohabit the same conceptual space’.<sup>67</sup> On a similar path to Clapham,<sup>68</sup> who speaks about the enforceability of human rights in the private sphere, Slaughter’s motivation for doing so is the traditional public/private distinction:

If, for instance the primary actors in the system are not states, but individuals and groups represented by state governments, and international law regulates states without regard for such individual and group activity, international legal rules will become increasingly irrelevant to state behaviour.<sup>69</sup>

Thus, while the distinction between civic actors and states may be qualified in holding individual rights violators to account, it is clearly essential to maintain the distinction in preserving the legitimacy of international law. Just as in the case of stakeholders’ interests, overlapping accountability does not mean that the rights and obligations of states and civic actors are the same.

#### *The link between national and international claims*

The emergence of civic participation in international legal process has also permeated the national legal process. As Halliday has argued, states that have emerged from decades, if not centuries, of colonial rule – such as South Africa – offer some of the most promising examples of both civic participation and principled state commitments in the development of domestic human rights standards, including those regarding the protection of refugees.<sup>70</sup>

Civic participation in human rights claims often involves collaborative efforts between international and national or ‘local’ civic actors; this can sometimes lead to tensions, if the interests between international and local civic actors are not necessarily the same. For example, international human rights organisations – which are

<sup>67</sup> (Slaughter 1995).

<sup>68</sup> (Clapham 1993: 89-133) argues that ‘difficult and dangerous distinctions’ are made between the individual and the state, following the traditional view that only states are capable of holding duties and violating individual rights. However, Clapham also acknowledges (p. 356) that individuals (private actors) such as trade unions ‘may not be under the same obligations as government’.

<sup>69</sup> (Slaughter 1995: 2).

<sup>70</sup> (Halliday and Schmidt 2004).

mainly North American and European in their social and political orientation – generally subscribe to the view that human rights are universal and should be respected in spite of cultural distinctions.<sup>71</sup> However, the political agenda – and corresponding priorities – of local human rights organisations may not necessarily be the same as those of international human rights organisations.<sup>72</sup>

The relationship between the international and national dimensions of civic promotion and enforcement of state accountability also highlights the relationship between international and national accountability mechanisms. For example, international accountability mechanisms generally require that an individual claim for reparations suffered as the consequence of human rights violations should exhaust local remedies before the claimant is able to approach international mechanisms for redress. In other words, the ‘lowest’ level of enforcement ought to be the first course of action, otherwise known as the subsidiarity principle.<sup>73</sup>

Although some states persistently refuse to set up any mechanism to protect and/or promote human rights at the national level, the domestic legal systems of most states provide some mechanisms that allow civic actors to assert their rights as prescribed in international law. In South Africa, for example, rights can be invoked through civic interventions in legislative processes, representative or *amicus curiae* petitions in judicial proceedings, representations at independent commissions, and other processes.

In emphasising the increasing ability of civic actors to protect their human rights through both domestic and international law, Trindade refers to the ‘emancipation of the individual from the state’.<sup>74</sup> Accordingly, Trindade insists that states are obligated to provide ‘national measures of implementation’ to give effect to their international law obligations.<sup>75</sup> It is this national level of human rights protection that we turn to in the next section.

### 2.2.3 National law as process: civic promotion and enforcement of state accountability

As discussed in the preceding section, the role of actors, acting on their own or through collectivities<sup>76</sup> in an international legal process, is the achievement of several decades of human rights and national liberation struggles. As Merry puts it, the emergence of broadly recognised, universal human rights norms created a ‘political space for reform’.<sup>77</sup> However, in order to realise the ‘emancipatory potential’ of human rights, Merry argues, it is important that they become translated as part of a

<sup>71</sup> (Donnelly 1989).

<sup>72</sup> (Mutua 2002).

<sup>73</sup> For example, (Banjul Charter 1982: Article 56) creates this requirement. Similarly, Article 1 of the (Statute of the ICC 1998) incorporates the complementarity principle.

<sup>74</sup> (Trindade 1999: 524-531).

<sup>75</sup> (Trindade 1999: 522).

<sup>76</sup> (Berting et al. 1990).

<sup>77</sup> (Merry 2006b: 4).

national ‘legal consciousness’, or ‘vernacularised’ in a way that is consistent with local norms and context<sup>78</sup>. As Merry explains elsewhere, the form that this takes can either ‘replicate’ global norms, promoting a more ‘transnational model’, but allowing local context to provide ‘distinctive content’ or interact with various local contexts at global and local levels, resulting in what Merry refers to as a ‘hybrid’ approach.<sup>79</sup>

Vernacularisation by legal civic actors can be accomplished in various ways through either co-operative forms of civic participation; for example, in a policy-making or legislative process, as Merry has illustrated. However, it can also be accomplished through confrontational interactions such as legal interventions in the courts, which draw more on a legal imposition approach, as reflected in Kidder. Co-operative forms of civic participation would resemble more of an interactive or ‘hybrid’ ‘form of vernacularisation, while confrontational interactions would resemble more of a ‘replication’ of global norms through legal imposition, though still drawing on local context.

The capacity to participate actively in a national legal process and even make direct and indirect claims in national legal systems is by definition context-specific, but also the most important way in which civic actors – both individuals and collectivities – assert rights contained in international law. The types of *indirect* legal claims available to civic actors include criminal claims against former political leaders for international law crimes,<sup>80</sup> and civil claims against corporations for violations of international law in connection with their activities abroad.<sup>81</sup> As mentioned earlier, the ‘exhausting of local remedies’ through national legal claims is usually a pre-requisite for launching legal claims at the international level.

The principal type of *direct* claims available to civic actors in enforcing a state’s accountability for its international legal obligations is the judicial review of a government’s constitutional and administrative obligations. For example, administrative review has been an effective tool for South African citizens and foreigners alike, and in diverse ways.<sup>82</sup>

<sup>78</sup> (Merry 2006b: 179, 219-220).

<sup>79</sup> (Merry 2006a: 44-48).

<sup>80</sup> Actions have been taken by the New York based Centre for Constitutional Rights, together with other organisations (see <http://www.ccr-ny.org/v2/GermanCase2006/germancase.asp>) as well as by UK lawyers. See (Machover and Maynard 2006).

<sup>81</sup> (Richter 2001).

<sup>82</sup> In (*Larbi-Odam v MEC for Education (North-West Province)* 1998), the Court confirmed that there was no legal barrier to long-term resident foreign workers who wished to obtain permanent residence. The case of (*‘Soobramoney v Minister of Health, KwaZulu – Natal’* 1998), discussed in (Sachs 2005), tested the justiciability of economic and social rights by measuring whether kidney dialysis treatment to preserve an individual’s right to life can be justified against other public health costs.

*National human rights institutions*

According to the UN-brokered ‘Paris Principles’, states are urged to establish national human rights institutions, which should be ‘vested with competence to protect and promote human rights’.<sup>83</sup> The responsibilities of national institutions envisaged include, among others, advising government independently (including proposing legislation), taking up allegations of human rights violations, and generating awareness of human rights.<sup>84</sup> National institutions are also expected to cooperate with civic actors, including NGOs, trade unions, professionals, religious leaders and qualified experts, as well as the country’s government departments and, in the framing of policies, the legislature.<sup>85</sup>

National human rights institutions in democratic countries have taken a keen interest in ensuring that their country’s legislation and practices accord with international human rights standards. National human rights institutions, which include offices of the ombudsman, national human rights commissions, courts, parliaments, independent police complaints bodies and court users’ committees,<sup>86</sup> have played an important mediating role between the political and legal arenas. These institutions have also formed an important component in the practice of human rights at the global level, for example by contributing to meetings of regional human rights bodies.<sup>87</sup>

Cardenas argues that the emergence of national human rights institutions – especially from the 1990s – cannot be disengaged from the existence of institutions of global governance, in particular the United Nations. Accordingly, national human rights institutions owe a great deal of their credibility to the standard-setting and capacity-building efforts of international organisations, usually with the involvement of civic actors. Cardenas also argues that this validation by non-state actors can also have ‘perverse’ consequences, in which states determine the conditions under which these institutions are funded and operate, and dilute the role of civic actors in monitoring human rights compliance and participation in policymaking.<sup>88</sup>

The concerns raised by Cardenas are to some extent reflected in what Human Rights Watch has described as a ‘mixed picture’ of national human rights institutions in Africa:

Many (national human rights institutions) have indeed been formed by governments with dismal human rights records, weak state institutions, and no history of autonomous state bodies. Some appear largely designed to deflect international criticism of serious human rights abuses. They have been formed with flawed man-

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<sup>83</sup> (Paris Principles 1993: section A(1)).

<sup>84</sup> (Paris Principles 1993: section A(3)).

<sup>85</sup> (Paris Principles 1993: section B(1)).

<sup>86</sup> Such institutions can also act as ‘primary justice’ mechanisms. See (Degabriele and Handmaker 2005).

<sup>87</sup> The African Commission on Human and Peoples’ Rights has actively sought linkages with national human rights institutions in Africa.

<sup>88</sup> (Cardenas 2003).

dates and weak powers that limit their ability to effectively investigate, monitor, or make public statements. Others have been staffed with commissioners who are unwilling or unable to protest abuses because they are either beholden to the executive or fearful of reprisal.<sup>89</sup>

Assessing the credibility of any national human rights institution must be done with due regard to the specific local context in which the institution operates. It may be a very good thing for a national human rights commission to carry out certain types of human rights monitoring once fulfilled by civic actors alone. If a government can hold itself accountable through horizontal structures, then human rights organisations can focus on other aspects of human rights compliance, such as the role of corporations in human rights abuses. In any event, there is no reason why civic actors cannot continue to be engaged in human rights advocacy, either promoting government accountability through co-operation in a policy process, or holding a government directly accountable through the courts. While there is always the potential for government co-option – whether of a national human rights institution, or a civic organisation – the role(s) of national human rights institutions and civic actors should be perceived as complementary to, rather than in contradiction with each other.

#### *Monitoring and enforcement of government policies – administrative review*

While mediating organisations – whether they be national human rights institutions or civic organisations – offer possibilities for informing government policy, the extent to which they actually influence the direction of policy and promote accountability for adhering to national or international human rights norms is unpredictable. An alternative mechanism and process often available to civic actors is administrative review. This provides an opportunity to make legal claims against states, first through departmental channels and – ultimately – the national courts.

A primary task of courts in reviewing decisions made by an administrative authority is deciding whether they are consistent with the powers available to that administration; in other words, whether they are objectively lawful. Two other, more subjective, evaluations by courts in reviewing the lawfulness of administrative decisions concern whether a decision is procedurally fair and/or reasonable. Establishing a test for ‘reasonableness’ is a particular challenge.<sup>90</sup> In countries with a robust rule of law culture, courts face difficulties in finding a ‘delicate balance’ between, on one hand, giving due deference to the executive, and, on the other, scrutinising the decisions of administrative officials who overstep their authority. Hoexter argues that the principles of ‘rationality and proportionality’ ought to guide a determination of ‘reasonableness’ in administrative decision-making. The former, she argues, analyses (i) the information that is available to the administrator at the time of making a decision, (ii) the reasons for making that decision, and (iii) whether

<sup>89</sup> (Nowrojee 2001).

<sup>90</sup> (Hoexter 2007: 293-323).

such a decision is ‘objectively capable of furthering the purpose’ intended by the granting of a particular power to that administrative official. Determinations of proportionality seek to avoid a situation in which an ‘imbalance’ is created between the beneficial and adverse effects of a decision, or a situation in which ‘less drastic or oppressive means’ were available in order to accomplish the task given to the administrative official.<sup>91</sup>

In resolving the tensions that may arise in the relationship between the judiciary and the executive, and in considering the role of civic interventions in holding governments accountable by way of administrative review, the level of ‘intensity’ that such a review could have can also be a point of analytical departure. Klaaren argues that judicial review has been characterised, at one extreme, by an ‘inherent variability’ very much dependent on the approach taken by a particular judge. At the other extreme is a rigid structuralism created by the deterministic nature of a country’s legal regime, and especially its constitution, with marginal space for judicial scrutiny if the government has consulted widely in making a decision; for example, by way of a legislative committee. Klaaren goes on to explain that the middle ground between these two extremes involves both a certain deference to the executive (or rather, recognition of the principle of separation of powers), as well as critical consideration of the type of subject matter and the nature of jurisdiction. In other words, the court would be expected to make a distinction between actions taken by a Minister (executive action) and actions taken by that minister’s department. A court would also be expected to take more forceful action in circumstances where a civic actor’s constitutional rights were affected.<sup>92</sup>

#### 2.2.4 Civic claims in international and national legal process

Higgins has argued that civic participation in international legal process by way of invoking human rights claims against violating states has challenged state sovereignty and provided a forum that, in less than a century, has dramatically expanded the number and scope of stakeholders influencing this process. But, while Higgins acknowledges that the civic-state relationship has shifted, both from a legal and a political perspective, she also reaffirms that the principal responsibility for human rights protection still lies firmly with the state, and that the impact of civic participation will therefore always be weighed against a state’s willingness to carry out its obligations.

Whether human rights can be seen as a forum for expanding civic influence in international legal process, a ‘revolution’, or what Ramcharan has referred to as a ‘renaissance of international law’,<sup>93</sup> the emergence of a global human rights regime has had permanent consequences for the nature of state sovereignty. These conse-

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<sup>91</sup> (Hoexter 2006: 63-64).

<sup>92</sup> (Klaaren 2006a).

<sup>93</sup> (Ramcharan 1995: 3).

quences have yet to be realised fully, but are already causing noticeable shifts in the relationships between states and civic actors.

The roles and responsibilities of civic actors and states may in some cases overlap, but they are also markedly different from each other. Firstly, civic actors have the ability to hold states or inter-governmental institutions to account in carefully defined circumstances when they fail to live up to their stated obligations, or violate an individual right. Secondly, civic actors – whether individuals or collectivities – have amply demonstrated their capacity to assist states and inter-governmental institutions in realising their obligations in international law. Thirdly, government officials who violate international criminal law may be held criminally liable for their individual acts. And finally, the ability to make international claims nearly always follows efforts to make a claim at the national level, in accordance with the subsidiarity principle.

The developments of the past few decades that have led to the capability of civic actors to exercise legal capacity, or *jus standi*, illustrate three things. Firstly, they emphasise the value of Higgins' reinvigorated participation approach to critically interpreting the interaction of civic actors and states as parties with often contesting interests in international legal process. Secondly, they clarify the roles and responsibilities of states and civic actors. Thirdly, they emphasise the distinctly judicial character of human rights enforcement, which is increasingly being emphasised in national law systems.

Civic participation in national legal process, and particularly the ability of civic actors to invoke national law and legal institutions, has shifted the civic-state relationship, though by no means replaced it. The roles of the state and its structural institutions are still of primary significance. Civic legal interactions have affirmed the capacity of the government's own institution, the courts, to hold government accountable for carrying out its human rights obligations, thus negotiating a 'delicate balance' between court-sanctioned interventions and government decision-making.

### 2.3 THEORISING THE IMPORTANCE OF STRUCTURAL BOUNDARIES

As described earlier, civic-led accountability has its political origins in what Ignatieff has characterised as a human rights 'revolution'. This revolution has resulted in structural changes that define the boundaries of the international and national legal orders, and has created space within both for civic participation in promoting and imposing state accountability.

The structural boundaries created by states condition the extent to which civic actors are able to exercise their agency in holding states accountable for carrying out their human rights obligations. At the same time, recognising the conditioning nature of these structural boundaries enables civic actors to be more strategic in discovering the space available to influence or 'elaborate' these structures. Accordingly, the second theoretical proposition in this book is that *boundaries which de-*



*fine the structural relationship between civic actors and the state have shifted in very specific ways that must be respected by civic actors (agents) if they want to be strategic in their efforts.* This section examines in more detail some of the structure and agency-based explanations for, and implications of, this major relational shift.

The conceptual use of agency in this study is modest. References to agency have assumed a range of different and often vague meanings, including the idea of agency as a broad ‘synonym for resistance’, accompanied by only a limited critical understanding as to whether such acts of resistance may simply involve a maintenance of the status quo or result in actual, structural changes.<sup>94</sup> There is also limited differentiation between individual and collective agency, since the outcome is generally similar.<sup>95</sup>

### 2.3.1 The limits of structuration theory

Analysts applying a conception of agency to the work of civic actors have tended to over-emphasise the role of agency on the basis of ‘structuration theory’, which is attributed to the work of Anthony Giddens.<sup>96</sup> In essence, this theory avoids an over-reliance on either agency or structure, claiming that the two are mutually constitutive; structure is composed of rules and resources that agents may relate to, while agency, according to Giddens, is the human capacity to interpret and act. Giddens argues that neither agency nor structure should be deterministic of the other.

Structuration theory has provided the basis for ‘complexity theory’, which Fowler has applied to what he terms ‘civic-driven change’.<sup>97</sup>

Structuration is a dynamic arrangement that is continually enacted by learning-based reiteration of transactions by agents. Successful repetition implies and reinforces desired predictability. Society becomes itself as a never ending process. In this respect, social structures’ are not like a building. They are created and held together by patterns of continuous exchange that people learn to assume will persist and hence that they can rely on.<sup>98</sup>

As Fowler argues, the perceived desirability of structuration theory is that its malleable approach allows for multiple interpretations, on one hand suggesting that agents are formed by their social structures, on the other concluding that agents are capable of constructing the social structures they are subject to; in other words, that structure and agency are ‘mutually constitutive’. Shilling argued that such an approach can artificially conflate issues.<sup>99</sup> As an alternative, he argued that if the rela-

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<sup>94</sup> (Ahearn 1999).

<sup>95</sup> (Ahearn 1999: 13).

<sup>96</sup> (Giddens 1987).

<sup>97</sup> (Fowler 2007).

<sup>98</sup> (Fowler 2007: 21).

<sup>99</sup> (Shilling 1999) advocates what he terms the ‘interaction order’ as a mechanism for ‘mediating’ associated tensions. Criticising what he terms a ‘relatively disembodied’ understanding of agency that neglects the ‘emotional dimensions’ (p. 544), he argues that a prioritisation of structure or



tionship between structure and agency were understood on the basis of ‘interactions’, it would be possible to assess the impact of civic organisations as ‘embodied’ agents in seeking to hold government accountable.<sup>100</sup> These approaches, which are essentially variations of structuration theory, lead to almost limitless interpretations, which is not especially helpful in seeking to characterise at least some general elements of the roles of civic actors in holding states accountable.

Another source of agency- and structure-based explanations is Hay and Wincott, who argue that individuals are ‘knowledgeable and reflexive’ and, as such, they ‘routinely (often intuitively) monitor the consequences of their action’.<sup>101</sup> Their analysis of structure and agency provides a more categorical explanation of civic interactions to hold governments accountable than Shilling’s. However, their extensive list of subjective interpretations (for example, cognitive filters) still makes it difficult to come to any general conclusions. Consequently, I have chosen to avoid structuration theory altogether in favour of adapting Margaret Archer’s analytical dualism approach.

### 2.3.2 Exploring the interplay: adapting an analytical dualism approach

Expressing concern that the structure/agency debate has favoured one of these two mutually exclusive extremes, but also deliberately engaging theory with practice and rejecting the ‘ontological security’ offered by conflating the two,<sup>102</sup> Archer offers an alternative. She argues that conflation of structure and agency is ‘always an error in social theory ... it merely throws a blanket over the two constituents (and) ... prevents investigation of what is going on beneath it’.<sup>103</sup> Instead, she explains, it is far more useful to explore the ‘interplay’ between the two.<sup>104</sup> Put more simply, Archer argues that humans clearly form society, but through their activities humans are also shaped by society. Consequently, there is value in distinguishing between the ‘parts’ and the ‘people’ that form a society.<sup>105</sup>

What she terms ‘analytical dualism’ provides a clear framework for explaining civic interactions involved in holding states accountable. Archer describes interaction between structure and agency as a chronological process involving a sequential

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agency, for example the idea that decisions are taken by agents on the basis of ‘rational choice’, results in an inability to explore the ‘casual significance’ between structure and agency.

<sup>100</sup> (Shilling 1999: 545) argues that the mutually constitutive approach of Giddens, as well as the analytical dualism approach of (Archer 1996), ‘possess a minimalist view of the body’, but that neither take notice of ‘habits, senses and sensualities’, which have the capacity to ‘mould and constrain social structures and action, as well as being partially shaped by them’.

<sup>101</sup> (Hay and Wincott 1998: 956) argue that this understanding of individuals (which they extend to ‘groups of individuals’ or collectivities) as being engaged in ‘strategic action’ is more ‘dynamic’, potentially yielding certain results, including institutional transformation and what they term ‘strategic learning’, which informs future strategies.

<sup>102</sup> (Archer 2003: 135-136).

<sup>103</sup> (Archer 1996: 688-689). See also (Archer 2000).

<sup>104</sup> (Archer 1996: 691).

<sup>105</sup> (Archer 2000: 307).

relationship between: (1) specific temporal sequences of structural conditioning, which leads to (2) social interaction; followed by (3) structural elaboration (preceded by previously-arising sequences and post-dated by subsequent ones).<sup>106</sup>

In explaining the role of civic interactions, the principal objective of which is to hold the state accountable and result in structural changes, the structure is a more significant variable than an open-ended understanding of the nature of civic agency. This is well illustrated through civic participation in policymaking. The task of forming laws and policies for the implementation of government policies is clearly that of government, although it may call on civic actors to advise on their content. For civic actors or agents interested in influencing policy in a particular direction, the types of interactions they make at a particular moment are conditioned by government-determined structures. And yet, as a result of civic-state interactions, for example civic participation in a government-led policymaking process, it is possible for civic agents to elaborate on that same structure.

This analytical approach to structure/agency relationships provides a more grounded means of exploring the interplay between civic actors and state institutions. Consequently, it provides a clearer basis for assessing the narrow, but significant, space available to civic actors in exercising their agency, either with a view to promoting state accountability, or confronting states with their human rights obligations.

This book cautions against overly broad notions of agency, which Ahearn rightly argues must be clearly defined; rather than being seen as a ‘synonym of resistance’, agency can more appropriately be termed the ‘human capacity to act’.<sup>107</sup> The lack of agency definition has perhaps lent itself to over-inflated notions of civic capacity to hold states accountable, and unrealistic expectations of the degree to which they really influence state behaviour. Accordingly, the following sections explain what is meant by civic agency in this book, as well as describing the structures that condition civic agency.

### 2.3.3 Types of civic agency

Two forms of civic agency are explored in this book to explain the nature of civic interventions in South Africa in encouraging or enforcing state accountability: co-operative and confrontational interactions. Further efforts to promote government compliance in a democratic environment, not dealt with comprehensively in this book, but which Belvedere and others address to a considerable extent,<sup>108</sup> include civic efforts to form public opinion through public advocacy that fall short of public shaming, as well as analysis of government policies and practice through applied social or policy research.

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<sup>106</sup> (Archer 2000: 697-698).

<sup>107</sup> (Ahearn 1999).

<sup>108</sup> (Belvedere 2006); (Tarrow 1998); (Meyer et al. 2002); (Diani and Mcadam 2003); (Welch 2001); (Korey 2003) and (Keck and Sikkink 1998).

### *Co-operative interactions (promoting compliance)*

Co-operative interactions by civic actors are the most diverse form of civic agency in advocating for accountability, with two main dimensions that are explored in this book. Firstly, civic agents participate in the development of policy, whether in advising internal government-led policy processes or by making contributions to public hearings in parliament. Secondly, civic agents provide advice and assistance in the training of government officials and the more complex forms of policy implementation. In both dimensions (policymaking and policy implementation), the structural limitations of civic interactions are defined by the state, which is ultimately responsible, and democratically accountable. However, in neither of these other types of civic intervention can there be much expectation that the government will be influenced, although it may decide of its own volition to adopt recommendations made by civic actors.

### *Confrontational interactions (enforcing compliance)*

The confrontational form of civic agency is more limited in scope than co-operative interaction, but potentially has great value in elaborating a state-created structure. In fact, there are only three variants of confrontational civic agency that aim to enforce government compliance. The first variant, which is explored in greater detail in this book, is legal review through internal administrative mechanisms and through the courts. The second variant of confrontational civic agency involves various efforts, often in conjunction with the media, aimed at publicly shaming the government for a particular act or omission. The third and final variant is essentially an extension of public shaming: mass mobilisation – openly confronting government through large-scale protest.

The specific forms of civic agency involved in public shaming and mass mobilisation include acts of civil disobedience, large-scale demonstrations, well-organised civic boycotts and other highly visible campaigns. No other methods exist for civic actors to enforce government compliance within a democratic framework.

State institutions (primarily the courts, but also other elements of government) may for various reasons define structural limitations to the expression of civic agency, and even suppress civic actors, particularly if they are confrontational. For example, police may refuse permission for a picket line, demonstrators may be arrested, and media portrayals of such interactions may be subject to government censorship. However, government efforts to suppress civic interventions may themselves be subject to civic legal challenge, leaving the courts (which are of course state-constructed institutions) to have the final say.

## **2.3.4 State-created structures**

In democratic, accountable countries that tend to have greater respect for the rule of law, I have identified four principal structures – partly overlapping – that tend to condition co-operative and confrontational forms of civic agency to hold govern-

ment accountable for realising its human rights obligations. According to Archer's model, these structures also allow for structural elaboration, through which the government may be sanctioned for its failure to promote, protect and fulfil human rights.

In the first type, the *administrative structure*, governments hold themselves accountable, in particular by way of self-corrective mechanisms. The scope for civic agency in administrative structures is wholly prescribed by the state and, with the exception of internal administrative review, is entirely at the discretion of the state. The types of (self) sanctions available to frame or correct government agency include internal policy reviews and administrative review mechanisms, such as internal appeal procedures for individuals whose applications for refugee status have been rejected at first instance. However, civic agency can ensure that decisions are subject to external review, since most acts of an administration are potentially reviewable by a court.

The second type, the *legal structure*, is composed of national legislation, international obligations that are of 'direct effect', and a judiciary that interprets a state's obligations. The courts in particular provide the greatest scope for confrontational civic agency, by way of judicial review. The possibilities for exercising civic agency that test the limits of the country's national and international legal obligations are illustrated by cases brought by civic actors that have been settled by judgement, by negotiated settlement or by way of (structural) interdicts.

Direct and indirect accountability mechanisms comprise the third type: the *democratic accountability structure*. This structure emerges from democratic elections to determine the composition of a country's legislature, often the head of government and, indirectly, the government's administration. Both legislative members and, often, government departments are allowed to propose legislation. Legislative committees or departments may invite individual civic experts and organisations (independently of each other) to make representations on policy matters under consideration. Furthermore, a legislative committee may have the authority to make recommendations, including proposed amendments to legislation, and to review the practices of a government department. Civic participation may also be possible in (horizontal) committees responsible for the nomination of key government representatives or the nomination of judges.

The fourth type, the *constitutional monitoring structure*, provides for an additional level of 'horizontal accountability', through independent commissions that monitor government behaviour and often derive their mandate from a country's national constitution. These mechanisms, which can sanction government through the publishing of critical reports, based on in-depth investigations, often work closely with civic actors. A country's constitution or supreme law, sometimes including a Bill of Rights and usually stipulating the structure of government and its principal institutions, generally provides for these national institutions. These institutions fulfil various functions, such as reviewing public accounts or allegations of corruption, as well as focusing special attention on women, for example, or on the

conditions of an election. One such example is the South African Human Rights Commission (SAHRC), established in terms of section 9 of South Africa's constitution. The SAHRC is not only mandated to review, but also to 'take steps to secure appropriate redress',<sup>109</sup> which in some cases has drawn the SAHRC into bringing judicial review claims in the courts, often together with civic organisations.

### 2.3.5 Media structures – sanctions by way of public shaming

A further structure that I address in this book, which is partly independent of government, but still conditions civic agency, is the *media structure*. This includes various avenues open to influencing public opinion on human rights issues. Here there is much potential scope for agency to promote government accountability, to make it easier for human rights advocates to promote a particular cause, to expose specific human rights violations, and to increase awareness about human rights in general.

However, whether it is employed in co-operating with government or confronting it on its human rights obligations, civic agency is still heavily conditioned by the state, since print media, radio and television, and even the internet are all subject to some form of state regulation. Commercial media tends to be profit-driven, and will strive to increase its circulation by appealing to what it perceives to be the demands of its public and of advertisers. Commercial media therefore tends to be more open to critical civic perspectives of the government. State-owned media tends to present a less critical position on the activities of government.

Issues of ownership and government control often prove to be substantial barriers to human rights advocacy, particularly on controversial issues such as the treatment of foreigners. For example, according to Danso and McDonald, most newspapers in South Africa have traditionally been owned and/or controlled by a 'handful of syndicates' representing mainly minority white interests.<sup>110</sup> While in recent years they have tended to be critical of the government, on the whole they have not been very sympathetic towards issues concerning foreigners. Their treatment of such issues has not been very encouraging. Danso and McDonald examined 1 200 clippings from English-language newspaper published between 1994 and 1998; in these clippings, with some exceptions, coverage of issues concerning foreigners and immigration tends to be overwhelming negative.

(C)overage of cross-border migration issues by the English-language press in South Africa leaves much to be desired. Highly sensationalised, Africanised and negative reporting of migration issues is generally in the form of superficial, statistics-happy articles that do little to inform the reader about the complexities of migration or how it fits in with broader social, political and economic developments in the coun-

<sup>109</sup> (South African Constitution 1996: section 184(182)(b)).

<sup>110</sup> (Danso and McDonald 2000: 8).

try/region. Readers are all too often left with little more than incriminating innuendoes and sensational accounts of what migrants are alleged to have done.<sup>111</sup>

Another example in Southern Africa, representing an increasingly powerful alternative to conventional media, is the growth of so-called 'community media'. Community-owned media outlets encourage greater media accountability to the general public. The transmission of radio broadcasts to South Africa by the African National Congress formed an important part of the liberation struggle. More recently, the growth of community radio in Zimbabwe has shown that it is a significant alternative source of public information to other (often state-owned) media, and is less afraid to tackle controversial issues, though it is also hugely vulnerable to government interference.<sup>112</sup>

With the growth of information technology, and especially internet-based media, civic human rights advocates have acquired a medium of expression that is potentially very significant, with very exciting potential possibilities for holding governments accountable by way of public shaming. Human rights advocates have interacted not only with conventional, mainstream media sources, but also with alternative media sites,<sup>113</sup> blogs<sup>114</sup> and 'social-networking' websites<sup>115</sup>. By the same token, some governments have shown a desire to regulate internet-based media more closely, with the complicity of giant commercial internet operations such as Yahoo and Google.<sup>116</sup>

### 2.3.6 Motivations for civic agency

Every participant in civic-state interactions has specific motivations for exercising their agency, or what Kidder terms 'externally grounded reasons' for being interested in a particular outcome, and this is measured by divergences in meanings, interests and political positions. The reasons that civic actors raise for exercising

<sup>111</sup> (Danso and McDonald 2000: 21).

<sup>112</sup> (Van Der Winden 1998) For more recent developments, including government efforts to interfere with community radio transmissions, see the Media Institute of Southern Africa (MISA) at [www.misa.org](http://www.misa.org). MISA also produces a 'media barometer' that monitors the conditions of media and press freedom in Southern African countries, available at: <http://www.misa.org/mediamonitoring/ambreports.html>. Last checked on 24 August 2008.

<sup>113</sup> Independent journalists writing about controversial issues have increasingly turned to alternative news sources. Examples include the New York-based satellite television, radio and internet-streaming broadcaster Democracy Now! ([www.democracynow.org](http://www.democracynow.org)), Inter Press Service ([www.ips.net](http://www.ips.net)) and Indymedia ([www.indymedia.org](http://www.indymedia.org)).

<sup>114</sup> These are Internet websites that are relatively easy to update. One such example is the blog Rafah Today, run by the young Palestinian journalist Mohammed Omer, reporting on the human rights and humanitarian situation in Gaza since 2003. See: [www.rafahtoday.org](http://www.rafahtoday.org). Last checked on 24 August 2008.

<sup>115</sup> These are often membership-based, publicly accessible Internet websites (such as YouTube, Facebook and MySpace) that have become platforms for human rights activism. See, for example, Witness: <http://www.youtube.com/user/Witness>. Last checked on 24 August 2008.

<sup>116</sup> (Mackinnon 2006).

their agency to hold the government accountable are rarely the same. For example, civic actors may be motivated by the funding provided by external donor agencies.<sup>117</sup> A civic organisation may also be compelled by its membership or constituency to respond to demands in a particular way.<sup>118</sup>

Civic participation in policymaking, discussed in chapter four, may generate very different, and even conflicting positions. One civic agent may feel it is desirable to be part of a government-led policy development task team, so that it may try to influence its outcome, while another may consider any kind of involvement to be an unacceptable compromise, and that efforts to influence the direction of government policy must always come through external lobbying or public shaming.

For the civic agent engaged in the process of policymaking, such a role may not unduly affect their independence, so long as the distinctions are clear. For the civic agent playing no role in a policymaking task team, government policymaking must be solely a government exercise, that civic organisations can only challenge through external, democratic mechanisms.

There may be externally grounded reasons for government actors to allow for civic participation; these relate to the often limited capacity of government administrations to implement newly imposed legal obligations, including human rights obligations. For example, the new South African government was highly dependent on United Nations officials and civic actors in interpreting its international legal obligations during the initial years of its introduction of *ad hoc* individual asylum determination procedures, between 1993 and 1998. As chapter four illustrates, despite prevailing tensions between the South African government and civic actors, in finalising the Refugees Act the government still depended on the input of civic actors, and it requested civic actors to participate in a policymaking ‘task team’.

The nature and purpose of legal advocacy organisations also plays a role in defining a civic actor’s externally grounded reasons for being interested in a particular outcome. Some organisations not only advocate for rights-regarding policies; they also represent individuals as clients. In these circumstances, the (perceived) danger of compromise from co-operating with government is higher than for a civic actor who does not play a role in representation.

If critically examined, the externally grounded reasons of civic agents should ideally define the scope that state-constructed structures permit for civic participation and the (sometimes hidden) motivations driving some civic actors. In such cases, they become the theoretical boundaries that guide both civic and government agency and, as such, it is important that they be exposed to illustrate the nature of civic-state interactions.

Taking into account the externally grounded reasons of civic and government agents, and adapting Archer’s analytical dualism approach to a process of account-

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<sup>117</sup> (Oomen 2005).

<sup>118</sup> (Jordan and Tuijl 2006).



ability through civic interaction, the framework used in this book for assessing civic advocacy interventions is as follows:

- 1) Specific historical events create *state-created structures* with which civic organisations interact in seeking to hold a government accountable for its normative obligations, and which condition the nature of civic interactions.
- 2) The *interaction of civic organisations* with state-created structures, through either co-operative or confrontational measures, may lead to tangible results.
- 3) The nature of these tangible results, which amount to an *elaboration of those structures*, and may include amendments to the legislation and policy as well as changes in the nature of policy implementation.

It is the *interaction*, or what Archer terms ‘interplay’, between structure and agency that provides more of an explanation than the nature of either structure or agency. I now turn to the nature and consequences of these interactions.

## 2.4 CIVIC ACTORS MEDIATE THE RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL NORMS

The first and second assumptions, that the structural boundaries between civic actors and the state are both the product of tangible shifts in the civic-state relationship and also important to respect, lead to the third and final assumption, namely that *civic actors play a crucial role in mediating the translation of international legal norms into local contexts*.

For example, Albie Sachs, a South African lawyer and law professor, wrote in the 1970s about how he and his colleagues aimed to ‘liberate the law’ in reforming Mozambique’s law and policies.<sup>119</sup> Sachs argued that this approach of ‘liberating the law’ was taken in the context of a legal system rooted in Portuguese colonialism, which was later challenged by a popular political ideology aiming to dramatically advance social justice, and promote a deeper political consciousness, for the people of Mozambique. In other words, advancing the interests of the Mozambican people required their direct involvement in the process of social and political development. Similarly, policy reform in South Africa involved ‘liberating’ South Africa, and its laws, from apartheid, another process in which Sachs played a key role.<sup>120</sup>

It is a virtually limitless task to explain the scope for civic advocacy, and especially legal advocacy, to promote human rights and to hold states – through their governments – accountable, reflecting a long-fought ontological struggle to critique the nature of law and the nature of society as inter-relational rather than oppositional. Roger Cotterrell, a leading socio-legal scholar, argues very clearly that ‘legal ideas are a means of structuring the social world’.<sup>121</sup>

<sup>119</sup> (Sachs and Welch 1990).

<sup>120</sup> (Sachs 1990); (Sachs 1992).

<sup>121</sup> (Cotterrell 1998: 192); See also (Cotterrell 1992).



The field of law and society (or the emergence of socio-legal concepts) offers a robust, yet multi-disciplinary, way of assessing the scope of legal mechanisms and processes beyond their doctrinal significance, and measuring the *real* space civic interventions have to hold states and their governments accountable.

Building on the basic agency and structure-based explanations of the previous section, this book applies Merry's thesis of civic actors translating global obligations into their local, vernacular context, as well as Kidder's notion of externally-imposed law. Understanding what Kidder refers to as the externally grounded reasons why civic organisations may be interested in a particular outcome makes it easier to appreciate law as process; in other words, that law evolves through different types of co-operative or confrontational *interactions*.

#### 2.4.1 Law as process: human rights and socio-legal theory

A socio-legal perspective on human rights offers greater possibilities for understanding the potential and limitations of human rights, and the legal process through which human rights are advocated.

Echoing Ehrlich's earlier contention that there is both 'law in the books' and a 'living law', and having been shaped by a background in legal realism,<sup>122</sup> from the 1970s Moore argued that 'law and the social context in which it operates must be inspected together'.

In order to do this, she argued, it is important to use anthropological tools, taking what she termed the 'semi-autonomous social field' (SASF) as being capable of producing its own internal 'rules and customs', but 'also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded'.<sup>123</sup> Society and law have their own, separate characteristics, each of which must be thoroughly understood before their relationship is analysed.

Moore bemoaned the fact that most lawyers in the 1970s understood law to amount to little more than a 'complex aggregation of principles, norms, ideas, rules, practices and the agencies of legislation, administration, adjudication and enforcement, backed by political power and legitimacy'.<sup>124</sup> The reality, she argued, was quite different. Law was merely 'one of a number of factors that affect the decisions people make, the actions they take and the relationships they have'.<sup>125</sup> These consisted of two different types, namely intentional norms and evolving norms. Moore claimed that was in the nature of rules to 'evolve',<sup>126</sup> but took the analysis further in the context of 'intentional norms', breaking them down into their legislated, judicial and administrative components. The legislated norms in particular, she argued, amounted to 'attempts to shift the relative bargaining positions of persons in civic

<sup>122</sup> (Ehrlich 1936).

<sup>123</sup> (S.F. Moore 1978: 55).

<sup>124</sup> (S.F. Moore 1978: 54).

<sup>125</sup> (S.F. Moore 1978: 78).

<sup>126</sup> (S.F. Moore 1978: 58).

organisations' dealings with one another'.<sup>127</sup> In other words, they were conscious attempts at social direction. Judicial and administrative norms were, by contrast, much more malleable.

As Cotterell later argued, 'an understanding of the nature of law requires not only systematic empirical analysis of legal doctrine and institutions but also of the social environment in which legal institutions exist'.<sup>128</sup> In other words, Cotterell has insisted that we must simultaneously understand what are broadly understood to be the characteristics of law as well as the characteristics of society. This departure from the conventional, instrumentalist, top-down notion that law serves to regulate societies on the basis of its content alone has been thoroughly rejected. For example, Griffiths refers to such an approach as 'sterile', explaining the impact or effectiveness of legal rules in influencing behaviour as the 'social working paradigm'.<sup>129</sup>

But the reverse also holds true. Moore has critiqued the conventional assumption of society as amounting to simply 'social arrangements susceptible to conscious human control' through the 'instrument' of the law.<sup>130</sup> Moore added that in addition to legal rules, societies were subject to binding 'social rules', which were not necessarily legally enforceable, but no less effective in forcing compliance.<sup>131</sup> While the intention of law was to change the social relationships in existence, she argued that this is difficult to do with legislation alone.<sup>132</sup> The 'essential difference' between legal rules and other kinds of rules, Moore explained, 'lies in the agency through which ultimate sanctions might be applied'. She went on to argue that while the enforcement of legal rules relied mainly on the state mobilising the 'coercive force of government', a society still has the capacity to 'make law its custom'.<sup>133</sup>

Put another way, all societies should be understood as complex, whether in a rural or urban setting,<sup>134</sup> and yet still capable of mobilising government, depending on their degree of independence and whether they are 'sufficiently organised'.<sup>135</sup> This position is well reflected in the South Africa study in this book; in South Africa, social norms and institutional inertia have proven to be very enduring, and yet civic organisations have proven themselves to be highly adaptable, mobilising global knowledge in local contexts. In making a socio-legal analysis of civic-state interactions, this book draws principally on Merry's substantial contributions to socio-legal scholarship, which have developed Moore's concept of 'intentional norms' and proposed a sophisticated way of understanding the relationship between rights and culture that explains the ways in which civic actors mediate this relationship.

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<sup>127</sup> (S.F. Moore 1978: 78).

<sup>128</sup> (Cotterell 1992: 3).

<sup>129</sup> (Griffiths 2003).

<sup>130</sup> (S.F. Moore 1978: 54).

<sup>131</sup> (S.F. Moore 1978: 64) argues that the 'desire to stay in the game and prosper' is a particularly significant factor, and that it is often enforced by various types of 'deferential gestures' (p. 71).

<sup>132</sup> (S.F. Moore 1978: 75).

<sup>133</sup> (S.F. Moore 1978: 79).

<sup>134</sup> (S.F. Moore 1978: 57).

<sup>135</sup> (S.F. Moore 1978: 79).

## 2.4.2 Translating human rights in a local context

The mobilisation of rights by civic actors has a *global* or transnational aspect that, according to Merry, is translated into local contexts. Understanding the operation of rights in a multi-cultural, highly malleable, legal, social and political culture provides a more sophisticated way of explaining civic-state relationships and what may be, as Merry puts it, the ‘political possibilities’ of claiming rights.<sup>136</sup>

Leaving behind the highly polarised discourse on universalism and cultural relativism of the 1990s, principally driven by the ‘universalists’,<sup>137</sup> Merry argued that culture should not be ‘essentialised’. Instead, she argued, culture should be understood both as a ‘contested’ notion and as a means by which power and claims to legitimacy are made.<sup>138</sup> In other words, not all cultural interactions referred to as traditional, cultural or indigenous are necessarily so; to the contrary, those seeking to maintain a hegemonic hold on society generally construct them. By the same token, those who want to challenge this hegemonic hold try to ‘reconstruct’ cultural assumptions. At the transnational level, this includes what human rights advocates now commonly refer to as a culture of rights, or what Risse and Sikkink refer to more specifically as a process of ‘human rights socialisation’ by way of civic interactions.<sup>139</sup> At the local level, mention is often made of the need to develop a ‘national human rights culture’.<sup>140</sup>

Rather than seeing human rights as essentially universal or culturally relative, translating human rights into a local, vernacular context realises their full ‘emancipatory potential’.<sup>141</sup> This process of ‘translating’ human rights demands what Merry has identified as three kinds of changes. Firstly, human rights should be framed in a way that is consistent with local (community) interests. Secondly, the product of translation should be consistent with structural systems of a political, economic or similar nature. Finally, those who are to be the object of a human rights protection must be clearly defined.<sup>142</sup>

As Merry cautions, and this book illustrates in chapters four, five and six, translation does not necessarily mean that a system has been ‘transformed’. Indeed, a number of practical obstacles, or what Merry identifies as ‘conundrums’, militate against this happening.<sup>143</sup> The most interesting of these conundrums, for the purposes of this book, is that the effectiveness of human rights is related to *structural*

<sup>136</sup> (Merry 2006b: 216).

<sup>137</sup> (Donnelly 1989).

<sup>138</sup> (Merry 2006b: 9-15).

<sup>139</sup> (Risse and Sikkink 1999: 17-37).

<sup>140</sup> (Sachs 1990) and (Sachs 1992).

<sup>141</sup> (Merry 2006b: 179).

<sup>142</sup> (Merry 2006b: 220). (Barnhizer 2001b: 14) also emphasises the importance of specific definitions in terms of what should be ‘a shared understanding of what rises to the level of human rights violations and what kinds of remedies, if any, are available’.

<sup>143</sup> (Merry 2006b: 222-223).

*changes* put into place by a state in committing itself to a given international human rights norm.

For example, in undertaking a normative human rights obligation, through ratification of a treaty, it is expected that a state will set up concrete institutions for enforcement. In doing so, the norm becomes supported by civic actors and develops the rights consciousness of state actors as well. The types of changes, and the corresponding challenges that emerge, are relevant in explaining the role of civic actors in shaping and enforcing human rights protection. As elaborated further in chapters four and five, civic actors interact with the state in the context of policy-forming processes and other, locally-developed forms of co-operative civic-state interactions, in which translation takes a more ‘hybrid’ form.

Different dynamics arise in confrontational interactions, for example in litigating human rights, where translation of international legal norms takes what Merry would identify as a more ‘replicating’ form, albeit by reference to local context.<sup>144</sup> In these circumstances, human rights are not only translated, they are also imposed.

### 2.4.3 Legal process is interactional

Since Robert Kidder, together with Burman and Harrell-Bond,<sup>145</sup> presented an integrated theory to understanding different legal cultures and legal process as essentially interactional, there has been a noted tendency in the scholarship on legal pluralism to adopt a mutually constitutive approach to the relationship between different legal, social and political cultures, based on structuration theory.<sup>146</sup> Merry quotes Freeman’s critical review of the literature on legal pluralism, stating that it comprises ‘simple reductionist views of law as the product of the ruling class’ and that such a position ‘ultimately ends in immobilization, since if everything is complex and variable, just as if everything is a matter of interpretation, how can one say anything?’<sup>147</sup> Consequently, this book adopts a critical approach that considers the nature of law, both in its historical context and as the product of a dialectical approach, in understanding the nature of state law in its relation to civic actors. As Merry argues:

The dialectical analysis of relations among normative orders provides a framework for understanding the dynamics of the imposition of law and of resistance to law, for examining the interactive relationship between dominant and subordinate groups or classes. It offers a way of thinking about the possibilities of domination through law and of the limits to this domination, pointing to areas in which individuals can and do resist ... Indeed, state law is plural.<sup>148</sup>

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<sup>144</sup> (Merry 2006a: 44).

<sup>145</sup> (Burman and Harrell-Bond 1979).

<sup>146</sup> (Merry 1988: 883-886) explains how these studies examine ‘how state law both constitutes and is constituted by the normative orders of which it is composed’.

<sup>147</sup> (Merry 1988: 885).

<sup>148</sup> (Merry 1988: 890).

Measuring the impact of ‘alien law’, otherwise known as non-indigenous or ‘imposed’ law, has often been situated in the post-colonial context, and more particularly in the context of challenges to colonial legacies. As Kidder explains, ‘the prototype of imposed law (is) ... a colonial situation where legal systems are imported from dominant cultures and forced on indigenous populations’.<sup>149</sup> The reality, he explains, is quite different, particularly in pluralist legal systems that draw on multiple sources, from the observance and constitutional protection of indigenous, customary law, to obligations created by the ratification of international treaties.

Kidder’s interactional model of understanding contesting legal cultures offers a flexible, yet dynamic and historically contextualised framework for measuring whether the instrumentalisation of a human rights norm can be regarded as legitimate and effective. Kidder’s framework both measures the degree of influence through (positive) participation in a policy process on the direction of a policy norm, and assesses the impact of a direct (negative) challenge to that norm. The assumption is that any attempt to change the direction of an existing norm or policy is, by definition, ‘alien’ to that process, and that change comes through interaction. Contrary to most conventional (i.e. juridical) assumptions on the nature of law, Kidder’s legal pluralist approach assumes that norms are anything but static and so their intended results can be externally influenced. This framework is directly relevant to understanding the nature of civic-state interactions for promoting state accountability.

The interactional model that Kidder introduces takes issue with the ‘command’ model of law as the product of colonial law imposition. He rightly states that, in contrast to what law has conventionally believed, not all societies allow themselves to be subjugated by laws imposed upon them.<sup>150</sup> Furthermore, Kidder argues that an ‘intention to subjugate’ need not exist in order to be considered as ‘imposed’. As he puts it, ‘public stances often do not correlate with private purposes’.<sup>151</sup>

Kidder’s ‘interactional model’ involves an assessment of ‘the role and sources of power at different levels of externality’,<sup>152</sup> and assumes that ‘anything that increases the power of external legal actors to offer alternatives thereby increases the vulnerability of the internal system’.<sup>153</sup> In other words, measuring whether there has been social-normative compliance must also consider the degree of ‘externalisation’ that takes place as the result of making such a claim.

Adapting Kidder, I measure externalisation by way of the social distance that always exists between lawmakers (most often an administrative official) and the civic actor making a claim (for example, the civic actor making a claim). Social distance is, according to Kidder’s integrated theory, measured by divergences in

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<sup>149</sup> (Kidder 1979: 289).

<sup>150</sup> (Kidder 1979: 296).

<sup>151</sup> (Kidder 1979: 294).

<sup>152</sup> (Kidder 1979: 296).

<sup>153</sup> (Kidder 1979: 297).

meanings, interests and political positions.<sup>154</sup> This approach more clearly explains civic-state interactions. On the one hand, explaining civic-state interactions in terms of social distance can expose the potential danger to civic actors who abandon their critical independence and blur the relationship between themselves and government. On the other hand, social distance can explain how opportunities can arise for civic actors to support government, when government has disclosed a willingness to move in a progressive direction; in these circumstances, a narrowing in social distance can be exploited by civic actors who are able to recognise shared meanings, interests and political positions.

In countries where great disparities exist, particularly on the basis of gender, race and class, finding these divergences is generally not a difficult task. The challenge arises in finding some level of consensus, however marginal, concerning the meaning, interests and political positions of government, on the one hand, and civic society, on the other. South Africa, for example, has made very deliberate efforts to bridge the country's formidable social and economic disparities; in an almost unfathomably diverse, multi-layered society, the government has actively involved civic organisations in the formulation of human rights-based policies. The South African government has made public consultation a core aspect of good governance, from involving civic actors in the appointment of judges<sup>155</sup> to engaging civic actors in the formation and implementation of government policies. South Africa's hybrid legal culture recognises multiple sources of law, from English rules of evidence and legal procedure, to Roman Dutch codification of civil law obligations, and even an explicit recognition of traditional or customary law. Also, South Africa's national constitution has enshrined non-discrimination as the basis for promoting equality of citizens and other residents, and national courts have drawn on international law in interpreting constitutional obligations.

#### **2.4.4 An integrated socio-legal framework for assessing civic-state interactions**

In explaining civic-state interactions to encourage a state to live up to its obligations to promote, protect and fulfil human rights, this book shares Kidder's assessment that explaining whether law is imposed involves an examination of 'interacting interests' and that these are in turn 'affected by structural constraints and resource imbalances that determine strategies' in which civic actors assert their interests.<sup>156</sup> This description of the nature of law is consistent with both Archer's analytical dualism approach<sup>157</sup> and with what Higgins characterises as 'legal process'.

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<sup>154</sup> (Kidder 1979: 297).

<sup>155</sup> The (South African Constitution 1996: 178) established a Judicial Services Commission.

<sup>156</sup> (Kidder 1979: 303).

<sup>157</sup> This approach is also consistent with how (Cotterrell 1992: 145-149) sees 'laws, political institutions, social norms (and) economic systems' as not only social phenomena, but as 'the result of and the embodiment of social interaction'.

Furthermore, Kidder's interactional model, which assesses the nature of law in relation to its level of externalisation and the social distance between the respective interests of civic and state actors, fits well with Merry's understanding of translation, which takes on a more 'replicating' form. This hybrid approach critiques the process of how global norms find resonance in local contexts, and in which civic actors become subjective 'translators' of the human rights obligations of the state. Together, these frameworks of legal translation and legal imposition provide a comprehensive basis for assessing the nature of civic interactions; in the case of legal translation, for promoting state accountability through co-operative interactions, and in the case of legal imposition, for holding states directly accountable through confrontational interactions that mobilise the legal and social enforcement of rules.

## 2.5 CONCLUSION

Explaining the potential and limitations of civic interactions to enhance state accountability for promoting, protecting and fulfilling their human rights obligations by way of co-operative and confrontational interactions, and considering how these interactions might be strengthened, requires a multi-layered analysis. This book adopts a critical analysis of the process and mechanisms that exist to mobilise these interactions. Explaining how civic interactions enhance state accountability is not only instructive to civic organisations aiming to be more strategic in their approaches; it also has important implications for assessing the external legitimacy of civic actors.

Accordingly, this book makes three theoretical propositions. Firstly, the ability of civic actors to promote and impose state accountability is possible because of structural changes in the normative international and national legal framework. Secondly, understanding structural boundaries in the relationship between civic actors and the state, and how these boundaries shift in very specific ways, must be respected by civic actors (agents) if they want to be strategic in their efforts. And thirdly, civic actors play a crucial role in mediating the translation of international legal norms into local contexts.

The juridical, advocacy and enforcement 'revolutions' in advancing human rights characterised by Ignatieff lead to the first theoretical proposition: *the capacity of civic actors to promote and impose state accountability is shaped by structural changes in the normative international and national legal framework*. These normative changes have shifted the relationship between state and civic actors, creating much political space in which civic actors can now participate in international and national legal forums, both in framing human rights norms and in seeking state compliance with these norms. Individual and collective participation in international legal process has involved civic organisation in the formation of international human rights policies at United Nations meetings, and particularly during treaty-making processes. Civic actors have also played key roles in monitoring state com-



pliance with international human rights norms, and enforcing those norms through various state-created structures. Civic actors have even begun to acquire legal standing, invoking international courts to hold states accountable. However, while the increase in political space has permitted greater civic participation, the relationship between states and civic actors is essentially the same, and, as this chapter has also explained, the distinction between their respective roles and responsibilities is important for strategic reasons.

Developments at the international level relate to developments at the national level, where political space has also expanded. Civic actors promote states in becoming more accountable through co-operative measures, for example by participating in government-led policy processes to give legal effect to international obligations, and in helping governments in their implementation of these policies. Civic actors also seek to enforce state accountability by way of confrontational measures, in particular by way of judicial review.

The second proposition, that *civic agency must respect structural boundaries*, is of strategic significance, and is consistent with Archer's approach to structure and agency, which recognises the importance of this distinction. This book provides structure- and agency-based explanations in seeking to explain how civic-state interactions promote or enforce state accountability. Civic agency interacts with a range of different state-created structures: administrative structures, legal structures, democratic accountability structures and constitutional monitoring structures, as well as the media structure. In each of the structures with which civic agents interact, externally grounded reasons exist that explain both the motivations for civic participation and the desirability of a particular outcome.

The third proposition is that civic actors play a key role in *mediating the relationship between international human rights norms and their translation in domestic law*. Various explanations can be made on the basis of socio-legal theory. For example, Merry's characterisation of translating human rights in the local context as a process of 'vernacularisation' is helpful in understanding the importance of context and the tremendous scope there is for civic organisations to advance human rights in a national context. Kidder's interactional model of assessing the nature of 'imposed law' is helpful, not only in completing a picture of voluntary and imposed structural changes as the outcome of civic-state interactions, but in dismissing the conventional, 'command-model' notion that law necessarily prescribes social behaviour. This is particularly helpful in South Africa's highly pluralistic legal culture, in which measuring the level of externalisation and social distance caused by a particular type of civic interaction can determine whether civic organisations are maintaining a healthy balance between, on one hand, holding government accountable, while on the other, supporting government when it is moving in a progressive direction.

To explain how these three theoretical propositions relate to the practice of advocating refugee rights in South Africa, in chapter three I have mapped the historical context in which refugee rights advocacy has taken place. This context relates to



the historical circumstances under which civic organisations emerged in South Africa to mobilise human rights in local and national contexts. It also relates to the political circumstances from which policy emerged and which, in 1994, was in radical need of reform. Finally, it relates to the way in which civic actors have organised themselves in collaborative networks at local, regional and national levels to advocate refugee rights.



## **CHAPTER 3**

### **MAPPING THE CONTEXT: POLICY SHIFTS, POLITICAL STRUGGLE AND CIVIC CO-ORDINATION**

#### **3.1 INTRODUCTION**

In order to assess the capacity of civic advocacy in South Africa to promote or enforce state accountability for national and international legal obligations, we must investigate the historically specific circumstances that have framed the structural landscape in which civic actors have exercised their agency. The history of the South African anti-apartheid movement has profoundly shaped the interactions between civic advocates and the state structures that were eventually mobilised to address refugee rights, both in policymaking and enforcement processes.

The struggle against apartheid and colonialism in South Africa dates back to the period of Jan van Riebeeck, who arrived from the Netherlands in 1652 and founded a trading colony in the Cape peninsula on behalf of the Dutch East India Company (VOC). The establishment of this colony by the VOC began an era of racist colonialism that lasted nearly 350 years. During this time, British colonialists took over the colony, laying the basis for confrontation with white Afrikaners (the descendants of van Riebeeck and other Dutch settlers), many of whom eventually moved, or were forced to move, eastwards into the country. As the British expanded further into the Afrikaner settlements, numerous conflicts erupted, culminating in what became popularly known – albeit misleadingly – as the “Anglo-Boer wars”, and are known contemporarily as the South African wars.<sup>1</sup>

Neither the Afrikaner, nor the British, nor any other European settlers and their descendants recognised the rights or interests of indigenous Africans. African lands were confiscated and people were forced into slavery and compulsory military service. After the turn of the twentieth century, and in the aftermath of the last South African War, Pixley Ka Izaka Seme founded the South African Native National

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<sup>1</sup> As historians, including (Omissi and Thompson 2002), (Meredith 2007), (I.R. Smith 1996) and many other scholars have confirmed – although rarely from the perspective of indigenous Africans – the wars that took place in South Africa were not simply between Afrikaners and the British colonialists. These wars were, in fact, part of a long history of – and African resistance to – settler-colonial domination, and a scramble for the country’s rich natural resources.

Congress (SANNC) in 1912. The SANNC, which later became the African National Congress (ANC), was initially formed as a civic organisation, and became a political movement later. The organisation was established in direct response to the Natives Land Act in 1913, which expropriated land for the use of white colonial settlers.<sup>2</sup> The ANC took a careful approach in the beginning, engaging with the British colonial administrators and sending delegations to London. However, these early efforts proved to be unsuccessful, and in 1919 the ANC organised its first demonstration against the Pass Laws, which required Africans to carry a pass, and regulated where they could live and work.<sup>3</sup>

As the laws in South Africa became progressively more rigid, resistance to the government increased, and by the 1950s – as explained below – the ANC began to organise civic resistance on a very large scale, through a defiance campaign. As the government's response became more violent, another political resistance movement – the Pan Africanist Congress (PAC) – was formed in 1959 by Robert Sobukwe, with a more confrontational stance and an Africanist perspective, in contrast to the ANC's multi-racial perspective.<sup>4</sup>

Resistance to white domination precipitated even more violent responses from the government. The notorious Sharpeville Massacre in 1960 – in response to a civic anti-pass law demonstration by the PAC – and the June 1976 massacre of primary and high school students in Soweto, who demonstrated against compulsory, apartheid-language education, shocked the world, as these events were reported by the foreign press. Largely in response to these massacres, the international anti-apartheid solidarity movement in Europe and North America gathered steam from the 1960s onwards.<sup>5</sup> While the government banned political movements such as the ANC and the PAC, other civic organisations were formed as important focal points of civic resistance. These organisations ranged from the Congress of South African Students (COSAS) – founded by Steve Biko, Barney Pityana and others – to various trade unions, and, in particular, the Congress of South African Trade Unions (COSATU), as well as liberal-minded non-governmental organisations (NGOs). Eventually, many of the civic organisations owing their origins to the defiance campaign came together to form the United Democratic Front (UDF), which played a crucial organising role in the late 1980s and early 1990s, and paved the way for the un-banning of the ANC and the transformation of South Africa into a democratic state.<sup>6</sup>

According to Reddy, the defiance campaign in South Africa accomplished several different things, in addition to dramatically increasing the membership of the ANC. The campaign led directly to the establishment of the Legal Aid and Defence Fund, and an international solidarity movement that mobilised awareness of apart-

<sup>2</sup> (Thema 1953). See also: (Lodge 1983).

<sup>3</sup> (Posel 1991).

<sup>4</sup> (Lodge 1983).

<sup>5</sup> (Fieldhouse 2005).

<sup>6</sup> (Kessel 2000).

heid around the world, and generated considerable sums of money to advocate for accountability through the legal system in South Africa. While the campaign revealed the unwillingness of the United Nations, by way of the Security Council, to put pressure on South Africa to abolish its racist policies, it did inspire the General Assembly to call for international action and, eventually, sanctions against South Africa.<sup>7</sup>

Many major political, legal and institutional changes in the South Africa of the early 1990s – which also paved the way for a refugee policy – were the outcome of a political negotiations process. The outcome of these negotiations was the Congress for a Democratic South Africa (CODESA), a broadly representative process involving the (recently unbanned) political movements, the nationalist-led government, and various representatives from civic organisations. The agreements made during CODESA marked a major policy shift away from a colonial and authoritarian regime, based on ethnic divisions, to a democratic government established on the basis of universal franchise, accountability and social justice.

This policy shift was therefore not only the product of formal negotiations between political movements and the white-minority government. It was the culmination of a long-fought political struggle involving multiple civic actors who had been mobilising for progressive change in an organised way, both within South Africa and at the international level, since at least the beginning of the 20<sup>th</sup> Century. Policy shifts and participation by civic actors in political struggle in South Africa framed the conditions for civic participation in protecting refugees between 1996 until 2006. Human rights (and by extension refugee rights) advocacy in South Africa has been characterised not only by challenges to the existing legal normative framework, but by the pursuit of a strategy of ‘correcting’ the normative framework through reference to administrative law and international law.

This chapter first explains how a racialised migration policy in South Africa shifted, and made way for a human rights-based refugee policy. The chapter then elaborates on the history of political struggle in South Africa, from which refugee advocacy organisations emerged, and finally, it explains how civic advocacy networks gradually co-ordinated their responses to promote the protection of refugees.

### 3.2 POLICY SHIFTS: ABANDONING RACIALLY-BASED CONTROL OF PEOPLE

This section explains how South Africa’s government policies rapidly transformed as the country emerged from three and a half centuries of racial domination; this involved major policy shifts, including a shift from racially-based immigration policies and border controls, to human rights-based refugee policies. In other words, within a relatively short space of time, South Africa went from being a refugee-producing country to a refugee-hosting country.

<sup>7</sup> (Reddy 1987). Reddy was head of the United Nations Centre Against Apartheid for over twenty years, during which time the UN General Assembly called for international sanctions against South Africa.

With the Native Lands Act of 1913 and Native Urban Areas Act of 1923, the white minority government of South Africa institutionalised nearly three centuries of racist dispossession and brutal control of the country's indigenous population. These laws gradually developed into what became known as South Africa's policy of internal *influx control* that restricted the movement and association of people on the basis of race. Known as 'apartheid' – or separation – the racist ideology that informed these policies was entrenched at nearly every level of government policy until these policies began to shift in the late 1980s and early 1990s. As this section explains, South Africa's refugee policies emerged from policies that were rooted in this same ideology.

### 3.2.1 Influx control (internal and external)

Influx control closely regulated two of the most important aspects of civic associational life, namely where one could live and work, on the basis of race.<sup>8</sup> The government's extensive security apparatus, in particular the South African Police, enforced influx control. Cawthra has described the role of the police as 'always in the front line in the enforcement of apartheid ... (and) ensured that black South Africans were kept in their places in segregated and inferior institutions'.<sup>9</sup> The far-reaching powers granted to the police substantially reduced their accountability, turning them into a greatly feared institution. Countless human rights advocates were murdered or 'disappeared' by government security agencies.

South Africa's exclusionary immigration policies can be characterised as 'external influx control'. Just as with the country's internal policy of influx control, the country's immigration and border control policies were influenced by notions of white supremacy, and denied opportunities to non-white migrants and immigrants. South Africa's handling of individuals who had fled persecution or conflict was formulated along similar principles, acknowledging the humanity of some and denying the humanity of others.

In 1986, following a recommendation by a presidential commission the previous year, former South African president P. W. Botha announced the scrapping of the country's notorious pass laws or 'influx control'. The historic announcement did not mention anything about the prospect of democratic participation for the country's majority. On the contrary, it reinforced Botha's belief that the future of the country still depended on apartheid or 'separate development' by way of a white minority-controlled State, tri-cameral parliament,<sup>10</sup> and separate Bantustans. Indeed, as a New York Times journalist acknowledged, while the pass laws had come to an

<sup>8</sup> (Posel 1991).

<sup>9</sup> (Cawthra 1993: 1).

<sup>10</sup> The tri-cameral parliament model, which gave highly restricted 'autonomy' to members of the (1) coloured and (2) Indian communities in two separate parliaments, and which was totally subservient to the main, white-controlled parliament, was explicitly rejected by the ANC and other liberation movements, though it remained in existence on paper from 1984 until the country's first democratic elections in 1994.

end, the ‘spirit’ lived on in the form of what Botha referred to as ‘orderly urbanization’.<sup>11</sup>

As the social and political crisis in South Africa deepened, and Botha waged a militarised policy of ‘total onslaught’ against the liberation movements, both inside South Africa and within the region, massive forced displacement of people took place. This displacement was of three different kinds. South Africans who were dispossessed of their land and property for the use of whites were forced to live in townships or in far-flung Bantustans; they became internally displaced within South Africa’s internationally recognised borders.<sup>12</sup> Other South Africans fled the country for various reasons, as persecuted students, academics, army defectors, community activists and members of political movements, and became refugees.<sup>13</sup> Thirdly, and directly related to South Africa’s policy of regional de-stabilisation,<sup>14</sup> countless numbers became forcibly displaced in their efforts to flee armed conflicts. In particular, hundreds of thousands of people fled civil wars in Mozambique and Angola. South Africa played an important, facilitating role in these brutal conflicts.<sup>15</sup>

Meanwhile, South Africa’s migration and border control policies, formulated along similar lines to influx control, remained. The principal legislation that guided South Africa’s discriminatory migration policy was the notorious Aliens Control Act.

### 3.2.2 The Aliens Control Act 1991: arbitrary and unchallengeable

Similar to the Pass Laws, the Aliens Control Act 1991 not only provided sweeping, arbitrary powers to the Minister of Home Affairs and his administrative officials; before 1993, decisions taken under the Act were virtually unchallengeable in a court of law. The Act was the final, ‘omnibus’ version of legislation that – from the 1920s, when it initially sought to restrict entry to the families of Indian labourers – had as a core objective the active promotion of white immigration, and an almost total ban on formal non-white immigration. The Act therefore had undeniably racist origins, both in form (the policy norms themselves) and in implementation (the

<sup>11</sup> (Battersby 1988).

<sup>12</sup> South Africa regarded the Bantustans as foreign entities, and they were recognised as if they were states. It maintained this fiction despite the lack of these entities’ basic pre-conditions for the existence of a state, and the fact that no other state extended recognition to them. Indeed, these entities were the subject of a unique response from the United Nations, which acknowledged collective *non-recognition* on the basis of South Africa’s racist policies, and considered the Bantustans to be part of South Africa.

<sup>13</sup> Tens of thousands were recognised as refugees and granted residence, mainly in neighbouring countries and within the region, in Zambia, Zimbabwe, Angola, Mozambique, Swaziland and Tanzania. These countries eventually became known as the ‘front-line states’ in the regional and global struggle against South Africa’s apartheid regime.

<sup>14</sup> South Africa carried out military incursions and actively supported right-wing insurgents in Zimbabwe, Zambia, Angola, Mozambique, Swaziland, Tanzania and what eventually became Namibia.

<sup>15</sup> (Armon et al. 1998).

ways in which the Department's discretion was exercised).<sup>16</sup> However, the racist nature of South Africa's immigration policy was highly nuanced, and characterised by specific criteria for inclusion or exclusion. As discussed in the next section, these criteria changed frequently, reflecting the constantly changing political situation in the country.<sup>17</sup>

Until a 1995 parliamentary amendment to the notorious Aliens Control Act (ACA)<sup>18</sup>, it was virtually impossible for civic actors to challenge what were often decidedly arbitrary decisions taken under the Act. The ACA, which regulated all entry and residence in the Republic, provided an 'ouster clause' that stated:

no court of law shall have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any act, order, or warrant of the Minister ... issued under this Act and which relates to the restriction or detention, or the removal from the Republic, of a person who is being dealt with as a prohibited person.<sup>19</sup>

In other words, if the Minister (for example, acting through an immigration officer), decided that one had no legal grounds for residing in South Africa, that person could be declared a 'prohibited person' and detained and deported accordingly. A court could review neither the decision to declare a person as 'prohibited', nor any decision to detain and/or deport them. The sole limitation placed on this otherwise limitless power, which drew on a long history of non-interference by the courts in the workings of the government in South Africa, concerned the aspect of detention, which the Act provided 'shall not be for a longer period than is under the circumstances reasonable and necessary'.<sup>20</sup>

### 3.2.3 Four pillars of South Africa's old migration policy

Crush and McDonald wrote of South Africa's migration policies as having 'rested on four pillars: (1) racist policy and legislation on the basis of whether one was 'easily assimilable'; (2) the exploitation of migrant labour from neighbouring countries; (3) tough enforcement legislation, and (4) the repudiation of international refugee conventions'.<sup>21</sup>

The first two of these pillars have also been characterised as a 'two gates' policy. In general, South Africa encouraged immigration to 'virtually anyone with a white skin' (gate one), including certain 'honorary whites' from Asia and else-

<sup>16</sup> (S. Peberdy and Crush 1998) argued that South Africa's immigration policies during the country's extended period of white minority rule were 'rooted in racism'.

<sup>17</sup> (Sally Peberdy 1999: 8).

<sup>18</sup> The (Aliens Control Act 1991) was an 'omnibus' piece of legislation, its origins dating back to the turn of the 20<sup>th</sup> Century and was particularly notorious for its racialised nature. See (S. Peberdy and Crush 1998).

<sup>19</sup> (Aliens Control Act 1991): section 55(1).

<sup>20</sup> (Aliens Control Act 1991): section 55(2).

<sup>21</sup> (Crush and McDonald 2001: 2-4).



where.<sup>22</sup> However, it also made some exceptions to this, notably the exclusion of Jews during the first part of the 20<sup>th</sup> century. Furthermore, while the country's racialised policy generally excluded immigration to all non-whites, it made temporary provisions for migrant labourers (gate two).

*First Pillar: 'easily assimilable'*

For decades, the South African government encouraged white migration through a racialised set of immigration laws aimed at persons who an Immigrant Selection Board determined would be 'easily assimilable'. Both the Unionist government in the 1930s and the Nationalist government that came to power in 1948 were interested in white immigrants from countries that were perceived to be sympathetic to its policies, such as Great Britain (for the Unionists) or Germany and The Netherlands (for the Nationalists).

In the 1930s, the racial criteria that had long regulated admittance to South Africa was amended by religious criteria as well. Reflecting the blatantly anti-Semitic views within government that Jews were dominating the professions and business sector, the government introduced the Quota Act of 1930. According to whether or not one came from a 'scheduled' or 'unscheduled' country, the Act successfully limited the numbers of Jewish immigrants coming from Eastern Europe. According to Peberdy, who based her conclusions on available official statistics, 'Jewish immigration fell from 2,788 in 1929 to 1,881 in 1930 and to 885 in 1931'.<sup>23</sup>

With the rise of fascism in Germany came a rapid increase in the numbers of Jews wishing to emigrate elsewhere. The government of South Africa was faced with a dilemma; it wished to encourage immigration from Germany, while at the same time limiting the number of Jews wishing to immigrate to the country. The response was to introduce the Aliens Act of 1937, which, as mentioned earlier, built upon legislation originally introduced by the British colonial administration in the 1920s to restrict the immigration of families of Indian migrant labourers brought over to build railways. Over the years, the legislation was amended or reworked entirely, several times, and formed the basis of the country's immigration policy. In terms of the 1937 Act, decisions on whether or not to accept an application to immigrate to South Africa would be taken by the newly-created Immigrant Selection Board.<sup>24</sup>

Peberdy argues that anti-Semitism was for some time a significant feature of South Africa's immigration policy and border regime, under both the Unionist and the Nationalist governments. Under the Unionists, for example, the principal criterion for immigrating to South Africa was that an applicant was a 'natural-born British subject or a Union National', while under the Nationalists, the principal criteria related to the 'absorptive capacity' of South Africa, in other words, whether an ap-

<sup>22</sup> (Crush and McDonald 2001: 2).

<sup>23</sup> (Sally Peberdy 1999: 160).

<sup>24</sup> (Sally Peberdy 1999: 159).

plicant was ‘likely to be readily assimilated’. By their interpretation of these criteria, according to Peberdy, the Immigrants Selection Board excluded large numbers of Jewish immigrants.<sup>25</sup>

According to Giliomee, Hendrik Verwoerd, leader of the National Party (NP) and architect of apartheid, was of the view that economic considerations were principally at stake in constructing a quota system, but that anti-Semitic factors also played a role in reinforcing such a policy.

According to Verwoerd ... the problem was of an economic kind, namely Jewish over-representation in key economic sectors. Yet he failed to identify a reason why Jewish dominance was more dangerous than that of any other ethnic group. Neither did he attempt to make a case that there was a common Jewish agenda in South Africa.<sup>26</sup>

Making a somewhat unconvincing distinction between anti-Semitism and official support for the Nazi regime in Germany, Giliomee questioned how much the government’s immigration policy was in fact directly influenced by the ideology of that regime, with which the Unionist Government of South Africa was, in any event, at war. While not in any way denying that anti-Semitism was a core consideration of the government’s policies, and indeed had been for some time, Giliomee was keen to point out that, with the exception of one NP leader,<sup>27</sup> the National Party, at least, was not necessarily influenced by Nazi ideology. Calling the government’s anti-Semitic quota policies ‘opportunistic rather than deep-rooted’, Giliomee partly revealed his own sentiments when he wrote:

Its sources were not German anti-Semitism but local stereotypes of the Jew out-smarting everyone and profiting at their expense. ... Anti-Semitic sentiments were fuelled by Afrikaner frustration over their lack of economic progress in the city.<sup>28</sup>

By contrast, Peberdy’s extensive archival research exposed a wide-ranging conspiracy in seeking to prevent Jewish immigration, extending to South Africa’s ambassadors in Europe, who communicated back to their government in Pretoria.

The ambassadors agreed that “Jewish immigration is dangerous [*n gevaar is*] to South Africa” and that it should be discouraged and if possible be completely stopped. The only doubt expressed was whether they could be accused of anti-Semitism by not strictly following immigration regulations. They were certainly not

<sup>25</sup> (Sally Peberdy 1999: 166).

<sup>26</sup> (Giliomee 2003: 417), quoting an article by Verwoerd in *Die Transvaler*, 1 September 1937.

<sup>27</sup> (Giliomee 2003: 418), referring to Eric Louw, a prominent leader in the National Party, who ‘spoke of a world Jewry exerting a malignant political influence, the language of Hitler.’ Giliomee later argued that Louw abandoned such an overtly anti-Jewish stance when the National Party came to power in 1948.

<sup>28</sup> (Giliomee 2003: 418)

worried about the legitimacy of side-stepping the regulations, only the possibility of confrontation.<sup>29</sup>

There seems little doubt that, at least for a while, the government's policy was tinged with a decidedly anti-Semitic flavour and whether economic considerations were a principal factor or not was, in fact, irrelevant. The tragic consequence of these short-lived policies was that during a crucial period in Germany's much-documented persecution of the Jewish people and other groups – including mentally handicapped persons, Roma and Sinti, homosexuals and others – it became almost impossible for Jews fleeing this persecution to immigrate to South Africa.

On the other hand, the fact that the Jewish Board of Deputies raised objections to the quota policy only and not, it would seem, to the government's wider efforts to restrict non-Whites, illustrates how this discourse took place entirely within the confines of this first 'pillar'. In other words, there was at least tacit acceptance, within the mainstream Jewish community in South Africa, of a racially segregated immigration policy. While the overt anti-Semitism of the South African government's immigration policy was short-lived, as the government developed strong ties with the State of Israel,<sup>30</sup> the racialised nature of the policy remained entrenched.

The 'easily assimilable' criterion raised numerous dilemmas for officials tasked with interpreting it. As Peberdy discovered during the course of her extensive archival research, doubts were raised amongst members of the Immigration Advisory Board about certain nationalities, including Portuguese.

Italians and Portuguese "were questionable" but could be assimilated if they were "from good 'stock'," not least because some Afrikaners had Portuguese and Italian surnames. However, he doubted whether "a Spaniard, a Pole, a Magyar, or Czech (to name only a few) could assimilate."<sup>31</sup>

Nevertheless, the principal target of this first 'pillar' or 'gate' of the South African immigration policy was to maintain a white population and, particularly after 1948, a population sympathetic to the political programme of the National Party. Accordingly, the government saw utility in opening its doors to former white colonialists in newly-liberated Angola, Mozambique, and other countries, as well as from Eastern Europe.

From the 1960s the government recognised that those leaving Angola and Mozambique in advance of independence in these Portuguese colonies, and anti-communist 'defectors' from Eastern Europe, were likely to be sympathetic to its policies, and therefore opened its doors to them. Special concessions were made for these 'refugees'<sup>32</sup> to emigrate to South Africa, apparently in terms of a separate pol-

<sup>29</sup> (Sally Peberdy 1999: 162-163).

<sup>30</sup> (McGreal 2006).

<sup>31</sup> (S. Peberdy and Crush 1998: 37).

<sup>32</sup> The term 'refugees' for this group must be qualified, since no proper status-determination took place to assess their reasons for claiming refugee status, or whether such a person might be excluded on the grounds of having committed a serious non-political crime.

icy, which remained confidential. Several were reportedly excluded from South African citizenship on the basis of their maintaining Portuguese citizenship.<sup>33</sup>

*Second pillar/second class: the exploitation of African migrant workers*

An exploitative system of migrant labour was the goal of the second of Crush's 'two gates', and the second 'pillar' of the government's overall policy. On behalf of South Africa's giant mining and agricultural industries, the system permitted migrants from neighbouring countries, principally Mozambique and Lesotho, to work in South Africa, often in appallingly bad conditions. Their contracts (and temporary entry permits) were negotiated through semi-privatised agencies.

As Crush and Tshitereke have written, this form of exploitative migration was mainly provided for in terms of bi-lateral treaties between South Africa and the countries of which the migrants held nationality.<sup>34</sup> Numerous migrants from Mozambique, Zimbabwe, Lesotho, Swaziland and elsewhere, gained temporary residence in South Africa in this way, although their residence was very uncertain.

The appalling labour conditions for African migrant workers were firmly rooted in the government's policy of apartheid, and therefore consistent with the general lack of labour protections for black South African workers. In a 1970 article, Frederick Johnstone summed up the fundamental unjustness of the government's policy on African migrant workers from the nominally independent South African 'homelands', officially regarded as labour reserves by the South African government through its policy of influx control:

The whites want the continued use of African labour without the continued residential presence of African people in the 'white' areas. Thus non-essential Africans are removed, while essential African workers are shuttled about, deprived of rights in the places where they live and work, and without jobs in the 'homelands' where they are told to exercise their rights. Through this migrant labour system the whites secure their supposedly contradictory goals of prosperity and white supremacy and racial separation, at the expense of the Africans, on whom it inflicts permanent instability, the destruction of family life, and other serious disabilities.<sup>35</sup>

Notwithstanding the almost total lack of labour protection, many migrants throughout the region took advantage of this exploitative labour arrangement, since the opportunities for earning a living were still preferable to the conditions in their own countries. With the eruption of civil war in Mozambique, it became increasingly difficult to distinguish between migrants who had fled the violence of the war and those who had come for work reasons.<sup>36</sup> Many of these migrants who had remained in South Africa by the early 1990s were permitted to vote in the country's first,

<sup>33</sup> ('Interview with C. Schraevesande' 2006).

<sup>34</sup> (Crush and Tshitereke 2001).

<sup>35</sup> (Johnstone 1970: 128).

<sup>36</sup> (Johnston 1999).

general election in 1994.<sup>37</sup> Many of these migrants – including former Mozambican refugees – were granted permanent residence, either through an amnesty for former mineworkers, announced in October 1996, or as part of a general SADC Amnesty, announced in June 1996.<sup>38</sup>

*Pillar three: dehumanised border enforcement*

The third ‘pillar’ of South Africa’s immigration policy, during the period of white minority rule, was characterised by a dehumanised, unforgiving approach to border enforcement. As mentioned, the policy was deeply racialised; influx control was effectively transferred to the borders.<sup>39</sup>

The unforgiving nature of the country’s border control policy extended to all black foreigners who entered the country unannounced, whether they were refugees from the war in Mozambique, or migrants in search of casual employment. Refugees and migrants went to great lengths in their desperation to avoid border control officials and reach relative safety in neighbouring South Africa. Mozambican refugees suffered especially. After having fled some of the worst post-independence violence seen on the African continent, refugees braved additional horrors; they were confronted by dangerous wild animals in the Kruger National Park, which bordered both countries, as well as a fence that generated a lethal electric charge. The desire to avoid border control officials was clear. When officials managed to intercept foreigners entering the country, they carried out a range of dehumanising practices that, as Crush and McDonald put it, were ‘reminiscent of the pre-1986 pass laws era’.<sup>40</sup>

Serious bureaucratic challenges also caused problems. In terms of the Aliens Control Act and associated regulations, there were three separate government agencies with authority to handle border control issues: immigration officials of the Department of Home Affairs, border police officers, and the South African military. This led to overlapping jurisdictions and serious inter-departmental conflicts.<sup>41</sup>

*Pillar four: repudiation of international refugee law*

The racially tainted implementation of South Africa’s immigration policy and border enforcement was matched, predictably enough, by the fourth pillar: the government’s stubborn unwillingness to develop refugee policies in line with international law. As mentioned, the lack of a refugee policy had a predictably harsh impact on the several hundred thousand Mozambicans who did manage to flee the civil war and find their way to South Africa in the 1970s and 80s. While South Africa mostly

<sup>37</sup> (Polzer 2007: 24-25).

<sup>38</sup> (Crush and Williams 1999).

<sup>39</sup> (Handmaker and Parsley 2001), and alluded to by (Crush and McDonald 2001).

<sup>40</sup> (Crush and McDonald 2001: 3).

<sup>41</sup> (Handmaker and Singh 2002) The lack of proper co-ordination between border enforcement agencies continued throughout the 1990s until at least 2002.

tolerated Mozambicans living in the nominally independent ‘homelands’ of Gazankulu and Venda, the government regarded them, legally, as ‘prohibited persons’. The government furthermore refused to allow the UN High Commissioner for Refugees (UNHCR) to operate in the country and provide humanitarian assistance to the tens of thousands of refugees from war-ravaged Mozambique.

As Polzer noted, ‘Mozambicans in South Africa have never been subject to or protected by an established and structured refugee law’ although Mozambicans have been subject to ‘official and semi-official frameworks’ that have ‘shaped interactions between Mozambican refugees and state actors and have enabled or constrained the acquisition of legal status’.<sup>42</sup> While, on the whole, these types of informal relationships with the former homeland authorities, chiefs, and (more recently) local government have had more direct impact on former Mozambican refugees than the formal laws, these former refugees have always been vulnerable to exploitation by farmers as well as apprehension and deportation under the South African government’s immigration laws. Left without international protection, or an international agency to oversee their protection, the country’s border enforcement policies resulted in a particularly precarious situation for former refugees.<sup>43</sup>

In 1991, the government eventually permitted the UNHCR to operate in the country for the joint purposes of formally recognising the former Mozambican refugees, in lieu of repatriation, and for facilitating the return of South African exiles. As discussed further in chapter five, in 1993 the South African government signed a Tripartite Agreement with the UNHCR and the government of Mozambique, and a separate Basic Agreement with the UNHCR, to facilitate the formal recognition of status for former Mozambican refugees, based on the definition of a refugee contained in the 1951 United Nations Convention Relating to the Status of Refugees.

### 3.2.4 Paving the way for a refugee policy

Attempts to resolve the Mozambican refugee crisis from the early 1990s onwards laid the basis for a formal policy of refugee status determination, which allowed applications for asylum on an individual basis. As it became more widely known throughout the world, and particularly on the African continent, that the country was undergoing a negotiated transition to democracy, further underscored by the release of Nelson Mandela in 1990, South Africa became seen as a potential place of refuge for persons fleeing persecution and war.

One of the earliest claims for refugee status came in 1991, when three Russian women who worked at the Russian embassy approached the South African government and declared their intentions to ‘defect’ from their country and apply for political asylum. Claude Schraevesande, a senior official in the immigration section of

<sup>42</sup> (Polzer 2007: 23).

<sup>43</sup> This situation did not ease until 2000, when a project for regularising the status of former Mozambican refugees finally began to be implemented, as discussed in chapter five.

the DHA, was requested to deal with the matter. The women were granted political asylum in late 1991 or early 1992.<sup>44</sup>

Following years of international isolation, in 1991 South Africa finally permitted the UNHCR to set up an office in the country to assist Mozambican refugees. That same year, South Africa brought into force what became the last version of the Aliens Control Act. The Act was problematic in many respects; preserving the extensive discretion of the Department of Home Affairs in determining entry and residence, maintaining the odious policy of declaring individuals without legal residence to be ‘prohibited persons’, and reincorporating the notorious ‘ouster clause’ that shielded any decision of an immigration officer from judicial scrutiny. However, it still represented a break with the country’s racialised past, by removing explicit references to race.

With the signing of a Memorandum of Understanding (MoU) between the UNHCR and the Southern African Development Community (SADC) in 1997, South Africa committed itself to collective approaches on border control issues, including refugee movements. Among other measures, this provided for co-operation in the areas of:

refugees, forced population movements into and within the region, migratory movements (and the) establishment and development of mechanisms for managing and addressing the root causes of the movements.<sup>45</sup>

As this MoU confirmed, from a country that had faced decades of international isolation, South Africa emerged as a key global player in the Southern African region, in the Organisation of African Unity, and at the United Nations. Guided principally by South Africa’s first interim constitution in 1993, the result of political negotiation, the new policies that came into being all aimed to reflect the country’s democratic, constitutional culture, including its re-engagement in international affairs and legal process, and ending the country’s long period of international isolation.<sup>46</sup> A key aspect of these national and international dispensations was the country’s embracing of international human rights law – including refugee law – through the adoption of the 1993 Interim Constitution. The framing of the Constitution, which was the product of negotiations between the political movements and the nationalist government, and explicitly recognised South Africa’s international legal obligations, featured a great deal of involvement by civic actors.<sup>47</sup>

However, in framing a rights-based refugee policy in accordance with the constitutional imperatives posed by the 1993 Interim Constitution, the South African government faced two main initial challenges. First, there was the obvious need to

<sup>44</sup> (‘Interview with C. Schraesande’ 2006).

<sup>45</sup> (Gaborone Memorandum 1996).

<sup>46</sup> For twenty years, from 1974 until democratic elections in 1994, South Africa was excluded from participating in the debates of the UN General Assembly, which routinely condemned the government’s policies of apartheid.

<sup>47</sup> (Spitz and Chaskalson 2000).



reform the highly problematic and unconstitutional normative framework represented by the Aliens Control Act. The second main challenge was to provide a durable solution for the several hundred thousand Mozambicans who had obtained refuge in former 'homeland' areas of South Africa, although their legal residence had never been formally recognised.

This normative commitment on the part of the South African government, to be governed not only by its national constitution, but also by international refugee law, laid the structural basis for the expression of civic agency that sought to interact with government and either (1) frame a particular policy, (2) support its implementation, or (3) hold the government accountable to this policy through the courts. But this is only part of the picture. As the next section explains, civic actors that interacted with the South African government emerged from a history of political struggle.

### 3.3 POLITICAL STRUGGLE: THE ORIGINS OF CIVIC ACTORS IN SOUTH AFRICA

The South African anti-apartheid struggle, through its primary protagonist, the African National Congress, was a political struggle, supported by a network of independent civic organisations that exercised their capacity – or agency – against the oppressive South African regime on a collective, co-ordinated basis.<sup>48</sup> From the *politics of struggle*, civic actors in South Africa later became involved in the *politics of transition*, playing key roles in political negotiations that ushered in an interim constitution and, finally, accountable government and administration, with democratic elections in 1994. Immediately following the elections, South Africa ended many decades of international isolation, once again taking up its seat in the UN General Assembly and in other UN bodies, including the Security Council, and becoming engaged in helping to resolve other international conflicts.

Transition to a democratic, accountable government in South Africa brought with it the *politics of transformation*. Civic actors had to redefine their roles in relation to government, even though this had been anticipated to some extent. As Khehla Shubane argued in 1992, following the hasty reconstruction of the liberation groups following their unbanning by the apartheid regime, there existed 'no consensus' amongst those involved in the anti-apartheid struggle and negotiations process regarding 'the role of civil society in constructing a post-apartheid democracy ... other than on the need to move away from apartheid.'<sup>49</sup>

This section describes some of the key pressures that led to the demise of white minority rule, and the roles fulfilled by civic actors that capitalised on these pressures. It then explains how civic actors in South Africa trace their origins to two distinct types of civic actors from the political struggle against white domination, particularly its policies of influx control. One set of civic actors, mainly black, and

<sup>48</sup> (Shubane 1992) and (Botha 1992).

<sup>49</sup> (Shubane 1992: 33).



many of whom were inspired by Steve Biko's 'black consciousness' philosophy, had been engaged in political struggle both inside and outside South Africa, resisting the government's racist and oppressive policies mainly through international advocacy and acts of civic disobedience in South Africa. Another set of civic actors, mainly white, had mobilised in indignant reaction to the government's policies through mainly legal interventions; what Abel terms 'politics by other means'.<sup>50</sup> Finally, this section explains how civic actors shifted from their anti-apartheid stance to becoming partners in South Africa's transition from authoritarianism to a democratically accountable government.

### 3.3.1 Pressures that led to the demise of white minority rule

As explained earlier, leaving aside African resistance to white minority rule throughout 250 years of colonial domination and pressures between the British colonialists and the Afrikaner community, organised black civic resistance began at the turn of the 20<sup>th</sup> century with the founding of the ANC. This resistance culminated in the 1950s, with the launch of the Defiance Campaign. Finally, coinciding with the emergence of additional civic groupings in the 1970s, the whites-only South African government found itself confronted with three principal sources of pressure, which ultimately led to the demise of white minority rule. First, the government's policies of rigid control on the internal and external movement of people, and associated repressive security policies, were being openly flouted by civics that had organised large-scale acts of defiance; and were, moreover, hugely expensive to administer. Second, the country faced noticeable emigration of whites, who felt that better opportunities lay elsewhere. Finally, there was pressure from an increasing number of individual states, the United Nations and an internationally mobilised civic anti-apartheid movement, which insisted that South Africa renounce its apartheid policies or face continued international isolation.

Initially, the apartheid regime responded to this pressure with a new strategy that aimed to entrench the unequal position of whites in South Africa in a manner that would be seen as acceptable to Western states and the United Nations. The intended impact of this new strategy externally was meant to convey the impression that significant political concessions were being made, while internally the intended impact was to divide the political movements by encouraging nominal self-rule by the country's black majority.

Four main programmes were developed to maintain the country's apartheid regime in a manner that the government hoped would be supported by the West. The first programme set up a so-called tri-cameral parliament, the main component of which was composed of whites and vested with principal law-making authority; two other 'parliaments' were composed of Indians and coloureds<sup>51</sup> respectively, and had

<sup>50</sup> (Abel 1995).

<sup>51</sup> This term was both a racial category under the apartheid regime, and a self-designation by descendants of the mostly Muslim, Malay-descended community in South Africa.

more limited law-making authority. The second programme envisaged that political representation for Africans was to be vested in the leaders of so-called 'Homelands' or 'Bantustans'; these were argued to be legally autonomous of South Africa, and supported through 'development assistance' by South Africa, but were in fact only nominally independent. The third programme revamped South Africa's migration policies to actively encourage, rather than passively allow, white immigrants from Europe, the USA and former colonies such as Australia and New Zealand; a handful of 'honorary whites' from the Far East were also permitted to immigrate to South Africa under certain conditions. Africans were generally excluded from immigrating to South Africa, and active efforts were taken to prevent solidarity activists from entering the country. The final programme re-equipped South Africa's security agencies in order to strengthen their hold on the country by vigorously clamping down on political dissent and reinforcing the powers of the police, including in matters of border control.

For a while, the government's four-pronged strategy worked. The United States, Britain and other economically powerful countries continued to support the South African government. Leaders of the political movements were routinely labelled as 'terrorists'. Even pressure from the United Nations withered.<sup>52</sup> Internally, it became almost impossible to organise politically, as the government murdered or imprisoned activists, or forced them into exile. Externally, South Africa pursued a policy of regional destabilisation, supporting dissident right-wing regimes, particularly against what they regarded as communist regimes in Mozambique and Angola.

However, many years of co-ordinated, internal mass mobilisation, and growing international political isolation, began to have an impact. Even as P.W. Botha launched his policy of 'total onslaught' in the 1980s, white minority rule had already begun to crumble. The fate of these policies was to be sealed in a strategic shift of emphasis on the part of the political and resistance movements, underground and in exile, as well as by anti-apartheid solidarity activists in South Africa and abroad. Without abandoning political organising, armed resistance and spectacular acts of sabotage, the ANC placed more emphasis on mass civic resistance through trade unions, social movements and other civic network structures that the government had not (yet) banned. The political movements were supported by governments in the 'front-line states', especially Zimbabwe, Zambia and Tanzania, who provided political and logistical support to the ANC. Further support came from solidarity activists in Europe and North America, who mobilised a worldwide boycott and put increasing pressure on their own governments to isolate South Africa's apartheid regime. Mass mobilisation culminated in the forming of the United Democratic Movement, and eventually the release of Nelson Mandela and other long-term political prisoners in 1990, ushering in a formal process of negotiation and political transition to a democratic government.

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<sup>52</sup> This is evidenced by a relative silence in the 1980s that followed a wave of applications in the 1970s, under the so-called 1503 confidential review mechanism of the UN.

### 3.3.2 New forms of civic expression

Ironically, the government's formal efforts to suppress freedom of expression led to new and highly creative forms of civic expression. As mentioned previously, the white minority government's policies not only controlled movement, but restricted civic association along racial lines, and stifled freedom of expression. Efforts by the government to control movement and civic association along racial lines generated different types of responses, which activists adopted in challenging the government. While formal opportunities for civic participation in these restrictive conditions were almost non-existent for non-whites in South Africa, it was possible for black activists to organise outside South Africa and 'underground'. Political movements and civic organisations were formed, aimed at challenging the legitimacy of the government's apartheid system.

Building on the precedents set by the ANC and PAC, which were banned in 1960, and most of their leaders imprisoned following the notorious Rivonia trials in 1963 and 1964, numerous civic organisations were formed.<sup>53</sup> These civics represented oppressed constituencies, and were established in opposition to the South African government from the 1970s through to the 1980s. They operated at the grassroots level, both legally and outside the law. While the civics took root in political struggle, they also aimed to provide services that were denied by the government, such as proper education, health care and other basic services.<sup>54</sup> These organisations included: the Western Cape Relief Fund, the National Association of Democratic Lawyers, the Black Lawyers Association, various civic associations organised under the banner of the South African National Civics Organisation (SANCO), and township-based Street Committees.

In addition to the ANC and PAC, a further, important source of inspiration to the civic organisations was the black consciousness movement. Not being part of any formal political association, the movement drew much of its inspiration from the work of the late Steve Biko and fellow founder Barney Pityana. The movement formally established the South African Students' Organisation (SASO), but its powerful ideology also inspired the establishment of other 'grassroots' civic structures.

Referring to a 'dangerous vacuum' that had been created by the government's banning of African political parties such as the ANC and PAC, yet rejecting the notion of 'working with the system', Biko recognised the leadership of imprisoned political activists such as Mandela, Sobukwe, Kathrada and others. He emphasised the need for oppressed communities to organise themselves. Biko encouraged the

<sup>53</sup> The Rivonia trials aimed to undermine the ANC by prosecuting several members of its leadership for acts of treason, which led to long prison sentences. In fact, as (Mandela 1994: 467-469) explains, the concentration of leaders in prison strengthened its resolve. Robben Island, where many of the ANC's political leaders were imprisoned, became known as the 'university'.

<sup>54</sup> (Botha 1992: 62-66).

formation of a broad-based coalition of interests, addressing the fragmentation that various South African governments had long fostered.<sup>55</sup>

Explicitly rejecting the notion of ‘coloured’, ‘Indian’ and ‘native’ peoples, Biko insisted that all oppressed peoples should properly refer to themselves as ‘black’ in making much-needed contributions to their local and national communities in the national struggle against apartheid.

There is a lot of community work that needs to be done in promoting a spirit of self-reliance and black consciousness among all black people in South Africa. ... Further operation within the system may only lead to political castration and a creation of an “I-am-a-coloured” attitude which will prove a setback to the black man’s programme of emancipation and will create major obstacles in the establishment of a non-racial society once our problems are settled. ... Thus in an effort to maintain our solidarity and relevance to the situation we must resist all attempts at the fragmentation of our resistance.<sup>56</sup>

Although South African police interrogators murdered Biko on 12 September 1977,<sup>57</sup> his ‘black consciousness’ ideas formed a hugely motivating ideology for generations of political leaders, activists, progressive academics and social reformers.

### 3.3.3 Court challenges – politics by other means

Meanwhile, efforts by (mainly white) liberal South Africans during the anti-apartheid struggle, particularly through a series of court challenges, were also significant. Organised opposition to the apartheid regime by liberal, progressive and largely white organisations initially took root in the 1950s, in opposition to the government’s removal of ‘coloured’ people from the voting role, and then grew in the late 1970s and 80s.

The emergence of these liberal organisations reflected a growing indignation by an important constituency of white middle-class professionals – as well as clergy and some politicians – against the government’s racist policies, or at least the manner in which they were implemented. These organisations included: Black Sash, Legal Resources Centre, Lawyers for Human Rights, Detained Persons Support Committee (later the Human Rights Committee), Institute for a Democratic South Africa, Centre for the Study of Violence and Reconciliation and the Trauma Centre of Cape Town. Faith-based NGOs made similar contributions, and included: the South African Catholic Bishops’ Conference, South African Council of Churches, Jewish Board of Deputies and the African Muslim Agency.

<sup>55</sup> From an article entitled ‘Fragmentation of the Black Resistance’, first published in the SASO Newsletter of June 1971 and reprinted in (Steve Biko and Stubbs 1996).

<sup>56</sup> (Steve Biko and Stubbs 1996: 38-39).

<sup>57</sup> (Burns 1977). Although the government tried to cover up Biko’s murder, the police officers involved later applied for amnesty to the South African Truth and Reconciliation Commission for their roles in his death.

The mainly individual legal claims launched by liberal South Africans against the government were not necessarily designed to achieve a concrete outcome. Rather, they were a form of what Abel termed ‘politics by other means’ that supported the civics and political movements. As Abel acknowledges:

Law was by no means the only or even the most important factor in the struggle against apartheid. The legal victories of the 1980s were part of an intensified wave of resistance in a cycle of challenge and repression dating back to World War II: the Defiance Campaign, women’s refusal to carry passes, the treason and Rivonia trials, Sharpeville, black power, and Soweto ... The legal battles ... did not win the war by themselves. But they empowered the masses while offering some protection from state retaliation.<sup>58</sup>

In other words, the legal challenges by white liberal organisations and their lawyers aimed to correct the normative framework through remedial measures, and eventually through an accumulation of individual legal challenges that undermined the basis of the government’s apartheid system. Accordingly, challenges were brought against a whole range of policies, from the Group Areas Act, forced removals and censorship, to acts of state terrorism.

### 3.3.4 Civic partners in political transition

By the time democratic changes became visible in the early 1990s, civic actors previously in opposition to the South African government became partners in the process of transition, particularly following the country’s first, democratic elections in 1994. As the relationships between state and civic actors were redefined, what for decades was a civic-led struggle for social justice against an illegitimate government was transformed into a legitimate, state-led process of nation building. Many of those formerly with civic groups began to fulfil various roles in government, from mid-level and senior civil servants to parliamentarians, judges and human rights commissioners. Civic actors became engaged in the framing of policies to address South Africa’s significant political, social and economic challenges. Particularly notable was the development of an interim Constitution, which involved considerable civic input and was viewed as ‘a major stepping stone towards a full constitutional democracy in South Africa’.<sup>59</sup>

While democratic changes in South Africa from the 1990s onwards initially had a disorienting impact on civic organisations, which had to re-organise themselves to a very different political context, the benefits of an accountable government also became apparent. The ‘struggle’ continued, but with different priorities. In addition to consolidating democracy and addressing grinding poverty, both the new government and civic actors were immediately confronted with a range of new issues that neither had seriously dealt with before, if at all.

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<sup>58</sup> (Abel 1995: 548-549).

<sup>59</sup> (Spitz and Chaskalson 2000: 2).

One of these new issues in the context of South Africa's transformation concerned South Africa's policy and treatment of asylum seekers and refugees. Political changes in South Africa meant that the country began to be seen as a safe place of refuge. Furthermore, the economic opportunities in South Africa were much better, comparatively, than in other African countries. This combination of factors led to increasing numbers of individuals who had fled persecution and conflict arriving in South Africa to apply for political asylum. South Africa went from being a refugee-producing to a refugee-hosting country, but lacked policies and implementation structures, let alone an institutional knowledge of how to respond to these new challenges. The government was forced to draw upon not only its own 'home-grown' constitutional culture, but also from international law and institutions in developing a refugee law and policies of implementation.

However, as important as new policies and legislation were in 'correcting' existing norms, including legislation to protect refugees, in the first decade of South Africa's 'new' democracy, it became clear that policy reform on its own was not enough. As the next section explains, policy formation and implementation form part of a larger and ongoing process requiring constant 'maintenance' through good civic co-ordination, persistent and proactive monitoring and advocacy efforts, as well as training at all levels, research and finally litigation, drawing on administrative law and human rights principles.

### **3.4 CIVIC CO-ORDINATION: THE EMERGENCE OF A REFUGEE RIGHTS ADVOCACY NETWORK**

This section explains how the history of policy transformation and civic mobilisation in South Africa is tied to the present, and in particular how civic actors co-ordinated their efforts and formed a refugee rights advocacy network that helped to frame and enforce refugee protection norms in South Africa. Policy inputs by civic actors were initially made in co-operation with the Department of Home Affairs (DHA).

While interactions between civic actors and national government agencies to promote a rights-based approach to refugee policy were initially conciliatory, and policy proposals were openly discussed and debated, tensions eventually emerged and conciliation gave way to the courts as the principal platform upon which refugee rights were mediated. Furthermore, when their relationships with national government agencies soured, civic actors began to develop co-operative relationships with local or municipal government.

Co-ordinated inputs to the framing of new refugee policies, assisting in policy implementation and litigating for policy enforcement are covered in chapters four, five and six respectively. These co-ordinated inputs have relied on well-organised civic networks. Organisations first co-ordinated their interventions on a regional basis. This was followed by the emergence, in 1996, of a national advocacy plat-

form. By 2006, greater efforts were taken by civic organisations to direct their advocacy to local government.

### 3.4.1 Regionally-based structures

Once the UNHCR was permitted to operate in South Africa in 1991, it began to identify local implementing partners and to set up structures at the regional (provincial) level. Part of this strategy was to set up provincially-based “Refugee Forums”, initially in Cape Town and eventually also in Durban, Gauteng and Port Elizabeth. Regionally-based NGO structures, once termed ‘refugee forums’, emerged – and dissolved – leading in some cases to serious gaps in assistance, the failure of advocacy and, in the worst cases, the actual marginalisation of refugee communities. In other cases they led to innovative, new ways of organising assistance as well as local and national advocacy.

All of these Forums eventually collapsed, mainly because of two principal factors. The first was the failure to understand and acknowledge existing structures of civic mobilisation. The second, even more significant factor was the tendency of South African NGO service-providers to ignore refugee voices.

One of these regionally-based networks was the Gauteng Refugee Forum (GRF), established in the mid-1990s by the UNHCR, and seeking to incorporate the work of service providers and refugee advocates in Johannesburg and Pretoria.<sup>60</sup> By 1999, at a meeting held in Johannesburg to ‘elect’ new refugee representatives, refugees and service providers actually physically came to blows with each other. A few months later, the GRF no longer existed, after most of its members withdrew their membership. In the vacuum that was created, refugees began to organise themselves seriously. The Co-ordinating Body of Refugee Communities (CBRC) was one of the more successful initiatives. The CBRC set up volunteer advisory and referral services, especially to newly-arrived asylum seekers, through an office in Johannesburg. It also monitored the activities of the DHA, facilitated access to bank accounts and intervened when an asylum seeker or refugee was arrested.<sup>61</sup>

Similar problems plagued the Durban Refugee Forum (DRF), which was also founded and funded in part by the UNHCR, but which collapsed in 2000 after its main sources of funding were withdrawn. Refugees were unhappy with the way in which they were treated,<sup>62</sup> and under the impression that the Forum was gathering money on behalf of refugees with nothing to show for it. According to Pierre

<sup>60</sup> Minutes of meetings held by the GRF between 1997 and 1999 exposed a growing rift between the South African service providers and refugee community leaders. At one memorable meeting I attended at the offices of the South African Red Cross Services in August 1997, invited refugee representatives were asked for their input by the chairperson. When the input amounted to criticism of the manner in which they were being treated by the South African NGOs, the chairperson yelled that the refugees ‘should not bite the hand that feeds them’.

<sup>61</sup> (‘Interview with D. Ndessomin’ 2006).

<sup>62</sup> The existence of serious tensions between the refugee community and the Durban Refugee Forum was confirmed in a report by (Tlou 2000).



Matate: 'refugees felt marginalised by its existence. There was no forum to bring refugees together with the DRF. Many fights erupted ... Much money was involved. Money was not reaching the refugees'.<sup>63</sup>

There were violent incidents at the DRF's advice office<sup>64</sup> as well, and allegations of corruption on the part of at least one of its Board members, although these latter allegations were difficult to substantiate independently.<sup>65</sup>

The Eastern Cape, where Nelson Mandela and Steve Biko were born, had long been a centre of civic mobilisation and resistance. And yet Refugee Forums here also faced problems, although this was due more to opportunism and apathy than to the conscious exclusion of refugees. In East London, a Refugee Forum was created that operated on a small scale, and did not pay anyone a salary. However, according to Masha, 'the moment the money came, that's when things went wrong'.<sup>66</sup> After lengthy disputes over payment for small-scale projects, the co-ordinator of the Forum eventually left the country with the Forum's chequebook. The Forum was immediately blacklisted by other NGOs. Reflecting on the problems faced by the Forum, Tony Masha summed it up as a problem common to civic organisations established after 1994: 'there is a perception that if you set up an NGO, you can make money'. In Port Elizabeth, it was reported that refugee communities viewed the Forum as 'catering for the NGOs only'.<sup>67</sup> Although the Port Elizabeth Refugee Forum collapsed in 2000, civic organisations continued to provide services. Multiple correspondents interviewed in 2006 confirmed the existence of a 'referral culture', where NGO representatives were more likely to refer a client to someone else than to address the problem themselves.<sup>68</sup>

The Cape Town Refugee Forum was reported to be the most successful of the region-based forums, establishing various sub-programmes on education, emergency assistance and shelter.<sup>69</sup> However, it too faced internal divisions and was eventually collapsed into a single NGO, the Cape Town Refugee Centre.<sup>70</sup>

By 2006, NGOs in Durban and Cape Town seemed to have overcome many of the problems faced earlier, establishing more informal networks that seemed to operate more effectively. In Durban, following the short-lived existence of the Durban

<sup>63</sup> ('Interview with P. Matate' 2006).

<sup>64</sup> A Dutch volunteer on an exchange programme at the Durban Refugee Forum in 1999 was threatened with a knife, but fortunately was not physically injured. Security issues had not improved according to (Tlou 2000). Neither had a procedure been put in place to regulate the entry of refugee clients, nor had provision been made to secure the privacy of client consultations.

<sup>65</sup> Nevertheless, the unsolicited allegations of corruption were communicated to me by numerous correspondents I interviewed in Durban during March and April 2006 who were directly or indirectly involved in the operations of the Durban Refugee Forum and who wished to remain anonymous in regard to this issue.

<sup>66</sup> ('Interview with A. Masha' 2006).

<sup>67</sup> (Tlou 2000).

<sup>68</sup> ('Interview with T. Lembethe' 2006); ('Interview with A. Lane' 2006); ('Interview with Somali Community Reps.' 2006); ('Interview with the SAHRC (Port Elizabeth)' 2006).

<sup>69</sup> (Tlou 2000).

<sup>70</sup> ('Interview with F. Khan' 2006).



Refugee Network, which had never called a public meeting, an 'Indaba' (meeting) was called by Durban refugee service-provider NGOs in 2003. With the purposes of 'sharing information' with the refugee community, the 'Indaba' reportedly broke new ground in the hitherto strained relations between refugees and service providers. As Matate explained: 'At the meeting, service providers explained that we are not the refugee network, we are the service providers and we should be accountable to you (the refugees) ... it is your right to know what we are doing'.<sup>71</sup>

The Durban Refugee Service Providers Network (DRSPN) was established as a direct outcome of this meeting, and drew on the experiences of past activism in South Africa. According to Matate, 'We made contact with refugee country representatives, student leaders, tribal leaders, church leaders. Some refugees began developing a new refugees' network, called the KZN Refugee Council'.<sup>72</sup>

The loose-knit DRSPN involved well-established organisations such as the Mennonites, who developed a 'facilitative' social advisory programme informed by their years of experience and networks in Durban, and forming their own guidelines for service provision, rather than those established by the UNHCR.<sup>73</sup> Activities for refugees were independently undertaken by others, such as the women's empowerment organisation Bukani Bafazi ('Women Awake'), a well-established NGO within the Durban South African Muslim community.<sup>74</sup>

In Cape Town, the Tutumike network was established, involving a broad range of organisations, many of whom had been disenchanted with the experiences of the Cape Town Refugee Forum. Tutumike confined its activities to exchanging information on what NGOs were doing, organising public awareness activities to combat rising xenophobia, and determining ways in which refugees could be better assisted.<sup>75</sup>

### 3.4.2 Working outside the structures

Not all service providers and refugee advocates operated on a collaborative basis, and at times some were more effective as a result. For example, seasoned activists such as Ghadija Vallie preferred to operate outside the formalised regional and national structures. Informed by her long experience working as a paralegal and community organiser, as former head of the Western Cape Relief Fund, she worked on the basis of the same principles that informed her earlier work. She summed up her approach as follows: 'The only expectation of those working in the (Fund) was to break down apartheid. We didn't always think about the consequences; we just *did*'.<sup>76</sup>

<sup>71</sup> ('Interview with P. Matate' 2006).

<sup>72</sup> ('Interview with P. Matate' 2006)

<sup>73</sup> ('Interview with Y. Rajah' 2006).

<sup>74</sup> ('Interview with S. Francis' 2006).

<sup>75</sup> (Handmaker 2006) and ('Interview with F. Khan' 2006).

<sup>76</sup> ('Interview with G. Vallie' 2006).

Rather than work for government when the ANC came to power in 1994, Vallie continued her community-based development work and activism, with women's empowerment programmes and various community-development initiatives that she had helped to establish. She also operated a local business and consciously employed refugees. Beyond offering several refugees and asylum seekers a job, Vallie organised evening classes for them at local colleges, as well as affordable accommodation and, in some cases, food and living items from other businesses and organisations. All of these efforts were possible because of Vallie's long-developed network, that traced itself back to her activism of the 1980s. If it were reported to Vallie that a refugee or asylum seeker was being mistreated, she would phone up the DHA, within which she had identified contact persons and obtained their cell phone numbers. Alternatively, Vallie would head directly to the Refugee Reception Office to lodge a complaint. If someone were arrested, often in the middle of the night, she would head directly to the police station. Vallie also maintained contact with local NGOs to whom she would refer matters.<sup>77</sup>

As with her previous work, Vallie 'did' what had to be done at that particular moment, and with a keen knowledge of the surrounding politics. This high level of commitment and personal involvement became well-known, and was much valued by the refugee community, who would often come to her first for advice.<sup>78</sup>

### 3.4.3 National advocacy

As Vallie's work illustrates especially, the history of the South African anti-apartheid struggle, from the forming of political movements to social movements and civic networks and later NGOs, laid the foundations for national advocacy, realising hard-won democratic dispensations. The adaptability of these organisations' approaches provided the context for civic society initiatives to address 'new' issues, such as refugee and migrant rights protection, although not all shared Vallie's exceptional experience.

A critical analysis of national civic advocacy, as contained in chapters 4, 5 and 6 of this book, emphasises the importance of looking beyond policy norms, and the importance of well-informed and organised structures for monitoring and advocacy. In 1997, for example, organisations came together in a loose-knit initiative known as the Refugee Rights Consortium (RRC). The RRC lobbied the DHA as well as the Department for Correctional Services (Prisons) and Police for better treatment to refugees and asylum seekers at a national level. It also came together with regional

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<sup>77</sup> ('Interview with G. Vallie' 2006)

<sup>78</sup> The role of Vallie in the past, and the continued regard that organisations and individuals had for her, was reiterated by several others with whom I spoke. These included a High Court Judge, Parliamentarians, staff of the Legal Resources Centre, Black Sash, National Association of Democratic Lawyers, UCT Legal Aid Clinic, the Trauma Clinic and Bush Community Radio Station, as well as farm workers, members of the refugee community and countless others. Former solidarity activists working for the Holland Committee for Southern Africa also confirmed that Vallie was a highly respected figure, both locally and internationally.

networks (Forums) of service providers to refugees. The aim of all concerned was to be more structured in their approaches to advocacy and service provision. The civic society initiative on refugee issues that eventually emerged from these efforts, still aimed at engaging government, refugees and the UNHCR, became known as the National Consortium on Refugee Affairs (NCRA).

Much could be said about the work of the NCRA that goes beyond the scope of this study. While it originally embarked on a more confrontational advocacy strategy that sought to change the policy and treatment of refugees, in the last few years of its existence it tended to focus less on advocacy and more on awareness activities and maintaining communication with the DHA, with whom it collaborated in a backlog-reduction programme in 2001 and 2002. However, in 2006, under pressure from its members, the NCRA began to return to a more advocacy-oriented role. It issued a report that comprehensively assessed current failings within the refugee status determination procedure, including lack of access to refugee reception offices. Furthermore, it addressed issues concerning access to recognisable identity documents, access to livelihoods, arrest and deportation and the situation of unaccompanied refugee minors.<sup>79</sup>

In fact, it was openly recognised by 2006 that advocacy was a weakness of NGOs in South Africa. A survey by the University of the Witwatersrand on behalf of the Atlantic Philanthropies foundation identified advocacy as a major gap.<sup>80</sup> In any event, by 2007 the NCRA had dissolved, and was replaced by the Consortium on Refugees and Migrants in South Africa (CoRMSA), which produced a regular newsletter and appeared to return to a more proactive approach to civic advocacy. CoRMSA owed much to the efforts of researchers at the University of the Witwatersrand, which as a member of the NCRA had been one of the most vocal concerning the lack of a collective national advocacy strategy.

#### 3.4.4 Research centres

Research and teaching on migration, forced migration and refugee studies in South Africa and the region grew to be a major focus of universities, in South Africa and internationally, between 1996 and 2006. One of the earliest research programmes to be developed was the Centre for Migration Studies at the University of the Western Cape. The University of Cape Town's Faculty of Law began teaching refugee law in 1996, and conducted policy research on migration and refugee issues. This was followed by a similar programme established in the School of Law at the University of the Witwatersrand in Johannesburg. A Forced Migration Studies Programme (FMSP) was also established at the University of the Witwatersrand in 1997, and grew to be a major research and teaching programme on forced migration studies in South Africa. Furthermore, the Child Law Project at the Centre for Human Rights

<sup>79</sup> (Ncra 2006).

<sup>80</sup> (Palmary 2006).

in the Faculty of Law at the University of Pretoria began taking on a number of cases concerning refugee children, establishing some important legal precedents.

Other research centres and think tanks involved in migration and refugee issues during the period 1996-2006 have included the Community Agency for Social Enquiry, the Institute of Security Studies in Pretoria, the Centre for Policy Studies, the Centre for Development and Enterprise, the South African History Archive and the Human Sciences Research Council. The Institute for Democracy in South Africa (IDASA), a Cape Town-based NGO, set up a major programme with Queens University of Canada called the Southern African Migration Programme (SAMP), but by 2006 the Programme had begun to scale back its activities substantially.

Other international organisations concerning themselves with migration and refugee matters in South Africa included the Amsterdam-based Association of European Parliamentarians for Africa (AWEPA), the New York-based organisation Human Rights Watch, and Washington D.C.-based organisations US Committee for Refugees and Migration Policy Institute. The Refugee Studies Programme at Oxford University and Centre for Refugee Studies and Osgoode School of Law at York University in Canada also took a considerable interest in South African migration and refugee issues.

Research dialogues were facilitated by a series of (mainly) policy-oriented conferences between 1996 and 2006, mostly organised by SAMP. Lawyers for Human Rights organised a policy conference in March 1998, as did other research organisations such as the Human Sciences Research Council. The NCRA, with funding from the European Union Foundation for Human Rights in South Africa, commissioned a number of important research papers that addressed key policy issues. Furthermore, researchers within South Africa and abroad participated in the South African Immigration (SAIMMIG) e-mail list-server, established by Jonathan Klaaren at the School of Law of the University of the Witwatersrand in 1996, and the shorter-lived LHR-Refugees list-server, established in 1997 but disbanded two years later. The SAMP also circulated information, including a compiled listing of related news articles, to a list of subscribed e-mail addresses. The list-servers became an important platform for information-sharing and co-ordinated responses by lawyers, either in respect of individual cases or more generally on policy issues.

### **3.4.5 Lawyers' networks: policy feedback, advice and representation**

Lawyers' networks emerged between 1996 and 2006, focusing on policy reform and direct assistance to asylum seekers and refugees. A legal and policy sub-committee of the NCRA (and its predecessor, the Refugee Rights Consortium) provided an important platform for discussing policy issues. The lawyers who led these clinics were principally from the Legal Resources Centre in Cape Town and Lawyers for Human Rights, as well as University-based law clinics. There was also a handful of independent lawyers willing to handle refugee cases on a *pro bono* basis. However, their capacity to handle individual cases on an *ad hoc* basis was limited,

despite growing demand from asylum seekers and refugees who claimed their rights had been violated.

A key development came in 2000 when the UNHCR decided to fund a network of independent legal advice offices for asylum seekers and refugees, while simultaneously closing its direct advisory function. With funding from the UNHCR, Lawyers for Human Rights eventually established refugee law clinics in Pretoria, Johannesburg, Port Elizabeth and Durban.<sup>81</sup> The UCT Legal Aid clinic, which had a long track record of advising and representing asylum seekers and refugees, expanded its services to this community at the University of Cape Town with funding from the UNHCR.<sup>82</sup> The Wits Law Clinic at the University of the Witwatersrand in Johannesburg also expanded its services to refugees and asylum seekers. Even paralegal advisors handled some cases involving asylum seekers and refugees. In particular, the South African women's rights organisation Black Sash became particularly active through its Johannesburg office.<sup>83</sup> As discussed in chapter five, advice offices connected with the National Paralegal Association became involved in a project to advise former Mozambican refugees in 2000.

As the numbers of asylum seekers and refugees in South Africa increased, lawyers' networks began to rely increasingly on refugee networks for information about alleged violations.

### 3.4.6 Refugee networks

Refugees began to organise themselves in formal and informal structures to provide services and advocate on specific issues, particularly following the collapse of regionally based Refugee Forums. These structures included the Co-ordinating Body of Refugee Communities (CBRC), the Somali Association of South Africa, and the Union of Refugee Women in Johannesburg, as well as Refugee Pastoral Care in Durban. Through these networks, refugees became involved in national advocacy, established links with politicians and, together with lawyers' networks, initiated litigation. Furthermore, according to one, prominent refugee leader, refugee networks were among the first civic actors to have made contact with local government officials.<sup>84</sup>

### 3.4.7 Working with local government

In 2006, with relations between national government and civic organisations regarded by South African lawyers to be at an 'all time low' since 1994,<sup>85</sup> local government and local police forces became increasingly important counterparts for civic actors keen to improve the living conditions of asylum seekers and refugees

<sup>81</sup> ('Interview with J. Van Garderen (1)' 2006).

<sup>82</sup> ('Interview with F. Khan' 2006).

<sup>83</sup> ('Interview with A. Lane' 2006).

<sup>84</sup> ('Interview with D. Ndessomin' 2006).

<sup>85</sup> ('Interview with W. Kerfoot' 2006).

and their treatment by police officers and the public. Reflecting these new developments, the FMSP had published an important collection in 2004 on the prospects for working together with local governments.<sup>86</sup> The collection addressed the many challenges faced by the city of Johannesburg, NGOs and broader South African society in welcoming, accommodating and indeed actively integrating (or not) forced migrants into the community.

Partnerships between civics and local government emerged, including a Local Government Working Group set up by the FMSP at the University of the Witwatersrand in 2005, together with Johannesburg-based NGOs. By 2006, civic networks such as Tutumike had negotiated a Memorandum of Understanding with the City of Cape Town on how the municipal government should treat asylum seekers and refugees living in the city. A similar agreement has been made with the Johannesburg municipality. These agreements on 'city citizenship' and collaborative forums have gone much further than statements by national government departments in declaring the civil rights of migrants and refugees and their access to social and economic rights by the various municipal agencies.

### 3.5 FROM POLITICAL STRUGGLE TO SOCIAL TRANSFORMATION

As this chapter has illustrated, South Africa's refugee policy, and the civic actors that lobbied for it, have emerged from a history of political struggle; with democratic elections and the emergence of an accountable government in 1994, civic actors have shifted their focus to social transformation. This transformation has involved efforts not only to address massive social and economic inequalities in South Africa, but to engage with the African continent and the rest of the world. As South Africa has emerged from international isolation, it has opened its doors to refugees, the victims of persecution in other countries, shifting – as mentioned earlier – from being a refugee-producing to a refugee-hosting country.

Social transformation has not been easy. Institutionalised racism and the brutal methods of enforcement that were once sanctioned by the government have proven to be some of the greatest challenges that South Africa's government has had to contend with in its post-democratic period. This was illustrated in 2000 by a deeply disturbing episode, reported in the local and international press, of Mozambicans being used in live 'training exercises' for South African police dogs. Film clips showed terrified Mozambicans desperately trying to avoid the dogs, held by white police officers who appeared to be entertained by the experience. Mario Sevens, the Mozambique Minister of Labour, responded to these attacks, saying they were: 'abominable, horrible ... an assault against human rights',<sup>87</sup> and the South African Police Services, fully aware of how the incident rekindled memories of South Africa under apartheid, responded with similar sentiments.<sup>88</sup>

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<sup>86</sup> (Landau 2004).

<sup>87</sup> ('Condemnation of SA Police Brutality' 2000).

<sup>88</sup> (Belvedere 2006: 217).

As previously indicated, and with an open acknowledgement that there are gaps in national advocacy, civic actors have been engaged in a process of reflection on what roles they can constructively fulfil through civic-state interactions, either in assisting the government to meet its human rights obligations, or in holding the government accountable for its failure to meet these obligations. Accordingly, the following three chapters explore interactions in which civic actors helped to frame the content of a government-proposed refugee policy, assisted the government in the implementation of a policy, or confronted the government when its policies or practices fell short of its national and international obligations towards refugees in South Africa.





## **CHAPTER 4**

### **NO EASY WALK: CIVIC PARTICIPATION IN REFUGEE POLICYMAKING**

#### **4.1 INTRODUCTION**

This chapter presents the book's first example of advocating state accountability through co-operative interactions by civic actors in order to promote the rights of refugees in South Africa; more specifically, it focuses on the co-operative interplay between civic actors and the government in the process of policy development. I contrast this example of co-operative interplay against the book's three theoretical propositions: (1) The capacity of civic actors to hold states accountable is shaped by structural changes in the normative framework. (2) Boundaries that define the structural relationship between civic actors and the state must be appreciated if they want their interventions to lead to structural change. (3) Civic actors play a crucial role in mediating the translation of international legal norms into a locally relevant context; legal process is interactional.

The analysis in this chapter draws on Archer's analytical dualism approach to explain the interplay between civic actors and the South African state in order to promote the state's human rights obligations towards refugees. This approach sees civic agency as heavily conditioned in its interplay with state-created structures that civic agency ultimately seeks to elaborate.<sup>1</sup> This approach is relevant to examining not only the process of refugee policymaking, but also the process of policy implementation, as discussed in chapter five. In both cases, civic agency is conditioned in how it can respond to the government's legal and administrative implementation structures; and yet, as the illustrative examples in this chapter show, there is still some scope for elaborating these administrative structures and, in so doing, promoting structural change.

According to this approach, civic participation at both international and national levels – whether in state or government-led processes – has a limited, but potentially significant, impact in policymaking and enhancing state accountability to promote, protect and fulfil internationally-constructed human rights obligations.

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<sup>1</sup> (Archer 1996).

Perspective plays a significant role in examining the interplay between civic actors and the government. Trans-national elites who participate in global policy process (including the NGOs and academics mentioned in this chapter) have a very different perspective to national or local civic actors. As Merry argues, ‘national and local actors who participate in transnational events and bring home what they learn ... are the key players negotiating the divide between transnational actors and local activists’.<sup>2</sup> Accordingly, civic actors fulfil the role of what Merry describes as ‘translators’, mediating the process of applying global rules to local contexts.<sup>3</sup> Clearly, the relative remoteness of a civic actor is also linked to how legitimate a translator will be regarded by local constituencies. Kidder’s notion of externalisation, or social distance between the government lawmaker and civic actors, also explains how a given civic intervention has the potential both to lead to structural change and to impact on a civic actor’s critical independence. Social distance between the lawmaker (in this case the government of South Africa) and various local and transnational civic actors is revealed by divergences in meaning, interests and political positions. These divergences, which emerged during the framing as well as the implementation of refugee policy in South Africa, are partly revealed in the externally-grounded reasons that civic actors and the government had for participating in the refugee policymaking process.

The first part of this chapter explains how a political space emerged – internationally and in South Africa – for civic actors to participate in policymaking processes. The second part explains the context in which a formal refugee policy emerged in South Africa, but was regarded by civic actors as unconstitutional. The third part of this chapter traces civic involvement in the development of South Africa’s first comprehensive refugee policy, explaining how the policy emerged from competing forces within government and among civic actors. The outcome was that the refugee policy process fell between two ‘tracks’, one of which led to the Refugees Act of 1998, and the other becoming a hotly-contested debate over two very different visions of what a refugee policy ought to contain. The final part of this chapter evaluates the refugee policymaking process and the corresponding roles of civic actors and other external actors in this process, followed by an explanation of the principal challenges that emerged once the refugee policy finally came into force in April 2000.

## 4.2 AN EMERGING SPACE FOR CIVIC PARTICIPATION IN POLICYMAKING

The political space that emerged for civic actors to participate in policy processes in the 1990s in South Africa can be seen as part of what Ignatieff has characterised as a global human rights advocacy revolution.<sup>4</sup> Higgins has provided a similar expla-

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<sup>2</sup> (Merry 2006b: 20).

<sup>3</sup> (Merry 2006a).

<sup>4</sup> (Ignatieff 1999).

nation, in international law terms, as a space in which civic actors participate in international legal process alongside states and international organisations.<sup>5</sup> The fact that international legal process involves multiple participants, all of whom have capacity to influence the outcome of the process, is similar to the potential that civic actors have to enhance state accountability at the national level, which is principally where social justice aspirations are realised.

As discussed in the previous chapter, up until 1994 the government of South Africa was closed to civic interactions, especially in the area of human rights; although at the international level, civic actors were key players, mobilising for the isolation of the country's former apartheid regime, regionally and in the United Nations. Once South Africa resumed its functions within the United Nations and normalised its diplomatic relations with countries that had long isolated it, the role of civic actors in the country also shifted dramatically. Having resisted, challenged or shamed the previous, authoritarian government, civic actors could then play an important role in bolstering the democracy-building efforts of the new government.

There are two dimensions to civic participation in the area of human rights policymaking – and, by extension, refugee rights policymaking. First, civic actors participate in international legal process, enhancing state accountability where global rules are made, and bringing a local context to this process. Second, civic translators assist government in formulating locally relevant policy responses and administrative structures to reflect these global rules.

#### 4.2.1 Participation in international legal process

Civic participation in international legal process is mainly facilitated through the acquisition of formal, accredited status with international organisations.<sup>6</sup> The international structures that civic agents interact with to promote state accountability include legal and political mechanisms that oversee state implementation of internationally binding obligations.

A growing literature<sup>7</sup> has illustrated the multi-dimensional participation of civic organisations promoting state accountability on the basis of international human rights law. The most well-known examples are the international human rights organisations Amnesty International and Human Rights Watch.<sup>8</sup> South African organisations established to defend human rights nationally have also participated in

<sup>5</sup> (Higgins 1994).

<sup>6</sup> For example, consultative status through the Economic and Social Council in the United Nations system and observer status at the African Commission on Human and Peoples' Rights.

<sup>7</sup> (Korey 2003); (Welch 2001) and (Keck and Sikkink 1998).

<sup>8</sup> Discussed by (Brown 2001) and (Winston 2001). Other human rights organisations include the International Commission of Jurists (ICJ), International Human Rights Federation (FIDH) and Interrights. Organisations have also gained prominence advocating for the defence of international human rights through regional mechanisms. These include the African League for the Defence of Human Rights (RADDHO), International Helsinki Federation for Human Rights, Derechos, Asian Human Rights Commission and Statewatch.

international meetings, fulfilling the roles of ‘upward’ translators of the local South African context during these meetings.

Whatever their geographical area of focus, the agency wielded by civic organisations to promote state accountability is always conditioned by legal and political structures and institutions established by states, either individually or as part of international and supra-national institutions such as the United Nations. One relevant example of the interplay between civic agents and the state-established structures they seek to elaborate and reform is the work of the Executive Committee of the UN High Commissioner for Refugees (ExCom).<sup>9</sup>

The ExCom is the principal global structure promoting legal and political accountability of states who are state parties to the 1951 Convention (and 1967 Protocol) Relating to the Status of Refugees. It is also mandated to ‘advise the High Commissioner, at (his) request, in the exercise of (his) functions under the Statute of his Office’.<sup>10</sup> This mandate includes the formulation of policies for refugee protection and humanitarian responses. While the principal participants in the ExCom are representatives of states that have ratified the Convention and Protocol, other states and international organisations (including those on a regional basis) are invited to attend and participate as observers.<sup>11</sup> Civic organisations are permitted not only to attend meetings, but to make interventions, although these are generally limited to one collective intervention per agenda item. At each annual meeting of the ExCom, conclusions on International Refugee Protection are drafted.<sup>12</sup> These conclusions are much cited by civic actors and regarded by many courts as definitive statements of international refugee law.

South African NGO Lawyers for Human Rights (LHR) began participating actively in meetings of the ExCom from 2000, and was especially active in 2001 during the ‘Global Consultations on International Protection’ of the United National

<sup>9</sup> Unsubstantiated assertions in this section are based on the author’s many years of experience working within the UN system, and particularly at meetings of ExCom. ExCom organises its considerable agenda through a steering committee, which each year holds two Standing Committee meetings in the first and second quarters of the year, and an annual meeting, usually held in the last quarter of the year.

<sup>10</sup> (Statute of the UN High Commissioner for Refugees 1957: Section 5(b)).

<sup>11</sup> Examples include states not party to the 1951 Convention, but who still participate actively, such as Pakistan, as well as the UN Relief and Works Agency (UNRWA), the World Health Organisation, the African Commission on Human and Peoples’ Rights and the Palestine Liberation Organisation.

<sup>12</sup> NGO participation is co-ordinated by the International Council of Voluntary Agencies (ICVA), which comprises a network of several hundred international and national organisations representing every continent. Civic actors have not only contributed to the formulation of policy guidelines, such as ExCom Conclusions. They have also drafted treaty language. The drafting of treaties is principally the responsibility of states as guided by the (Vienna Convention on the Law of Treaties 1980). However, from the earliest work of the United Nations system, NGOs have participated actively in state-led policy debates, particularly within the United Nations system. (Welch 2001: 88) refers to the role of Amnesty International in proposing treaty language at UN meetings as ‘the organization’s area of most lasting impact (and) show that AI was a leader rather than a follower on the normative front’.

High Commissioner for Refugees (UNHCR).<sup>13</sup> The South African National Consortium on Refugee Affairs (NCRA, now CoRMSA) has also attended ExCom and Pre-ExCom<sup>14</sup> meetings. Despite their relative lack of experience within the UN system, South African NGOs have played a prominent role in these consultations. For example, LHR made multiple submissions to the 2001 Global Consultations on socio-economic rights,<sup>15</sup> on the Article 35 supervisory mechanism,<sup>16</sup> and on the migration-asylum nexus.<sup>17</sup> This was thanks to a close and amiable relationship between LHR staff and the NGO Liaison Officer of the UNHCR, and with the Chair of the Executive Committee, who in 2001 happened to be the first secretary of the South African High Commission in Geneva. LHR also built strategic and amiable relationships with large and experienced NGOs such as Amnesty International, Jesuit Refugee Services, Human Rights Watch, UN Quakers Office, Lawyers Committee for Human Rights, International Catholic Migration Commission and International Council of Voluntary Agencies, as well as prominent regional networks, including the Senegal-based pan-African Human Rights NGO RADDHO. The organisation has since also been actively involved in a global network on asylum and migrant detention issues.<sup>18</sup>

Beyond the value of networking with similarly-minded organisations, attending meetings such as the ExCom has allowed South African civic organisations to acquire relevant knowledge and skills regarding how international legal process operates, which has increased their level of legal consciousness. Furthermore, when informed about the local perspective in which these global rules are to operate, the ‘double consciousness’ that they possess has given civic actors the capacity not

<sup>13</sup> This initiative of the UNHCR Division of International Protection, which was chaired by the government delegation from South Africa, coincided with the 50<sup>th</sup> Anniversary and meeting of State Parties to the 1951 UN Refugee Convention as well as the *Agenda for Protection* in December 2001.

<sup>14</sup> Meetings of the ExCom are preceded and often paralleled by a series of preparatory meetings organised by NGOs and UNHCR. Known as Pre-ExCom, these meetings provide an opportunity for NGOs to formulate or consolidate their positions on key refugee protection issues, and to meet, interact and debate with each other, with state delegates and especially with the UNHCR, particularly on issues that are to arise in the course of the committee’s agenda.

<sup>15</sup> *NGO Statement: Social and Economic Rights*, Written and oral submission drafted by Lawyers for Human Rights. Presented to the UNHCR Standing Committee, Executive Committee of the High Commissioner’s Programme, Palais des Nations, Geneva, 25-28 June 2001.

<sup>16</sup> *African Perspectives on Article 35 Supervision of the 1951 Refugee Convention and Complementary Monitoring Mechanisms*, Written submission to the UNHCR Global Consultations on Refugee Protection (Third Track, Cambridge Round), produced by WARIPNET and RADDHO (Senegal), Africa Legal Aid (Ghana) and Lawyers for Human Rights (South Africa), 9-10 July 2001.

<sup>17</sup> *NGO Background paper on the Refugee and Migration Interface*, Written submission produced by several NGOs and presented to the UNHCR Global Consultations on International Protection, Palais des Nations, Geneva, 28 – 29 June, 2001.

<sup>18</sup> Confirmed by (‘Interview with J. Van Garderen (1)’ 2006). Van Garderen was co-ordinator of the Refugee Rights Project of Lawyers for Human Rights from 1999 – 2006.

only to inform global processes, but also to strengthen the translation of these rules into locally relevant policy responses.<sup>19</sup>

#### 4.2.2 Locally-relevant policy responses

Just as South African human rights organisations have participated in meetings at the international level, alongside international human rights organisations such as Human Rights Watch, both South African and international organisations have been involved in monitoring violations and policy issues at the national level. In this way, civic actors have fulfilled the role of ‘downward’ translators of globally established rules into locally relevant policy responses.

States tend to feel constrained in terms of what implementing national legislation can encompass. Civic organisations fulfil a crucial role in ensuring that domestic laws are translated in order to reflect a State’s treaty obligations. Civic organisations monitor whether national laws conform to treaty language, sometimes adopting the very same language, word for word,<sup>20</sup> but they also seek to ensure that national laws reflect local realities. However, civic organisations do not always take a progressive position. They can also be highly protectionist, taking a very restrictive position on a country’s international obligations regarding human rights in general and refugee rights in particular.

For example, Schrag has illustrated civic society and state interaction in the realisation of international refugee rights norms through a process of law-making in the United States.<sup>21</sup> In the USA, the role of civic society has been polarised by progressive<sup>22</sup> and protectionist<sup>23</sup> elements. These contradictory roles have sought to steer legislation in one direction or another. Civic organisations and individuals advocating for a rights-regarding refugee policy in the USA have had to compete against other civic organisations advocating for stronger borders and annual limits on the number of immigrants,<sup>24</sup> as well as corporate<sup>25</sup> and media<sup>26</sup> interests. The

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<sup>19</sup> (Merry 2006b: 217).

<sup>20</sup> For example, (Achieng 1999), of the NGO Foundation for Human Rights International (FHRI), explains how this was achieved in Uganda in the area of penal reform.

<sup>21</sup> (Schrag 2000), *passim*.

<sup>22</sup> These included organisations which insisted that the United States incorporate language consistent with the 1951 UN Refugee Convention, as interpreted by several decades of national and international jurisprudence and state practice.

<sup>23</sup> These included organisations which insisted that the policy incorporate a restrictive approach that aimed at a largely white (i.e. European-descended) population, and generally aimed to reduce overall migration to the United States.

<sup>24</sup> (Schrag 2000: 41-42). These included interventions from an organisation calling itself the Federation for American Immigration Reform (FAIR) and the Pioneer Fund, which operated from the 1920s.

<sup>25</sup> (Schrag 2000: 41, 55) illustrates the roles of airline companies who were motivated to reduce passenger waiting times and the costs of detention of undocumented migrants.

process of policymaking has also involved extensive input from experts<sup>27</sup> and NGOs<sup>28</sup> who have supported their arguments by reference to international human rights law and international refugee law.

A very similar dynamic has existed in South Africa, where civic society has played a progressive role in translating a broad range of international human rights norms into binding legal and social norms at the national level. But civic organisations in South Africa advocating on immigration, refugee, and border control issues have also represented protectionist elements. Protectionist organisations in South Africa have to some extent been a product of the apartheid era. For example, the Human Sciences Research Council (HSRC), an independent research institute, produced a report in 1993, based on dubious research methodologies, which suggested that millions of immigrants were flooding into the country, and recommended that South Africa strengthen its borders as a matter of national security.<sup>29</sup> The Institute of Security Studies, another South African organisation founded by former South African military officers, referred to this report as ‘one of the best books on the subject of undocumented population movements in Southern Africa’.<sup>30</sup> While both the HSRC and Institute of Security Studies have since undergone significant changes and produced more robust research with a stronger focus on South Africa’s international and domestic human rights obligations,<sup>31</sup> some organisations, including the Helen Suzman foundation, a self-professed liberal organisation, have remained deeply xenophobic, as summed up in a 2004 article that argued:

With illegal aliens streaming across our borders at the rate of one million per annum, we are literally importing “Africa” into our country. Logically, within twenty to thirty years, the quasi-Western experiment known as South Africa will be no more, and Johannesburg or Pretoria will look like Nairobi, Lagos or Luanda.<sup>32</sup>

Progressive organisations in South Africa dealing with immigration, refugee and border control issues have tended to outnumber protectionist organisations, both in terms of number and their degree of influence on policy issues. As discussed in chapter three, progressive organisations on refugee and migrant issues have grown in number since 1996, encompassing a diverse range of legal, social services, aca-

26 (Schrag 2000: 40–43) explains the role of a popular US news programme called *60 minutes*, which ‘transformed asylum procedure from an arcane subject of interest only to those who followed administration of the immigration laws into a hot political issue’.

27 (Schrag 2000: 46–50) refers to individual experts, many based at US law schools and familiar with the functioning of the UN and with considerable knowledge of international law, who provided extensive inputs to the policy process at multiple stages in the legislative process.

28 (Schrag 2000: 34, 38, 45, 49, 55) describes the efforts of multiple NGOs, including the Lawyers Committee for Human Rights, American Bar Association, American Civil Liberties Union and others, drawing reference for their arguments from an extensive knowledge of international law.

29 (Minaar et al. 1996).

30 (Solomon 1998: 1).

31 (Hadland 2008) and (Steinberg 2005).

32 (Roodt 2005: 4).



demic and religious perspectives. Of particular interest are two organisations discussed later in this chapter; Lawyers for Human Rights, and the UCT Legal Aid Clinic at the University of Cape Town. From the mid-1990s, both organisations developed a combination of legal advice services for asylum seekers and refugee capacity-building programmes for lawyers, NGOs, police officers and other officials, and applied policy research and advocacy on refugee and migrant rights at both national and international levels. Furthermore, both organisations were active from an early stage in the development of a comprehensive refugee policy, as discussed in the following sections, and – as they both have a ‘dual consciousness’ – became important translators of global rules on refugee protection in the South African process of refugee policymaking.

### 4.3 AN EMERGING SPACE FOR CIVIC PARTICIPATION IN REFUGEE POLICYMAKING IN SOUTH AFRICA (1991-1996)

While chapter three discussed the origins of South Africa’s immigration, refugee and border control policies, this section explains more specifically how a political space emerged for the participation of civic actors in a refugee policymaking process. South Africa’s wide-ranging Constitution laid the normative basis for a participatory democracy, and became a guide for civic participation in policy formation, policy implementation and policy enforcement interventions. The Constitution incorporated long-standing universal values,<sup>33</sup> and the process of forming it involved numerous civic translators. These translators advocated strongly that the document not merely repeat the texts of its predecessors,<sup>34</sup> but reflect the challenges the country faced in overcoming centuries of institutional discrimination and oppression, which also had universal resonance.

However, South Africa’s constitutional dispensations prepared neither the state nor civic organisations for the myriad human rights challenges they faced as they began to interact in collaborative efforts to build South Africa’s nascent democracy. One of the most significant challenges faced, from the early 1990s, was how to deal with a sizeable population of former Mozambican refugees, as well as individuals and groups who began to arrive in South Africa in growing numbers to apply for refugee status, shifting the country’s position as a refugee ‘producing’ to a refugee ‘hosting’ country. As with the process of Constitution-drafting, efforts to form a policy on refugees was guided by a small, but significant, group of civic translators, who drew upon international guidelines and policies to protect refugees, as well as referring to South African constitutional and administrative law.

<sup>33</sup> (Sachs 1990); (Sachs 1992) and (Spitz and Chaskalson 2000), *passim*.

<sup>34</sup> The former colonial administrators drafted most of the Constitutions of newly liberated countries in Africa.



### 4.3.1 South Africa's nascent refugee policy

South Africa developed a basic policy on refugees in the early 1990s. As it became more widely known throughout the world, and particularly the African continent, that South Africa was undergoing a negotiated transition to democracy, confirmed by the well-publicised release of Nelson Mandela in 1990, South Africa's reputation as a potential place of refuge for persons fleeing persecution and war was secured. In fact, South Africa had already assessed applications for refugee status as early as 1991 when – as mentioned in the previous chapter, three Russian women who worked at the Russian embassy declared their intentions to 'defect' from their country and approached the South African government for political asylum.

With increasing numbers of persons applying for refugee status in South Africa from the mid-1990s, it became clear that South Africa's *ad hoc* approach was inadequate, and the government was obliged to formalise its policy. The first objective of the government was to clarify which department was to be designated as responsible for asylum determination and liaising with the UNHCR.<sup>35</sup> Secondly, formal procedures were put in place to deal with individual applications for political asylum.

#### *Clarifying departmental responsibility*

As the numbers of asylum applicants increased, the government identified the need for a single department to take responsibility for the processing of individual applications. According to the former head of the refugee affairs section, at some stage there was consideration given to the idea that it would be more appropriate for Foreign Affairs to be responsible for handling the applications of asylum seekers.<sup>36</sup> However, having handled the case of the Russian defectors and, more significantly, being responsible for immigration control, the Department of Home Affairs (DHA) was a more obvious choice.

A further proposal that was discussed, and which was approved in principle by then-Director-General of Home Affairs Piet Coleyn, involved NGOs playing a role in making status determinations.<sup>37</sup> Claude Schraevesande of DHA approached the Legal Resources Centre (LRC), a South African NGO established in the late 1970s, with such a proposal. However, aware of its independent and critical role, LRC swiftly made it clear to DHA that 'we are not here to work with government, we are here to ensure government toes the line'.<sup>38</sup> According to Schraevesande, the proposal

<sup>35</sup> Up until 1993, there was considerable overlap between the Ministries of Foreign Affairs and Home Affairs.

<sup>36</sup> ('Interview with C. Schraevesande' 2006).

<sup>37</sup> ('Interview with C. Schraevesande' 2006) This would have been consistent with the prominent role being played by NGOs in various consultative forums that supported the negotiated transition, most encapsulated within the context of negotiations at the Conference for a Democratic South Africa or CODESA, as discussed in (Spitz and Chaskalson 2000), *passim*.

<sup>38</sup> ('Interview with C. Schraevesande' 2006).

was eventually ‘scuttled by the Department’ and the DHA developed internal procedures for the handling of asylum applications.

Schravesande, tasked by Director-General Coleyn to develop institutional capacity on individual asylum status determinations in advance of the Mozambican voluntary repatriation, and liaising with the UNHCR (acting in its advisory capacity), set up what became the Refugees Directorate at DHA. The Directorate immediately began drafting a formal policy on refugee status determination.

#### *A formal policy on refugee status determination emerges*

South Africa’s formal policy on refugee status determination emerged from *ad hoc* policy measures issued in terms of the notorious Aliens Control Act of 1991. From 1993 until 2000, the legal normative framework for administering status-determination procedures in South Africa consisted of *ad hoc*, internal departmental policy circulars and passport control instructions issued in terms of the notorious Aliens Control Act of 1991.

Although South Africa’s pre-1991 migration policy was explicitly racist, based on the government’s policy of apartheid, it remains debatable whether South Africa’s post-1991 migration policy should be seen as explicitly racist, although it was undoubtedly unconstitutional.<sup>39</sup> However, the nature of South Africa’s enforcement of the 1991 policy most certainly was racist, reflecting institutionalised, xeno-racist attitudes within South Africa.<sup>40</sup> The discretionary powers provided by the Aliens Control Act allowed for *ad hoc* procedures for refugee status determination. However, this same discretion also led to arbitrariness, which the Constitution prohibited.

As discussed in chapter two, the guidelines that the Department of Home Affairs (DHA) developed to make a retrospective recognition of Mozambican refugees through a ‘Basic Agreement’<sup>41</sup> provided the DHA with a template for making individual status determinations on asylum applicants from other countries. In consultation with and on behalf of the Director-General of Home Affairs, and advised by the UNHCR, the DHA’s new Refugees Directorate built on the Basic Agreement template and introduced a series of passport control instructions, department circulars and amendments to the passport manual. All of these policy instruments were issued in terms of the Aliens Control Act. Passport Control Instruction numbers 20 and 23 of 1994, accompanied by various forms, laid down the main procedures for individual status determinations,<sup>42</sup> while other policy measures provided procedures

<sup>39</sup> (Klaaren 1998), *passim*. Government restrictions on migrants are a global phenomenon, and South Africa was not unique in this regard. Common to many states, the 1991 policy favoured restrictionism above humanitarianism, reflecting the position most states continue to hold.

<sup>40</sup> (Handmaker and Parsley 2001), *passim*.

<sup>41</sup> (Basic Agreement 1993).

<sup>42</sup> DHA, Passport Control Instruction No. 20 of 1994 (“Guidelines for Refugee Status Determination of Mozambicans in South Africa”) and DHA Passport Control Instruction No. 23 of 1994 (“Amendment to ... No. 20 of 1994”), DHA Forms BI-1590 (“Eligibility Determination Form”),

on how to deal with ‘stowaways’ who smuggled themselves into the country.<sup>43</sup> Measures were also taken to enable recognised refugees to be provided with travel documents.<sup>44</sup>

The Aliens Control Act, which was accompanied by an almost indecipherable mass of regulations, policy circulars and passport control instructions, was still fundamentally oriented around security and control, and provided no guarantee of just treatment for migrants and refugees. While there was talk in 1994 of new legislation being introduced as a result of discussions between the DHA and the UNHCR,<sup>45</sup> a serious initiative to produce a comprehensive refugee policy did not emerge until years later.

The Aliens Control Act of 1991, which provided for the *ad hoc* policy on status determinations, was amended in 1995 by South Africa’s democratically elected Parliament. The intention was to eliminate some of the Act’s more extreme measures, such as a bar on judicial review of the Department’s decisions.

However, as Ramjii and Klaaren argued, ‘the amendments were minor and the structures introduced have failed to make any significant impact’.<sup>46</sup> The two significant changes were removal of the ‘ouster clause’ that prevented courts from reviewing decisions of administrative officials taken under the Act, as well as section 55(5), which mandated periodic judicial review of persons in detention.

#### 4.3.2 Constitutionality questions

The collection of *ad hoc* measures that formed South Africa’s nascent refugee policy in terms of the Aliens Control Act raised serious questions about its constitutionality, even in its amended form.<sup>47</sup> Furthermore, as the numbers of individual asylum applicants in South Africa began to increase significantly, the administrative capacity of the government quickly became overwhelmed.

To some extent, the policy incorporated internationally recognised legal terminology in the recognition and treatment of persons seeking asylum. However, the policy still fell short of international standards in numerous respects, most fundamentally the lack of clear guidelines on status determination, and the lack of due process guarantees. The absence of a comprehensive refugee policy became more

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BI-1594 (“Information Leaflet”), BI-1595 (“Status Determination Questionnaire”) and DHA Guidelines BI-1596 (“Status Determination - Mozambican Refugees in South Africa”).

<sup>43</sup> DHA, Passport Control Instruction No. 63 of 1994.

<sup>44</sup> DHA, Passport Control Instruction No. 33 of 1995, which also included an amendment to the Passport Manual.

<sup>45</sup> (‘Legislation on Refugees Pending’ 1994: 4).

<sup>46</sup> (Klaaren and Ramji 2001: 35).

<sup>47</sup> (Klaaren 1996); (L. De La Hunt 1998) and (Klaaren and Sprigman 2008), *passim*.

apparent after the government of South Africa acceded to the two major international refugee conventions, by January 1996.<sup>48</sup>

But despite these formal commitments, lawyers and other refugee rights advocates made it clear that nothing less than new legislation would satisfy, and the Department of Home Affairs agreed with them, at least initially. This mutual recognition led to various policymaking processes. As discussed in the following section, from 1996, various civic actors participated in policy task teams, and in other ways, to develop policy and legislation on refugees. By invoking South Africa's international obligations, civic actors fulfilled a key mediating role in helping to translate the government's ratification of key international instruments protecting refugees – and, generally stated, human rights commitments – into locally relevant policies. The contributions of civic actors in formal, government-led task teams were paralleled by civic workshops and seminars to debate and clarify civic positions on refugee protection issues, and to lobby for their incorporation.

#### 4.4 CIVIC CO-OPERATION IN FORMING A REFUGEE POLICY IN SOUTH AFRICA (1996-2006)

The refugee policy-making process in South Africa's constitutional democracy illustrates how civic-state co-operative interactions sought to 'correct' the normative framework in forming a comprehensive and rights-regarding refugee policy. Civic actors invoked the rights of foreign nationals in international law and, in particular, the rights of refugees, which was implicit in the South African government having assented to the two major international refugee Conventions. In addition, civic actors appealed to the broad remit of South Africa's constitution.<sup>49</sup>

The process of forming a new refugee policy involved multiple stakeholders. These included various government departments, and in particular the Department of Home Affairs (DHA). Inter-governmental organisations such as the UNHCR were also involved, as were 'section nine institutions', such as the Human Rights Commission.<sup>50</sup> Civic participation included lawyers, academics, social workers and NGOs, both South African and from abroad, and other civic organisations, including representatives from within the refugee community in South Africa.

<sup>48</sup> This was the (OAU Refugees Convention 1969), acceded to by South Africa on 15 December 1995 as well as the (Convention Relating to the Status of Refugees 1951) and the (Protocol Relating to the Status of Refugees 1967), both acceded to by South Africa on 12 January 1996.

<sup>49</sup> Nearly all rights in the Bill of Rights of the (South African Constitution 1996) refer to 'everyone', with the exception of political and citizenship rights, Articles 19 and 20; the right to enter, remain and reside, Article 21(3); the right to a passport, Article 21(4), and the right to freely choose a trade, occupation or profession, all of which are reserved for 'citizens'.

<sup>50</sup> This refers to section nine of South Africa's Final Constitution (1996), which provided for various supervisory agencies to promote and protect the constitution. Beside the Human Rights Commission, other agencies referred to in section nine include the Commission on Gender Equality, the Auditor-General, and the Public Protector (Ombudsman).

Efforts to form a new refugee policy were initially conciliatory. South African NGOs established the Refugee Rights Consortium in September 1996. Government officials showed a willingness to engage with civic actors in open and critical policy debates. While the South African government's early attempts to assist refugees in its territory were very much *ad hoc*, they did provide a basis of co-operation with the UNHCR and, to some extent, civic partners in the collaborative policy-making initiatives that emerged. This mutual recognition of the need for a new refugee policy led to a process that was divided roughly into two separate tracks.

The first track, driven by the government's draft policy proposals, led to a workshop in 1996 at the South African Human Rights Commission, and was followed by the formal appointment of a government-led policy task team and, eventually, debates in parliament. Civic inputs into this first track formed direct inputs into the government-driven policy-making process that produced the Refugees Act in 1998, although the Act did not come into force until 2000.

The second track comprised various parallel debates that formed an important indirect contribution to the first track policymaking process. The second track included the South African government delegating co-ordination of what became known as the Green Paper process<sup>51</sup> to an NGO. This almost completely parallel process fed into an academic discussion that bore little substantive relation to the refugee policy that ultimately emerged. Nevertheless, the outcome of the Green Paper process did make a significant local contribution to a hotly contested debate, which had been going on at the global level for some time. One side of this debate argued that refugee law ought to be 'reformulated' in order to meet the interests of states. The other side argued that refugee law be pragmatically 'reinvigorated' through principled enforcement of South Africa's administrative laws and human rights, in order to realise the original intentions of the Refugees Convention, and South Africa's constitutional obligations to all residents of the Republic.<sup>52</sup>

Particularly in the first track, but to some extent also in the second, government-determined structural boundaries emerged that conditioned the degree to which civic agency could influence the outcome of the policy process and therefore 'elaborate' the structure itself. Furthermore, all stakeholders in both tracks had externally grounded reasons for participating in the policymaking processes. Divergences between the civic and state actors in their respective interests, meanings and political positions characterised the 'social distance' between them and other key external actors in the policymaking process, such as section nine institutions and representatives of the UNHCR.

<sup>51</sup> A 'Green Paper' is a discussion document that could potentially become government policy at a later stage.

<sup>52</sup> A further 'track' beyond the scope of this book concerned (limited) inputs by civic actors in the development of the South African government's 'Collective Approach to Border Control' in the mid-1990s. See (Schneider 1997), *passim*.

#### 4.4.1 Early debates on DHA's draft policy and the first Refugee Bills (track 1, phase 1)

As early as 1995, debates took place on a 'first draft Refugee Bill', which was released by the DHA to limited public comment. It was discreetly circulated to national and international institutions as well as to a selected number of civic actors, and resurfaced in 1996. Ghaith Al-Omari of the Refugee Studies Programme at Oxford University provided some minor feedback on the draft. Additional feedback was provided by Lee Anne De la Hunt, a practising attorney in Cape Town; Canadian law Professor James Hathaway; and Dennis McNamara and Kemal Morjane, both of the UNHCR.<sup>53</sup>

The first draft bill was reworked by the DHA and presented as a 'second draft bill', in time for two workshops in November 1996. While the second draft bill did not present a substantial departure from the *ad hoc* policy that had been implemented in terms of the Aliens Control Act 1991, the willingness of the DHA to engage with civic organisations came as a welcome surprise. The workshops took place at the offices of the then-recently established South African Human Rights Commission (SAHRC).<sup>54</sup> The workshops were organised by LHR and the Wits Refugee Research Programme, in collaboration with the SAHRC, under the banner of the Refugee Rights Consortium.

The DHA sent mostly high-profile representatives to the meeting, including then-Director of Refugee Affairs Claude Schraevesande, as well as the drafters of the Refugees Bill, Chief Director of Legal Services Attie Tredoux and DHA lawyer Michael Hendrickse. Schraevesande later acknowledged that these meetings provided unique opportunities for the DHA to form policy in direct consultation with NGOs.<sup>55</sup>

Also attending were representatives from the Departments of Correctional Services and Safety and Security, as well as from Lawyers for Human Rights, Legal Resources Centre, Cape Town Refugee Forum, Centre for Applied Legal Studies and Refugee Research Programme of the University of the Witwatersrand and the UNHCR. At the time the workshop took place, the relationship between civic organisations and the DHA was so positive that the Deputy Minister of Home Affairs sent a letter to Lawyers for Human Rights and other civic participants in the workshop, stating that:

I am particularly glad that finally the NGO's and the Department of Home Affairs are in the process of working out a partnership to deal with this very important matter. I need to assure you of my genuine appreciation for the work your Consortium

<sup>53</sup> (Al-Omari 1996). On the second draft, see (Hathaway 1996); (L.A. De La Hunt 1996), and (McNamara and Morjane 1996), *passim*.

<sup>54</sup> As mentioned above, in terms of section nine of South Africa's constitution, the SAHRC is mandated to monitor government policies and practices and their compliance with South Africa's constitution.

<sup>55</sup> ('Interview with C. Schraevesande' 2006).

is doing and I hope that the Government of the Republic of South Africa can render all the assistance possible. As for my part, I will ensure that I lobby my colleagues in Government for their support.<sup>56</sup>

The objectives of the workshop were to ‘engage the Department of Home Affairs’, among others, in order to ‘identify existing deficiencies ... determine what steps need to be taken to correct these ... (and) determine which role the participants should play’. Related objectives were to clarify discrepancies between policies and practice, improve co-ordination and communication, and improve access to the procedure.<sup>57</sup>

Following presentations by the DHA and civic actors, the workshop discussed a range of different concerns. These included the situation of unaccompanied children, excessive delays in processing applications, concerns over the composition of a one-man ‘appeal board’, language difficulties that inhibited communication with asylum seekers, the detention of asylum seekers and refugees, and the role of the UNHCR in all these matters. ‘Task groups’ were to be set up by civic actors on a wide range of issues, from administrative justice and detention, to social welfare issues.<sup>58</sup>

Smith claimed that that a certain official at the November workshops was ‘out of his depth’,<sup>59</sup> which in a sense was true. However, by the same token this criticism could have applied to nearly all who were present at the workshops, civic actors and government representatives alike. No one, with the exception of Pia Prütz Phiri, a senior lawyer from the UNHCR, had extensive knowledge or experience in international refugee law issues. Consequently, the workshop – and the policy discussions that followed – focused on human rights and, especially, the administrative justice concerns of the refugee policy then in existence. Some, in particular the reformulation advocates, disputed whether this was the ‘proper approach’, as discussed later in this chapter.

The workshops did allow for open and critical exchanges, and in September 1996 there was an optimistic feeling among civic participants that a refugee policy was imminent as part of a new phase in the country’s democratic period to which these same civic actors had already made substantial contributions. As discussed in chapter three, the measures taken by the pre-1994 government had been far-reaching, involving many different civic organisations and forcing government to develop new strategies and approaches. In summary, these measures included: the unbanning of political movements in 1990, agreement over an interim constitution in 1993, and the holding of the country’s first democratic elections in 1994.<sup>60</sup> In the

<sup>56</sup> This was confirmed in a letter to LHR in 1996 from Lindiwe Sisulu, Deputy-Minister of Home Affairs, entitled: ‘Statement of support, Workshop: ‘asylum and naturalisation: concerns regarding policy and practice’, included in the (RRC Workshop Document 1996: ii).

<sup>57</sup> (RRC Workshop Document 1996: iii and iv).

<sup>58</sup> (RRC Workshop Document 1996: 12-15). The task groups never emerged.

<sup>59</sup> (T. Smith 2003: 8).

<sup>60</sup> (Abel 1995) and (Kessel 2000), *passim*.



view of civic participants attending these workshops, refugee policy was another progressive step in the same direction.

However, in 1996, two years into the country's new democracy, relations between government and civic organisations were still being formed. Government was unaccustomed to consulting with civic actors on matters of policy, and many senior members of government – most of whom were white – were in the process of being replaced, as part of the new government's efforts to transform the country's bureaucracies and be more representative of all South Africans. For their part, many of the civic structures that existed prior to 1994 had either disappeared completely or been subsumed within government structures. New groupings emerged that addressed issues such as privatisation as well as access to shelter, water and other resources.<sup>61</sup>

An advocacy approach rooted in both human rights and administrative law formed the background to the November workshop, and emerged as the dominant discourse that ultimately framed the country's refugee policy. However, the Minister of Home Affairs, Mangosuthu Buthelezi, was leader of the Inkatha Freedom Party, a political party in opposition to the ruling ANC, which appointed the Deputy Minister of Home Affairs and eventually also the Director-General. Although both parties formed a Government of National Unity,<sup>62</sup> political tensions were evident throughout the refugee policymaking process.<sup>63</sup> While those who participated in the November workshop represented senior and middle-level officials of the former administration, Minister Buthelezi decided to appoint a separate Green Paper Task Team, which became a distinctly parallel process. The combination of all these factors, and particularly the Green Paper Process, meant that the Track 1 policy process that eventually produced a Refugees Act was effectively put on hold for nearly one and a half years.

#### 4.4.2 The draft Green Paper on International Migration (track 2, phase 1)

In contrast to the government-led and co-ordinated track 1 process, the Green Paper on International Migration Task Team was chaired by Wilmot James, director of the South African NGO IDASA, although it was formally appointed by then-Minister of Home Affairs Buthelezi. Co-ordination of the Task Team was provided by both the DHA and the Southern African Migration Project (SAMP), a research project of IDASA and Queen's University of Canada. SAMP also provided the secretariat (administrative support) to the Green Paper Task Team, and commissioned policy research.

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<sup>61</sup> Examples include the Anti-Privatisation Forum, as discussed by (Mckinley and Naidoo 2004), *passim* as well as the Landless Peoples' Movement, Khulumani Trust and others.

<sup>62</sup> The National Party also participated in the Government of National Unity at the outset, but withdrew in May 1996.

<sup>63</sup> (Crush and McDonald 2001: 8-10).



The Task Team released a ‘Draft Green Paper on International Migration’ in 1997. Chapter four of the Draft Green Paper was exclusively devoted to refugees, and was heavily influenced by the work of Canadian Professor James Hathaway, who was head of the Reformulation of Refugee Law Project at York University in Canada at the time.<sup>64</sup> The proposals it contained were a radical departure from the type of policy frameworks being discussed up until that point, notably its controversial proposal for temporary protection.

Efforts were undertaken by Hathaway to explain the ‘reformulation’ model, in a briefing paper published by SAMP and debated at a conference organised by LHR. These explanations and debates were important, since two key publications explaining the ‘reformulation thesis’ that emerged from the project at York University were still unpublished at the time the Draft Green Paper was being debated.<sup>65</sup>

#### 4.4.3 Debates over chapter four of the draft Green Paper (track 2, phase 2)

In his paper, delivered at a conference organised by Lawyers for Human Rights in Pretoria in March 1998, in which chapter four of the draft Green Paper was debated, Hathaway acknowledged the concerns referred to above, but questioned whether temporary protection of refugees should be seen as ‘threat or solution’.<sup>66</sup> Hathaway argued in favour of a ‘decisive and practical reinvigoration of refugee law,’ for a more collective and ‘solution oriented’ approach, and a more deliberate distinction between immigration and refugee protection. He emphasised that:

The refugee protection system was never intended to be a mechanism that generates solutions, but is instead a palliative regime that protects desperate people until and unless a fundamental change of circumstances makes it safe for them to go home.<sup>67</sup>

Vigorously arguing against ‘routine admission of all refugees to permanency,’ Hathaway maintained that such a view ‘holds refugees hostage to a major project of social transformation.’<sup>68</sup> He also stated that ‘the basic protective role of refugee protection should not be a captive’ in debates over whether refugees ought to be entitled to permanent residence. Hathaway felt that the South African civic advocates arguing in favour of permanent residence were ‘absolutist’ in their orientation.<sup>69</sup>

<sup>64</sup> Hathaway was a consultant to the Green Paper Task Team.

<sup>65</sup> As the Green Paper acknowledged, the model as proposed in the Green Paper was strongly influenced by the work of Hathaway and the ‘Reformulation Project’, which was funded by the Ford and MacArthur Foundations and based for its duration at the Centre for Refugee Studies, York University, Canada. Two important works, published after the Green Paper was drafted, explained the ‘reformulation thesis’ in more detail, namely (Hathaway and Neve 1997) and (Hathaway 1997).

<sup>66</sup> (Hathaway 2001).

<sup>67</sup> (Hathaway 2001: 44).

<sup>68</sup> (Hathaway 2001: 44).

<sup>69</sup> (Hathaway 2001: 46-47).

At the 1998 conference, Hathaway argued, and later reaffirmed, that the model in chapter four of the Green Paper was ‘seriously misunderstood.’<sup>70</sup> However, that was neither a fair nor an accurate assessment of the detractors to the Green Paper’s reformulation proposal, who engaged with the Green Paper’s rationale behind temporary protection as well as with its resistance to integration. In contrast to the ‘reformulation’ advocates, the approach adopted by most South African-based commentators, conditioned by newly introduced, democratic accountability and constitutional structures, was to develop the administrative structure. Goodwin-Gill characterised such an approach as a ‘reinvigoration’ of the refugee determination regime.<sup>71</sup> In South Africa, this approach was taken both to increase efficiency and to deliberately force the South African government to engage with its international and domestic human rights obligations.

According to Smith’s interview with the DHA’s then-government legal advisor, Tredoux, the origins of the Green Paper Task Team were ‘more an idea of IDASA’s than of the Government’s, and that the Government simply acquiesced in the process’.<sup>72</sup> Such scepticism on the part of government explains why the official response of the government to the proposals contained in the Draft Green Paper on International Migration was, in the end, to shelve them.

Whatever the reasons for the government’s scepticism, ultimately the Green Paper Task Team’s proposals for a ‘reformulated’ refugee policy were not adopted by the government. As mentioned, the Track 1 deliberations were put on hold, but resumed in May 1998, once the South African government again took principal control of the process by appointing a Task Team to produce a White Paper and Refugee Bill.<sup>73</sup> In any event, the policymaking process was always DHA’s to lead, a factor that was not readily acknowledged by civic actors at the time, being of the view that civic actors ought to be more central to the process.

#### 4.4.4 The White Paper Task Team (track 1, phase 2)

With the formation of the Refugees White Paper Task Team in May 1998, the process of forming a refugee policy regained the momentum that, as Human Rights Watch pointed out, had been lost since the meetings at the South African Human Rights Commission in 1996.<sup>74</sup> Whether it was on the basis of positive interactions in 1996 and/or in response to extensive lobbying by members of the increasingly well-organised refugee advocacy lobby, or simply because the DHA recognised it

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<sup>70</sup> (Hathaway 2001: 47).

<sup>71</sup> (Goodwin-Gill 1999).

<sup>72</sup> (T. Smith 2003: 8).

<sup>73</sup> A White Paper is a government policy document which, normally following cabinet approval, is presented to Parliament for debate. Depending on the political importance attached to a White Paper, it is developed into a bill, the final step before it becomes a law. In this case, a Draft Bill was already attached to the White Paper, which helped accelerate the process.

<sup>74</sup> (Hrw 1998: 137-140).

could not produce the policy on its own, the DHA ensured that the Task Team was broadly representative. And yet, as government took the lead by forming the White Paper Task Team, the structural boundaries that conditioned the agency of civic actors in seeking to influence the outcome of the policymaking process became more clearly defined.

As was to be expected, deliberations within the White Paper Task Team were contentious. Meanwhile, the National Consortium on Refugee Affairs (NCRA) had by this time formed a well-developed legal and policy sub-committee, two members of which were also on the Task Team. The sub-committee was an active network, much of its success attributed to the recent use of e-mail.<sup>75</sup> Therefore, alongside the formal deliberations, civic actors also discussed and formed positions on various policy proposals in parallel meetings of the sub-committee. This section critically examines, firstly, the composition of the Task Team and the expertise of individual members. Secondly, it explains three variables that affected the work of the Task Team.

#### *Composition of the White Paper Task Team and their expertise*

The Refugees White Paper Task Team was diverse in its composition. It included two civic representatives; one from LHR, the other a practising attorney and academic. Two representatives from so-called 'chapter nine institutions'<sup>76</sup> also participated, those being the South African Human Rights Commission (SAHRC) and the Commission on Gender Equality (CGE). As in the September 1996 Workshop, a representative from the UN High Commissioner for Refugees (UNHCR) took part, as well as several senior representatives of the DHA. Unlike the Green Paper process, which involved substantial civic co-ordination, the DHA chaired the Refugees White Paper Task Team. In doing so, the DHA asserted its authority to determine the direction of government policy, but in a way that engaged outside expertise. With some notable exceptions, most of the individual representatives on the Task Team – civic and government alike – still had little or no experience with either the theory or the practice of refugee law.

LHR had first critiqued South Africa's immigration control laws in 1992,<sup>77</sup> and had been actively involved in refugee issues since 1996. However, as the result of an acrimonious conflict between LHR and the DHA, the invitation by the DHA to participate in the White Paper Task Team was specifically addressed to LHR's

<sup>75</sup> While on the surface these parallel meetings organised by the sub-committee could be seen as an extension of a broader track 2 process, as discussed later, in a structural sense these particular meetings were directly in response to government-led proposals, in contrast to the civic-led proposals that emerged from the Green Paper process.

<sup>76</sup> These are semi-autonomous, state-funded institutions established in terms of chapter nine of the (South African Constitution 1996) to supervise and promote the government's compliance with the provisions of the Constitution.

<sup>77</sup> (Ramasala 1992).

newly-hired assistant co-ordinator, who had very little experience in refugee law.<sup>78</sup> Strategically, LHR's management chose not to make an issue of this and to participate mainly from the outside, being of the view that it was important to have at least some form of participation inside the government-led process, and especially to have access to various draft policy documents that were to emerge from the Task Team's deliberations.

The representative from the CGE also had virtually no experience in refugee matters and, in fact, rarely attended the meetings of the Task Team. While the representative from the SAHRC, Barney Pityana, had been engaged in civic advocacy and human rights issues for decades,<sup>79</sup> he did not have a background in refugee law.

Meanwhile, the DHA representatives were also relatively new to refugee matters, although one had been involved in producing the second Draft Refugee Bill, and had participated in the policy workshop at the SAHRC in 1996.<sup>80</sup>

Those who did have substantial expertise numbered three: Tredoux, then Chief Director for Legal Services at the DHA, who also chaired the Task Team; De la Hunt, an attorney in Cape Town and senior lecturer at the University of Cape Town; and Geddo, who was a lawyer and senior refugee protection officer at the UNHCR.<sup>81</sup> As Smith rightly acknowledged, these three held 'the most experience and knowledge ... [and] drove the process forward'.<sup>82</sup> De la Hunt and Geddo, in particular, became key translators of South Africa's global obligations towards protecting refugees to a form that was locally relevant.

As Belvedere noted, civic experts became more engaged in defending 'key provisions that had been safeguarded from early on',<sup>83</sup> advancing refugee protection standards beyond the debates that took place in the 1996 workshops. Furthermore, the civic members of the Task Team were part of a well-organised legal and advocacy network. The Legal and Policy Sub-committee of the National Consortium on Refugee Affairs (NCRA) organised several workshops in parallel to the Task

<sup>78</sup> He had, however, previously worked as a junior researcher at the Centre for Migration Studies at the University of the Western Cape.

<sup>79</sup> Dr. Barney Pityana has been a leading figure and human rights advocate in the formation of civic-led protests against the apartheid regime in South Africa, and elsewhere in the world. As a close colleague of Steven Biko, he helped develop the black consciousness ideology and co-founded the South African Students Organisation (SASO). Later, after being forced into exile, Pityana headed a major programme at the World Council of Churches in Geneva to boycott the apartheid regime. Eventually he returned to South Africa and became the first chairperson of the South African Human Rights Commission, as well as South Africa's first representative to the African Commission on Human and Peoples' Rights.

<sup>80</sup> Another (senior) DHA representative, who was notorious for his hostility to civic participation, attended some meetings of the Task Team.

<sup>81</sup> Tredoux was a seasoned DHA bureaucrat mostly responsible for drafting the final version of the Aliens Control Act. De la Hunt had not only commented on the first Draft Refugees Bill; she also taught refugee law, and had advised and litigated in numerous refugee matters. Geddo had many years of experience with UNHCR, both in Geneva and from various postings in Africa.

<sup>82</sup> (T. Smith 2003: 13).

<sup>83</sup> (Belvedere 2006: 156).

Team's deliberations. In between, members of the sub-committee were frequently in touch with each other, particularly through two e-mail list-servers.<sup>84</sup>

Drawing on external linkages that the civic members of the Task Team had, these parallel debates of the NCRA legal sub-committee fell within Track 2 of the process of refugee policy development. These debates had considerable impact, though indirect, on the Task Team's track one deliberations, which can be regarded as the official process. In addition to those represented on the Task Team, participants in this broader, track two discourse included international specialists on refugee protection,<sup>85</sup> local experts in administrative law and politics,<sup>86</sup> and local civic organisations involved in advocacy to refugees.<sup>87</sup>

#### *Key factors affecting the work of the White Paper Task Team*

Apart from the Task Team members' relevant areas of expertise, three key factors emerged early on that would characterise not only the final results of the official process, but how these results were to be reached, who participated in their outcome, and finally, to what extent these discussions would influence the implementation of the Refugees Act.

The first of these factors was a clear renunciation of the main thrust of the Green Paper model. By this time it was clear that the track two policy debates had more or less abandoned the 'reformulated' model as contained in chapter four of the Green Paper. Instead, the White Paper Task Team adopted a 'decentralized, hearings-based refugee determination system' along the model drafted by Klaaren and Sprigman, the main outline of which was sent to civic participants as well as the UNHCR and SAHRC representatives in the White Paper Task Team.<sup>88</sup>

<sup>84</sup> These were the SAIMMIG-CALS list-server, set up by Jonathan Klaaren at the Centre for Applied Legal Studies, and the shorter-lived LHR-Refugees list-server, set up by Lawyers for Human Rights.

<sup>85</sup> These included Guglielmo Verdirame and Barbara Harrell-Bond who both worked at the Refugee Studies Programme at Oxford University; Harrell-Bond was its founder and, for many years, director. Also involved was Bonaventure Rutinwa, who also worked and studied at Oxford and taught refugee law at the Centre for the Study of Forced Migration at the University of Dar-Es-Salaam. Chris Sprigman was a visiting lecturer at the School of Law, University of the Witwatersrand. Bronwen Manby, who became Deputy Director in the Africa programme of Human Rights Watch, also made numerous important contributions.

<sup>86</sup> These included Jonathan Klaaren, then senior lecturer in the School of Law, University of the Witwatersrand; Femi Naidoo, who taught politics at the University of Durban-Westville; and Marion Sinclair, who founded the Centre for Migration Studies at the University of the Western Cape (UWC). Vernon Seymour, who taught international relations at UWC, and Professor Tiya Maluwa, who taught refugee law in the law faculty at the University of Cape Town, also made contributions.

<sup>87</sup> These included legal advice and advocacy NGOs, such as Black Sash, Lawyers for Human Rights and Legal Resources Centre. Service providers included the Refugee Forums in Cape Town, Durban and Gauteng, religious organisations such as the Catholic Diocese of Johannesburg, Africa Muslim Agency and Jesuit Refugee Services, as well as some refugee representatives, particularly from Cape Town.

<sup>88</sup> Klaaren, J. and Sprigman, C. 'Refugee status determination procedures: terms of reference for a decentralized, hearing-based refugee determination procedure, including procedures for manifestly

The second factor was DHA's (re)asserting of its authority as chief policy drafter. As acknowledged by both Smith and Belvedere, once the White Paper and Refugee Bill were drafted, there were last-minute changes made by what Smith termed 'conservative forces'.<sup>89</sup> These changes were immediately challenged by NGOs who took part in the White Paper Task Team,<sup>90</sup> and were corrected, to a large extent, once the draft bill reached the parliamentary Portfolio Committee on Home Affairs (Portfolio Committee). While civic actors were perfectly entitled – and indeed expected – to protest, and many civic actors made representations to the Portfolio Committee, the product of the Task Team was always going to be one in which government, not civic actors, had the final say. In other words, it was government, not civic actors or the UNHCR, who held responsibility for forming an effective and rights-regarding refugee policy in South Africa, although it is undeniable that many within the refugee advocacy movement felt some personal responsibility for the end result. Any other position on this matter is in danger of misreading what are, essentially, different functions of government and civic actors.

The third key factor was the very tight timeframe in which the Task Team was expected to produce a Refugees White Paper and accompanying Draft Refugee Bill. The Task Team was forced to produce these documents within just over a month of deliberations.<sup>91</sup> Nevertheless, civic organisations managed to organise parallel meetings to debate various aspects of the proposals, including a workshop in Pretoria on 29 May 1998, followed by a seminar in Cape Town, later in 1998. While the Draft Refugees White Paper and Bill that was circulated for public comment on 19 June 1998 provided only a month for written feedback, at least thirteen organisations responded.<sup>92</sup>

#### 4.4.5 Parliamentary debates (track 1, phase 3)

Although they were brief, the parliamentary debates that took place on 5 November 1998 on the Draft Refugees Bill provided a clear reflection of where civic actors and the government stood in relation to each other. The level of 'externalisation' or social distance that had emerged, as well as the rationale for introducing refugee legislation, illustrated divergences in meanings, interests and political positions between civic actors and the DHA, as well as the potential for civic influence in the policy process. The debate that took place in South Africa's parliament on the Draft Refugees Bill explicitly recognised both the considerable contributions of civic ac-

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unfounded applications', Facsimile sent 3 June 1998. These ideas were elaborated in (Klaaren and Sprigman 2008).

<sup>89</sup> (T. Smith 2003: 3).

<sup>90</sup> (Belvedere 2006: 149-156).

<sup>91</sup> As (Belvedere 2006: 140) noted, this pressure was due to political factors at play; the White Paper and Draft Refugee Bill needed to be completed before the end of that year's parliamentary session, otherwise new elections and a possible cabinet reshuffle would have delayed the process even further.

<sup>92</sup> (Klaaren et al. 2008: 52).

tors to the policymaking process, as well as the role of NGOs in promoting refugee protection. As chairperson of the Portfolio Committee Desmond Locky noted:

There are many NGOs and churches which are dedicated to promoting refugee interests, to providing welfare assistance and to meeting the most basic needs of refugees in our society. We must make use of this opportunity to salute their unselfish service.<sup>93</sup>

A very different message came from the then-Deputy Minister of Home Affairs, Lindiwe Sisulu. In introducing the proposed legislation, Sisulu emphasised that relations between civic actors and the government at the time were less than comfortable. Referring to 'newly arrived academics', the Deputy Minister openly expressed her irritation that, on some issues, such persons 'have no clue what they are talking about'. She disputed the argument that South Africa had a duty to 'reciprocate' on the basis that many South Africans themselves were once refugees. Making a distinction between refugee status provided by the proposed legislation, and status based upon a 'commitment to the eradication of apartheid', she argued that such references to reciprocal treatment amounted to a 'cheap type of emotional blackmail'.<sup>94</sup>

While the Deputy Minister's irritations may to some extent have been understandable at the time, reflecting a general deterioration in the relationship between the DHA and civic actors since the September 1996 workshop, her denial that South Africa had a 'reciprocal' duty to refugees may have been an over-reaction. In any event, this view was not shared by the Deputy Minister's fellow ANC (and other) parliamentarians. Locky, for example, commented that:

Our country has, over many decades, forced thousands of our own citizens to flee the repressive order of the former NP regime, and to seek refugee status all over the world. Today, with this Refugees Bill before Parliament, we are reaching yet another decisive milestone in entrenching a culture of fundamental human rights in our society ... creating a legislative framework to meet our moral and international human rights obligations.<sup>95</sup>

Sikakane,<sup>96</sup> Chauke<sup>97</sup> and Bam<sup>98</sup> made similar references to South Africans' own experiences of being refugees. Harsh comments about 'reciprocal' treatment aside, the Deputy Minister did confirm that the basis upon which her government had introduced refugee legislation was a 'matter of principle', rooted in South Africa's 'constitutional and international obligations' and that the Refugees Bill aimed to

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<sup>93</sup> (Hansard 1998: 7756).

<sup>94</sup> (Hansard 1998: 7751). It is not clear to whom Sisulu was referring, although the fact that the Draft Bill rejected most elements of the Green Paper's reformulation model, which was mainly drafted by foreign academics, could be related.

<sup>95</sup> (Hansard 1998: 7754).

<sup>96</sup> (Hansard 1998: 7765).

<sup>97</sup> (Hansard 1998: 7769).

<sup>98</sup> (Hansard 1998: 7771).



provide refugees with ‘dignity’.<sup>99</sup> This was virtually the same position advocated by most South African civic organisations. In other words, while on the surface the relationships between certain civic actors and the government were problematic, and their respective interests were very different, as far as the ideological basis upon which the Refugees Bill was rooted is concerned, there were fewer differences in meanings and political positions than either side may have been willing to acknowledge at the time.

#### 4.4.6 Towards a new administrative order

The combined outcome of tracks one and two of the refugee policymaking process laid the framework for a new administrative order to process and receive refugee applicants, on the basis of international law and South Africa’s domestic constitutional and administrative legal order.

Laying the basis for this new administrative order did come at a cost. There was much confusion created among civic organisations and the government alike by having two separate policy tracks. This was coupled with an even more destabilising, large-scale replacement of senior staff within the DHA’s administrative structure. These factors impacted significantly on the relationship between civic organisations and government. The exceptionally open and critical exchanges experienced in the 1996 policy workshops between NGOs and government were never repeated, and tensions began to grow in the midst of the Green Paper process.

Forming refugee policy in South Africa on the basis of the Green Paper’s ‘reformulated’ model was considered, and rejected, in favour of a pragmatic approach based on South African constitutional and administrative law, as well as on international human rights principles. In the absence of legal or any other kind of representation for most asylum applicants, it was felt by locally-based refugee advocates and academics that the system needed, first and foremost, and as a matter of urgency, to include adequate checks against administrative unfairness, particularly concerning the possibility of *refoulement*.<sup>100</sup> The consequences of a wrong decision in the procedure could very well amount to serious human rights violations if rejected claimants were returned to their countries of origin.<sup>101</sup>

As the next section evaluates, government-created structures conditioned the responses by various civic actors, but also permitted structural elaboration. The clearly delineated roles and strategic positions taken by civic actors – which were rooted in South Africa’s international and constitutional obligations – show that, despite the policy process being primarily driven by state interests, there were am-

<sup>99</sup> (Hansard 1998: 7751).

<sup>100</sup> This key principle of international refugee law, which is widely considered to be a *jus cogens* prohibition and thus part of international customary law, prohibits states from sending someone to a country where they would face a well-founded fear of torture, or persecution on various grounds.

<sup>101</sup> (L.A. De La Hunt and Kerfoot 2008), *passim*.



ple opportunities to engage in the process. Engaging did not necessarily mean compromising; on the contrary, most civic actors still maintained a critical distance.

#### 4.5 ANALYSING CIVIC PARTICIPATION IN POLICYMAKING

This section analyses civic participation in the refugee policymaking process in South Africa, which in turn reveals the narrow (but significant) scope for civic influence in government-led efforts at policy reform, yet also the crucial role that civic actors play as translators of global norms in local contexts. Beyond the tense debates on the reformulation model contained in the Green Paper, critiques on refugee policy making and its implementation in South Africa have often amounted to moralistic arguments that the government must do what it promises, supported by little more than legal rhetoric stating that the law says what the government must do. The highly doctrinal discussion that has followed these arguments has offered limited possibilities for critical reflection. Few, apart from Belvedere, have critically examined the social and political context in which the refugee policymaking process took place, let alone the interplay between civic agents and mainly state-created structures involved in framing these policies, focusing instead on the substantive content of the policy.<sup>102</sup>

A critical look at the impact of civic advocacy in advocating for the Refugees Act reveals advocacy strategies steeped in administrative law and human rights principles. The process through which refugee policies came about showed a sophisticated understanding of the need to develop the administrative law structure, rather than simply challenging that structure by way of legal challenges in the courts.

This section evaluates civic participation in the refugee policymaking process in South Africa. Firstly, the clear tensions between, on one hand, a proposal to reformulate refugee law and, on the other, advocating pragmatic enforcement (in terms of South African public law) that engages directly with the country's international law obligation, has revealed that the capacity of civic actors to hold states accountable is shaped by structural changes in the normative legal framework. Secondly, this section shows how the conditioning nature of state-created structures in the refugee policymaking process have defined the structural relationship between civic actors; this section explains how these structures have shifted in very specific ways that must be respected by civic actors if they want to be strategic in their advocacy

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<sup>102</sup> (Belvedere 2006) has looked beyond the legal doctrine and situated the refugee policymaking process in a local and global political discourse. By contrast, (Solomon 2002: 61) has suggested that problems in policy implementation could be overcome by accepting the existing policy regime and not getting caught up in legal definitions, although these definitions have tended to be the most contested issues of all. (T. Smith 2003) usefully addressed the process of refugee law-making as highly contested, and identified some of the various organisations and personalities involved, yet offered little critical prospective as to the externally grounded reasons why NGOs participated in the policymaking process, and how this related to a broader social and political context.

efforts. Thirdly, the refugee policymaking process illustrates the crucial role of civic actors in mediating the translation of international legal norms into locally relevant contexts. The capacity of civic actors to influence government policy can thus be understood in terms of social distance, as measured by divergences in interests, meanings and political positions, which are partly revealed in the externally grounded reasons for civic and state participation in policymaking. Finally, this section comments on the long delay in implementing the new refugees policy.

#### **4.5.1 Civic capacity and refugee policy making: choosing reinvigoration over reformulation**

The capacity of civic actors to participate in international and national legal process, and the degree to which this is shaped by changes in the normative legal frameworks, led civic actors to advocate the reinvigoration of refugee law over its reformulation. The refugee policy discussions that took place within the framework of the 1996 workshop, and which were resumed by the NCRA legal sub-committee during the White Paper process, adopted a reinvigorated approach to refugee policymaking. This reinvigorated approach drew upon global developments in international human rights<sup>103</sup> and recognised the importance of public administrative law as the principal means of translating human rights obligations in a national context. For its part, the reformulation model presented in the framework of the Green Paper process was a radical approach, not to simply ‘translate’, but to reorient South Africa’s refugee law obligations according to what the government was (presumably) more likely to accept.

From the outset, it was always going to be a challenge for proponents of the ‘reformulation thesis’, reflected in chapter four of the Draft Green Paper, to explain both its unconventional content and approach. It was an even greater challenge to explain the direct relevance of the reformulation model to South African policymakers, academics, NGOs and other civic society stakeholders concerned with refugee protection in South Africa.<sup>104</sup> Indeed, this has proven to be a global challenge; the reformulation model has been met with scepticism from widely respected scholars in international refugee law.<sup>105</sup>

There appeared to be a tendency amongst proponents of the reformulation model to unduly essentialise the political culture of South Africa as being fundamentally the same as that of any other government. As one of the more vocal proponents of the reformulation thesis, and a commentator on the process of refugee policymaking in South Africa, Barutciski argued that there was a conceptual link between a limited rights regime and the liberalising of asylum procedures, which applied to South Africa as it would to any other country.

<sup>103</sup> Here reference is made to Ignatieff’s human rights ‘revolution’, discussed in chapter two, with its juridical, advocacy and enforcement dimensions.

<sup>104</sup> Argued elsewhere in (Handmaker 1999: 301-306) and (Handmaker 2001: 97-101).

<sup>105</sup> (Rutinwa 2001); (Chimni 1998: 363) and (Anker et al. 1998).

Clearly the rights regime accompanying refugee status is crucial to a Government's decision to allow entry. Limited rights apparently encourage a more liberal admission policy in situations of mass inflow, while elaborate rights that may lead to integration tend to discourage Governments from allowing refugees to access their territories.<sup>106</sup>

In other words, Barutciski argued, by constraining access to rights, the government would be more inclined to admit refugees. Such an argument has, however, been difficult to maintain in the South African context. Before 1993, challenging administrative decisions in South Africa was only possible in circumstances in which rights were highly constrained, and the possibilities for administrative review extremely limited. Despite an expansion in rights provided by the 1993 interim Constitution, until 1995 it was technically impossible to challenge any decision of an immigration officer. This changed slightly with the 1995 Amendments to the Aliens Control Act, which were in direct response to the country's emerging constitutional obligations, and were expanded further in section 33 of South Africa's 1996 Final Constitution. An expanded rights regime provided by the Constitution has therefore been followed, with greater possibilities in terms of administrative justice, and, on the whole, has led to more liberal asylum procedures.

Put another way, efforts to bring refugee policies into line with global standards of refugee protection have been the outcome of a highly contested human rights advocacy revolution. This has been strongly complemented at the national level by an expansion of judicial review in South African public law, which has promoted a culture of constitutionalism, with international and national dimensions.

#### 4.5.2 Recognising structural boundaries in constructing a refugee policy

The recognition by civic actors of the structural boundaries that defined their relationship with the government, and the degree to which civic actors took this into account in formulating their positions, made them more effective advocates in the refugee policymaking process.

At the international level, where civic participation is possible, these structural boundaries are defined by the self-corrective mechanisms that are in place. These include protocols to international (human rights) treaties, as well as the development of new guidelines and recommendations for the behaviour of states and international organisations in the furthering of their international obligations.<sup>107</sup> Self-corrective mechanisms also extend to the national level, whether in the form of constitutionally mandated oversight bodies such as the South African Human Rights Commission, or the Law Commission, which has regularly solicited civic input and advice.

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<sup>106</sup> (Barutciski 1998: 714).

<sup>107</sup> In the case of the 1951 UN Refugee Convention, there is a very specific self-corrective mechanism, namely the Article 35 monitoring function of member states' compliance with their obligations under the Convention and in particular concerning *non-refoulement*.

States take the comments of civic actors seriously, whether they are from NGOs with a prominent global presence, such as Amnesty International, or from national pressure groups. As mentioned earlier, as far back as the 1940s Eleanor Roosevelt observed that civic actors had formed part of a broader set of interests in developing credible universal human rights standards through a succession of treaties, declarations, guidelines and recommendations from treaty bodies and special rapporteurs. South African organisations have joined the efforts of international human rights organisations by contributing to international policy debates taking place at the UNHCR's ExCom or in assisting the DHA to develop a credible national policy to protect refugees.

In the course of refugee policymaking in South Africa from 1996-2006, the boundaries that conditioned civic agency were established by the DHA's administrative and democratic accountability structures. Civic actors, exercising their agency, tested these structures, and questioned the extent to which they translated (or not) the government's ratification of international human rights treaties. Although civic actors who participated in the White Paper Task Team were conditioned in the contributions they could make – depending entirely on the discretion of the DHA to include civic actors in the first place, let alone accept their recommendations – there remained openness on the part of government to engage in a critical discussion. This critical discussion – or interplay – led to an elaboration of these structures, or structural change.

Following the end of unusually close interactions between civic actors and the DHA in refugee policymaking in 1996, by the time the White Paper Task Team was put together, it was understood by most of those involved in the policymaking process that the DHA needed to take the lead. At the same time, the DHA – and even more so the Portfolio Committee on Home Affairs – demonstrated a willingness and even enthusiasm to listen to critical civic perspectives and explicitly acknowledge civic contributions to the policymaking process. The fact that key elements from within the government were willing to listen to civic actors meant that the normative structure that would emerge from this process, namely the Refugees Act, benefited in a significant way from elaborations by these civic agents, who drew on extensive parallel networks of interests and expertise.

#### **4.5.3 Mediating the translation of international legal norms in the refugee policymaking process**

Civic actors have played a key role in translating South Africa's international legal obligations to protect refugees into the Refugees Act of 1998. The form in which this mediation took place revealed the social distance between civic actors and the government, or the extent to which both parties diverged in terms of interests, meanings and political positions.

A comparison between the Green and White Paper processes is particularly revealing in this regard. In contrast to the tense discussions taking place in the context

of the White Paper process, civic actors became almost entirely co-opted in the Green Paper process by co-ordinating the process, and even drafting entire sections of the Green Paper. As the DHA lacked the central role it had in the 1996 workshop and White Paper process, it could more easily reject the findings of the Green Paper Task Team, although political tensions between the Minister and senior Departmental Officials clearly also played a role. The model of refugee protection contained in chapter four of the Green Paper ultimately bore little resemblance to the policy actually adopted by the government.

While the White Paper Task Team was very much a government-led process, it involved a number of external actors, namely an NGO representative, an academic or practitioner, and representatives of the UNHCR, the Gender Commission and the South African Human Rights Commission. In other words, the DHA engaged civic actors and others in forming a new refugee policy, while rightly retaining ownership over the process.

Assessing the externalised nature of the refugee policymaking process is useful in determining whether the policy emerged as the outcome of consensus, or as the result of a predominantly government-led initiative. Kidder's criteria for measuring the social distance that emerges from such an interaction relates to corresponding divergences in meanings, interests and political positions, in other words the externally grounded reasons of each actor to participate in a policy process. As the following section explains, the strategic decisions taken by civic actors and others, such as the UNHCR, revealed the clear interests that were at stake. The social distance between civic actors and the government widened or narrowed, depending on the extent to which their respective interests, meanings and political positions were consistent with each other.

#### *Reasons for participation by the DHA in refugee policymaking*

Since 1994, the DHA had been struggling to develop a policy that would appropriately meet the administrative demands placed on it by a growing number of applications for refugee status. At the same time, the DHA was compelled to respond to multiple pressures from: (1) civic organisations, in terms of the DHA's constitutional and international obligations, (2) the UNHCR, in terms of the DHA's international obligations, and (3) section nine organisations, in terms of the DHA's constitutional obligations.

The fact that the DHA took control of the refugee policymaking process in setting up the White Paper Task Team was an important reassertion of its central role in making policy, which the Green Paper process had diluted somewhat. That the DHA chose to involve civic organisations in the Task Team, despite some tensions, was indicative of its desire to try to resolve as many issues of fundamental disagreement as possible in the formation of a new administrative system, rather than continue solely on a path of confrontation, in which its policies were constantly subject to judicial challenge. One particular issue that the DHA wished to resolve

was that of legal meanings, including key definitions contained in the international refugee conventions. While political positions and interests may have been different, by involving multiple interests, DHA aimed to reach some level of consensus on the meanings attributed to certain refugee law terms.

*Reasons for civic participation in refugee policymaking*

The two civic organisations represented in the White Paper Task Team to form a refugee policy were Lawyers for Human Rights and UCT Legal Aid Clinic. As one of the first civic-society organisations in South Africa to focus serious attention on refugee protection matters, and with an almost 20-year history of fighting injustice and intolerance, LHR was motivated by a strong desire to promote human rights and advance the social justice aspirations of South Africa's Constitution. LHR had a number of clients who had claimed refugee status and the organisation was confronted on a daily basis with stories of how the DHA, other government authorities, the media, companies and the general public had been treating asylum seekers and refugees. Despite facing hostility from certain government officials at the time the White Paper Task Team was operating, LHR always recognised that policy was the responsibility of the DHA. LHR also recognised that the DHA's administrative structure needed considerable strengthening, but anticipated that – for the meantime – they would continue to challenge decisions taken by the DHA on judicial review.

LHR's principal reasons for becoming involved in the refugee policymaking process were therefore twofold. Firstly, LHR wanted to underscore their support for a DHA-led policy process that bolstered the department's capacity to fulfil the demands placed on it by growing numbers of applications for refugee status. Secondly, LHR calculated that the DHA would put in place a refugee policy that would, as explicitly as possible, reflect South Africa's international treaty obligations, as well as the provisions of South Africa's Constitution. A third and related reason for involving themselves in the White Paper Task Team was to ensure that there would be opportunity to review policy proposals in a more critical setting through the NCRA's legal sub-committee and, later, in representations before the Portfolio Committee on Home Affairs.

In short, LHR recognised the need to bolster the administrative capacity of the DHA, while still preserving space for judicial review of an administrative decision of the DHA. This approach acknowledged that lawyers ought to pay more attention to the broader administrative law framework regulating government departments in South Africa, beyond simply permitting the capacity for judicial review.

As an experienced practising lawyer and director of UCT Legal Aid Clinic, De la Hunt witnessed (on a daily basis) how the DHA's policy was being implemented. Further, she helped establish the first university-level course on refugee law, and was therefore – as mentioned earlier – one of the representatives on the White Paper Task Team best versed in refugee law. Her reasons for participating in the Task Team were, therefore, similar to those of LHR; to ensure that the daily realities of

policy implementation were being taken into account, but also to contribute her knowledge of refugee law and practice.

*Reasons for participation in refugee policymaking by the UNHCR*

Guided by an international mandate, the UNHCR's formal reasons for participating in the Task Team's deliberations were more closely aligned to states. However, the UNHCR was also guided by Article 35 and by its general mandate to protect refugees, and to monitor state compliance in terms of the state's obligations under the UN and OAU Refugee Conventions.

Similar to the civic representatives, the UNHCR wanted to see in place a policy that reflected South Africa's obligations under the international refugee conventions. In promoting this objective, the UNHCR played a 'diplomatic' role, as a close advisor to the DHA. At the same time, the UNHCR supported the principle that civic actors should be involved in the refugee policymaking process. Accordingly, the UNHCR confronted a certain tension between these two roles, embarking on what Loescher has characterised as a 'perilous path'.<sup>108</sup> By participating in the Task Team, the UNHCR felt it could promote an environment in which civic actors and government debated key policy issues. At the same time, the UNHCR could bring its considerable knowledge of refugee law and comparative state practices to the Task Team.

*Reasons for participation by section nine organisations in refugee policymaking*

The Gender Commission and the South African Human Rights Commission both derive their mandates from section nine of South Africa's constitution, which obliges them to monitor government in complying with its obligations under the constitution. Their reasons for participating in the Task Team were therefore principally guided by their desire to ensure that the provisions of the constitution were being appropriately reflected in the formation of a new administrative regime to process applications for refugee status, as well as in the rights that asylum seekers and refugees would enjoy in South Africa. At the same time, these Commissions recognised that it was the DHA's responsibility to develop policy, not theirs.

#### **4.5.4 Further delays, from policy to implementation**

Once the Green Paper model was effectively abandoned by the White Paper Task Team in May 1998, it was only a matter of a few months until the Refugees Act of 1998 came into existence in December of that year. But, the much-vaunted policy did not come into force until 1 April 2000, once the DHA issued administrative Regulations to the Refugees Act.<sup>109</sup>

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<sup>108</sup> (Loescher 2001), *passim*.

<sup>109</sup> (Regulations to the Refugees Act 2000).



In contrast to the White Paper process that produced the Refugees Act, civic actors were not publicly consulted with regard to the Regulations, which precipitated more confrontational approaches by civic actors.<sup>110</sup> The United States government, that had long been assisting the South African government in border control infrastructure, training and policy advice,<sup>111</sup> also played a considerable role in drafting the Regulations. It was not surprising, therefore, that civic actors perceived the Regulations ‘more as a product of government to government (as well as the UNHCR) drafting efforts than as the fruit of a public consultation service’.<sup>112</sup>

It was not only civic actors who received the new policy, as further articulated by the Regulations, with surprise; the DHA was also unprepared for implementing the new Regulations. This lack of preparedness manifested itself in two main respects. The first area in which the DHA found itself unprepared concerned an administrative backlog of more than 25 000 unresolved applications that had built up under the old system of asylum determination, established under the Aliens Control Act of 1991; this issue is not discussed in this book. Secondly, although the South African government had agreed long before to consider granting permanent residence to former Mozambican refugees who, for various reasons, had decided not to take part in a UNHCR-led repatriation programme, this policy had lain dormant ever since. These former refugees were thus left in a situation of administrative limbo, once the repatriation programme came to an end and the South African government publicly declared a ‘cessation of hostilities’ in Mozambique. Consequently, they no longer qualified as refugees under the *old* administrative system and were ineligible for consideration under the *new* administrative system provided for by the Refugees Act. How the government eventually responded to this issue, together with considerable involvement from civic actors, is discussed in the next chapter. And so, from the process of policymaking, I now turn to an even more hazardous area of civic-society interactions in the context of policy implementation.

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<sup>110</sup> On concerns about the Regulations and their impact, see (Klaaren et al. 2008: 55-56); (L.A. De La Hunt and Kerfoot 2008: 99-100), and (Belvedere 2006: 163-170).

<sup>111</sup> See (Handmaker and Singh 2002: 6-7).

<sup>112</sup> (Klaaren et al. 2008: 55).



## CHAPTER 5

### WHO'S RESPONSIBLE?

### CIVIC PARTICIPATION IN

### REFUGEE POLICY IMPLEMENTATION

#### 5.1 INTRODUCTION

This second illustration of advocating state accountability through co-operative civic interactions focuses on policy implementation.<sup>1</sup> More specifically, this chapter examines a project, the legal and political basis for which was established by a tripartite commission in the early 1990s to provide a durable solution for former Mozambican refugees (hereinafter referred to as FMRs) in South Africa, by regularising their status in South Africa.<sup>2</sup> This regularisation project, which was essentially an 'amnesty' for the FMRs' lack of residential status, was finally implemented between 1999 and 2000. The project required co-operation between national civic actors and government officials at the national and provincial levels, and extensive co-ordination by an international NGO.

As was done in the previous chapter, this example of co-operative civic-state interactions is tested against the book's three theoretical propositions. Firstly, in the specific historical context that this regularisation project took place, the capacity of civic actors to hold the government of South Africa accountable has been shaped by structural changes in the national and international legal framework. Secondly, the boundaries that define the structural relationship between the civic actors involved in this project and the government have shifted in specific ways; civic actors should respect these boundaries if they want to be strategic. By the same token, a failure by civic actors to respect these boundaries can lead to compromises in the independence of civic actors, and in their capacity to have strategic influence. Thirdly, civic actors have a crucial role to play in mediating the translation of international legal norms into local contexts. The possibilities for fulfilling this role are illustrated by

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<sup>1</sup> On refugee policy implementation, see also (Tuepker 2002), *passim*, (Belvedere 2006: 174-262) and (Handmaker et al. 2008: 89-166).

<sup>2</sup> The term 'durable solution' is a much-used refugee policy term, referring generally to one of three options, namely: return/repatriation to a refugee's country of origin, integration/regularisation of a refugee in the host country, or resettlement of a refugee in a third country.

the level of social distance between civic actors and the government, or divergences in their respective interests, meanings and political positions.

Reflecting on the implementation of the civic-led regularisation project presents instructive, if not unsettling examples of how civic collusion with government can have alternately positive or negative outcomes in protecting refugee rights. The potential for the civic-state collaboration to regularise the status of tens of thousands of FMRs was seriously undermined by the highly unsatisfactory way in which the project was designed. While over sixty per cent of FMRs who applied for regularised status were approved, the remainder were left with continued uncertainty in terms of their legal status. Of principal concern was the lack of a clear distinction between civic and state responsibilities, the absence of due process in the processing of applications, and the lack of an effective and independent monitoring presence.

This chapter begins by briefly addressing the historical reasons why FMRs ended up in South Africa, why previous efforts to provide them with a durable solution to their plight were grossly inadequate, and how it is that many ended up without any form of legal residence status. Second, this chapter explains and analyses the particular roles civic actors fulfilled in the regularisation project – from preparation to implementation, between 1998 and 2000 – alongside government actors from the South African Department of Home Affairs (DHA). Finally, this chapter assesses the impact of civic participation in the FMR regularisation project, in light of the book's theoretical propositions.

## 5.2 A TENUOUS PLACE OF REFUGE

Despite its past history of racist and authoritarian policies, and current problems of xenophobia, South Africa has long served as a tenuous place of refuge for many hundreds of thousands of people from Mozambique.<sup>3</sup> During the 1980s, many refugees arrived in South Africa as a direct consequence of the violent civil war in Mozambique. Their reception in South Africa has been described by Jonny Steinberg as follows:

Of the 1.7 million people who fled Mozambique, between 250,000 and 350,000 came to South Africa. Most ... crossed the border in a steady stream between 1985 and 1987 ... The reception the refugees received was shaped by an extraordinarily subtle and variegated cocktail of national apartheid politics and local interests and sensibilities ... From the arrival of the first refugees in 1984 until its demise a decade later, the apartheid government did not offer Mozambicans forced to leave their country by war refugee status. The government did, however, in principle permit refugees to settle in the homeland territories scattered across the northeast of South Africa ... Permission to settle in KwaZulu and Lebowa was nominal and meaning-

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<sup>3</sup> (Hrw 1998) and (Dolan 1995a), *passim*.

less, for the homeland government of Lebowa banned Mozambican settlement outright, and in KwaZulu refugees were barely tolerated.<sup>4</sup>

In addition to its direct and indirect involvement in the war,<sup>5</sup> the South African government (fearing cross-border raids by Umkhonto we Sizwe cadres<sup>6</sup> who, the military believed, had training camps in Mozambique) was keen to secure the border at all costs. The South African military, which had principal responsibility for border enforcement, introduced draconian measures to prevent entry, most notoriously an electric fence many kilometres long that could be set to lethal voltage.<sup>7</sup> Kruger Park, the country's largest wild animal reserve, and filled with lions and other dangerous animals, also served as a deterrent to entry. But despite these dangers, tens of thousands of Mozambican civilians made their way into the country in search of refuge and work. While the Bantustan authorities governing the semi-autonomous territories in the Northern and Eastern parts of South Africa received many of these Mozambican refugees, they were not formally recognised.<sup>8</sup>

Despite the very large numbers of Mozambicans who ended up in South Africa as refugees, there was no international organisation – UN or civic – providing humanitarian assistance to the FMRs.<sup>9</sup> The South African government would not allow it.<sup>10</sup> As a consequence, these refugees became 'self-settled', relying on the generosity of ordinary South Africans and the limited assistance provided by traditional leaders, churches and the Bantustan authorities.

### 5.2.1 The UNHCR establishes an office in South Africa

With a gradual softening in policies of the apartheid government from the late 1980s, South Africa agreed to negotiate with the United Nations High Commissioner for Refugees (UNHCR) concerning the establishment of an office in the

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<sup>4</sup> (Steinberg 2005: 3).

<sup>5</sup> The war was to a large extent fuelled by the interests of the former apartheid government in South Africa, which pursued a policy of regional destabilisation. The government provided the right-wing opposition RENAMO forces fighting the left-wing FRELIMO forces with ammunition, training and occasionally back-up.

<sup>6</sup> Umkhonto we Sizwe, 'Spear of the Nation', also known as "MK", was the armed resistance movement of the African National Congress.

<sup>7</sup> This was known as 'the snake' and required a Ministerial order to be switched to lethal mode.

<sup>8</sup> As explained later, Mozambicans registering for the UNHCR-led voluntary repatriation programme in the early 1990s were given a form of temporary, 'retrospective' recognition of their refugee status.

<sup>9</sup> (Polzer 2004: 7) relates this to South Africa's 'national rejection of responsibility', effectively shifting responsibility to the Homeland authorities.

<sup>10</sup> Due to its suspension from the General Assembly of the United Nations, the South African government did not allow any UN Agency to operate in the country, even on a humanitarian basis. UNHCR's repeated requests to provide humanitarian assistance to these refugees were flatly refused by the government.

country.<sup>11</sup> In 1991, the UNHCR was given a formal mandate by the South African government to set up operations in South Africa. This was an historic development, marking the first concrete steps by South Africa to (1) develop a refugee policy based on universally accepted norms, and (2) lay the administrative structure for assessing the legal status of refugees and providing for a durable solution, including the unresolved situation of several hundred thousand FMRs.

The UNHCR's mandate to conduct operations in South Africa was officially confirmed by the signing of a Basic Agreement<sup>12</sup> governing the UN organisation's relationship with the South African government. Upon acquiring its mandate, the UNHCR immediately gave priority to a programme aimed at providing a 'durable solution' for several hundred thousand Mozambican refugees who had resided in South Africa, but had never been formally admitted.<sup>13</sup> In its ongoing negotiations with the South African government, the UNHCR also stressed the need for a tripartite framework to administer a voluntary repatriation programme, based on other country programmes in which the UNHCR had taken part. In its role as advisor to a Tripartite Commission between the governments of Mozambique, South Africa and itself, the UNHCR proposed two solutions for the Mozambican refugees, both of which were ultimately adopted by the Commission, in the form of joint recommendations.

The first recommendation was for a voluntary repatriation programme, to be implemented in terms of a 'Tripartite Agreement' between the two governments and the UNHCR. The second was for a form of regularised status to be granted to former Mozambican refugees who had decided to settle in South Africa and had chosen not to return. In order to give the voluntary repatriation programme a legal basis, the UNHCR and DHA facilitated a project of initial registration, which essentially granted refugee status retrospectively.

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11 ('Statement by Prütz Phiri' 1996), in which she remarked that these early meetings were somewhat surreal affairs, with the South African government represented mainly by uniformed military officers.

12 (Basic Agreement 1993). This Agreement later formed the basis of a bizarre court challenge by Kgama Baramoto, a former general and commander of the Garde Civil in Zaire, together with two other senior government officials, Mudima Mavua and Ngbale Nzimbi, all of whom had fallen out of favour with then-president Mobutu Sese Seko, and had fled the country. The (Baramoto case 1998) is discussed in chapter six.

13 Another programme developed by the UNHCR, around the same time as the consequence of political negotiation, concerned the return of South African exiles, on the basis of agreements reached between the South African government and numerous liberation groups, including the Pan Africanist Congress (PAC), African National Congress (ANC), and other previously banned groups, including the End Conscription Campaign (ECC). For a study on the return of (white) war resisters, see (Israel 2002). According to ('Interview with G. Vallie' 2006), social movements and civic organisations such as the Western Cape Relief Fund were instrumental in the implementation of this programme, acting as crucial mediators between UNHCR and groups in South Africa, as well as assisting with their various social, economic and psychological needs.

### 5.2.2 Assessing the Mozambican voluntary repatriation programme

Ray Wilkinson reported in the UNHCR's widely-distributed magazine *Refugees* that the Mozambican voluntary repatriation programme was a 'remarkable success story'.<sup>14</sup> The South African press also reported the repatriation programme to be a big success.<sup>15</sup> However, independent assessments of the UNHCR's programme, including by Chris Dolan and Alan Simmance, paint a different picture, particularly concerning the programme in South Africa.<sup>16</sup> Out of an initial planning figure of 240 000 (which the UNHCR later revised to 120 000, inexplicably), only around 20 000 persons were voluntarily repatriated between March 1994 and January 1995. This figure was far exceeded by forcible deportations (over 70 000 persons in 1994 alone) by the South African border control authorities.<sup>17</sup>

Dolan explained that the repatriation programme was woefully unsuccessful in South Africa because, at the time, no efforts were taken to regularise the status of the remaining FMRs. In other words, the 'voluntary' nature of repatriation was illusory; there was no alternative offered. Dolan further explained that NGOs – which in some cases received very large sums of money for being implementing partners – had become complicit in the failings of the Mozambican repatriation programme, in particular through their failure to ensure an independent and effective legal advocacy presence, which in turn allowed for inappropriate behaviour.<sup>18</sup> Furthermore, while the repatriation programme from South Africa proved to be largely unsuccessful (on the basis of the UNHCR's own statistical predictions), a promise by the *tripartite* commission, that the Government of South Africa would put in place a mechanism to regularise the status of Mozambicans, remained unfulfilled.

The critiques of the 'voluntary' repatriation programme made by Dolan and others<sup>19</sup> highlighted the structural challenges that civic actors face when participating in government policy implementation. These critiques also served as pointed warnings regarding the importance of civic advocacy in monitoring government behav-

<sup>14</sup> (Wilkinson 1998). The magazine's cover story focused almost entirely on UNHCR's reintegration programme. In other words, it reported on the experiences of those who participated in the repatriation, paying no attention to those who chose not to return to Mozambique.

<sup>15</sup> ('UN Mission Widely Praised' 1995).

<sup>16</sup> (Dolan 1995c) and (Simmance 1996).

<sup>17</sup> (Dolan 1998: 92-98).

<sup>18</sup> As an example of this, (Dolan 1995c) describes UNHCR and NGOs literally lining Mozambicans up in a row and asking them whether they wished to return to Mozambique. But despite many cautionary messages from numerous analysts, there were still efforts to assist Mozambicans to return to Mozambique voluntarily, including by the Wits RRP. Having later amended its views on whether former Mozambican refugees who continued to reside in South Africa desired to 'return home', Wits RRP began implementation from 1997 of what were known as 'assisted voluntary return' programmes, both on its own and in collaboration with other local and international organisations and agencies. (Simbine and Johnston 1997).

<sup>19</sup> (Simbine and Johnston 1997); (K.B. Wilson and Nunes 1994) argued that failings in the voluntary repatriation programme were the consequence of not taking into account the refugees' own flight and return movements.

ious. Unfortunately, almost none of these factors were taken into consideration in the development and implementation of the regularisation project.

### 5.2.3 Lack of legal documentation for those remaining

When, in 1996, the UNHCR applied the cessation clause to FMRs remaining in South Africa,<sup>20</sup> with no corresponding effort to regularise their status inside the country,<sup>21</sup> their already uncertain legal status in South Africa became even more doubtful. Lack of any formal recognition of their status meant that they were vulnerable to abuse and deportation.<sup>22</sup> Official reluctance to integrate Mozambicans into South Africa was particularly resented by those who had voted for the ANC in the 1994 elections.<sup>23</sup> By the late 1990s, when international NGOs began to take a serious interest in FMRs, an estimated several hundred thousand former Mozambican refugees were believed to be in South Africa without legal documentation.<sup>24</sup>

The plight of FMRs in South Africa eventually attracted the attention of the Association of European Parliamentarians for Africa (AWEPA), an ambitious and well-funded Dutch NGO. As discussed in the following section, implementation of the project combined the efforts of AWEPA, local NGOs and the South African government. During the planning and implementation of this project, the civic-state distinction as to who was ultimately responsible for its implementation became blurred. In the process, the project seriously limited the agency of local civic actors involved, and severely curtailed the legal protection of a highly vulnerable group of forcibly displaced persons.

## 5.3 CIVIC CO-OPERATION IN THE STATUS REGULARISATION PROJECT

Civic co-operation in the project to regularise the legal residential status of former Mozambican refugees had its origins in a meeting held at a conference centre in Amsterdam in February 1996. A Dutch organisation called *Refugiado* organised the meeting to discuss the plight of refugees from Mozambique, some of whom had returned to their country, but many of whom remained in the countries where they had sought refuge. Apart from the claim that such experiences in Southern Africa apparently held ‘lessons’ for Europeans, it seemed an unlikely gathering place to discuss matters of refugees and reconciliation, or to try and appreciate the perspective of Mozambicans seeking to rebuild their lives after several decades of war.

20 This was, in itself, an unusual move. Having just acceded to the two major Refugee Conventions, this was something that the government of South Africa ought to have decided, not UNHCR. It seemed, therefore, that the intention of UNHCR in applying the cessation clause to FMRs was simply to relieve itself of any continuing legal obligations towards this group.

21 This is notwithstanding two other regularisation programmes, known as the Miner’s Amnesty and the SADC Amnesty, which did benefit some FMRs. See (Crush and Williams 1999).

22 (Johnston 1999).

23 (Dolan 1995b).

24 (Johnston 2001).

Amsterdam was the headquarters of Refugiado, whose Board was headed by Dutch former politician and anti-apartheid campaigner Jan Nico Scholten. The organisation shared an office with two other organisations that Scholten had established and headed, including AWEPA and the African European Institute (AEI).<sup>25</sup>

Scholten was fond of referring to his network of organisations as part of a 'family'. He referred to the Dutch Refugee Council (DRC) as the 'mother' of Refugiado and the African-European Institute (AEI) as Refugiado's 'father'. He further regarded the AEI as a 'full sister' of AWEPA.<sup>26</sup> Scholten served as, respectively, Chair of the Refugiado Board, Chair of the DRC Board, AEI President and AWEPA President. With the exception of the DRC, these organisations were all managed by the same general staff, and often shared the same letterhead.<sup>27</sup> The AWEPA 'family' wanted to make a concrete contribution to help the FMRs, beyond political lobbying and awareness activities. As Scholten declared at the conference in 1996:

the organisations I represent are committed to human dignity and justice; our work is based upon partnership and solidarity. We are dedicated to the consolidation of democracy and peace ... Let us join forces in our struggle for human rights, African and Europeans together.<sup>28</sup>

Notwithstanding its lack of experience, either in funding or in co-ordinating large-scale refugee or any other humanitarian assistance projects in Africa,<sup>29</sup> AWEPA identified just such an opportunity to 'join forces' in South Africa. This opportunity

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<sup>25</sup> These organisations were products of high-level anti-apartheid political activism in the 1980s. At the time, Scholten was a member of the Dutch parliament, and had formed the Association of West European Parliamentarians for Action Against Apartheid (AWEPA), to mobilise other parliamentarians in Western Europe, and politically isolate the South African apartheid government. With the demise of political apartheid and the thawing of the Cold War in the 1990s, AWEPA re-orientated itself and became the Association of European Parliamentarians for Africa (AWEPA). The substantial funds for Scholten's network of organisations came mainly from European governments and the European Union. Refugiado, registered by Scholten as a foundation two years previously, in the spring 1994, had ambitious plans to try and help the refugees of Southern Africa, beyond the organising of conferences, high-profile delegations of Europeans to Southern Africa, and conference publications.

<sup>26</sup> (Scholten 1996).

<sup>27</sup> According to independent experts in ('University of London Evaluation' 1998), the organisation was 'over-identified' through the AWEPA president. The experts recommended a 'fixed term' for the position of president. For all these reasons, it is reasonable to conclude that there was no effective separation between them. For the sake of consistency, therefore, 'AWEPA' here refers to the activities of all three organisations.

<sup>28</sup> (Scholten 1996).

<sup>29</sup> The report of independent experts from the ('University of London Evaluation' 1998: 169) concluded that, beyond 'institution building projects within government structures' or political lobbying in Europe, AWEPA was discouraged from undertaking 'specific, discrete projects' that addressed, among other things, refugee issues, in which it had no expertise. Although this report long pre-dated the implementation of the regularisation project, AWEPA carried out the project regardless.



came just four months after the 1996 meeting in Amsterdam, when, in early June 1996, the *tripartite* commission, composed of the UNHCR and the governments of Mozambique and South Africa, announced that a cessation clause concerning Mozambicans claiming refugee status in South Africa would come into effect as of 31 December 1996. The legal implication of declaring a ‘cessation clause’ is that the hostilities in Mozambique were deemed to have ended, and it would no longer be possible to claim refugee status on this basis.<sup>30</sup>

AWEPA proposed a project that was to be the third major post-1994 ‘amnesty’ in South Africa, otherwise referred to as the ‘Mozambican amnesty’ or ‘regularisation project for former Mozambican refugees’.<sup>31</sup> AWEPA’s project aimed to provide permanent residence to persons who had arrived from Mozambique as refugees, but who wished to remain in South Africa and had therefore chosen not to take advantage of the UNHCR-sponsored repatriation programme. AWEPA offered to support the process by sourcing the funds as well as providing co-ordination to the regularisation project. Since it was reported that there were still persons who wanted to return to Mozambique, AWEPA also offered to support a limited number of ‘assisted return’ projects.<sup>32</sup>

Since AWEPA itself had no background in humanitarian work, it had to hire additional experts and find local partners in South Africa to implement these two projects, although it maintained ‘overall co-ordination’, particularly concerning political matters.<sup>33</sup> At a conference organised in Nelspruit, South Africa in June 1997, AWEPA laid out its agenda for future activities<sup>34</sup> and began identifying local partners for its ambitious regularisation project. Led by AWEPA, these organisations eventually formed what was termed a ‘Task Force’ to co-ordinate activities locally.

On Human Rights Day, 10 December 1997, nearly one year after the cessation clause had had been formally put into place, the then-Minister of Home Affairs, Mangosuthu Buthelezi, sent a letter to AWEPA confirming the South African government’s agreement to grant an exemption to FMRs. The letter also acknowledged the ‘possibility of (AWEPA’s) kind assistance in providing financial and human

30 (‘Mozambicans to Lose Refugee Status’ 1996). As already mentioned, this announcement followed the conclusion of a mostly unsuccessful effort on the part of UNHCR and the government of South Africa to provide a durable solution for the several hundred thousand Mozambicans still resident in South Africa.

31 Two previous amnesties focused on former mineworkers and nationals of SADC countries. See (Crush and Williams 1999).

32 In (Awepa 1988), AWEPA misrepresented the figures provided to them by local organisations, making the erroneous claims that between one-half and a third of an estimated 300 000 former Mozambican refugees in South Africa wished to return to Mozambique. In fact, according to (Johnston 2001: 36), only 158 FMRs applied for assistance to return to Mozambique.

33 This expression was repeated in several documents produced by the project, including minutes of meetings.

34 The conference, organised by AWEPA, who also produced a report, was entitled ‘Prolonged Hospitality or Return Home?’.



resource assistance in this regard'.<sup>35</sup> The letter did not, however, confirm that an agreement was in place between AWEPA and the DHA. This was something that was to be negotiated. Furthermore AWEPA was still in the process of identifying local NGOs willing to contribute to the project.

This section will first discuss the role of civic actors in the preparation of the regularisation project, and in particular, the formation of a joint civic-government Task Force. Next, this section will discuss how the implementation of the project was delayed, which is followed by a critical assessment of the project's implementation.

### 5.3.1 Preparations for the regularisation project

Two South African organisations (that eventually became key partners in the regularisation project) were involved from the preparatory stages of the regularisation project. These were the South African Council of Churches (SACC), principally through the Witbank Diocese in Mpumalanga, and the Refugee Research Programme (RRP), which at the time was affiliated to the University of the Witwatersrand Rural Facility in Acornhoek, Mpumalanga.<sup>36</sup> The SACC and the RRP brought a great deal of institutional experience in (respectively) humanitarian assistance and advocacy-oriented research, although both also had their limitations. In particular, neither organisation had a legal background.

The SACC had long-developed contacts with exiled Mozambican communities through its member parishes, and had participated in the UNHCR repatriation programme as an implementing partner. The SACC therefore had experience in large-scale responses to refugees,<sup>37</sup> but had limited knowledge of immigration policies, something which proved to be problematic at a later stage in the regularisation project's implementation.

The RRP had been conducting research in the area since 1993. Dolan, the programme's founder, produced some of the most important early work concerning forced migrant communities in South Africa,<sup>38</sup> although he had left the RRP by 1997. After Dolan and other core research staff left, the RRP's work was mainly limited to small-scale surveys of rural-based refugee communities. With much-reduced research funding, its capacity was limited. Nevertheless, the RRP remained the only organisation in South Africa still conducting rural research of forced migrant communities, and had the most institutional knowledge of any organisation in South Africa concerning the socio-economic conditions of former Mozambican refugees.

<sup>35</sup> Letter from M G Buthelezi, Minister of Home Affairs, to Dr J N Scholten, AWEPA, 10 December 1997.

<sup>36</sup> RRP also became the principal partner in the assisted voluntary return projects.

<sup>37</sup> ('Spelling Relief for Rulani's Refugees' 1998).

<sup>38</sup> (Dolan 1995a); (Dolan et al. 1997) and (Dolan 1998).

The SACC and RRP together did not have the resources to implement the regularisation project, and identifying other South African partners to form part of AWEPA's Task Force proved difficult. Lawyers for Human Rights (LHR) contributed to some early Task Force meetings, but were reluctant from the very beginning, particularly concerning the organisational structure,<sup>39</sup> and a few months later withdrew from the Task Force altogether.<sup>40</sup> The Southern African Migration Project (SAMP) initially agreed to contribute to the all-important information campaign, but its involvement was far less than was initially envisaged when AWEPA drastically cut the budget for awareness-raising activities, even though it had already raised hundreds of thousands of US dollars through various European donors.<sup>41</sup> Indeed, AWEPA's lack of transparency, budget discrepancies and frequent manipulations of local partners' budgets proved to be a major source of discontent among South African partners.<sup>42</sup>

<sup>39</sup> One document produced by LHR, 'AWEPA Meeting, Pretoria', 27 February 1998 outlined (at AWEPA's request) the legal status of former Mozambican refugees in an international context, the consequences of their then-current legal status and, somewhat repetitively, the consequences of 'becoming illegal', as well as the risks if their amnesty application was not approved. In the same document, LHR made known its multiple concerns regarding the AWEPA project proposal, which also requested clarification on the co-ordinating role AWEPA envisaged for itself as well as the organisational set-up in general, and questioned various assumptions specified in the proposal document. AWEPA's response to LHR's concerns was not to discuss them in the meeting with other Task Force members, or to respond in writing, but to reserve such matters for 'bi-lateral discussions'.

<sup>40</sup> LHR, Letter to Task Force Members, 7 October 1998, in which it expressed 'serious reservations over the Project's ability to meet its stated objectives under the present circumstances'. In a separate letter to Jan Nico Scholten of AWEPA dated 7 October 1998, LHR expressed frustration that 'though we have frequently made known our concerns, we do not believe that they are adequately being addressed'.

<sup>41</sup> In a letter to LHR dated 23 September 1998, AWEPA confirmed that donors to the project up until that point included the Swiss government, Swedish government, Bilance (Cordaid) Netherlands, Concern (Ireland) and the Dutch Refugee Council. This reluctance to honour funding agreements with its local partners, in addition to AWEPA's erroneous claim that the shortfall for the education campaign was promised by DHA, eventually pushed AWEPA's then South Africa-based co-ordinator to resign from the project. Confirmed in an e-mail from Nadja Manghezi to Handmaker, J. dated 1 November 1999.

<sup>42</sup> Unbeknown to the local partners, AWEPA had been able to raise over one hundred thousand US dollars from the Dutch Refugee Council, and by July 1998 had declared, internally, an eight hundred thousand dollar budget for the first phase alone. In a document by the Dutch Refugee Council, 'Rapportage van de Commissie van Drie', July 1998, the budget was declared to be 793,427 US dollars. In letters to the Swedish government, however, AWEPA declared its budget to be 496,100 US dollars, an astonishing 172,200 of which was reserved for 'travel'. These figures do not include the budget and funds raised for the assisted voluntary return projects. By contrast, its message to the public was different. In ('Refugees the Focus of New Aid Group' 1998), it was claimed by AWEPA president Jan Nico Scholten that the budget for the first phase was '2 million Rand' (equivalent to just over 200,000 US dollars at that time). In a later statement, however, AWEPA, 'Preliminary task force meeting South African partners', minutes of a meeting in Pretoria, 18 June 1998, claimed that 'the budget for the first two phases of the project ... almost US\$ 800,000'.

The consequences of these complex factors are explained in the following sections, beginning with the creation of an implementation Task Force, followed by the project's launch and a decision on the part of AWEPA, prior to implementation, to abandon a credible monitoring function.<sup>43</sup> As argued in an earlier analysis of the project to regularise the status of FMRs,<sup>44</sup> various assumptions AWEPA made in its proposal document were strongly contested by the South African organisations it approached as potential partners, notably LHR, but with little result.

### *Task force meetings*

Meetings of the Task Force in preparation for the first phase implementation of the Mozambican amnesty/regularisation project were organised by AWEPA, mostly in Pretoria, South Africa.<sup>45</sup> The meetings mainly addressed the Mozambican regularisation project, but also referred to ongoing assisted voluntary return projects. In the minutes to these meetings, nearly always chaired and carefully controlled by AWEPA, the activities and inputs of the 'local partners' were carefully spelled out in 'action points', giving the impression of consultation. Furthermore, minutes of the Task Force preparatory meetings, also produced by AWEPA, often mentioned that recommendations were 'shared' by all participants to the meeting.

For example, in AWEPA's minutes to a Task Force meeting on 27 February 1998, it was recommended that: (1) training of police officers take place, (2) that there be a moratorium on deportations and (3) more detailed information be provided to the Task Force concerning the target group.<sup>46</sup> None of these recommendations were ever implemented in any meaningful way. Police officers were never trained by the project. Furthermore, it was widely reported that the South African government's ongoing campaign of deporting Mozambicans was continuing,<sup>47</sup> and had in fact increased dramatically since 1993. AWEPA took the position that 'because a full moratorium is infeasible, there should be more clarified guarantees (sic)'.<sup>48</sup> Finally, there was no further research commissioned to gather additional information about the target group.

Although AWEPA held regular discussions with the DHA regarding preparations for the project, only cursory information was communicated back to the Task Force about what had actually been discussed, and what steps had been taken by the DHA towards preparation. Both the limited information provided to participants,

<sup>43</sup> Extensive references are made to secondary or so-called 'grey' material provided by LHR, RRP and other participants to the regularisation programme, which is now located in an archive of the Forced Migration Studies Programme, University of the Witwatersrand.

<sup>44</sup> (Handmaker and Schneider 2002).

<sup>45</sup> The meetings were often personally attended by AWEPA president Jan Nico Scholten himself, coming from Amsterdam, and/or by Pär Granstedt of the AEI, coming from Sweden.

<sup>46</sup> AWEPA, 'Task force meeting: action points', Minutes of a meeting in Pretoria, 27 February 1998.

<sup>47</sup> Among many articles published in the major newspapers at the time, see: (Mugabe 1998); ('4,500 Illegal Held at the Borders' 1998) and (West 1997).

<sup>48</sup> AWEPA, Minutes, 18 June 1998.

and the way in which disagreements with AWEPA's agenda were carefully avoided, reflected what evaluators of AWEPA later criticised as an 'out-dated' management style.<sup>49</sup>

In its feedback to the AWEPA proposal, LHR questioned several assumptions that the project organisers had made, none of which LHR felt were satisfactorily addressed by AWEPA. The first main concern raised by LHR concerned AWEPA's vague reference to assuming 'total co-ordination' of the project rather than clearly explaining what roles it, the South African and Mozambican government authorities, and local organisations were to assume. Such uncertainties dangerously blurred the responsibilities of – and the relationship between – government and non-government organisations, raising serious questions concerning the perceived lack of compliance with administrative due process requirements. This lack of clarity on roles and responsibilities also meant that insufficient priority was given to the need for a competent, independent monitoring presence, which meant that participants in the regularisation project essentially monitored themselves and each other. LHR's second major question was whether assurances had been obtained from all three border control authorities<sup>50</sup> on whether a moratorium on deportations would be in place throughout the duration of the regularisation and assisted voluntary return projects.<sup>51</sup> Despite the obvious threat that such deportations posed to the process, clear assurances were never obtained.

In the meantime, in March 1998, at AWEPA's request, a background paper was produced by local NGOs and was 'presented to the South African Department of Home Affairs' by AWEPA's President.<sup>52</sup> This hastily-prepared document drew upon the research and experiences of SAMP and RRP in monitoring the implementation of the two previous amnesties, for miners and SADC nationals. The document furthermore drew on the rights protection concerns of LHR, and included recommendations on how the amnesty ought to be defined, publicised, and implemented. At this stage, there was still no proposal from the DHA regarding the guidelines for implementing the regularisation project, including the determination criteria for regularisation.

#### *AWEPA launch of the regularisation project*

Despite continuing uncertainties as to what would be the criteria for regularisation, and without consulting its 'partners' in South Africa, AWEPA formally launched the regularisation project in London, England in the second week of April 1998.

<sup>49</sup> ('University of London Evaluation' 1998).

<sup>50</sup> ('Illegal Rampages by Home Affairs' 1998).

<sup>51</sup> At the time these three border control authorities were the Department of Home Affairs (with principal responsibility), together with the South African Police Services and the Department of Defence.

<sup>52</sup> (Handmaker et al. 1998).

The event drew the attention of the South African press, with two papers referring to a 'four year project to support former Mozambican refugees'.<sup>53</sup>

Two months later, on 17 June 1998, and just one day prior to a Task Force meeting in South Africa, AWEPA notified its local partners of the South African government's responses to the document produced by LHR, SAMP and RRP.<sup>54</sup> Apparently, the government had apparently also made known at this meeting that 'there was no formal agreement between DHA and AWEPA', despite the existence of the 1997 letter from Minister Buthelezi referred to earlier.<sup>55</sup> In another contradictory message, AWEPA claimed that the DHA had 'agreed by letter to the 6 issues agreed on 7 May [sic]', including, among other matters, that 'the outreach programme should start on 1 August 1998'. Finally, AWEPA assured the Task Force that 'no money will go to the South African authorities'.<sup>56</sup>

#### *Abandoning a credible monitoring function*

Following the public launch, AWEPA came under increasing pressure to start implementation of the project, and focused on eliminating obstacles to a launch; in the absence of active involvement by LHR, AWEPA decided to abandon a credible monitoring function. In other words, there was no organisation involved in the project that had the capacity or legal knowledge to ensure that the implementation of the programme would be done in accordance with established international practices, or in terms of nationally established due process guidelines, as specified by the Constitution. Given the UNHCR's decades-long experience with durable solutions,<sup>57</sup> including the regional repatriation programme for Mozambican refugees and the setting up of the Tripartite Commission, it was surprising that AWEPA did not approach the UN organisation for advice or possible involvement. A representative of the International Organisation for Migration attended some meetings of the Task Force at the outset, but was only passively involved.<sup>58</sup>

Once the UNHCR heard of the regularisation project, it communicated its concerns directly to the then-Deputy Minister of Home Affairs, stating that it had neither been approached by AWEPA, nor did it agree with the 'large numbers' speci-

53 ('Solving the Refugee Problems' 1998) and ('Bulk of Mozambican Refugees Want to Remain in South Africa' 1998).

54 According to a letter to J. N. Scholten from A S Mokoena (then-Director-General of Home Affairs), 'Legalising the status of Mozambican former refugees', (not dated), this followed a meeting between AWEPA and the Department on 7 May 1998.

55 Referred to in AWEPA, Minutes, 18 June 1998.

56 AWEPA, Minutes, 18 June 1998.

57 The UNHCR also have extensive experience with regularisation/legalisation programmes in different parts of the world.

58 There was reference in the AWEPA Minutes, 18 June 1998 that 'Discussions are going on with IOM to start a needs assessment in Mozambique to get more details on the needed resources for the returnees'.

fied in the proposal.<sup>59</sup> Some of this concern was disingenuous;<sup>60</sup> the UN agency never fully accepted criticisms of its 1993-1996 repatriation programme of Mozambican refugees from South Africa. Furthermore, while the UNHCR did have a contribution to make, given its extensive experience in implementing large-scale durable solution projects, and it was fully justified in insisting that it be consulted, its excessive concern over the 'mixing of refugee issues with non-refugee migration matters' seemed somewhat exaggerated.<sup>61</sup> Nevertheless, one would still have expected AWEPA to approach the UNHCR for advice and possible monitoring in accordance with the agency's mandate, which the UNHCR clearly stated it was willing to do. This option was never pursued by AWEPA.

At a late stage in the planning of the project, and in the absence of active participation in the Task Force,<sup>62</sup> the National Paralegal Association (NPA) was approached and agreed to contribute to the project through their member branches in Northern Province and Mpumalanga. LHR was one of the very few organisations in South Africa at the time with the expertise and capacity to carry out what the Task Force had collectively emphasised was an 'important' monitoring function. But, as already mentioned, LHR had determined it could not accept this role in what it perceived to be a dangerously compromised organisational structure. LHR was of the view that AWEPA's close and non-transparent relationship with the government would result in AWEPA prioritising this relationship over that with its local partners, which is in fact what happened.

While AWEPA's proposal was based on inadequately researched, vague or misleading assumptions, at the same time AWEPA repeatedly displayed an unwillingness to be guided by the experiences, concerns and perspectives of local organisations. For their part, NGOs were mostly reluctant to speak out against the authoritarian management style of AWEPA. In addition, the project struggled with endless delays as well as a lack of clarity concerning the roles and responsibilities of local civic actors and of the DHA, which also became a member of the Task Force.

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<sup>59</sup> UNHCR, 'Repatriation of Mozambicans from South Africa', letter to the South African Deputy Minister of Home Affairs, 24 February 1998. AWEPA claimed orally in a Task Force meeting I attended that UNHCR had been approached, but had 'chosen not to participate'.

<sup>60</sup> Up until its letter to the Deputy Minister in February 1998, the UNHCR had displayed little interest in pressing the South African government to address the plight of the several hundred thousand former Mozambican refugees who, in choosing not to repatriate to Mozambique, were left without formal legal residence in South Africa.

<sup>61</sup> Disagreement over the actual numbers of former Mozambican refugees (or AWEPA's designated term, 'refugees during the period of destabilisation') proved to be a problem throughout the project's planning and implementation. AWEPA maintained a figure of 300 000, while the RRP argued there were approximately 220 000. Meanwhile, the Department of Home Affairs (DHA) claimed they estimated no more than 90 000 would apply for regularisation, a surprising conclusion since the DHA claimed it deported over 700 000 Mozambicans between 1990 and 1997 (Source: DHA).

<sup>62</sup> LHR later made a modest contribution to the training of volunteers and paralegals.

### 5.3.2 Delays in implementation

After a written commitment from the Minister of Home Affairs, funding for the project apparently secured, and finally a public launch of the regularisation project in London in April 1998, it is unclear why implementation of the project was delayed for a year and a half. Since official guidelines on the implementation of the regularisation project had not been issued by April 1998, the Task Force requested LHR to provide further feedback to the Task Force on certain 'legal issues', even though LHR was not formally part of the project's Task Force. Furthermore, AWEPA and other Task Force members requested SAMP to provide feedback on the information campaign and strategies.

LHR's advice,<sup>63</sup> presented in September 1998, concluded that there were many outstanding issues of concern, of a legal or administrative nature, that needed to be addressed. These included concerns over the proposed inclusion criteria, the documentation that applicants would be required to submit in support of their application, access to the procedure, and whether assurances would be obtained against apprehension and deportation, both leading up to and including implementation of the regularisation project. The LHR document proposed that exceptions be made for 'survival fraud'; in other words, for applicants who would not otherwise have been eligible for regularisation of their status, but could reasonably explain that they had no option for obtaining documentation other than through illicit means, in order to avoid arrest and deportation. LHR furthermore recommended that the Departmental procedure draw on the previous practice of the Department, namely policy circulars that had been issued in 1994 in connection with the Mozambican repatriation programme.<sup>64</sup> The Task Force did not take up these recommendations during the project's implementation.

SAMP's report, presented early in 1999, proposed an extensive information campaign aimed at avoiding the mistakes of the first two amnesties, and utilising a wide range of media resources.<sup>65</sup> The document advised that efforts should be undertaken to reach women as a special target group, and measures were also proposed to combat existing xenophobia and correct prevailing misperceptions among the South African public and opinion-makers. Additional training of government officials was also envisaged by SAMP. Virtually none of this advice was followed, and only a basic information campaign was implemented.

On the 2 March 1999, the South African Director-General of Home Affairs sent a letter to AWEPA's office in Cape Town. The letter notified AWEPA that 'problems (were) being experienced with the programme as the Department does not have personnel available to accompany the mobile units'. In view of the then-forthcoming national elections, with which DHA staff would also be occupied, the

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<sup>63</sup> (Schneider 1998).

<sup>64</sup> These included Passport Control Instruction No. 20 of 1994, as amended by Passport Control Instruction No. 23 of 1994.

<sup>65</sup> (Williams and Eyber 1999).



Department ‘suggested that the whole project be postponed until after the 1999 elections’, which were to be held on 1 July 1999.<sup>66</sup>

The South African government finally issued ‘Draft Guidelines’ for the implementation of the regularisation project; these Guidelines mentioned that ‘this Departmental Circular follows Departmental Circular no. 33 of 1999 which dealt with Authority to issue immigration permits (sic)’.<sup>67</sup> Reference to this additional circular gave the DHA officials formal authority to grant permanent residence. However, neither these guidelines (which were never officially amended from the original draft), nor the eventual implementation of the Amnesty, took much from the recommendations by LHR or SAMP into consideration. They were also never officially gazetted (i.e. published by the official Government Printer) as required by law.

### 5.3.3 Doing justice to the matter? Blurred roles and overlapping responsibilities

When the regularisation project finally began to be implemented in September 1999, many of the concerns raised by local civic actors had still not been addressed; in particular, the roles of the DHA, AWEPA and local civic actors blurred, and their corresponding responsibilities overlapped with each other. It is impossible to canvass all of the issues that arose during the implementation of the project. However, four issues stand out that illustrate both the degree to which local civic actors became compromised in their relationships with the South African government, and the lack of due process for FMR applicants. These issues are: (1) AWEPA’s non-transparent political lobby, (2) AWEPA’s financing and co-ordination of government functions and disregard of due process and, finally, (3) the lack of an effective, independent monitoring presence.

#### *Non-transparent political lobby*

The lack of a transparent political lobby by AWEPA is the first issue. At various stages in the planning and implementation of the project, AWEPA made frequent assertions that it was involved in the establishment of multiple, high-level forums to ensure the smooth implementation of the project. For example, AWEPA had earlier promised the Task Force that the Minister of Home Affairs had given AWEPA his personal backing for the project. AWEPA’s minutes from the meeting of 18 June 1998 promised the possible creation of a new ‘tripartite commission’ between the Mozambican and South African authorities and AWEPA, although it does not appear that anything ever came of this. In the same minutes, AWEPA claimed that ‘the problems between the UNHCR and AWEPA had been solved’ by using the

<sup>66</sup> Letter to J.N. Scholten from A.S. Mokoena, ‘Former Mozambican Refugee Project’, 2 March 1999.

<sup>67</sup> Department of Home Affairs, ‘Draft guidelines for the exemption for the Mozambican refugees in terms of section 28(2) of the Aliens Control Act, 1991, from the provisions of section 23(a) of that Act’, Departmental Circular No. 34 of 1999, dated 15 July 1999 and signed by Michael Tlhome-lang on behalf of the Director-General of Home Affairs.



term 'returnees' rather than 'repatriation'. It was further claimed that the UNHCR would 'be present in the role of advisor'.<sup>68</sup> Neither the idea of a further, tripartite commission, nor the involvement of the UNHCR ever materialised.

In a further statement made in March 2000, AWEPA claimed that the regularisation project was 'politically guided by DHA and AWEPA and coordinated by the Dutch NGO Refugiado', thereby confirming that the project received joint political guidance. Without mentioning the considerable tensions between the DHA and participating local NGOs, the March 2000 report by AWEPA claimed that:

the project has proven to be a very valuable experience. Collaboration and understanding has been good and productive. In today's South Africa the project can be held up as a good example of collaboration between government and civil society groups, a thing seldom experienced in the past.<sup>69</sup>

Since AWEPA and Refugiado were the same organisation, AWEPA deliberately blurred the distinction between itself, a civic actor, and the South African government, which made it very difficult to distinguish where the role of civic actors ended and where government accountability began.

AWEPA's promises and claims to the Task Force seemed intended to give the impression that its political lobby was crucial to the outcome of the project. Instead, these statements confirmed that the nature of AWEPA and its sister organisations were characterised, as two Dutch investigative journalists later concluded on the basis of various evaluation reports by AWEPA's donors, by an 'autocratic and secretive' nature.<sup>70</sup>

*AWEPA's financing and co-ordination of government functions and disregard of due process*

The second issue was AWEPA's financing and co-ordination of functions normally fulfilled by the DHA; many of AWEPA's interventions amounted to a disregard of due process. As mentioned earlier, AWEPA declared on 18 June 1998 that, 'no money will go to the South African authorities'.<sup>71</sup> There were clearly some sensitivities about this, including a statement from the Director-General of Home Affairs to the South African Parliamentary Portfolio Committee on Home Affairs, one month earlier, that:

They [AWEPA] have indicated that they are willing to fund the exercise, but it now appears as if they intend to target persons who do not qualify in terms of the Cabinet decision and it may be necessary to fund the exercise departmentally. It is en-

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<sup>68</sup> AWEPA, *Minutes*, Meeting, 18 June 1998.

<sup>69</sup> AWEPA Progress Report, 2000.

<sup>70</sup> (Asbeck and Meeus 1998).

<sup>71</sup> AWEPA, *Minutes*, 18 June 1998.

visaged that, if the state has to fund the project, it will cost approximately R1 m [Note: approximately USD 100,000]. This has not been provided for.<sup>72</sup>

A day after confirming that ‘no money would go to South African authorities’, AWEPA issued a more cryptic statement that ‘Home Affairs is the lead agency ... and that AWEPA/AEI, together with their partners, are assisting Home Affairs in this project’.<sup>73</sup> Presumably, the reasons for maintaining this distinction were that the job of regularisation was the responsibility of government, not of NGOs. Indeed, local NGOs who were members of the Task Force had insisted on this. Yet, as the project got underway, AWEPA both funded numerous activities of government and – as mentioned above – took overall responsibility for the project’s co-ordination.

In the run-up to a crucial inter-provincial meeting in October 1999, AWEPA explicitly acknowledged that it would do all it could to obtain funding for the DHA.

There is a serious built-up [sic] of unprocessed files ... The issue of unprocessed files was discussed with DHA while visiting the Daantjie Mobile Unit with Dr. Jan Nico Scholten. Personnel shortage was mentioned as the main problem for not being able to process files as they come in ... Long delays will have a negative effect on the whole project ... *Dr. Scholten expressed his willingness to immediately contact donor agencies for additional funds to allow for the cost of temporary transfer ... of Immigration Officers from within the DHA to speed up the processing of applications.* DHA will work out financial requirements and a proposal.<sup>74</sup> [Emphases added]

At another inter-provincial meeting, the DHA again requested funding from AWEPA. In response, AWEPA assured DHA that they were ‘taking this matter seriously and (had) asked for more money, but the matter (had) unfortunately not yet been finalised’.<sup>75</sup> One month later, AWEPA announced in a meeting with the DHA that it had found the funds requested:

AWEPA has raised the necessary funds to extend the contracts of the 19 DHA temporary staff appointed to the project. During this same period, one Church Volunteer will remain in each of the district DHA offices where files are processed in order to assist in the work and to link back information to the applicants.<sup>76</sup>

<sup>72</sup> (Williams 1999: 85).

<sup>73</sup> AWEPA, Minutes, 19 June 1998.

<sup>74</sup> AWEPA, ‘Meeting of inter-provincial committee on the regularisation of FMR’s on 28/10’, Fax message from G. ten Velde, 25 October 1999.

<sup>75</sup> DHA, ‘Minutes of the inter-provincial meeting on the outreach project of former Mozambican refugees of the period of destabilisation held at Dwarsloop’, 25 November 1999.

<sup>76</sup> AWEPA, ‘Meeting with DHA, Pretoria’, Minutes of a meeting at DHA in Pretoria, 18 December 1999.

This announcement was later confirmed at an inter-provincial meeting, where AWEPA announced that it 'had made funds available for the extension of the contracts of 19 temporary staff for a period of three months'.<sup>77</sup>

AWEPA also funded certain activities of Mozambican diplomatic officials. Even though it was known as early as 15 September 1999 that the Mozambican consulate was 'caught unaware in providing ID's inside RSA' and needed to establish a regional presence, it did not appear that much was actively done to insist that the consulate adopt a more proactive role. However, in March 2000 it was announced that 'AWEPA has been able to raise additional funding to give support to the Mozambican Consulate for a three months outreach activity'.<sup>78</sup> Though this intervention came at a very late date in the implementation of the project, AWEPA's funding enabled the Mozambican consular officials to travel to the areas where the regularisation project was taking place in order to certify applicants' Mozambican identity, so that they would not have to travel long distances, and at considerable expense, in order to reach the Mozambican consulate in Nelspruit.

The point to make here is not to argue whether AWEPA's funding of government functions had a negative or positive outcome, but to question whether it was appropriate for a civic actor to fund and co-ordinate key functions of government. In June 1998 this seemed to be out of the question, but a year and a half later it seemed that AWEPA had changed its mind.

On some occasions, AWEPA actually assumed some of the government's key functions. On 21 July 1999, AWEPA confirmed in a meeting with DHA in Pretoria that it was responsible for drafting a crucial official announcement of the starting date for the project. AWEPA confirmed that: 'We agreed with Mr. Kruger that we will draft an official announcement. In order to publish this, again an official date has to be mentioned'.<sup>79</sup>

Another intervention by the AWEPA co-ordinator in South Africa and an AWEPA staff member in Amsterdam proposed the setting-up of a proposed appeals board:

In a meeting I had with Mijntje [AWEPA] and Mr. Zitha [DHA], the latter had an idea of establishing a kind of immigration board made up of one DHA official, one Volunteer and one Paralegal to deal with the application process. Could this possibly be extended to the appeals process as well? Not only will it reduce the workload on DHA Immigration Officers but also has the advantage as mentioned by Mr. Zitha that 'the right hand knows what the left hand is doing'.<sup>80</sup>

<sup>77</sup> DHA, 'Minutes of the inter-provincial meeting on the regularisation of former Mozambican (sic) refugees held at Wits Rural Facility in Accornhoek (sic)', 13 January 2000.

<sup>78</sup> AWEPA, 'Support to the Mozambican former refugees of the period of destabilisation progress report', March 2000.

<sup>79</sup> AWEPA, 'Support to the Mozambican former Refugees of the Period of Destabilisation', Letter from J. N. Scholten to M. Tlhomelang (DHA), 21 July 1999.

<sup>80</sup> AWEPA, 'Meeting of inter-provincial committee on the regularisation of FMR's on 28/10', Fax letter referring to the forthcoming meeting from G. ten Velde, 25 October 1999.

Such a proposal, if realised, would not only have been highly compromised by the direct role played by civic actors, it would most certainly have been an *ultra vires* construction, in other words formed without any legal basis. Though AWEPA's proposal for such a structure showed their willingness to develop administrative systems on behalf of the DHA, it also revealed a disregard for the FMR applicants' rights to due process. While this particular proposal was eventually abandoned, no administrative appeals process was ever established, which was itself a violation of due process, since applicants were left with no clear recourse if their applications for regularised status were rejected.

Due process was curtailed in other ways. In multiple documented cases, AWEPA staff – as well as AWEPA-paid paralegals and volunteers – fulfilled functions that clearly fell outside their remit and severely compromised their role as independent advisors. In some cases, civic actors were virtually adjunct employees of DHA. In his reports, AWEPA's co-ordinator echoed the position of DHA on issues such as 'false' documentation. In doing so, he ignored an earlier recommendation by the Task Force that such cases ought to be treated as 'survival fraud', since it had been virtually impossible in the past (i.e. prior to 1994) for many applicants to have obtained such documentation in a legitimate way.<sup>81</sup>

More seriously, when an RRP monitor strongly criticised the behaviour of DHA officials in Northern Province on 29 September 1999, the DHA responded angrily.<sup>82</sup> The AWEPA co-ordinator, rather than supporting the independent role of RRP, or at least stepping back and letting the matter be argued, explicitly accepted the DHA's position that the RRP had gone beyond their mandate. AWEPA not only took the position that RRP should apologise to DHA, but that RRP should amend its monitoring and evaluation procedures so that such 'problems' would never happen again.<sup>83</sup>

As a consequence of AWEPA's financing and co-ordination of government functions, as well as its central role in negotiation of policy, NGOs and government officials alike frequently described the regularisation project as the 'AWEPA project'. In one case, discussed below, DHA Northern Province described the status that Mozambicans would receive as an 'AWEPA exemption'.<sup>84</sup> The media, too, frequently identified the project as a joint AWEPA/DHA initiative.<sup>85</sup> Once again, blurred distinctions between the roles of civic actors such as AWEPA and government made it very difficult to determine on what basis decisions were being taken.

<sup>81</sup> (Handmaker and Schneider 2002: 22).

<sup>82</sup> DHA, 'Comments to Draft report: Regularisation of Former Mozambican Refugees Monitoring & Evaluation Summary for weeks 1 & 3 (9-27 Aug 99)', September 1999.

<sup>83</sup> AWEPA, 'Meeting of inter-provincial committee on the regularisation of FMR's on 28/10', Ibid.

<sup>84</sup> DHA, 'Comments to Draft Report', 1999, Ibid.

<sup>85</sup> ('SA Offers War Refugees Citizenship' 1999).

*Lack of an effective and independent monitoring presence*

During the early meetings of the Task Force, an effective and independent monitoring presence was acknowledged to be a crucial aspect of the overall project. AWEPA confirmed its importance by making explicit reference to 'two levels' in the project. These were, firstly, 'to assist Home Affairs in the outreach project' and secondly, that 'the monitoring of the project ... will be independent from Home Affairs'. It was further stated, rather vaguely, that the 'monitors will be responsible towards the former refugees'.<sup>86</sup> AWEPA's representative Pär Granstedt specified that monitors would have three 'channels' of recourse, namely: 'the task force, the media and the donors'.<sup>87</sup> No mention was made of the possibility of administrative and legal recourse. This proved to be a major issue once the project was terminated.

Rather than putting in place an effective monitoring presence, monitoring due process was left to the poorly-defined, often overlapping roles played by RRP, the National Community Based Paralegal Association (NCBPA), and SACC Volunteers. These roles fell far short of what was required, and placed all three organisations in a structurally compromised position. Neither RRP nor the NCBPA possessed the capacity to effectively monitor issues of legal process, nor did they have the clout to hold the government accountable. Volunteers and paralegals fulfilled multiple roles, ranging from advising individual applicants to assisting in the processing of applications.

Most importantly of all, there was no mechanism to allow for even a basic administrative or legal challenge, which, according to the evidence available, was certainly needed. Several documented episodes illustrate the failings of what was generously termed the 'monitoring and evaluation' function of RRP, and the advisory roles of SACC volunteers and paralegals.

In September 1999, the provincial office of the DHA Northern Province complained about the behaviour of paralegals:

the D.H.A. did not know the role of paralegals as they seem to be supervising instead of working and they were also contradicting the whole procedure that DHA is using instead of legally correctly advising people accordingly. This led to the need of training paralegals in the line function of DHA with specifically reference to Alien Control Act and procedure. They were also trained in differences between Awepa and SADC exemption so that they can assist the people correctly.<sup>88</sup>

In this case at least, it seemed that paralegals were doing exactly what they were supposed to do, though clearly not in a manner with which the DHA was comfortable.

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<sup>86</sup> LHR, 'AWEPA pre-meeting', Notes taken by J. Schneider, 18 June 1998.

<sup>87</sup> Ibid. These points were later independently verified by other NGO representatives present at this meeting.

<sup>88</sup> DHA, 'Comments to Draft Report', 1999, Ibid.

On other occasions, it appeared that paralegals lacked knowledge of how the ACA operated, which DHA responded to by training the paralegals and volunteers themselves. Later in September, the RRP issued a report on how paralegals and volunteers were faring in Giyani. At one stage the report criticised volunteers for wanting to take up employment with the DHA.

The regional Head is recruiting the volunteers and paralegals to apply for other temporary posts at the DHA. Volunteers seemed to be very much interested ... Two of them completed the applications and went for interview on 24/09/99.<sup>89</sup>

It was further reported that:

Volunteers and Paralegals are not allowed to answer any questions asked by the Mozambicans. They are told that they know nothing except to complete the application forms. If anyone (FMR) asks anything, they must be sent to the Home Affairs Officials. Paralegals are not allowed to go around the offices especially where there are officials who are helping Mozambicans, they are told to stay in their office and that they have nothing to do in there.<sup>90</sup>

While the concerns raised in RRP's monitoring report were understandable, given the highly unconventional roles that the volunteers and paralegals were fulfilling, the strong implication of RRP's critique was that DHA's behaviour in restricting their access to the DHA offices was wrong. However, while recruiting paralegals and volunteers emphasised how blurred their respective roles were, it was absolutely correct, from an administrative law point of view, that the DHA take sole responsibility for the process and highly inappropriate that paralegals or monitors interfere with this, for example by answering questions about the process.

A different kind of incident was reported by RRP concerning applications by FMRs in Elim, Northern Province:

No appeals have been made yet. The para-legal does not believe there will be many appeals, since he, the volunteers and the immigration officer carefully interviewed all applicants who applied through the process to establish their genuine status.<sup>91</sup>

This troubling report confirmed that the paralegals, volunteers and the DHA had all agreed that few appeals, if any, would take place. Hence, the FMRs were not offered even basic administrative justice standards in the AWEPA project's handling of their applications. However, the lack of due process was not acknowledged by AWEPA, which had already claimed in March 2000 that:

Those FMR's who have not made use of the opportunity to apply during the six months Outreach period and those that have been rejected will become illegal aliens in terms of the Aliens Control Act. The extensive publicity campaign around the

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<sup>89</sup> RRP, 'Northern Province Weekly Monitoring Report', 29 September 1999.

<sup>90</sup> Ibid.

<sup>91</sup> RRP, 'Regularisation of former Mozambican refugees monitoring & evaluation summary for Northern Province', March 2000.

Outreach project and the fact that the services were brought close to the target group in the designated areas has provided ample opportunity for genuine applicants to come forward and register themselves and their families for resident status in South Africa.<sup>92</sup>

Long after AWEPA disengaged from the project, the RRP recognised that due process had been denied to a large number of FMRs. The RRP approached lawyers in Johannesburg about the possibility of appealing rejected decisions.<sup>93</sup> Most of the appeals are still pending.

#### 5.4 ANALYSING CIVIC PARTICIPATION IN POLICY IMPLEMENTATION

The role of civic participation in policy implementation during the FMR regularisation project represents a second illustrative example of civic-state interaction deserving of critical analysis. The dual imperative of wanting to support government and maintain a critical distance was a particular source of tension in the FMR regularisation project. By uncritically supporting the DHA and not giving due attention to the views of local NGOs, the co-ordination role fulfilled by AWEPA seriously compromised the independence of NGOs who took part.

From the extensive archival data available, it appears that the RRP staff, paralegals and volunteers did as much as they could given the very constrained resources provided by AWEPA, and limited experience in dealing with immigration matters. At the same time, their uncritical involvement in the project made them partly complicit in the project's administrative justice failings in their duty to the FMRs. In particular, serious flaws in the planning and implementation of their roles led to countless instances of Mozambican applicants being denied basic due process rights.

Rather than distinguish itself from government, AWEPA confirmed that its 'political guidance' in the project amounted to joint co-ordination on the part of AWEPA and DHA. Further, AWEPA allowed its 'local partners' to take the blame if their actions posed a threat to AWEPA's relationship with DHA. A clear example of this was the episode that took place in September 1999, when AWEPA took the side of DHA's Northern Provincial office against a complaint by an RRP staff member.

AWEPA assumed 'total co-ordination' of the entire project. The project was frequently identified by NGOs as the 'AWEPA-Refugiado project to assist former Mozambican refugees'<sup>94</sup> or by DHA as the 'AWEPA Project'.<sup>95</sup> In one instance, a regional co-ordinator was asked whether it was necessary for volunteers to wear Refugiado T-shirts at all times. In response, the co-ordinator:

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<sup>92</sup> AWEPA Progress Report, 2000.

<sup>93</sup> E-mail from J Klaaren to N Johnstone, re: 'Legal Issues on Amnesty', 22 May 2000.

<sup>94</sup> Reference by SACC on the occasions that it took minutes of Task Force meetings in 1999.

<sup>95</sup> Reference by DHA-Northern Province (Giyani) and DHA- in their weekly and monthly reports.



informed volunteers that they do not have to wear the Refugiado T/Shirts during office hours. She authorized them to wear office attire with the Refugiado armbands [and that] this was approved by the Refugiado Coordinator.<sup>96</sup>

There can be no doubt that the project was identified at multiple levels as an AWEPA or Refugiado project, which as explained earlier, essentially means the same thing. As such, just as AWEPA could legitimately claim some responsibility for the project's successes, it must surely also be held accountable for its failings.

In particular, the failure of the AWEPA project to ensure an effective monitoring presence, its deliberate undermining of local NGOs in its relationship with the DHA, and its taking over of government responsibilities made it virtually impossible to distinguish what were government and what were civic (AWEPA) responsibilities. As a result, basic administrative justice was denied to FMRs applying for regularisation of their status.

As in relation to refugee policymaking, the dynamics of civic actors in relation to refugee policy implementation can be explained with reference to the book's three theoretical propositions. Firstly, the capacity of civic actors to hold states accountable is shaped by structural changes, which are rooted in specific historical circumstances. Secondly, the boundaries that define the relationship between civic actors and the state must be respected if civic actors want to be strategic in their efforts. And thirdly, civic actors play a potentially crucial role in mediating the translation of international legal norms into local contexts.

#### 5.4.1 Civic capacity in refugee policy implementation

The capacity of civic actors to participate in refugee policy implementation has similar origins to the capacity of civic actors to participate in refugee policymaking. Drawing on the methodological approach introduced in chapter two, this chapter discussed specific historical events that led to a decision by South Africa, in the context of the tripartite commission, to regularise the status of FMRs and the many years of delay that transpired following a largely unsuccessful, UNHCR-led repatriation programme. These historical events conditioned the agency of civic actors who for many years had criticised the government for having been not only unable to resolve the long-term plight of FMRs, but also for wasting little time in declaring their presence illegal and deporting them back to Mozambique.

These specific historical events also conditioned the agency of FMRs themselves, who had little choice other than to represent their status with fraudulent documentation in order to work and avoid arrest and deportation – what NGOs such as LHR termed 'survival fraud'. Given these circumstances, the potential for a well-financed NGO such as AWEPA to negotiate a positive role for itself and local South African NGOs through well-placed interactions was considerable. However, the failure of AWEPA to appreciate these specific historical events created a com-

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<sup>96</sup> RRP, 'Mpumalanga and Bushbuckridge Weekly Monitoring Report', 27 September 1999.



promising situation for the civic actors, who eventually became involved in the implementation of the FMR regularisation project.

#### **5.4.2 The importance of structural boundaries in refugee policy implementation**

The AWEPA-led regularisation project emphasised the importance of clarifying – and respecting – structural boundaries when civic actors participate in the implementation of government policy. Lack of clarity in the structural boundaries between AWEPA and the South African government made it very difficult for local civic actors to exercise their agency and influence or ‘elaborate’ the structural conditions under which the project was implemented.

Civic co-operative interactions to assist the South African government to fulfil its obligation in the context of the AWEPA-led regularisation project reveal a complex interplay of civic agency and government-defined structures. In contrast to the role of civic actors in the refugee policymaking process, where roles were clearer, those that participated in the AWEPA project experienced the negative pressures of being conditioned by (and even coerced into accepting) the excessive limitations of the state-created structure. As mentioned, it was virtually impossible to distinguish the externally grounded motivations of AWEPA from those of the South African government. As a consequence, opportunities for South African civic actors to influence the government's implementation of its policy were very limited, and in some cases highly compromised their critical independence. Furthermore, the lack of distinction in the roles of civic actors and the government resulted in an administrative justice deficit for the Mozambican applicants whose applications were rejected. This could have been avoided, had sufficient attention been paid to the recommendations by South African organisations, had the roles been clear and had there been an effective monitoring presence.

A critique of the interplay between South African civic actors and the administrative structure established by the DHA, following mostly private discussions with AWEPA, reveals four main structural variables that conditioned the agency of South African NGOs that participated in this large-scale civic-state co-operative interaction.

First, AWEPA's hierarchical organisational structure shifted principal responsibility for implementation from a collaborative enterprise with local partners in South Africa to a top-down structure led from AWEPA's headquarters in Amsterdam. NGOs were overwhelmed by AWEPA's heavy-handed approach to ‘partnership’, which tended to ignore local concerns; for example, concerning the continued deportation of Mozambican FMRs and the issue of ‘survival fraud’. Some chose to accept this situation and continued to participate, while others rejected the situation and withdrew.

Second, AWEPA's non-transparent lobby of the South African government meant that South African NGOs played a subsidiary role to whatever AWEPA had agreed with the DHA. Any inconsistencies that emerged, between what AWEPA

had promised to its local NGO counterparts and the DHA, tended to be decided in favour of the DHA. One illustration of this was the legal and administrative basis for the project, namely the ‘draft’ guidelines that had only been informally distributed, were never officially gazetted and, apparently, never changed from their original ‘draft’ form. A further illustration involved AWEPA’s active support for the position of the DHA against concerns raised by an RRP monitor reporting on the operation of the project in the DHA’s office in the Northern Province.

A third manifestation of the structural limitations that severely conditioned opportunities for civic agency during the implementation of the FMR regularisation project related to AWEPA’s financing and co-ordination of government functions. Although AWEPA had earlier promised its South African NGO partners otherwise, a great deal of the DHA’s involvement (and to a more limited extent, that of the government of Mozambique) was made possible through funds secured by AWEPA from various back donors.<sup>97</sup> While the DHA usually chaired meetings of the participating civic organisations and the DHA, AWEPA took on ‘total co-ordination’ of the project, usually prepared the minutes of meetings that identified ‘action points’, and prepared regular operational reports.

The fourth and most significant aspect of the administrative structural arrangements that not only conditioned civic agency, but severely limited the ability to deliver administrative justice, was the lack of a credible, independent monitoring presence. Neither the two main local partners, the SACC and the RRP, nor the paralegals brought on board subsequently, were able to monitor the DHA’s compliance with administrative law requirements effectively. There was no mechanism in place to provide for a basic administrative or legal challenge to any decision taken by the DHA. As a consequence, thousands of FMR applicants whose applications had been rejected were left without any remedy once the project concluded. Most of these persons continue to remain in South Africa without legal residence and are highly vulnerable to deportation, despite their long ordeal and many years of residence in the country.

### 5.4.3 Social distance in refugee policy implementation

As the AWEPA-led regularisation project revealed, the social distance between civic and state participants in the project was almost entirely absent. The externally grounded interests of AWEPA and government actors were virtually indistinguishable, and AWEPA was careful to avoid confrontation between the interests of local civic actors and the government; the local civic actors that were involved in this project had very little room to manoeuvre. Just as is the case with policymaking, the implementation of a policy is (or at least should be) a *primarily* state-led process, at least in relation to issues of accountability.

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<sup>97</sup> These were mainly government donors who provided the funds to AWEPA for the project.

In the AWEPA-led regularisation project, the motivations of the DHA were the clearest of all. The DHA was responsible for the implementation of policy, which included a commitment to regularise the status of Mozambicans, which was first proposed in the context of the tripartite commission in the mid-1990s. The financial and administrative help offered to the DHA by AWEPA to put its tripartite commitments behind them was a well-documented motivation. Connected to this were long-standing criticisms raised by civic actors such as the RRP and SACC, who pointed out the uncomfortable fact that the presence of the former Mozambican refugees was a direct consequence of apartheid policies by the former regime. By resolving at least one major issue, the DHA clearly also wanted to stem a growing tide of criticism against its policies towards migrants in general; criticism that was mounting as the Refugees Act came into force in 2000. To achieve these goals, the DHA was willing to permit extensive civic involvement in the project's implementation, which in turn also meant narrowing its social distance to civic actors, since these interests so closely corresponded with those of AWEPA.

AWEPA's motivations, apart from its stated ideological reasons (to 'join forces in (its) struggle for human rights') were not altogether clear. Certainly there were significant financial motivations. According to AWEPA's own documentation, hundreds of thousands of dollars were spent on transport from Europe, project administration and undisclosed amounts to support the DHA, while far less substantial sums of money were provided to support the roles of local civic actors. It can be presumed that AWEPA wanted to establish a reputation as not only a political lobby organisation, but also a provider of humanitarian assistance. While AWEPA had a long-standing reputation for solidarity with the governments in South Africa and Mozambique, it had never been involved in a project of this nature and scale. Consequently, AWEPA tied its interests to those of the South African government; the resultant social distance between AWEPA and DHA was so narrow that the project was popularly known, in particular by the DHA, as the 'AWEPA project'.

The motivations of local civic actors in the AWEPA-led project, in particular the SACC and RRP, were also complicated. The SACC, RRP and later paralegals all supported this long-awaited project to regularise the legal status of FMRs. Both organisations had been confronted with allegations of abuse against undocumented FMRs, allegedly committed by the DHA, police and other border control authorities. They had also observed mistreatment on the part of local farmers, who exploited Mozambicans either by under-paying them, or by not paying them at all and then reporting them to the immigration authorities as 'illegal aliens'.<sup>98</sup> These participating civic actors were of the view that gaining regularised status or 'amnesty' would eliminate at least one major structural obstacle. Therefore, for SACC and RRP, who knew the situation of FMRs very well, the social distance or externalisation between their interests and those of the DHA (and, by extension, AWEPA) was less important than for other civic actors. The social distance narrowed even more

<sup>98</sup> (Ratshitanga 1997). See also (Johnston 1999).

the closer they came to actually fulfilling certain roles of the DHA, which, as already mentioned, had serious due process consequences for the FMRs.

By contrast, LHR's motivations for engaging in the Task Force, at least at an early stage, were to ensure that the project was implemented in accordance with the government's obligations in international and South African law. In this respect LHR certainly shared the motivations of SACC and RRP. However, as a legal advocacy NGO, a further motivation was that the project be monitored, especially in terms of administrative due process requirements. The lack of commitment on the part of AWEPA towards supporting a credible monitoring presence, coupled with the hostility to such a presence on the part of the DHA, explained why LHR decided to withdraw from the project. To ensure that the project was credibly monitored would, indeed, have required a greater degree of social distance or externalisation than it would have for other actors. On the basis of its private and public interactions with AWEPA, LHR was not satisfied this could be accomplished under the top-down and non-transparent structure proposed by AWEPA.

The more disparate the motivations of state and civic actors are in implementing policy, the greater the level of externalisation. This doesn't necessarily mean that a more external or 'imposed' process of policy implementation is worse than one upon which state and civic actors agree. As the AWEPA example revealed, there were mixed consequences. Out of a total of 130 748 applications received, 82 969 FMRs did obtain legal status, which was a principal shared interest of both NGOs and the government.<sup>99</sup> However, 16 772 FMRs were rejected, and the status of 32 077 remained undecided in circumstances where due process was not adequately observed, whether in terms of the arbitrary nature of the process, the unfairness of the proceedings, or the degree of bias. Abandoning a credible monitoring role created a serious administrative justice deficit that the other participants, because of their commitment to go ahead with the project regardless, did not make provision for until it was too late.

## 5.5 BEYOND LEGAL FRAMEWORKS TO INCREASING LEGAL CONSCIOUSNESS

This chapter explained the historical circumstances that led to FMRs finding a tenuous place of refuge in South Africa, and to the failure of previous legal and administrative structures to facilitate a durable solution to their long-term displacement. In particular, it explained the joint efforts of government and civic actors to try to formally integrate FMRs by way of a regularisation project, and the opportunities and pitfalls that arose for civic actors who were involved in the implementation of this project. This chapter argued that subsequent failings in due process towards the FMRs can be explained by a critical assessment of the externally grounded reasons of the civic and government actors for participating in the project, as well as the lack of clarity in the structural boundaries that existed between gov-

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<sup>99</sup> Government of South Africa, *DHA Statistics*, dated 24 May 2000.

ernment and civic functions. Just as in the case of civic involvement in refugee policymaking, the social distance or externalisation variable provides a useful explanation for the limited (but significant) influence civic actors can have on the framing and implementation of government policies and legal frameworks.

However, to understand the real impact of legal frameworks requires us to look beyond the role of civic actors and the government, however critical such an assessment might be. Building on Dolan's earlier research on Mozambican refugees, Polzer has argued that the impact of legal frameworks and institutions also needs to be understood from the perspective of FMRs themselves, in other words, 'from below'.<sup>100</sup> Such a perspective, she argues, questions the extent to which legal frameworks actually relate to the lived reality of those they are intended to benefit, namely FMRs. This gap or 'disjuncture', Polzer argued earlier, provides an explanation both for the failure of the repatriation and regularisation projects to live up to their own stated objectives, and for the continued lack of access to social services suffered by FMRs.<sup>101</sup>

The gap between legal status and lived realities also relates to the (in)ability of FMRs to exercise agency in relation to state-created structures, although the picture is complex. At one level, Polzer argues, the informal relationships, established between FMRs and local communities are an expression of agency, a way of 'creatively adapting to, rather than merely accepting, policy-driven constraints', leading to a sometimes surprising level of local integration outside formal state structures.<sup>102</sup> At the formal level, however, their lack of legal status renders them outside the day-to-day protection of the state, severely constraining their access to social services and continuing to render them vulnerable to arrest and deportation. But even for those who had formal legal status, awareness among FMRs about how to benefit from this newly-acquired status, such as how to access basic services, was generally limited.<sup>103</sup>

To conclude on a note of optimism, there is at least some evidence that increasing FMRs' awareness of the implications of having formal legal status, and the associated constitutional rights, or 'legal consciousness', would be one way of addressing the gap between legal frameworks and lived realities. The same goes for the local civic actors involved in the implementation of the regularisation project, who were not in a position to effectively monitor whether due process was being observed.

It appears that the RRP at least has taken a lesson from this. Responding in part to their frustration that a number of FMRs who had been granted regularised status

<sup>100</sup> (Polzer 2007).

<sup>101</sup> (Polzer 2004: 2).

<sup>102</sup> (Polzer 2004: 4, 6-8) This is particularly significant for the approximately 100 000 FMRs living in urban areas, *Ibid.*, p. 13, who were ineligible to apply for regularisation of status and had a vested interest in presenting themselves as living in rural areas, using 'survival fraud', or remaining invisible to the authorities.

<sup>103</sup> (Polzer 2004: 11).

were still being denied social services, the RRP set up the Wits Acornhoek Advice Centre (AAC) in 2002. Ever since, the AAC's paralegal advisors have been increasing the local community's awareness of (or consciousness about) their legal rights, and in some cases intervening with the authorities. In two celebrated examples, the AAC brought the cases of two regularised FMRs, *Khosa* and *Mahlaule*,<sup>104</sup> to the Constitutional Court of South Africa, with the assistance of constitutional lawyers from the Legal Resources Centre. The Court responded positively, determining that the government's limiting of social grants to citizens was unconstitutional.

Acknowledging the positive impact the case had among both South Africans and the FMR community in the rural Bushbuckridge area, who saw the judgement and subsequent increase in the number of social grants as 'overall gain for the community, rather than as a competition over scarce resources', Polzer argued that, 'it is one of several cases where civil society has used the courts to challenge the government on its immigration policy'.<sup>105</sup>

Concluding with a reference to legal consciousness and the courts provides a useful transition to the next chapter. From civic participation in policymaking and policy implementation, I turn now to the role of civic actors in policy enforcement through litigating refugee rights.

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<sup>104</sup> (*Khosa* case 2003) and (*Mahlaule* case 2003)

<sup>105</sup> (Polzer 2004: 26).

## **CHAPTER 6**

### **LITIGATING AND SHAMING: CIVIC PARTICIPATION IN REFUGEE POLICY ENFORCEMENT**

#### **6.1 INTRODUCTION**

In this chapter, the third illustration of advocating state accountability through civic interactions explains how civic actors have held states directly accountable for their obligations to protect refugees in South Africa through confrontational interactions, namely litigation. This chapter also briefly addresses certain non-legal measures taken in conjunction with litigation, such as public shaming in the media.

After reflecting on the space that emerged in the 1990s for civic actors to advocate refugee rights against the state, this chapter will explain how civic actors mobilised refugee rights through the courts to advocate: (1) access to the refugee status determination procedure; (2) access to economic and social rights; and (3) enforcement of these rights through judgements, settlements and structural interdicts. Next, this chapter will reflect – briefly – on the role of non-legal civic interactions, before offering some concluding remarks.

As in the previous two chapters, the examples discussed in this chapter draw on the concepts elaborated on in chapter two, reflecting a complex interplay of individual and collective interventions. These interventions can be explained from the point of view of South African public (constitutional and administrative) law, structure/agency relationships, and socio-legal theory.

#### **6.2 TOWARDS ACCOUNTABILITY: AN EMERGING SPACE FOR CIVIC CONFRONTATION WITH THE STATE**

Just as in the area of refugee policymaking and policy-enforcement, developments in the mid-1990s generated an emerging, democratic space for civic confrontation with the state. By mobilising their knowledge and resources, lawyers challenged the policies and practices of the Department of Home Affairs (DHA) on the reception and treatment of refugees. These challenges were initially directed to the policy regime provided for on an *ad hoc* basis in terms of Regulations to the Aliens Control Act of 1991, and were later directed at the Refugees Act of 1998 and its imple-



mentation. Challenges were also made to other laws affecting asylum seekers and refugees, notably to their discriminatory treatment in the formal security industry and regarding the provision of social services.

Firstly, this section revisits the context in which civic actors in South Africa have been mobilising for progressive changes, with particular attention to their role in litigating rights. These developments enabled civic actors to bring direct claims against a state to enforce refugee and human rights policies as ‘translators’ in a government-endorsed ‘culture of constitutionalism’,<sup>1</sup> guided by universal and South African constitutional values. Secondly, this section will explore the particular challenges faced by the courts in reviewing decisions of a democratically accountable government, as a key component of this emerging democratic space. Thirdly, this section will explain how this emerging democratic space created the structural circumstances that have both conditioned civic agency as well as provided opportunities for structural change.

### 6.2.1 Two sources of civic organisation in South Africa

As discussed in chapter three, present-day civic organisations and networks involved in refugee protection in South Africa emerged from two sources. The first was comprised of political movements, trade unions and grassroots civic organisations representing various constituencies that organised a broad-based political opposition and challenged minority white rule, mainly through mass mobilisation and direct action. The second source included liberal and progressive organisations that were formed by professionals (academics, lawyers, social activists, religious workers and psychologists) and a small number of politicians, and their spouses,<sup>2</sup> all of whom objected to the government’s racist policies.

After the apartheid government’s banning of political movements in the early 1960s, the movements’ operations went ‘underground’. Social movements and other civic organisations continued to operate, albeit under very difficult circumstances. Many working for these organisations were arrested and detained under the notorious section 29 of the Internal Security Act. Some, including courageous lawyers such as Griffiths Mxenge and Bram Fischer, were either assassinated or died in detention. Many were quietly supportive of the liberation struggle and political movements, and notably the African National Congress (ANC), while others formed an active component of the struggle. Many civic organisations gained their own unique identity, developing strategies and building bases of legitimacy that the South African apartheid government found far more difficult to challenge or extin-

<sup>1</sup> (Monyae 2006: 132) argued that ‘the founding leaders of post-apartheid South Africa’s democracy enthusiastically seized the opportunity of promoting a culture of constitutionalism at home and abroad’.

<sup>2</sup> The women’s and anti-apartheid organisation Black Sash was founded in the 1950s by prominent women, including wives of prominent politicians, in protest at the government’s requirement that all women be required to carry passes.



guish than was the case for the formal political movements. Meanwhile, lawyers and legal advocacy organisations, which engaged the apartheid government on its own terms by challenging the internal contradictions of laws that discriminated institutionally against black people, supported these political movements by engaging in a form of 'politics by other means'.<sup>3</sup>

Eventually, the efforts of the apartheid regime to subvert political dissent, imprison or assassinate its leaders and maintain strict divisions on the basis of ethnicity failed to bring the liberation struggle to capitulation. On the contrary, the liberation struggle thrived through various forms of civic organisation.

#### *Emergence of social movements and civic networks*

Although the formal political movements were banned, the visionary ideas of Steven Biko, Nelson Mandela and others endured, and the liberation struggle continued through the emergence of various social movements, civic networks and other grassroots organisations, until the political movements were once again permitted to operate. The particular strategies employed by civic actors deliberately measured the ways in which the apartheid regime was enforced through a comprehensive network of laws and legal institutions.

One such civic organisation was the Western Cape Relief Fund (WCRF), which existed to assist, by way of both legal assistance and the co-ordination of social assistance, those held under the notorious section twenty-nine of the apartheid regime's Internal Security Act,<sup>4</sup> and other victims of political violence and state repression. As Ghadija Vallie (former co-ordinator of the WCRF) noted, these organisations were forced to adapt to changes in the political situation:

The situation changed and you had to adapt to that change. As things changed, you could no longer just look after the needs of people arrested under section 29 and their families. ...organising protests, funerals, support in courts, visiting political prisoners, visiting death row prisoners, monitoring mass detentions ... The Western Cape Relief Fund got people involved.<sup>5</sup>

As she was based at a law firm, Vallie had to organise numerous legal matters, which involved dealing with the government directly, including with the notorious Security Branch. The well-known firm of Essa Moosa and partners handled numerous cases of high-profile political leaders and activists under banning and detention orders. The firm acted in various ways for several of the Rivonia trialists (and their families) while they were serving time in prison, including for Nelson Mandela. But the work of community activists such as Vallie went far beyond simply 'the formalities' of dealing with the government.

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<sup>3</sup> (Abel 1995).

<sup>4</sup> (Internal Security Act 1982).

<sup>5</sup> ('Interview with G. Vallie' 2006). During the course of the interview, Vallie mentioned how much she was inspired and motivated by Biko.

*Beyond legal representation*

In her official work as co-ordinator of the WCRF and paralegal to the lawyers in the firm, Vallie went beyond the organising of legal representation, ensuring that people appeared in courts (for example, as witnesses). Vallie also collected family members of the accused to bring them to court for moral support, as well as many other tasks.

I had to buy peoples' clothes, collect their children from school, organise food for their families, pay rent, transport ... some came from rich homes, but the majority from poor homes. I also had to deal with family disputes.<sup>6</sup>

In addition, Vallie and others (unofficially) arranged for T-shirts to be printed (in the official ANC colours), and for placards to be held by protestors outside the court. She also helped organise marches, sit-ins and other forms of mass mobilisation.

We demonstrated against the tri-cameral parliament. We went to the Progressive Federal Party in parliament about children in detention. We organised hunger strikes and a boycott campaign.<sup>7</sup>

These activities, in support of litigation and in other, non-legal strategies, were very much connected. The government of the day was working very hard to undermine the political movements, and the efforts of their lawyers, by putting pressure on the social movements and civic networks. The government even deliberately provoked 'divisions'.<sup>8</sup>

The government knew that the underground efforts of political movements were somehow connected with the work of the lawyers and civic networks, but lacked the evidence or sophistication to prove this. Consequently, the 'cover' of Vallie's work as co-ordinator of the WCRF and paralegal in a law firm enabled her to do much more than just act as a representative of the firm; it also meant she had to carry out her 'unofficial' activities in a very discreet manner.

There were no cell phones, so we used the 'Bush telegraph', linking through people with phones. People organised their neighbourhood, their organisations. Before you knew it, people were there.<sup>9</sup>

Vallie also collected money from local businesses and raised funds from foreign donors, such as the Holland Committee on Southern Africa. Since the work she did was, of necessity, low key, publicly she was seen as someone to go to for legal as-

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<sup>6</sup> ('Interview with G. Vallie' 2006)

<sup>7</sup> Ibid.

<sup>8</sup> An example of this, mentioned in ('Interview with G. Vallie' 2006), was the 'Wit Doeke' (white headscarf), which the South African Truth and Reconciliation Commission later disclosed was a vigilante group, fully supported by the apartheid regime, aimed at stimulating violence, chaos and disorder in the townships.

<sup>9</sup> ('Interview with G. Vallie' 2006)

sistance. The political side of Vallie's work was only known to very few individuals.

In this sophisticated way, organisations such as the WCRF and individual community activists such as 'Ma' Mahlangu, Sophie Benge, Allan Boesak and many, many others were able to play highly effective, simultaneous roles as legal advocates, political activists and social reformers. Furthermore, Vallie liaised with the (then, mainly white) liberal human rights organisations.

#### *Liberal human rights organisations*

Social movements and civic networks that took root after the banning of the political movements in the 1960s were joined in the early 1980s and 1990s by a number of liberal human rights NGOs, including Black Sash, IDASA, Lawyers for Human Rights (LHR), Legal Resources Centre (LRC) and others. These organisations, mostly founded and supported by liberal-minded white South Africans (including some from the establishment, whom the government was reluctant to prosecute), played a very different but important role in the anti-apartheid struggle.

LHR, for example, was formed as a project of the Centre for Applied Legal Studies (CALS) in the law faculty of the University of the Witwatersrand in Johannesburg, in the late 1970s.<sup>10</sup> LHR was originally conceived as a network of liberal-minded lawyers who objected to certain policies of the apartheid regime, and were willing to make themselves available to represent individuals who were accused of politically-related crimes. In the late 1980s, the organisation established a National Secretariat in Pretoria, and became an NGO with permanent, paid staff-members. Shortly thereafter LHR established offices in the provinces, beginning with Pietermaritzburg, and eventually expanded their activities to provide much-needed legal advice and representation, to undertake human rights education for the public and officials, and to develop specialised projects on subjects from juvenile justice to prison reform issues. LHR also set up the country's first comprehensive paralegal training programme, which later became an NGO in its own right. By 1993, LHR had grown to more than a dozen advice and project offices, with a presence in all provinces of the country.<sup>11</sup>

Acting at times unwittingly<sup>12</sup> as instruments of the (underground) political movements and the social movements and civic networks, who were often operat-

<sup>10</sup> The Legal Resources Centre, whose work is extensively documented by (Abel 1995), was also formed around this time.

<sup>11</sup> In addition to its head office in Pretoria, LHR established offices in the urban-centres of Johannesburg, Cape Town, Durban, Port Elizabeth and East London as well as towns and more rural settings in Stellenbosch, Pietermaritzburg, Pietersburg, Umtata, Colesburg and Mafikeng.

<sup>12</sup> As ('Interview with G. Vallie' 2006) noted, there were occasions when it was not in the interests of either the political movements or the liberal lawyers or organisations, to know exactly what the other was doing. However, the liberation struggle, which was led by the political movements and operated through social movements and civic networks, recognised the 'access' that these liberal organisations had to the government and used this to their advantage.

ing on the margins of legality, these liberal organisations brought numerous legal actions to protect individual activists or challenge repressive policies of the apartheid state. Many within these organisations developed their own political consciousness,<sup>13</sup> and some played critical roles, including during the period of political negotiations in the early 1990s. This period saw new policies being formed – most notably an interim constitution, passed in 1993 – and the ‘correcting’ of other aspects of the legal system that fell far short of the country’s nascent constitutional and administrative law standards. Following South Africa’s first democratic elections in 1994, going from challenging a government culture that was distinctly authoritarian, civic actors began to build on the post-apartheid government’s commitment to a culture of constitutionalism.<sup>14</sup>

Extending South Africa’s hard-won constitutional and democratic ‘dispensations’ of the early 1990s<sup>15</sup> to refugees and other displaced persons has presented special challenges for South African civic organisations building on a post-apartheid culture of constitutionalism. In addition to advocating for humane laws and policies to regulate (forced) migrants, civic organisations have had to confront both the historical roots and more contemporary causes of xenophobia within South African society and among government institutions, as well as developing strategies to confront and respond to that xenophobia.

#### *Legal consciousness and refugee rights translators*

Explaining the operation of refugee rights as part of a multi-cultural, highly malleable South African ‘culture’, and the role of civic actors as gaining legal consciousness and becoming refugee rights ‘translators’ of global rules, is useful in understanding the potential for civic-state relationships to make human rights claims. As Merry puts it, the interactions of civic actors in a legal culture illustrate the ‘political possibilities’ of changing the culture.<sup>16</sup>

Merry contends that it is possible to characterise the interface between legal, social and political cultures, both at local and at global levels, as broad processes with *transnational* elements, including the ‘localization of knowledge’.<sup>17</sup> Drawing on international legal norms and comparative state practice, lawyers in South Africa have proven to be effective civic translators, ‘localising’ global knowledge on the protection of refugees through strategic challenges to the DHA’s policies.

<sup>13</sup> Members of LHR represented a wide spectrum of political interests, from the conservative party to the communist party.

<sup>14</sup> (Federico and Fusaro 2006).

<sup>15</sup> As mentioned earlier, these ‘dispensations’ included a progressive new legal order, democratic and accountable government and civic participation in the new, South African democracy. All of these developments were reinforced by the country’s constitution. The process of protecting and consolidating these dispensations is popularly referred to in South Africa – notably the Constitutional Court – as an emerging ‘culture of constitutionalism’.

<sup>16</sup> (Merry 2006b: 216).

<sup>17</sup> (Merry 2006b: 19-20).

Since litigation essentially involves civic interactions of a more confrontational character, I also use Kidder's integrated theory of imposed law<sup>18</sup> to analyse how civic actors have petitioned for government accountability. As explained earlier, this involves measuring the social distance between the lawmakers (in this case an administrative official of the DHA) and the civic actors making a claim, as represented by a divergence in their respective meanings, interests and political positions. Kidder's approach also explains how imbalances in power in South Africa can be rectified through litigation in the courts. As discussed in the next section, this also relates to a more refined understanding of how the judiciary have taken the concept of 'reasonableness' into consideration when making legal judgements.<sup>19</sup>

### **6.2.2 Building credible administrative systems and convincing a reluctant judiciary**

Two of the greatest challenges faced in extending South Africa's dispensations to refugees have been to build a credible government administrative system for administering refugee status, and to convince a conservative judiciary that has been historically reluctant – or procedurally unable – to review decisions made by government officials. Matters changed somewhat with the emergence of an Interim Constitution in 1993, which was finalised in 1996.

While the South African government was highly inexperienced in asylum determination, the courts were substantively prevented from reviewing government decisions. According to Hoexter, judicial latitude for interpreting the correctness of an administrative decision related to an assessment of the 'difference between dialectical and substantive reasonableness'.<sup>20</sup> In other words, prior to 1994, the courts made an artificial distinction between the process of coming to a particular administrative decision, and a separate assessment of whether a particular administrative decision was, on the face of it, reasonable or not. Consequently, before the country's progressive Interim Constitution in 1993 it was difficult to review any decision of a South African administrative official. As mentioned earlier, it was exceptionally difficult to review government decisions by immigration officers taken in terms of the Aliens Control Act 1991 (ACA); these decisions were additionally shielded from review by an 'ouster clause', which was only removed in 1995 by way of a legislative amendment to the ACA.<sup>21</sup>

These substantive challenges were largely resolved by Article 33 of South Africa's Constitution. In sub-section 1, Article 33 provided an unqualified right to 'everyone' that the decision of an administrative official shall be 'lawful, reason-

<sup>18</sup> (Kidder 1979).

<sup>19</sup> (Hoexter 2006: 63-64).

<sup>20</sup> (Hoexter 2007: 302).

<sup>21</sup> (Klaaren and Ramji 2001: 38).

able and procedurally fair'.<sup>22</sup> Sub-section 2 provided a 'right to written reasons' if their 'rights have been adversely affected by administrative action'. Finally, subsection 3 required that national legislation be enacted 'to give effect to these rights', including the opportunity for judicial review in order to 'promote an efficient administration'. In giving effect to subsection 3, the Promotion of Administration of Justice Act (PAJA) was passed into law by South Africa's parliament in 2000.<sup>23</sup>

However, even with a robust constitution and clear promises on the part of the democratically elected government that it would pursue fair, rights-regarding and efficient administration of its affairs – and be held accountable for these promises – there remained a dilemma. As highlighted by Klaaren and others,<sup>24</sup> though emboldened by their generous scope for reviewing administrative decisions, judges still saw their role as striking a 'delicate balance'. The balance was to be struck between, on one hand, an appreciation of the government's position as it struggled with multiple administrative problems (many inherited from the previous regime), and on the other, a newly-acquired constitutional duty to vigorously scrutinise the decisions of administrative officials. Courts possessed virtually no precedent to guide them in striking this balance.

Furthermore, unlike well-established and vigorously tested asylum determination regimes in North America, Europe and Australia, the administrative system for conferring refugee status in South Africa has struggled with its relative newness.<sup>25</sup> Following the country's Interim Constitution in 1993, the democratic government of South Africa made a principled commitment to respect and promote international human rights by acceding to various treaties. These included the 1969 OAU Refugee Convention, the 1951 UN Refugee Convention and the 1967 Protocol to the UN Refugee Convention; by January 1996, South Africa had become a party to all three of these instruments. However, the government had no explicit legislation in place governing refugees until April 2000, and officials lacked both the training and the resources to fulfil their international obligations towards refugees. Maatla Hlapolosa, a lawyer in Durban, explicitly referred to the DHA's lack of due process in refugee status determinations, claiming that – on a regular basis – the DHA simply 'don't apply their minds to decisions', and issue arbitrary decisions on the basis of personal opinions they hold about a particular applicant, which is a serious violation of administrative due process.<sup>26</sup>

In short, the lack of a dedicated refugee policy, as well as inexperience, poor training and other administrative challenges faced by the South African government, coupled with a judiciary unaccustomed to challenging the decisions of the

<sup>22</sup> (South African Constitution 1996), Article 33(1). The constitution was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997.

<sup>23</sup> (Promotion of Administration of Justice Act 2000). See also (Currie and Klaaren 2001).

<sup>24</sup> (Klaaren 2006b).

<sup>25</sup> (Handmaker et al. 2008).

<sup>26</sup> ('Interview with Hlapolosa and Slabbert' 2006).

government, all represented the state-created structural circumstances that heavily conditioned the possibilities for civic agency to promote refugee rights.

### 6.2.3 Civic agents and state structures

Structure and agency explanations presented in this chapter to explain the interactions between civic actors and state institutions again draw upon Margaret Archer's analytical dualism approach.<sup>27</sup> In line with this approach, specific historical events have generated legal and administrative structures that have both conditioned civic agency to protect on behalf of refugees in South Africa by way of confrontational interactions, but have also allowed for structural change (elaboration), primarily through the instrument of judicial review.

In the context of litigating refugee rights, two main conditioning factors are explained in this section. Firstly, the legal and administrative structure in which applications for refugee status have been received, processed and adjudicated shifted from a basic asylum determination procedure, set up by way of *ad hoc* regulations in terms of the Aliens Control Act 1991, to a more formalised system, established through the Refugees Act 1998, which came into being in April 2000. Secondly, external influences by third states and international organisations – with particular interests in the direction taken by South Africa's policy and its implementation – have profoundly influenced the administrative structure.

Faced with these two conditioning factors, yet emboldened by the expanded possibilities of challenging government decisions, legal advocacy organisations such as LHR, LRC and university law clinics have exercised their agency. Increasingly, legal advocacy organisations have worked closely with refugee-led organisations, representing constituencies within the refugee and asylum-seeker community. One such organisation has been the Union of Refugee Women (URW), established in Durban, but with outreach to other areas.<sup>28</sup> As explained below, the URW brought a legal case challenging discrimination within the private security industry all the way to the Constitutional Court of South Africa, albeit with mixed results.

In advocating for accountability through litigating refugee rights, usually in combination with other forms of (non-legal) advocacy, such as public shaming through the media, legal advocates have worked together in coalitions with multiple stakeholders, including refugee organisations. Through exercising their (combined) agency, using mainly the tool of judicial review, these civic actors have brought a number of cases aimed at both remedying the situation of individual clients and challenging refugee policies more generally. These cases have resulted in a number of decisions that have led to structural change (elaboration) within the legal and administrative framework for refugee protection in South Africa, whether in gaining

<sup>27</sup> (Archer 1996).

<sup>28</sup> ('Interview with S. Mukamana' 2006).



access to status determination structures or in recognising social and economic rights.

*Legal and administrative structure for refugee status determination in South Africa*

The Basic Agreement, referred to in the previous chapters, was put in place in 1993 as the initial legal and administrative structure to administer refugee status on an individual basis. The Agreement was accompanied by several *ad hoc* policy instruments, mainly issued in 1993 in terms of the Aliens Control Act of 1991; together, these policy documents created and spelled out the role of the Standing Committee. According to the Basic Agreement, the Standing Committee was responsible for according refugee status and other functions, including the withdrawal of refugee status.<sup>29</sup> The Basic Agreement also provided for an Appeal Board (for many years consisting of a single member), which was responsible for exercising a degree of internal oversight over the procedure.<sup>30</sup> As discussed earlier in chapter four, this *ad hoc* procedure was fraught with problems, and its constitutionality was seriously questioned. It was therefore not surprising that lawyers challenged many aspects of the 1993 policy – mostly successfully – up until the Refugees Act came into being in April 2000. Cases discussed in the next section that were decided prior to April 2000, therefore, relate to the old refugee status determination regime, while cases brought by civic actors subsequently were decided in terms of the post-April 2000 refugee status determination regime.

The Refugees Act limited the role of the Standing Committee largely to that of an oversight body and, in particular, to monitoring the refugee status determination process. This role included sufficient power to formulate procedures, regulate the work of Refugee Reception Offices and liaise with the UNHCR officials, as well as generally monitoring decisions of Refugee Status Determination Offices (RSDOs) and reviewing applications determined to be manifestly unfounded.<sup>31</sup>

Under the Refugees Act, the Standing Committee's former powers to consider and grant refugee status were assumed by dedicated refugee reception officers and refugee status determination officers. Refugee reception officers (RROs) were made responsible for the initial interview of asylum applicants.<sup>32</sup> Furthermore, the RROs were required to issue the applicant with an asylum seeker permit, in terms of sec-

<sup>29</sup> (Basic Agreement 1993: section 3).

<sup>30</sup> (Basic Agreement 1993: section 4).

<sup>31</sup> (Refugees Act 1998: section 11). According to ('Interview with J. Van Garderen (2)' 2008), the Standing Committee's designated powers as an independent monitor of the status determination process, or as a self-corrective mechanism within the structure of the Act, have not often been utilised. Further, the proposed Refugees Amendment Act (2008) incorporated the Standing Committee with the Refugees Appeal Board into a hybrid monitoring authority, although it removed these oversight powers.

<sup>32</sup> (Refugees Act 1998: section 21).



tion twenty-two. The matter was then handed over to the RSDOs, who were empowered to make decisions on individual applications.<sup>33</sup>

The Refugees Appeal Board was retained, but given more autonomy. In particular, the Board was empowered to ‘determine its own practice and make its own rules’.<sup>34</sup> Accordingly, the Board issued its Rules in September 2003, more than three years after the promulgation of the Refugees Act on 1 April 2000.<sup>35</sup> The Refugees Act provided extensive powers to the Board to receive and consider appeals, which – if an applicant were legally represented – involved hearings-based status determination procedures.<sup>36</sup>

Finally, the Refugees Act provided a number of substantive guarantees that were useful to lawyers arguing on behalf of refugees. The Act explicitly incorporated the rights contained in terms of section two of South Africa’s Constitution, which included the right to just administrative action that was ‘lawful, reasonable and procedurally fair’ and the right to be provided with ‘written reasons’ for an ‘adverse’ decision.<sup>37</sup> Accordingly, asylum applicants were to be given not only the right to written reasons for a refusal to be granted refugee status, but an opportunity to argue their claim in a hearings-based procedure before the Appeals Board. Article thirty-four of the Constitution gave ‘everyone ... the right to have any dispute ... decided in a fair public hearing before a court’. Refugee applicants thus had a further opportunity to challenge decisions in court, if the Refugees Appeal Board upheld an RSDO’s decision to refuse them refugee status.

### *External structures*

In addition to the legal and administrative structure created by the Basic Agreement and the accompanying policy regulations – and later, the Refugees Act – various external structures had a considerable impact on the implementation of the refugee status determination procedure. Through its ratification of international human rights treaties and by incorporating international law into its own constitution, South Africa made certain binding commitments, most of which were confirmed in the national policy instruments referred to. As South Africa ended its thirty-year exclusion from the United Nations and ratified various human rights treaties, the government also resumed full participation in the work of the UN General Assembly and specialised organs. This included the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), which, in terms of the 1951 Refugee Convention, provided a specific mandate to supervise states’ obligations

<sup>33</sup> (Refugees Act 1998: section 24).

<sup>34</sup> (Refugees Act 1998): section 14(2).

<sup>35</sup> (The Refugee Appeal Board Rules 2003).

<sup>36</sup> (Refugees Act 1998: section 26).

<sup>37</sup> (South African Constitution 1996: section 33).

under the Convention and imposed concurrent obligations on states to co-operate with the UNHCR, including providing statistical data.<sup>38</sup>

Furthermore, the South African government entered into various bi-lateral and multi-lateral agreements with third states, covering both technical co-operation and accepting 're-admission' of nationals from pre-selected countries who were denied refugee status in a country.<sup>39</sup>

South Africa was seen as a kind of testing ground for newly-formulated refugee protection models.<sup>40</sup> The country also became the object of increasing attention from the USA, Australia and from European countries that advised or financed South Africa's migration and border control policies and its mechanisms of enforcement. Furthermore, the government became involved in global discussions on migration policy, in particular in order to 'combat' so-called irregular migration. What these discussions have boiled down to is the need to introduce various restrictive policies and interdiction measures, to deter and intercept would-be 'secondary movers' when it would be possible to claim refugee status elsewhere, and particularly in the region from which the asylum seeker had come.

Finally, international NGOs such as Human Rights Watch, Amnesty International and the US Committee for Refugees took a considerable interest in refugee issues in South Africa. Their highly developed institutional knowledge on the global picture of state efforts to address 'irregular migration' was of considerable value to South African NGOs and – at times – of considerable annoyance to the government. International NGOs facilitated the participation of South African NGOs at international meetings. International and South African NGOs also collaborated in reports on the treatment of asylum seekers and refugees in South Africa, including putting the developments in South Africa into a global perspective.<sup>41</sup>

#### 6.2.4 Litigating accountability

Between 1996 and 2006, lawyers in South Africa brought multiple legal challenges in an effort to expose irregularities in the DHA's decision-making process and to get clarity on what the DHA's policy actually was. Early cases only marginally addressed international law, though as the jurisprudence developed, international law became ever more important to the argumentation put forward by lawyers. As judges gradually accepted this reasoning, international law formed a basis for progressive judgements on refugee rights.

As the next section illustrates, administrative law has been the principal formal means of holding states accountable to their obligations to promote, protect and

<sup>38</sup> (Convention Relating to the Status of Refugees 1951: Article 35).

<sup>39</sup> (Travis and Macaskill 2004) confirmed that the governments of South Africa and the United Kingdom signed such an agreement to strengthen South African border controls.

<sup>40</sup> (Hathaway 2001).

<sup>41</sup> Reports produced by international NGOs, in collaboration with South African NGOs, that address the situation in South Africa include: (Hrw 1998) and (Uscr 2000).

fulfil refugee rights, and human rights in general. The following two sections will explain how national civic actors, and especially lawyers, mobilised for the enforcement of refugee rights in South Africa between 1996 and 2006. The first area of litigating refugee rights principally addressed access to the refugee status determination procedure. The second area of litigation aimed to secure the rights of asylum seekers and refugees to work, study and receive social grants in South Africa. The third area of litigation was to go beyond the recognition of refugee rights and enforce judgements against the government.

The following overview of refugee rights litigation does not aspire to be a complete record of all relevant cases. However, efforts by civic actors to enforce refugee rights protection against the government of South Africa – through a combination of litigation and other (non-legal) advocacy – have resulted in some key judgements. These judgements represent both significant accomplishments and some disappointing failures in advocating for accountability through litigation.

### 6.3 MOBILISING ACCESS TO REFUGEE STATUS DETERMINATION PROCEDURES THROUGH THE COURTS

Mobilising access to just refugee determination procedures – through the administrative system and the South African courts – has been the principal area in which civic actors have sought to advocate for accountability.<sup>42</sup> This has arisen out of a common dilemma faced by refugee advocates: there is no positive international law obligation on the part of states to grant political asylum, or to recognise anyone as a refugee. Instead, states have a negative obligation *not* to return someone to a country in conflict, in relation to the OAU Refugees Convention, or where they would experience a well-founded fear of persecution, in terms of the UN Refugees Convention. This is known as the *non-refoulement* principle.<sup>43</sup> For countries with formalised national refugee status determination procedures, in order to determine whether this negative obligation might be violated, it is imperative to secure access to effective (and just) administrative procedures in order to determine an applicant's refugee status.

Accordingly, the main issue that civic actors have litigated in South Africa has been the initial reception of asylum seekers and refugees in the country, and in particular, their access to status determination procedures that respect due process in terms of administrative law. More specific problems frequently encountered by lawyers in terms of administrative due process have included blanket assessments on the basis of an applicant's country of origin, vagueness, inconsistency and the lack of written reasons to refuse an applicant refugee status.<sup>44</sup>

<sup>42</sup> (L.A. De La Hunt and Kerfoot 2008).

<sup>43</sup> (Goodwin-Gill 1996: 117).

<sup>44</sup> (L.A. De La Hunt and Kerfoot 2008: 91-94).

This first aspect of ‘localising’ knowledge discussed in this section has four components: (1) promoting access to a fair procedure, (2) ensuring entry to South Africa to access the procedure, (3) providing for the special needs of unaccompanied children in accessing asylum procedures, and (4) securing physical access to one of the five, urban-based refugee reception offices in South Africa.<sup>45</sup>

### 6.3.1 Access to a fair procedure

A groundbreaking judgement on litigating refugee rights in South Africa was *João Pembele and others v. Refugees Appeal Board and others* (*Pembele case*).<sup>46</sup> Lawyers from the Cape Town office of the Legal Resources Centre (LRC), acting on behalf of Mr. Pembele and other applicants, brought this 1996 case under the refugee procedure that preceded the Refugees Act of 1998. The principal demand of the lawyers from the LRC was that the applicants be provided written reasons from the DHA for their decision to refuse them refugee status. Such a basic demand in terms of administrative justice was quite revealing of the DHA’s reluctance to subscribe to a culture of constitutionalism, as laid down in the country’s Constitution, publicly supported by the new government<sup>47</sup> and strongly promoted by human rights organisations in South Africa.

The 1993 Interim Constitution provided an explicit requirement that ‘every person shall have the right to be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public’.<sup>48</sup> This administrative due-process guarantee was made even stronger in the 1996 Final Constitution, which provided that ‘everyone whose rights have been adversely affected by administrative action has the right to be given written reasons’.<sup>49</sup> However, despite this explicit requirement, for the DHA, it was ‘business as usual’.

Although some of the applicants were alleged to have been responsible for international crimes, the one-page consent order issued by the court, which confirmed the contents of a settlement, ordered the Refugee Appeal Board to provide written reasons for its refusal to grant refugee status.

The *Pembele* consent order was closely followed by the judgement of *Kabuika*.<sup>50</sup> This 1996 judgement, which was also brought by lawyers acting for the LRC, was an early example of South African lawyers ‘localising’ global knowledge by appealing to binding obligations in international customary law in their argu-

<sup>45</sup> Refugee Reception Offices (RROs), as they are referred to in terms of the Refugees Act 1998, have been established in the urban municipalities of Johannesburg, Pretoria (Tshwane), Cape Town, Durban and Port Elizabeth.

<sup>46</sup> (*Pembele case* 1996).

<sup>47</sup> (Monyae 2006: 132).

<sup>48</sup> Section 24(c) of the (Interim Constitution of South Africa 1993).

<sup>49</sup> Section 33(2) of the (South African Constitution 1996).

<sup>50</sup> (*Kabuika case* 1997).

mentation. The judgement confirmed that, despite the fact that South Africa had not yet ratified the international refugee conventions at the time the applicants' claims were considered, the customary international law principle of *non-refoulement* applied, and was therefore binding on the government of South Africa as a principle of *jus cogens*.<sup>51</sup> The court furthermore accepted the lawyers' arguments that the Department made numerous factual errors and, in their failure to respect due process, the DHA had misjudged the claims by Kabuika that the conditions in Zaire had not improved since they fled the country.

Two years later, another major case came before the High Court, concerning a claim against the DHA by former generals and a senior government official of Mobutu's regime in Zaire.<sup>52</sup> After having resided for years on either special privilege, medical or holiday permits (in some cases granted by the Minister of Home Affairs personally), they found that their 'VIP' status in South Africa had expired, and they were ordered by the DHA to leave the country, whereupon they applied for refugee status. The government refused to consider their applications for refugee status, insisting that they should have applied earlier. The generals and former official brought a judicial challenge to this decision, taking the unprecedented step of immediately engaging senior legal counsel.

The applicants hired well-respected senior legal counsel, Advocates Tuchten and Unterhalter, on a private basis. Although the senior counsel were not acting on behalf of an NGO and had never handled a refugee case before, they consulted widely with refugee lawyers and academics, conducted extensive research on international refugee law and put forward exceptional argumentation. Even though, as in the *Pembele* case, the applicants would in all probability have all been excluded from refugee status on the basis of their previous activities in Zaire, the lawyers argued that their access to a fair refugee procedure ought still to be ensured. The lawyers further argued that Baramoto and his fellow applicants would not receive a fair hearing from the DHA's Standing Committee, and asked the court to grant a 'declaratory order' recognising the applicants as refugees.

The judge agreed that the applicants be permitted access to the procedure, but refused to accept that the applicants would not receive a fair hearing, and did not grant applicants refugee status over the heads of the department. The judge declared that 'there is no reason for holding that the tribunals will merely rubber stamp gov-

51 (Kabuika case 1997: 5) In coming to this conclusion, the court in *Kabuika* referred to academic commentary by South African Professors Christina Murray and John Dugard as well as the constitutional court judgement in the (AZAPO case 1996) The court declared:

'The intention to legislate contrary to the *jus cogens* would, however, have to be clearly indicated by Parliament in the legislation in question because of the prima facie presumption that Parliament does not intend to act in breach of international law.'

52 The regime of Mobutu Sese Seko in the former Belgian Congo, which Mobutu renamed Zaire and is now the Democratic Republic of Congo, was one of the most brutal regimes of the last century. See (Wrong 2001).

ernment policy. At the end of the day, if all else fails, review to this court remains an option available to the applicants in this regard'.<sup>53</sup>

In spite of the morally repugnant nature of the applicants' claims – all three were alleged to have contributed to war crimes, torture or crimes against humanity, as part of Mobutu's brutal regime<sup>54</sup> – *Baramoto and Others v Minister of Home Affairs and Others* became an important legal precedent, confirming the right of access to asylum procedures. The case was also reported later. From a legal doctrinal perspective, the fact that this case did not concern the most 'deserving' of applicants made the precedent that much stronger.

### 6.3.2 Ensuring entry to South Africa

The next aspect of litigating access to fair status determination procedures focused on entry to South Africa. Towards the end of 1999, civic actors and applicants were still waiting for the Refugees Act to be brought into force, a year after it had been passed into law.<sup>55</sup> Meanwhile, the Durban Refugee Forum (the Forum) had been informed about the situation of two Iraqi men who claimed to have fled their country's regime, and had smuggled themselves onto a ship that was due to arrive in Durban harbour in the third week of January. The men had expressed a wish to disembark in Durban and apply for refugee status. The Department of Home Affairs refused to permit this, declaring the Iraqi men (in advance of their arrival) to be 'prohibited persons' in terms of the Aliens Control Act 1991. In court papers, a DHA official was quoted as claiming that they 'feared that they (the Iraqis) would be stranded in the Republic because, as he claimed, it is impossible to repatriate persons to Iraq because of what he referred to as the "no fly zone." (sic)'.<sup>56</sup>

After numerous unsuccessful interventions at the DHA's refugee office in Durban, the Forum's legal advisor, Sheldon Magardie, decided to bring a case, firstly to permit him and an interpreter to board the ship, once it arrived, to verify the Iraqis' story. Secondly, Magardie asked the court to permit the two men to apply to the DHA for refugee status. The case became known as the *Durban Refugee Forum case*.<sup>57</sup>

As a 'translator' of South Africa's international obligations, Magardie spelled out the obligations of South Africa, in terms of the government having ratified the Refugee Conventions, in a comprehensive founding affidavit. Magardie referred to

<sup>53</sup> (Baramoto case 1998)

<sup>54</sup> Their alleged involvement in international crimes was well documented by human rights organisations such as Amnesty International, for example as reported by the United Nations in ('IRIN Emergency Update No. 45 on Eastern Zaire' 1996).

<sup>55</sup> Much legislation in South Africa that is passed into law, including the Refugees Act 130 of 1998, requires the responsible government department to introduce Regulations before it becomes operational. Just as with the Act itself, such Regulations must be formally published in the official government 'Gazette'.

<sup>56</sup> (Durban Refugee Forum case 2000) Founding Affidavit, paragraph 16a.

<sup>57</sup> (Durban Refugee Forum case 2000) Orders issued: 23 and 24 January 2000.

the disregard of the DHA towards its international obligations, the reasons for its refusal being the difficulty of deporting the Iraqis. Magardie referred extensively to South Africa's international obligations in terms of the 1951 UN and 1969 OAU Refugee Conventions,<sup>58</sup> and the DHA's own policy concerning stowaways.<sup>59</sup> Magardie also appealed to Article 33(1) of South Africa's Constitution – referred to earlier in this chapter – which guarantees due process to asylum seekers in South Africa, arguing that 'despite having acceded to the Convention it is clear that (the DHA) ... does not wish to abide by the clear dictates of Art 33(1)'.<sup>60</sup>

In a judgement issued on 23 January 2000, the court ordered not only that Magardie be permitted to board the ship,<sup>61</sup> but that the DHA 'take all such necessary steps' to allow the applicants to apply for refugee status.<sup>62</sup> In a further judgement, issued on 24 January 2000, the court ordered that the Iraqi applicants be provided with (extendable) residence permits for the duration of their application.<sup>63</sup> Finally, in an extraordinary condemnation of the DHA, the court further ordered the department to 'render full reasons to the Registrar for his decision declaring said (applicants) to be prohibited persons as contemplated in the Aliens Act 95 of 1991 (sic)'.<sup>64</sup>

While the judgement in the Durban High Court was an embarrassment for the DHA, it meant that civic actors were able to confront the DHA, and hold it accountable to its national and international obligations through the courts. However, rather than introduce policy concessions, the DHA chose to engage in further legal confrontations with civic actors on the operation of their refugee policy. In the next major case, *LHR (2001)*, the confrontations became even more hostile.

Immediately after the Refugees Act was finally brought into being on 1 April 2000, the DHA introduced a new policy circular, which provided that anyone appearing spontaneously at a port of entry should be sent back.<sup>65</sup> This policy was introduced seemingly on the basis of a narrow understanding of the so-called 'first country of asylum principle', otherwise referred to as the 'safe third country principle'.<sup>66</sup> This principle, commonly invoked by countries in the European Union that share a partially-harmonised asylum system, provides that one should not be permitted to claim asylum in one country if another country could potentially have of-

<sup>58</sup> (Durban Refugee Forum case 2000) Paragraphs 5, 20, 25, 26 and 30.

<sup>59</sup> Department of Home Affairs, 'Stowaways who are or who claim to be refugees', Passport Control Instruction No. 33 of 1995. Stowaways are to be permitted to apply for refugee status and, if necessary, to disembark a ship for these purposes.

<sup>60</sup> Ibid. Paragraph 26.

<sup>61</sup> (Durban Refugee Forum case 2000) Paragraph 2.

<sup>62</sup> (Durban Refugee Forum case 2000) Paragraph 3(b).

<sup>63</sup> (Durban Refugee Forum case 2000) Paragraphs 6 and 7.

<sup>64</sup> (Durban Refugee Forum case 2000) Paragraph 8. It is not clear whether the DHA ever submitted its reasons.

<sup>65</sup> DHA (2000), 'Influx of Asylum Seekers: First Country of asylum', Departmental Circular No. 59 of 2000.

<sup>66</sup> (L.A. De La Hunt and Kerfoot 2008: 97).



ferred that claimant protection.<sup>67</sup> The DHA claimed – accurately – that all applicants entering South Africa via a land crossing had passed through countries where it was possible to apply for refugee status. In response, LHR argued, somewhat provocatively, that if such a policy were to be maintained, asylum seekers would have to ‘parachute’ into South Africa in order to be permitted the opportunity to apply for refugee status.<sup>68</sup>

As recorded by Belvedere, LHR made numerous efforts to resolve the matter amicably, arguing that the policy violated several international legal obligations as well as the Refugees Act and the South African Constitution.<sup>69</sup> However, these efforts led only to increasingly hostile exchanges. The media eagerly reported on these public confrontations. LHR strongly criticised the behaviour of the DHA, which responded by challenging LHR’s legitimacy. The Director-General of the DHA even publicly referred to LHR as ‘peacetime heroes’ and ‘fools’ if they dared challenge the Department on this matter.<sup>70</sup>

During the course of these acrimonious exchanges, and having received countless complaints from individual asylum seekers who had struggled to enter the country, LHR formally launched a challenge to this policy in the case of *LHR (2001)*,<sup>71</sup> but the matter never went to trial. Reflecting simmering political tensions within the DHA, the Minister of Home Affairs publicly accused his own Director-General ‘of implementing a legally questionable asylum policy without his knowledge’,<sup>72</sup> and the DHA policy was hastily set aside. While there have been more recent, lingering doubts as to whether the practice has, in fact, been discontinued (at least in the case of Zimbabweans),<sup>73</sup> the government’s non-entrée policy has never been reintroduced in any formal way.

It is interesting to note how, on one hand, in the *LHR (2001)* case, the mechanism of litigation, in combination with civic actors’ use of the media, became a powerful political tool that eventually contributed towards the DHA retracting its policy. On the other hand, given the hostile nature of the confrontations between the Director-General of the DHA and LHR, it is doubtful whether the case would have been resolved as quickly as it did, had the Minister not stepped in to rebuke his own Director-General. The matter may well have gone to trial.

In the *Durban Refugee Forum* and *LHR (2001)* cases, the meanings, interests and political positions of civic actors on one hand and the DHA on the other became extremely polarised, leaving the corresponding social distance very wide. This made it extremely difficult for lawyers to localise global knowledge by appealing to South Africa’s international obligations to refugees, or even to appeal to the

<sup>67</sup> See (Kjaergaard 1994); (Gil-Bazo 2006); and (Lavanex 1999).

<sup>68</sup> (‘Lawyers to Fight Asylum Policy’ 2001).

<sup>69</sup> (Belvedere 2006: 189-191).

<sup>70</sup> (Chothia 2001).

<sup>71</sup> (*LHR case 2001*).

<sup>72</sup> (‘Buthelezi Accuses Masetlha’ 2001). Also noted by (Belvedere 2006: 191).

<sup>73</sup> (Vigneswaran 2006).



country's constitutional obligations towards refugees. In the *LHR (2001)* case, litigation became unnecessary once political forces within the DHA shifted and the Minister intervened, reducing the social distance virtually overnight. But, yet again, the presence of shared interests was short-lived as civic actors and the DHA confronted each other once again in the *Centre for Child Law case*.

### 6.3.3 Special access needs of children

The special access needs of children became the subject of another case brought in 2005 by LHR and the Centre for Child Law at the University of Pretoria (Centre) in the *Centre for Child Law case*.<sup>74</sup> LHR and the Centre brought this case after years of advocacy to try to persuade the government to recognise children as especially vulnerable, and to develop special procedures for assessing their eligibility for refugee status, in accordance with existing policy in South Africa for the treatment of vulnerable children generally.<sup>75</sup>

Until this time, child asylum seekers arriving in South Africa unaccompanied had been dealt with by the DHA in the same way as adults were. The lawyers from LHR and the Centre argued that the treatment of children as adults in the status determination regime was in clear violation of long-standing policies laid out by the UNHCR and as practised by other countries in the world.<sup>76</sup> The lawyers further argued that the lack of a special procedure was in contradiction to South Africa's obligations under the Convention on the Rights of the Child, which South Africa had ratified.<sup>77</sup> Finally, the lawyers argued that the lack of a special procedure for children was inconsistent with its own domestic legislation in terms of the Constitution and the Child Care Act.<sup>78</sup>

The DHA objected to these special procedures, and the matter went to trial. In the judgement handed down in this case, the court accepted the argumentation of the Centre for Child Law, affirming that unaccompanied foreign children should first be dealt with under the provisions of the Child Care Act as 'children in need of care'. This entailed having legal representatives assigned to them by the state, including for assisting in the asylum determination procedure.

### 6.3.4 Physical access to the refugee reception offices

Another aspect in which civic actors have advocated for access to fair status determination procedures – in an increasingly acrimonious environment – has been to ensure physical access to Refugee Reception Offices (RROs). As referred to earlier, the RROs had been set up in terms of the Refugees Act 1998. As Belvedere and her

<sup>74</sup> (Centre for Child Law case 2005)

<sup>75</sup> (Mayer et al. 2008).

<sup>76</sup> (Mayer et al. 2008: 198-206).

<sup>77</sup> (Convention on the Rights of the Child 1989). South Africa ratified the Convention on 16 July 1995.

<sup>78</sup> (Child Care Act 1983). See also (Mayer et al. 2008: 189-195).

colleagues had determined in a 2003 nationwide survey commissioned by the UN High Commissioner for Refugees, access to these offices continued to be a major concern of refugees and asylum seekers over a period of many years.<sup>79</sup>

The efforts made by civic actors to ensure physical access to the RROs were not only to ensure access to the refugee status determination procedure.<sup>80</sup> Civic actors were also concerned that asylum seekers and refugees be provided access for the purposes of renewing or extending their residence permits. More serious related concerns, as documented by Belvedere and others, were the total closure of DHA's office in Johannesburg – the largest RRO in the country – for a lengthy period in April 2005, and the introduction by the officials in other DHA RROs of a daily quota system that limited the physical numbers of applicants into the building. The end result was that hundreds, if not thousands of asylum seekers were being denied access to the RROs, either to have their applications for refugee status considered or to have their permits renewed. This also meant that countless asylum seekers were without any proof of formal status, and were therefore vulnerable to arrest and exploitation.<sup>81</sup>

Once again, after numerous, unproductive exchanges between civic actors and the DHA, LHR launched court challenges in April and October 2005, insisting that the DHA improve its access to the RROs. Meanwhile, the Cape Town office of the Legal Resources Centre launched its own court challenge with regard to similar policies in place at the Refugee Reception Office there, in the case of *Kiliko*.<sup>82</sup> The *Kiliko* case especially concerned a policy in terms of which DHA officials were ordered to process only twenty asylum seeker permits per day. This meant that dozens, if not hundreds of would-be applicants were turned away on a daily basis.

The DHA offered to settle the first LHR case in 8 May 2005, which LHR accepted; and the settlement was confirmed by a court order.<sup>83</sup> The May court order had little effect in improving access. According to LHR attorney Fritz Gaerdes, who issued a press release, the situation became even worse in June 2005, when the DHA closed its Johannesburg office in Rosettenville, forcing asylum seekers and refugees to use other DHA offices, in particular the office in Pretoria:

the High Court ordered the Department of Home Affairs to prepare and file a plan to facilitate all asylum applications by newly arrived asylum seekers. This plan required the Department to outline clear steps that it intended taking to solve the problems that asylum seekers experienced to access the asylum procedures ...

<sup>79</sup> (Belvedere et al. 2003).

<sup>80</sup> As more than one highly frustrated South African lawyer mentioned (in confidence) to me, the fact that lawyers had started with challenging the bureaucratic criteria for fair refugee status determination procedures and ended up, several years later, merely challenging access to the offices, represented a 'backward slide' in the behaviour of the DHA towards refugees and asylum seekers in South Africa.

<sup>81</sup> (Belvedere et al. 2003) and (Belvedere 2006: 191-278).

<sup>82</sup> (*Kiliko* case 2006)

<sup>83</sup> ('Interview with J. Van Garderen (2)' 2008).

Since June we have continually monitored the situation. What we saw was that the daily queues at the Pretoria refugee reception office were on average 250 persons long, whilst the Department on average only assisted 45 newly arrived asylum seekers daily. The longer queues were therefore not due to a greater influx of asylum seekers in South Africa but, in our observations, rather due to departmental inaction and inefficiency.<sup>84</sup>

The High Court issued a further order in the form of a structural interdict on 11 November 2005, which among other matters required the DHA to employ the services of ‘an independent process engineer or other suitably qualified individual to investigate, assess and make recommendations to ensure that asylum seekers can immediately access the asylum application procedures’.<sup>85</sup> LHR expressed satisfaction with the judgement, and declared it would continue to monitor the situation.

Judgement in the *Kiliko* matter was finally delivered on 16 January 2006. The Court judged the conduct of the DHA to be inconsistent with the fundamental rights of illegal foreigners as embodied in the Constitution. Accordingly, the Court also ordered a comprehensive structural interdict requiring the DHA to report on its progress in improving access to the Cape Town refugee reception office.

#### **6.4 MOBILISING REFUGEE ACCESS TO ECONOMIC AND SOCIAL RIGHTS THROUGH THE COURTS**

Another aspect in litigating refugee rights in South Africa has been to ‘localise’ global knowledge by appealing to international legal norms and comparative state practice, addressing the economic and social rights of asylum seekers and refugees, including the right to work and study.

Beyond securing the right to work, the conditions of employment have also needed to be addressed, in particular criteria that have been in place to preserve certain sectors of employment for South African citizens only. Finally, the denial of social grants, including access to food grants to refugees, has been challenged. Later cases have also been brought to secure disabled persons grants and childcare grants.

##### **6.4.1 Securing the right to work and study for asylum seekers**

While applicants await a decision on their status, for asylum seekers the right to work and study is not a luxury; for most it is a matter of survival.<sup>86</sup> As mentioned, applications for refugee status in South Africa have tended to take a very long time to process. It is not at all unusual for an application to take several years, and the DHA has found itself with successive backlogs of applications for refugee status, including a backlog of 100 000 applications at the beginning of 2006.<sup>87</sup>

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<sup>84</sup> (‘LHR Press Release’ 2005).

<sup>85</sup> Ibid.

<sup>86</sup> See also (Landau 2006).

<sup>87</sup> (Handmaker 2008).

As mentioned earlier in chapter four, the Regulations that brought the Refugees Act 1998 into operation were produced with virtually no public consultation. Rather than involve civic actors in the framing of the Regulations – which would no doubt have ensured that the right to work and study was protected – a consultant, paid for by the US government, drafted the Departmental Regulations. The Regulations brought the Refugees Act into use on 1 April 2000.<sup>88</sup> Regulation 7(1)(a) and corresponding Annexure 3 prohibited the right of asylum seekers to work and study while their applications for refugee status were being considered.<sup>89</sup>

A minor breakthrough in challenging the denial of the right of asylum seekers to work and study came about in 2001, following the so-called *Mutambala* letter. This was a letter from the Director-General of Home Affairs to the South African Human Rights Commission, confirming the Department's position that children of asylum seekers had the right to study, pending a determination of their asylum claim. In administrative law terms, this created a 'legitimate expectation'.

However, asylum seekers were still routinely refused the right to work and study, and lawyers continued to object strongly to this exclusionary provision in the Regulations. It ultimately became necessary to litigate the matter. The case of *Watchenuka*<sup>90</sup> was finally decided by the Supreme Court of Appeal, after DHA appealed the High Court decision in favour of the refugee applicants. The appeals court declared the policy denying asylum seekers the right to work and study to be unlawful on the grounds that it violated the conditions for having a dignified life. The Court ordered the DHA's Standing Committee to consider the circumstances of each applicant when deciding on the prohibition on work and study, whether on a case by case basis or by formulating guidelines to be applied by Refugee Reception Officers. Since individual screening would have entailed impossible administrative burdens, the prohibition was set aside.

#### 6.4.2 Challenging discriminatory employment practices

While the right of asylum seekers and refugees to seek work and employment was guaranteed by the *Watchenuka* case, numerous other official and social barriers have made it very difficult for asylum seekers to find a formal job or study-placement, and civic actors have largely been unsuccessful in challenging these discriminatory employment practices. This is partly related to the fact that while South Africa's Constitution preserves the right to fair labour practices for 'everyone',<sup>91</sup> the Constitution preserves the right to freely choose a trade, occupation or profession for 'citizens' only.<sup>92</sup> Furthermore, this same 'citizens only' section in the

<sup>88</sup> This was communicated to me, in confidence, by several well-placed individuals.

<sup>89</sup> Before the Refugees Act 1998 came into use, asylum seekers were generally permitted to work legally. The Regulations to the Refugees Act removed the right to work and study.

<sup>90</sup> (*Watchenuka* case 2004)

<sup>91</sup> (South African Constitution 1996: section 23).

<sup>92</sup> (South African Constitution 1996: section 22).

Constitution provides that ‘the practice of a trade, occupation or profession may be regulated by law’.<sup>93</sup>

One of the few areas of employment where many refugees have successfully found work is in South Africa’s burgeoning security industry. Many of the informal jobs, such as car parking guards or uniformed security officers (for example, regulating entry to an office or residential building) have been taken by refugees. It has been impossible, however, for refugees and asylum seekers to legally acquire a formal job in the security sector, because of a specific regulation determined by the Security Officers Board (the ‘Board’).<sup>94</sup> This regulation has reserved formal security jobs for South African citizens only.

Over a period of several years, lawyers, together with the National Consortium for Refugee Affairs (a national network of civic organisations), and the URW – referred to earlier – have persistently challenged this discriminatory policy, arguing that it is unconstitutional. After efforts to settle the matter with the Private Security Industry proved unsuccessful, civic actors took up the matter in the courts. Assisted by LHR, the URW argued in the *Security Industry case*<sup>95</sup> that exclusion on the basis of citizenship unfairly and unjustifiably infringed on refugees’ rights to non-discrimination and dignity. The High Court found against them, declaring that the public interest, particularly viewed against the safety and security of the public, and the control of the security industry, justified the limits on the right of refugees to be registered as security service providers.

The media reported that ‘the Security Industry Act which regulates the security industry does not unfairly discriminate against refugees and it is thus not in conflict with the Constitution’.<sup>96</sup> Human rights lawyers representing the Union of Refugee Women, who brought the case against the Board, were frustrated to face another, very experienced and noted human rights lawyer, Wim Trengove, as their opponent in Court. In explaining the Board’s position, Trengove argued:

that while the Act did favour citizens and permanent residents over non-citizens, it was not discriminatory. The mere fact that refugees had to comply with the Act did not mean they could not seek employment in other industries ... The security service industry was highly sensitive ... and extreme caution was required to ensure only trustworthy persons were permitted to become members. There was thus a need for strict and proper control.<sup>97</sup>

The URW appealed the decision of the High Court to the Constitutional Court on 29 August 2006, the URW’s lawyers – as rights translators – making extensive ref-

<sup>93</sup> Ibid.

<sup>94</sup> The Security Officers Board is a statutorily-created entity that used to be part of the police structure before a successful challenge by the Transport and General Workers Union; it then acquired an independent status.

<sup>95</sup> (Security Industry case (lower court) 2006)

<sup>96</sup> (Venter 2006).

<sup>97</sup> (Venter 2006)

erence to South Africa's obligations to refugees in terms of international law. The Constitutional Court was split on the matter.<sup>98</sup> The majority of the Court, led by Justice Kondile, did not accept the main line of argument presented by the refugee applicants, namely that the legislation unfairly discriminated against refugees. On the other hand, the Court accepted that exemptions should be issued to refugees where there were 'no high security interests'.<sup>99</sup>

The reasoning by Sachs, which tried to find a middle ground, made extensive reference to South Africa's obligations in international law, the 'significance' of the Refugees Act, the 'historical and social setting in which the rights and entitlements of refugees have to be determined' and finally the 'constitutionally-mandated obligation to counteract xenophobia'.<sup>100</sup> Sachs referred to South Africa's traditional culture of hospitality; as well as the special reasons why refugees found themselves in the country being the consequence of 'instability and bloodshed in their home countries (that had) rendered life there intolerable'.<sup>101</sup> However, ultimately Sachs agreed with Kondile that the discriminatory measure was not unconstitutional since there was still the possibility of granting an exemption:

I see no reason why access to employment in the security industry by persons in their situation should not be permitted in relation to sectors such as these, where no high security interests are at stake. To bar them would be to discriminate against them unfairly. At the same time I would not regard it as unfair to keep them from guarding installations and persons where particularly high security considerations come into play.<sup>102</sup>

And so, the discriminatory measure remains. Civic actors found it difficult to understand how the judgement of the Constitutional Court could demand, on one hand, that the security industry be 'fair and reasonable' in deciding whether or not to grant an exemption to a refugee applicant, while on the other hand, failing to declare the discriminatory provision in the Security Industry Act to be unconstitutional. In this case, the social distance between the state and civic actors remained wide after the Constitutional Court explicitly recognised the government's commitment to refugees, but failed to challenge this area of 'protected' employment. The observation by the Court shifted the social distance between the two parties slightly in relation to the *meaning* of the Security Industry Act. However, the fact that the Security Officers Board was merely urged to consider the possibility of employing refugees meant that the Court's observation was essentially meaningless, since the *interests* of both parties still diverged completely. Consequently, the constitutionality of the discriminatory measure was essentially confirmed.

<sup>98</sup> (Security Industry Case 2006) By the time the case reached the constitutional court, two applicants who wished to continue remaining anonymous had dropped out of the case.

<sup>99</sup> (Security Industry Case 2006) Paragraph 147.

<sup>100</sup> (Security Industry Case 2006) Paragraphs 133-144.

<sup>101</sup> (Security Industry Case 2006) Paragraphs 145-146.

<sup>102</sup> (Security Industry Case 2006) Paragraph 147.

### 6.4.3 Securing the right to social grants

Unlike the long-fought and ultimately unsuccessful efforts to eliminate citizen-based discrimination within the security industry, civic actors have been reasonably successful in claiming social grants for asylum seekers and refugees. Unlike in other countries, both in Europe as well as in countries that manage large refugee camps, the government of South Africa has not provided social assistance for asylum seekers or refugees. On the other hand, asylum seekers and refugees have been free to ‘self-settle’, avoiding the harsh and demoralising conditions faced in countries that require asylum seekers and refugees to reside in refugee camps or that prevent them from working.

In the absence of government assistance, some very modest emergency assistance has been provided by a small number of civic organisations, including NGOs, faith-based groups and refugee-led organisations. When the numbers of asylum seekers arriving in South Africa (during the early to mid-1990s) was small, these organisations received generous support from the UNHCR and other donors, and were able to provide a reasonable service. But as the numbers of asylum seekers steadily increased from 1996 onwards, the civic organisations that provided these services quickly found themselves overwhelmed.

In the cases of *Khosa*<sup>103</sup> and *Mahlaule*<sup>104</sup> referred to earlier, brought by lawyers of the Wits University Law Clinic, which concerned a lack of social services to former Mozambican refugees, the Constitutional Court determined that the government’s limiting of social grants to citizens was unconstitutional. More recently, in a 2006 case brought by NGOs in *Duale v Minister of Social Development*,<sup>105</sup> the court declared that refugees were entitled to food vouchers as ‘social relief of distress’, and ordered the Minister of Social Development to issue the vouchers and conduct an assessment of their situation.<sup>106</sup>

In all three of these cases, the social distance between NGOs and the South African government narrowed as the court declared the government to be obliged to provide social assistance, recognising South African citizens and refugees as having essentially the same interests, at least in relation to accessing social grants.

## 6.5 WHAT CHANGED? FROM RECOGNITION TO RELIEF

Beyond a judicial declaration that a government policy or action is invalid or that rights exist,<sup>107</sup> a further aspect of litigating refugee rights in South Africa worthy of critique has been the form of interdictory relief obtained from the court. This section explains what civic actors have accomplished structurally by litigating refugee

<sup>103</sup> (*Khosa* case 2003).

<sup>104</sup> (*Mahlaule* case 2003).

<sup>105</sup> (*Duale* case 2006). The court granted a consent order on 14 September 2006.

<sup>106</sup> (*Duale* case 2006) Paragraphs 1 and 4.

<sup>107</sup> (*Currie and De Waal* 2005: 199-216).



rights and obtaining an order, including interdictory relief from the court, whether in the form of (1) final relief by judgement, (2) interim or final relief through a court-ordered settlement, or (3) structural interdicts.

### 6.5.1 Final relief through judgement

The obtaining of final relief through judgements, or ‘decided cases’, represents the greatest potential for shaming governments, since the government is forced by the court to take positive steps to correct its behaviour. Judgements can also be reported.<sup>108</sup> However, seeking a judgement represents a strategic risk to civic actors; the court could potentially rule against them. There are also financial risks, since such cases tend to be complex and often require engaging the services of expensive senior counsel, especially when cases are taken on appeal. Both of these risks were evident in the *Security Industry* case brought by the UDW and others that challenged the discriminatory policy of the security industry, and was finally met with a mixed judgement in the Constitutional Court. As a consequence of all these factors, very few judgements have been issued on refugee-related cases in the South African courts.

In at least one decided case, *Van Garderen*,<sup>109</sup> the judgement of the court provided a dramatic remedy for the individual applicants concerned; but this was of marginal use as a precedent in other cases, since the judgement was distinguished in respect of a very specific set of facts. *Van Garderen* concerned an application by a *guardian ad litem* to protect the best interests of three refugee children on whose behalf he was acting. In a similar way to the approaches of rights translators in cases preceding this one, the lawyers in this case drew extensively on both South Africa’s constitutional and international law obligations, including the Convention on the Rights of the Child.

The children’s applications for refugee status had been considered, and rejected, by the Refugee Appeal Board (RAB), and the children were facing deportation. The court was asked to ‘substitute its finding for that made by the RAB and to accord asylum to the children’.<sup>110</sup> The court accepted this argument by the applicants and issued an order, both setting aside the decision of the RAB and granting asylum to the children. This was a significant departure from the *Baramoto* case heard ten years earlier, in which the court was unwilling to make a judgement on the asylum claim. However, the case could also be distinguished since the Department had not yet taken the opportunity to review the applicants’ claims, and the facts of the *Baramoto* case were obviously rather different as well. One of the reasons the court may have decided to rule in favour of the children and grant them status could be explained in terms of legal consciousness, notably the court’s awareness of the supremacy of international law, in this case the Convention on the Rights of the Child.

<sup>108</sup> Reported cases are generally included in the South African Law Reports.

<sup>109</sup> (*Van Garderen* case 2007).

<sup>110</sup> (*Van Garderen* case 2007: 7).



Consequently, the case represents a very interesting example of the effective role played by translators in ensuring that global rules find local application.

With regard to other judgements discussed in this chapter, the *Kabuika*, *Watchenuka* and *Centre for Child Law* cases<sup>111</sup> were strategically brought to challenge broader policies of the DHA, and did not require the court to interfere as much in the Department's decision-making. These cases provided both a remedy for the applicants concerned, and structurally changed government policy and behaviour. The *Kabuika* case, for example, recognised the principle of non-refoulement as a legally binding principle. In *Watchenuka*, the court overturned the provision in the Regulations to the Refugees Act prohibiting work and study for asylum seekers. In the *Centre for Child Law* case, the judgement imposed a positive duty on the part of government departments to liaise with one another to formulate and implement practical arrangements regarding unaccompanied foreign children in South Africa.

The judgement in the *Durban Refugee Forum* case<sup>112</sup> fell somewhere in between the 'delicate balance' of allowing departmental discretion, on one hand, and exercising judicial oversight, on the other. Although specifically targeting the plight of two Iraqi men who had smuggled themselves onto a ship, the case presented an opportunity (perhaps beyond the Forum's initial intentions) to 'localise' global knowledge by confronting the DHA at one of its regional offices with its international law and constitutional obligations. The case represents an interesting example of judicial activism. Going beyond a confirmation that there was a right of access to procedures and written reasons for refusal, the Durban court called on the DHA to answer on why the Department had violated international obligations to protect refugees. It was encouraging to note how serious these matters were seen to be by the 'provincial' division of the High Court, where such cases were far less often heard, in that the Court issued an extraordinary rebuke and emphasised the government's constitutional and international law obligations.

### 6.5.2 Interim or final relief through settlements (court-ordered)

Since courts tend to be cautious in substituting a government department's judgement for that of their own, obtaining interim or final relief through a court-ordered settlement often represents the best strategic option for civic actors. From the government's perspective, there is always the damaging possibility that the court will find against them; and in any event, the cost implications for a public institution also create pressures to settle. Consequently, most cases are settled out of court.

A 'consent order' from the court is a legally enforceable confirmation of the terms of a settlement agreement. A consent order provides for the future possibility of holding the government in contempt of court if they violate the terms of the set-

<sup>111</sup> (*Kabuika* case 1997); (*Watchenuka* case 2004) and (*Centre for Child Law* case 2005).

<sup>112</sup> (*Durban Refugee Forum* case 2000).

tlement.<sup>113</sup> However, even with a consent order attached, settlements have more limited ‘shaming’ value, unless the government blankly refuses to live up to the terms of the settlement.

Cases such as *Pembele*,<sup>114</sup> which confirmed the right of applicants to written reasons for the rejection of their refugee status claims, and the *LHR (2001)* case,<sup>115</sup> that challenged the DHA’s ‘first country of asylum’ policy, are notable since they resulted in more or less permanent improvements in the country’s refugee policy. They are also clear examples of cases in which the court’s negotiation of the ‘delicate balance’ fell on the side of allowing administrative discretion, as opposed to the court exercising their judicial imposition. By contrast, in the *Duale* case,<sup>116</sup> the court exercised a higher level of judicial imposition; the court not only confirmed the terms of the settlement, but also required the DHA to ‘inform the Applicants (through) Lawyers for Human Rights of its decisions on the Applicants applications for social relief of distress grants’.<sup>117</sup> Furthermore, in the *Duale* case the court left it open for the applicants to apply for further relief if they were ‘not satisfied with the decision made on their applications’.<sup>118</sup>

Despite the existence of a consent order, the potential for compliance and ‘deterrence’ against bad government behaviour for the majority of settled cases – few as they have been in number – has remained a serious point of contention. For cases that have targeted very specific policies – such as in *Pembele*, *LHR (2001)* and *Duale* – the prospects of compliance in an individual consent order have tended to be higher. However, since a full judgement in these cases was never issued, the court failed to deal with the full implications of the government’s constitutional and international obligations. Consequently, the long-term impact these cases have had in ‘detering’ government from repeating the same mistakes is questionable, especially the impact on successive generations of government departments, where senior officials have been replaced. In other words, there has been little incentive on the part of government to comply with the terms of a court-ordered settlement regarding, or in relation to, similar cases in the future.

A kind of stalemate has emerged, between the demands from civic actors that the government comply with its constitutional and international law obligations, the intransigence of government unwilling to have its decisions questioned and – with the exception of the court-ordered settlement in the *Duale* case – the reluctance of the courts to substitute their own opinion for that of the government. As a result, new types of enforcement-seeking orders in the administrative law field have been explored, with the aim of escaping this stalemate. One such order has been the structural interdict.

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<sup>113</sup> (Currie and De Waal 2005: 224-225).

<sup>114</sup> (*Pembele* case 1996).

<sup>115</sup> (*LHR* case 2001).

<sup>116</sup> (*Duale* case 2006).

<sup>117</sup> (*Duale* case 2006) Paragraph 5.

<sup>118</sup> (*Duale* case 2006) Paragraph 6.

### 6.5.3 Structural interdicts

South Africa's Constitution grants the judiciary far-reaching powers in developing remedies for harm suffered as a result of violations of the Constitution;<sup>119</sup> one of the more innovative remedies developed by the courts in constitution and administrative law cases is the structural interdict. The purpose of a structural interdict is to direct a government department – or any other violator – ‘to rectify the breach of fundamental rights under court supervision’. Currie and Waal have characterised these interdicts as consisting of five elements. The first element of a structural interdict is a declaration that government have violated the constitution. The second element is an order by the court that a government department comply with its obligations under the constitution. Thirdly, a structural interdict requires a department to produce a report ‘within a specified period of time’ in respect of which – fourthly – the applicant who brought the case should be given an ‘opportunity to respond’. Finally, the report is discussed in an open hearing, and ‘if satisfactory, the report is made an order of the court’.<sup>120</sup>

Put another way, a structural interdict is issued when the court finds against the government, but is willing to give it a further opportunity to ‘mend its ways’. Such an interdict actively engages civic actors beyond their role as litigants, since they play an active role in monitoring government behaviour within the context of this highly structured relationship. For their part, the courts negotiate the social distance between civic actors and government officials. Structural interdicts create an imposed relationship between the court, the government and the civic actors who bring these cases that seeks to bring meanings, interests and political positions of the civic actors and the government in line with each other.

The terms of such interdicts vary, but essentially require the government to report on its progress in meeting the requirements of a court order within a set time frame. Not reporting can lead to a contempt order from the court (and, theoretically, a jail sentence).<sup>121</sup> Lawyers have indicated that while structural interdicts can be a useful way of monitoring government behaviour and forcing government to take concrete steps to improve the situation, they can also be used as a delaying tactic by a government if it is already reluctant to take action.<sup>122</sup> Asked about the value of structural interdicts, Kerfoot, a refugee lawyer in Cape Town, remarked that ‘litigation is also not working’, at least not on its own. Instead, Kerfoot suggested that a combination of litigation, vigilant advocacy and damning stories in the media could bring results.<sup>123</sup>

<sup>119</sup> (Currie and De Waal 2005: 190-228) and (Ebadolahi 2008: 1576-1579).

<sup>120</sup> (Currie and De Waal 2005: 217-218).

<sup>121</sup> (Currie and De Waal 2005: 218).

<sup>122</sup> Confirmed in (‘Interview with Hlapolosa and Slabbert’ 2006); (‘Interview with S. Magardie’ 2006); (‘Interview with J. Van Garderen (1)’ 2006) and (‘Interview with W. Kerfoot’ 2006).

<sup>123</sup> (‘Interview with W. Kerfoot’ 2006).

In terms of the High Court's structural interdict issued in connection with a judgement issued by the court in 2005,<sup>124</sup> the DHA was required to hire the services of a consultant or 'process engineer', who was to report back to the High Court on 2 February 2006. In the *Kiliko* judgement,<sup>125</sup> the structural interdict similarly required the DHA to report on whether received and processed asylum applications were in line with national and international refugee law, as well as with the SA Constitution. In relation to the structural interdicts issued in both the LHR and *Kiliko* cases, the process engineer hired by the DHA presented a progress report on 1 February 2006.<sup>126</sup> The consultants of IQ Business Group (IQ) produced a dense, highly technical 79-page report, referring explicitly to the order of September 2005<sup>127</sup> and to reports written by civic actors, including the NCRA and LHR.<sup>128</sup>

The progress report written by the consultants did not address the substantive nature of the work of RROs and RSDOs, beyond looking at their respective workloads. Much attention was paid to the statistical output of officials, and in particular the number of cases decided. Attention was also paid to time-management issues, notably the period of time spent on particular tasks, and office requirements such as PCs, desks and fingerprint-capturing devices.<sup>129</sup> These were all important issues that confirmed the serious resource constraints faced by the Department in terms of adequate personnel, reception facilities and technical equipment. However, the report also recommended the establishment of a single processing centre, similar to a long-standing proposal by the Department of Home Affairs to establish a 'reception centre', which had received heavy criticism.<sup>130</sup>

Many aspects were missing in the consultants' report. The report failed to make an assessment of key knowledge capacity issues amongst RSDOs and RROs, for example interviewing techniques or the ability to recognise and respond sympathetically to traumatised applicants. Other aspects that were missing in the consultants' report included a proper understanding of the minimum administrative law requirements for producing a decision in a timely, unbiased and informed manner. Also missing in the report were an assessment of writing skills to produce a properly motivated decision, details of the numerous hazards involved in interpretation or translation, and guidelines to the management of secondary data used to reinforce an RSDO's decision to grant or reject refugee status. Noted South African lawyers such as William Kerfoot, who had been handling refugee cases since the mid-1990s, identified these problematic issues as early as March 1998, during a confer-

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<sup>124</sup> ('LHR Press Release' 2005).

<sup>125</sup> (*Kiliko* case 2006).

<sup>126</sup> ('Process Engineers' Report' 2006).

<sup>127</sup> The Report, ('Process Engineers' Report' 2006: 5), mentioned that 'IQ Business Group was appointed as Process Engineer by the Department of Home Affairs in response to a High Court Order No. 32849/2005 of 11 November 2005'.

<sup>128</sup> ('Process Engineers' Report' 2006: 8).

<sup>129</sup> ('Process Engineers' Report' 2006).

<sup>130</sup> (Jenkins and De La Hunt 2008), *passim*.

ence organised by LHR.<sup>131</sup> All of these aspects were also specified in 1999, during the course of a training programme implemented at the request of the DHA by LHR, together with the Centre for the Study of Violence and Reconciliation.<sup>132</sup>

## 6.6 THE ENFORCEMENT OF REFUGEE RIGHTS THROUGH NON-LEGAL MEANS

Litigation, clearly, is not an end in itself. It is often tied to broader civic efforts to hold government accountable by other, non-legal means. Refugee rights have been most effectively mobilised in South Africa through inter-woven strategies of mass social mobilisation and public shaming. While a full assessment (and critique) of this important, growing dimension of advocating for accountability in South Africa goes beyond the scope of this book, this section explores some of these non-legal means.<sup>133</sup>

As explained in chapter four, the emergence of a Refugees Act in South Africa involved extensive participation by civic actors, from human rights advocacy organisations to academics in the process of policy framing. The success of efforts by civic actors in translating international obligations to protect refugees into the language of government policy was facilitated by broad platforms of civic participation, both under the auspices of the National Consortium on Refugee Affairs (NCRA), and in government-led processes of refugee policy reform.

Civic actors have mobilised to protect refugees in South Africa in numerous ways beyond policy framing. They have written letters to the government, mobilised the media, organised policy-oriented and popular conferences, produced academic and general awareness-oriented publications, and organised demonstrations. But while there are virtually endless creative expressions of public shaming and civic disobedience that can be exercised by civic actors, the real impact of these interventions – on their own – is highly questionable. While the scope for exercising agency by pursuing a social action against the government is much broader and far less conditioned by state-created structures, the potential for ‘elaborating’ these structures (i.e. leading to structural change) is very limited.

There is some evidence, however, that public shaming and social mobilisation efforts in combination with legal action, or threat of legal action, can have an influence. One such example, documented by Belvedere, was a letter written by national and international civic actors to government ministers about the government’s portrayal and treatment of foreigners.<sup>134</sup> The letter came in the midst of regular moni-

<sup>131</sup> Kerfoot’s presentation, ‘The Lack of Due Process in Asylum Determination in South Africa’ was later incorporated into (L.A. De La Hunt and Kerfoot 2008).

<sup>132</sup> (‘Final Report, DHA Training’ 1999).

<sup>133</sup> However, see (Palmary 2006) and (Belvedere 2006).

<sup>134</sup> (Belvedere 2006: 181) refers to a May 2000 letter by Human Rights Watch, the NCRA, LHR, the Human Rights Committee and the Legal Aid Clinic of Wits School of Law to Minister Tshwete of Safety and Security and Minister Buthelezi of Home Affairs regarding their ‘portrayal (by Minister

toring, and of several individual legal cases brought by LHR against the DHA concerning unlawful detention, as well as ongoing investigations by the South African Human Rights Commission concerning abuse of foreigners in the Lindela Centre for the processing of suspected undocumented persons.<sup>135</sup> In response, the DHA and Lindela Centre introduced measures to quickly validate the legal status of suspected undocumented migrants held at Lindela, and to challenge unlawful deportations.<sup>136</sup> What began as a highly confrontational situation concerning the routine detention of foreigners, involving much social distance between civic actors and the government, was transformed – albeit temporarily – into a situation in which interests converged and the corresponding social distance narrowed.

A further example of combined mobilisation of legal and non-legal means came in the midst of numerous longstanding concerns about the functioning of the refugee reception office in Johannesburg, which later also formed the subject of litigation. Of particular concern was the DHA's failure to issue legal permits to asylum seekers, and instead to issue them with appointment letters. This practice left countless already vulnerable individuals subject to apprehension and detention by the police; many ended up at Lindela Centre and faced the possibility of deportation.<sup>137</sup> In response, Johannesburg-based NGOs Black Sash and the Human Rights Committee issued letters in 2002 and 2003 that were addressed to law-enforcement officials, explaining the nature of the asylum seeker's status in the country.

These NGOs worked together with the police to ensure that the letters were respected by police officers. The DHA office eventually responded by increasing their daily intake, although access remained a serious problem.<sup>138</sup> In the midst of these actions, a group of NGOs, including Black Sash, brought an official complaint to the Office of the Public Protector, which eventually issued its report in 2005.<sup>139</sup> The DHA responded by shutting down its offices in April 2005, and LHR and LRC subsequently filed cases against the DHA regarding poor access to the RROs in Johannesburg and Cape Town, following numerous additional letters of their own.

Although in this case political positions converged as civic actors became involved in what would ordinarily have been the government's sole responsibility – to verify the legality of the asylum seekers' status – the meaning (i.e. implication) of these interventions was very different for civic actors from what it was for the government, and so the corresponding social distance was still very wide. Furthermore, the NGOs involved in this initiative compromised themselves by harming the rela-

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Tshwete) of all foreigners in South Africa as criminals'. The letter went on to condemn allegations of ill treatment by officials and the conditions under which foreigners were held in detention.

<sup>135</sup> (Kollapen et al. 1999) and (Algotsson 2000).

<sup>136</sup> ('Deportation and Prosecution of Refugees in Conflict with SA's Legal Obligations' 2008).

<sup>137</sup> (Kollapen et al. 1999).

<sup>138</sup> (Belvedere 2006: 192-193).

<sup>139</sup> Public Protector of South Africa (2005), *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*, Pretoria.

tionship of trust with refugees and asylum seekers, some of whom they represented in legal actions.<sup>140</sup> In any event, the matter eventually had to be dealt with by the courts, which imposed a structural interdict in order to monitor the progress of government efforts to improve access to the RROs.

## 6.7 CIVIC PARTICIPATION IN POLICY ENFORCEMENT

This chapter addressed the role of civic actors in the enforcement of government policy by way of confrontational civic-state interactions. The handful of legal cases mentioned here reveal the growing sophistication of civic actors in South Africa to develop strategic, legal challenges to the South African government's policies, including restrictive entry policies, poor access to RROs, lack of access to social services and restriction of key areas of work to citizens only. Such restrictive measures are hardly new, at least from a global perspective. As far back as 1992, Hathaway spoke of the so-called 'emerging politics of non-entrée'.<sup>141</sup> As discussed earlier, confrontational responses to restrictive government measures are also not new, from a South African perspective, though lawyers and other advocates have become more sophisticated and creative in challenging government policies.

The examples of civic enforcement of refugee rights contained in this chapter illustrate how civic actors have contributed to a culture of constitutionalism; and in particular how administrative law has been the principal medium for realising refugee rights through formal means. These examples also provide insights into how state structures (i.e. administrative structures and the legal structure) have conditioned civic agency; yet they also show how civic actors can elaborate these structures in progressive ways. Civic agency has been effectively utilised to confront governments with their human rights obligations and – in certain instances – to publicly shame governments. In exercising agency in this way, civic actors have mediated the translation of international legal norms into their local contexts. As translators, civic actors have opportunities to stimulate structural changes that advance refugee rights in the government's policy or implementation procedures.

However, despite all the efforts of civic actors, and especially lawyers, to try to advocate state accountability through legal and non-legal challenges, structural changes or 'elaboration' of the government structure cannot be guaranteed. As the *Security Industry case* showed, the conditioning factor of the courts (the legal structure) can sometimes prove insurmountable, and end up maintaining the status quo. The extent to which courts have been willing to issue judgements about particular cases has depended on the manner in which they have negotiated a 'delicate balance'.<sup>142</sup> This balance has required courts, on one hand, to allow administrative officials to take their own decisions and refrain from undue judicial interference, and

<sup>140</sup> Confirmed by ('Interview with D. Ndessomin' 2006).

<sup>141</sup> (Hathaway 1992).

<sup>142</sup> (Klaaren 2006b).



on the other, to ensure that decisions of administrative officials do not violate constitutional and human rights, including constitutionally protected due process.

As this last section explains, the illustrative examples contained in this chapter have confirmed this book's three theoretical propositions: (1) the capacity of civic actors to hold states accountable is shaped by structural changes in the normative international and national legal framework; (2) the boundaries that define the structural relationship between civic actors and the state have shifted in very specific ways that must be respected by civic actors (agents) if they want to be strategic in their efforts; and (3) civic actors play a crucial role in mediating the translation of international legal norms into local contexts.

### **6.7.1 Civic capacity and government accountability in litigating refugee rights**

The capacity of civic actors to hold government accountable by litigating refugee rights is due to South Africa's locally-produced culture of constitutionalism, which incorporates the government's international law commitments. This culture of constitutionalism not only created clear obligations to protect refugees; it also created opportunities for civic actors to hold the South African government accountable – drawing on constitutional and administrative law principles – in the courts.

All three types of remedies obtained through civic interventions – judgements, court-ordered settlements and structural interdicts – reveal a narrow but significant scope for civic actors to exercise their agency and hold the government accountable through legal means. The still relatively new ability of the courts to hold government accountable by reviewing its administrative decisions has clearly not broken the intransigence of government departments accustomed to making decisions without having them questioned. However, it has provided the principal medium through which refugee rights are formally claimed.

While the scope for exercising civic agency through non-legal measures is much broader, comparatively, its scope for holding the government accountable is limited. As the next section explains, a combination of legal and non-legal measures provides the greatest potential scope for civic actors to confront government and hold them accountable for their international and national legal obligations. From insisting that written reasons be provided, to advocating access to the procedure, protecting the special access rights of children and securing social grants, civic actors have persistently pushed the South African government to live up to its national and international legal obligations towards refugees.

### **6.7.2 Strategic assessments within defined boundaries in litigating refugee rights**

Civic actors' strategic assessments when litigating a refugee rights issue have taken into consideration the boundaries of legal, administrative and constitutional monitoring structures, as defined by national and international norms and mediated



through administrative law principles. In making these strategic assessments, civic actors have become more sophisticated in their strategic use of legal measures to confront states with their accountability to refugees. However, as this chapter has also illustrated, the strategic opportunities for litigating rights are much stronger if they are combined with non-legal measures.

Cases brought by civic actors challenging the South African government's system to improve access to its refugee status determination regime, as well as provide some social relief to refugees and asylum seekers, have had mixed success. However, these kinds of cases have involved strategic networking by civic actors, such as in the *Security Industry case* and the *Centre for Child Law case*. In particular, lawyers have worked more closely with refugee groups. The once-relatively closed network of lawyers and NGOs engaged in legal advocacy on behalf of refugees has gradually broadened, building relationships of trust between NGOs and the asylum seeker and refugee community. This has had the additional benefits of enhancing the legitimacy of legal advocacy NGOs, as well as strengthening NGOs' monitoring capacity. Refugee-led organisations such as the Co-ordinating Body of Refugee Communities (CBRC) have regularly notified LHR and other NGOs if a documented asylum seeker or refugee finds himself in detention at Lindela Centre or the notorious 'transit hotel'<sup>143</sup> at the airport, and faces imminent threat of deportation. LHR has been able to secure the release of several individuals on an urgent application to the court.<sup>144</sup>

But while legal interventions have led to some groundbreaking remedies for asylum seekers and refugees, the efforts on the part of civic actors to combine these legal interventions with non-legal measures such as public shaming and mass mobilisation have still been relatively limited, at least in comparison with the highly co-ordinated strategies of the pre-1994 era.<sup>145</sup> The contemporary efforts of civic actors to hold the government accountable to its obligations towards refugees can also be contrasted with other contemporary legal and non-legal strategies in other areas. These include well-co-ordinated civic efforts to litigate and mobilise access to water,<sup>146</sup> shelter<sup>147</sup> and access to anti-retroviral drugs for patients with the HIV virus<sup>148</sup>.

Co-ordinated civic advocacy on refugee rights has made some progress. The Working Group on Forced Migration, co-ordinated by the University of the Witwatersrand in Johannesburg, the Tutumike network in Cape Town and the national

<sup>143</sup> ('Interview with D. Ndessomin' 2006) and ('Interview with J. Van Garderen (1)' 2006). The mis-named 'transit hotel' at Oliver Tambo International Airport in Johannesburg is a detention facility for undocumented foreigners. LHR has made numerous interventions to secure the release of individuals who claim to have a well-founded fear of persecution.

<sup>144</sup> ('Interview with J. Van Garderen (1)' 2006).

<sup>145</sup> (Kessel 2000); (Abel 1995) and (Atkinson 1992).

<sup>146</sup> (Dugard 2007).

<sup>147</sup> (S. Wilson 2007)

<sup>148</sup> (Heywood 2002).

civic network on refugees and migrants co-ordinated by the Consortium on Refugees and Migrants in South Africa (CoRMSA) – which replaced the National Consortium on Refugee Affairs – have all demonstrated their value as platforms for co-ordinated civic advocacy. However, these efforts of civic organisations have been outstripped by the persistent efforts of government to pursue containment measures.

A 2006 study by Ingrid Palmary of the Forced Migration Studies Programme of the University of the Witwatersrand determined that social advocacy efforts within the sector have been inadequate. After having interviewed close to forty-five organisations within the refugee and migrant advocacy sector, she concluded:

there is a frustration within the sector that there are too few linkages between monitoring research, lobbying and advocacy and legal services making the sector unco-ordinated and sometimes unsuccessful in its interventions.<sup>149</sup>

Palmary went on to explain that, while monitoring work is carried out to identify violations of refugee and migrants' rights, this is done in an '*ad hoc*' and unsustainable manner.<sup>150</sup> In a 2008 report by the Consortium on Refugees and Migrants in South Africa (CoRMSA), the lack of public advocacy by NGOs was identified as a contributing factor to the wave of xenophobic violence that took place in South Africa in May 2008. Loren Landau, the chair of CoRMSA's executive committee, remarked: 'the recent wave of violence has upset us all. Campaigners for non-citizens' rights and welfare have been particularly unsettled. Clearly, we have failed in efforts (to) ensure that all people's rights, lives and livelihoods are not imperilled by those who would do them harm'.<sup>151</sup>

### 6.7.3 Translating legal norms for holding the government accountable by litigating refugee rights

By undertaking confrontational legal and – to a lesser extent – non-legal measures to hold states accountable to their national and international obligations, civic actors have played a crucial role in mediating the translation of international legal norms into South African law. In all three types of remedies – judgements, court-ordered settlements and structural interdicts – the presence of a formal relationship between the court, the government and civic actors who have brought a case can again be understood in terms of social distance, as measured by divergences in meanings, interests and political positions.

In bringing cases to challenge the lawfulness of the DHA's implementation of its policies, civic actors have helped establish a number of precedents that have imposed checks on the DHA's wielding of administrative power in refugee status determinations, particularly when the social distance had narrowed to the point of shared interests between the government and civic actors. This has especially been

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<sup>149</sup> (Palmary 2006: 30).

<sup>150</sup> (Palmary 2006: 33).

<sup>151</sup> ('CoRMSA Annual Report' 2008: 4).

illustrated by lawyers' extensive references to international law in their legal argumentation, from references to the principle of non-refoulement as a rule of *jus cogens* in the *Kabuika* case to the invoking of the Convention on the Rights of the Child in the *Centre for Child Law* case.

In short, as the experience of litigating refugee rights in South Africa has demonstrated, civic organisations and their lawyers have the capacity to fiercely resist restrictive measures by the government. While there is certainly space for improvement, the results of their efforts can serve as a potentially significant counterweight in a narrow but significant space for civic participation.



## CHAPTER 7

### CONCLUSION

*We have set out on a quest for true humanity, and somewhere on the distant horizon we can see the glittering prize. Let us march forth with courage and determination, drawing strength from our common plight and our brotherhood. In time we shall be in a position to bestow upon South Africa the greatest gift possible – a more human face. – Steven Biko*<sup>1</sup>

On 31 January 2008, South African police officers raided the Central Methodist Church in Johannesburg. Employing heavy-handed tactics, which allegedly included pepper spray and dogs, the police proceeded to round up suspected undocumented migrants, who they claimed had no permits to stay in South Africa.<sup>2</sup> Among those arrested were Zimbabwean asylum seekers, who had fled growing violence in Zimbabwe and then managed to avoid detention at a notorious detention facility in Musina on the South Africa-Zimbabwe border, before seeking refuge in Johannesburg.<sup>3</sup> These asylum seekers had a legitimate right to stay in terms of national and international laws that the South African government was legally obliged to respect.

In the months that followed the January raid, a growing number of reports in the media highlighted widespread abuses of asylum seekers and refugees by the police and the Department of Home Affairs (DHA). Civic organisations stepped up their advocacy and launched a series of further public and legal challenges.<sup>4</sup> Civic or-

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<sup>1</sup> From an article entitled 'Black consciousness and the quest for a true humanity', first published in (B. Moore 1973) Reprinted in (S. Biko 1996: 98).

<sup>2</sup> ('Raid Highlights Migrant Abuse' 2008).

<sup>3</sup> As explained by (Hermes 2008) and others, the growing number of asylum seekers from Zimbabwe was due to growing state-organised violence by Mugabe's authoritarian regime that peaked in 2005 in the context of 'Operation Murambatsvina' and again in April 2008, following the Zimbabwe government's rejection of the 29 March 2008 elections.

<sup>4</sup> Lawyers for Human Rights (LHR) and the Consortium on Refugees and Migrants in South Africa (CoRMSA) issued a series of press releases condemning the behaviour of the South African police and the DHA. This series of public challenges were later posted on their websites:

ganisations insisted upon the government's accountability to migrants and asylum seekers in general, and condemned the police raids on the Methodist church.<sup>5</sup> In May, the local and international media began to report on a 'wave' of attacks against foreigners, mainly in township areas. Houses and shops were looted. People were beaten and even set on fire in the street. By 31 May 2008, at least 62 people had been killed and many more forced to flee.<sup>6</sup> The violence was so widespread that the government was compelled to establish emergency relief centres to protect the victims of xenophobic violence. However, in August 2008 the government threatened to close the relief centres.<sup>7</sup> At the same time, the government refused to close the detention centre in Musina, which had developed a reputation for widespread abuses, including allegations of torture.<sup>8</sup>

Civic organisations responded to these developments with co-ordinated responses and legal challenges that illustrated a growing sophistication in advocating for accountability. Supported by numerous other civic organisations, including the Treatment Action Campaign (TAC), Consortium on Refugees and Migrants in South Africa (CoRMSA) and others, Lawyers for Human Rights (LHR) launched constitutional challenges to the closure of the relief centres.<sup>9</sup> After many appeals by South African civic organisations to close the Musina immigrant detention facility – run by the South African Border Police in co-ordination with the DHA – LHR found itself supporting the Director-General of the DHA, who eventually agreed with the civic organisations that the facility be closed. LHR issued a press release on 20 November 2008:

(LHR) supports the call by the Director-General of the Department of Home Affairs for the closure of the detention facility in Musina for foreign nationals ... The facility is run by the South African Police Service with no safeguards to prevent unlawful detentions, the deportation of refugees or independent monitoring of the conditions of detention.

LHR described the conditions at the Musina detention facility, making extensive reference to international law and South African law:

We have found large numbers of children, often unaccompanied, detained along with adults in contravention of both the Constitution and the Children's Act ... South Africa has been cited for its mistreatment of detainees in immigration detention by the United Nations Working Group on Arbitrary Detention ... (which) has included abusive handcuffing, beatings with hosepipes and in one incident, detainees were forced to roll in urine on the floor. Such treatment is not only a criminal

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<http://www.lhr.org.za/news> and <http://www.cormsa.org.za/press/> Last checked on 31 December 2008.

<sup>5</sup> (Burger 2008).

<sup>6</sup> ('Xenophobic Attacks Plague the Country' 2008); ('Xenophobia Death Toll Hits 62' 2008).

<sup>7</sup> (Bell 2008).

<sup>8</sup> (Mbelle and Dissel 2008).

<sup>9</sup> (Irri 2008).

offence, but a violation of South Africa's obligations under the UN Convention Against Torture.

Reflecting on more than a decade of civic advocacy for government accountability for refugee rights in South Africa, this concluding chapter will revisit the book's central research question: how can the dynamics of civic interactions to advocate state accountability to promote, protect and fulfil refugee rights in South Africa be strengthened; under what circumstances do civic-state interactions lead to structural change, and what do these interactions teach us about the potential and pitfalls of realising rights in general? Answering this question explains the emergence of civic capacity, the strategic importance of recognising the structural boundaries of the state and the role of civic actors in mediating the translation of global rules into local contexts, which can lead to structural change.

This concluding chapter first presents the findings of this study, explaining how civic actors have interacted with governments through both co-operation and confrontation. Secondly, it explains the context in which civic actors have acquired capacity to advocate government accountability, and how this has shaped the possibilities for realising refugee rights in South Africa. Thirdly, the chapter explains the importance of respecting structural boundaries in a culture of constitutionalism. Fourthly, it explains how civic actors translate global rules into their locally relevant contexts. Finally, this concluding chapter explains how civic capacity to realise rights travels across time and space: across time, in terms of the ongoing relevance of social justice strategies from one historical period to the next, and across space in terms of the global relevance that social justice strategies in one country have regarding other struggles in different countries.

## **7.1 CIVIC CAPACITY, STRUCTURAL BOUNDARIES AND THE SCOPE FOR STRUCTURAL CHANGE**

Civic-state interactions in the twelve years that have passed since the South African government ratified the international refugee conventions have reaffirmed the capacity of civic actors to hold states accountable to their human rights obligations, clarified the structural boundaries of civic-state interactions, and revealed the scope for these interactions to lead to structural change.

In this book, I have sought to explain the dynamics of civic interactions to advocate state accountability in promoting, protecting and fulfilling refugee rights in South Africa, the circumstances under which civic-state interactions lead to structural change, and the potentials and pitfalls of these interactions in realising rights in general. Civic interventions to promote the state's accountability for its human rights obligations in South Africa are principally understood through the country's culture of constitutionalism. Carefully honed in the struggle against apartheid, civic actors – including lawyers and legal advocacy organisations in the post-1994 democratic era – have wielded both 'shield' and 'sword' in their advocacy of new

human rights issues, including refugee rights, advocating a new kind of ‘politics by other means’.<sup>10</sup>

In contrast to the pre-democracy era in which challenges against a government decision were almost unthinkable, administrative law has proven to be a dynamic mechanism, available to challenge the government directly on the content of its policies. It has been a powerful shield against ill-informed, biased or arbitrary decisions made in individual applications for refugee status. It has also become an effective sword, both in halting restrictive policies for admission to the country, and in advocating for economic and social rights, such as the right of refugees to study, their right to social grants, and their right to work in particular employment sectors.

Beyond explaining the civic potential for realising refugee rights, I have questioned how such a role could be strengthened. Further, I have asked what this has taught us about the potential of civic interventions in realising rights in general. Civic advocacy for refugee rights in South Africa demonstrates how state accountability can be promoted, or in more limited circumstances enforced, by way of co-operative and confrontational interactions between government and civic actors.

### 7.1.1 Civic-state interactions in refugee policymaking

The first example of civic-state interactions, discussed in chapter four, revealed both the opportunities and challenges for civic actors in South Africa to co-operate with the government in the development of national policies to protect refugees. South Africa is in many respects a model of participatory democracy, placing a duty on the government to ensure that there has been some level of civic involvement in the policymaking process. While the courts in South Africa have determined some of these duties to be enforceable, it is generally a matter of discretion as to what form this ‘public involvement’ takes.<sup>11</sup>

Where a process was too one-sided in terms of the dominant role played by civic actors – as in the Refugees Green Paper process – the South African government questioned its legitimacy, as was shown by its reluctance to implement. Similarly, where the government neglected to consult civic actors, as was the case in the development of the Regulations to the Refugees Act, civic actors contested the outcome of that process as illegitimate. By contrast, where civic actors actively participated in a government-led policy initiative, as was the case in the Refugees White Paper process, the legitimacy of the process, as well as the possibilities for its implementation, have been correspondingly enhanced. Broadly speaking, government and civic actors alike welcomed the outcome of the White Paper process: the Refugees Act.

Clarity regarding the respective roles of civic and state actors has made it possible to explain the motivations for their respective participation in a policymaking or

<sup>10</sup> (Abel 1995).

<sup>11</sup> (Hoexter 2007: 75-76), commenting on the (Doctors for Life case 2006) and the (Matatiele case 2007).



implementation process at a particular historical moment. This in turn has illustrated how the presence of social distance, at that moment, defined the strategic possibilities for a desirable outcome at a particular time, at least from the perspective of civic actors participating in a given policy or implementation process.

In the formation of the Refugees Act of 1998, it was notable that both civic and government representatives in the White Paper Task Team, as well as most observers to the process, commonly recognised the need for the Department of Home Affairs (DHA) to set policy, as long as appropriate consultation also took place. In other words, the opportunities for exercising civic agency were conditioned by administrative and legal structures in existence. Furthermore, there was a common understanding that the South African government was obliged to give effect to its ratification of the international Refugee Conventions. This recognition of the conditioning nature of state-created structures did not, however, mean that the views of civic actors were one and the same. There were, indeed, many differences of opinion as to how much the Refugees White Paper and Bill ought to make explicit reference to the rights of asylum seekers and refugees, and to the obligations of the government. And yet it was still possible to advocate for structural change (in Archer's terminology elaboration) in the DHA's legal and administrative structure. The legal structure that emerged from the White Paper process incorporated international law principles regarding the status determination procedure as well as due process principles contained in South Africa's constitution. The administrative structure included various possibilities for internal appeal, as well as for oversight by the Standing Committee and Refugees Appeal Board.

### 7.1.2 Civic-state interactions in refugee policy implementation

Unlike the refugee white paper policymaking process, the possibilities for civic actors to influence the direction of the DHA's policy were more limited in the context of the implementation programme for former Mozambican refugees. As discussed in chapter five, this second example of co-operative civic-state interactions in the status regularisation project for former Mozambican refugees was conditioned by South Africa's historical involvement in the violent civil war in Mozambique, and the legal and administrative structure that had denied these refugees a formal status.<sup>12</sup> By the same token, the desire of the South African government to *repair* this injustice to the government and people of Mozambique meant that it was possible for civic actors to promote a *correction* of this injustice and to elaborate the legal and administrative structure by granting the former refugees a legal residential status.

<sup>12</sup> According to (Rupiya 1998) and others, the previous South African government's support for the right-wing, opposition RENAMO forces that were fighting the once-Soviet-backed, left-wing FRELIMO government forces formed part of South Africa's regional destabilisation campaign. The civil war in Mozambique generated millions of refugees, many of whom sought refuge in countries throughout the region, including South Africa.

Accordingly, a Tripartite Commission consisting of the governments of Mozambique and South Africa, together with the UNHCR, aimed to resolve the situation for the hundreds of thousands of Mozambican refugees who ended up in South Africa.<sup>13</sup> The commission's two main commitments were to repatriate those who wished to return to Mozambique, and to grant an 'amnesty' or regularise the legal status of former Mozambican refugees (FMRs) who wished to remain in South Africa.

When civic actors, and particularly AWEPA, expressed an interest in facilitating the implementation of the regularisation project, it was clear that the structural conditions favouring administrative due process were hardly in place for this to happen. The marked lack of political will on the part of the DHA, and the shaky legal and administrative structure that finally emerged to implement the project, which involved extensive closed-door involvement by AWEPA to elaborate this structure, created a situation in which the ability for local civic actors and FMRs to exercise their agency was highly circumscribed. Particularly uncomfortable for local civic actors was the role that AWEPA played in conflating its interests with that of the South African government. The AWEPA co-ordinator's lack of distinction between his organisation's interest and the interests of the DHA, coupled with AWEPA's central co-ordinating role, artificially reduced the social distance between the DHA and local civic actors. This situation made it extremely difficult for local civic actors to challenge the behaviour of the DHA officials and ensure that administrative due process was being respected.

Furthermore, the significance of a credible monitoring presence was under-emphasised, as were concerns about 'survival fraud'. Finally, a moratorium on deportations was downplayed and then sidelined altogether by the government, with no objection from AWEPA. To make matters worse, when civic actors eventually did raise concerns about the project's implementation, AWEPA openly undermined them in the presence of government. This combination of factors both compromised the independence of local civic actors and had catastrophic results for thousands of FMRs, who were denied regularised status in structural circumstances that failed to comply with basic standards of administrative due process.

### 7.1.3 Litigation and shaming by civic actors

While co-operative interactions represented something relatively 'new' to civic actors, emerging as they did from political struggle, and later a negotiated constitutional transition that led to an accountable government, confrontational measures – through litigating and shaming the government into fulfilling its obligations to refugees – have been far more familiar territory for civic advocates.

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<sup>13</sup> The forming of the Tripartite Commission followed a 1992 peace agreement in Rome between the two main parties to the Mozambican conflict.

The history of the anti-apartheid struggle mapped out two specific directions for civic actors, which to some extent carried on in the post-1994 dispensation, although the experience of advocating refugee rights has tended to stress one particular direction over the other. As civic actors accustomed to litigating refugee rights took advantage of expanded opportunities for judicial review of administrative decisions, as provided for in the constitution, there have been correspondingly fewer efforts to publicly shame government. On one level this is surprising, given that, as illustrated in chapter three, advocacy efforts that combined litigation with a civic mobilisation campaign (and strategic use of the media), have tended to lead to more favourable outcomes. On another level, this might be explained by the fact that (1) the DHA was obliged to radically transform its administrative structure, and that (2) the opinions of the general public – and the media – were generally unsympathetic to refugees and migrants.

The potential for structural interdicts to precipitate concrete and lasting improvements – or structural elaboration, in refugee protection standards – remains to be seen. Structural interdicts create a special relationship between the court, government and civic actors in which this elaboration can take place. However, this relationship also contains underlying tensions. The first, and more obvious source of tension is between the government and civic actors, as acutely observed in the case of *LHR (2001)*, where the credibility of civic actors and their ability to challenge government decisions were explicitly brought into question. The second source of tension is between government and the courts; civic groups and individuals have only recently been permitted to comprehensively challenge decisions of the government on the grounds of whether they have acted in a ‘reasonable’ manner. Hoexter sums up the problem well:

More than any other ground, review for reasonableness exposes the tension between two conflicting judicial emotions: the fear of encroaching on the province of the executive arm of government by entering into the merits of administrative decisions, and the desire for adequate control over the decisions of administrative authorities.<sup>14</sup>

In other words, the courts in South Africa have faced a structural dilemma of maintaining what Klaaren has referred to as a ‘delicate balance’ between, on the one hand, allowing government to fulfil its role in determining the content of policy and its implementation and, on the other hand, acting as a constitutional check on government abuse of power.<sup>15</sup>

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<sup>14</sup> (Hoexter 2007: 293-294).

<sup>15</sup> (Klaaren 2006b).

#### 7.1.4 From structural conditioning to structural change: translators, social distance and public law

These three examples of civic-state interactions explain how the opportunities for civic agency have specific historical roots, which have conditioned civic agency to promote, protect and fulfil human rights, but have also allowed for structural elaboration (or structural change). Civic actors have fulfilled an important mediating role in the translation of global rules into the development, implementation and challenges of national policies. This study of civic advocacy for refugee rights in South Africa has also emphasised the importance of social distance as a strategic factor for civic actors, when assessing the possibilities for interacting with government in promoting state accountability towards refugees. Finally, this study highlights the usefulness of public (administrative and constitutional) law as a means of translating global rules into their local, vernacular contexts and enforcing state accountability to international human rights norms.

As the following sections explain, civic interactions to advocate state accountability for respecting refugee rights can be explained through three theoretical propositions. Firstly, the capacity of civic actors to promote and impose state accountability is shaped by structural changes in the normative international and national legal frameworks. Secondly, boundaries which define the structural relationship between civic actors and the state shift in very specific ways that must be understood by civic actors (agents), if they want to be strategic and successful in their advocacy efforts. And finally, civic actors play a crucial role in mediating the translation of international legal norms into local contexts.

### 7.2 CONTEXT SHAPES THE POSSIBILITIES FOR CIVIC-STATE INTERACTIONS

The social and political context from which civic actors have emerged has shaped both the nature of civic organisations and the possibilities for civic actors to influence state policies, mobilise for their enforcement, and hold states accountable. As discussed in chapter three, in South Africa two distinct types of civic actors emerged out of a long political struggle against racism. The first mobilised in strategic, proactive ways to resist the apartheid regime. The other type of civic actor supported this resistance, mainly by engaging in ‘politics by other means’<sup>16</sup> through a range of legal interventions, from providing protection to those facing the potential of torture during the course of police interrogations, to challenging forced removals by blocking the implementation of the Group Areas Act.

Since the country’s first democratic elections in 1994, civic actors have operated in a rapidly shifting context that has challenged civic actors to develop new advocacy strategies. With the emergence of a constitutional culture, and a correspondingly accountable government, civic actors have not only had to challenge govern-

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<sup>16</sup> (Abel 1995), *passim*.

ment in order to hold it accountable; they have also been obliged to engage in policymaking and implementation programmes, supporting government when it has demonstrated a willingness to move in a progressive direction.

Where co-operative interactions have failed, confrontational strategies by civic actors have tried to fill the gap in legal protection. However, litigation on its own tends to provide little guarantee of a productive outcome. As argued in chapter six, well co-ordinated civic advocacy strategies, combining public shaming and mass mobilisation with legal interventions, have led to the most successful outcomes.

The process of developing refugee policy in South Africa has drawn upon global policy discussions on refugee protection. In particular, the refugee policy discussion in South Africa has engaged in the debate of whether refugee law ought to be ‘re-formulated’ in order to correspond better with state interests or, alternatively, ‘reinvigorated’ in order to correspond better with its original intentions. As illustrated in chapter four, the dominant position advocated by civic organisations in the process of refugee policy formulation in South Africa has more closely reflected Goodwin-Gill’s view that mechanisms to encourage compliance need strengthening, and that NGOs play an important role in doing this. Refugee rights are the product of contestation, and civic actors have endorsed the need for institutional strengthening to ensure state compliance. The process of forming a refugee policy has furthermore demonstrated that the principal medium through which these rights are realised is the field of administrative law.

Pressures on the DHA to produce a new refugee policy came both internally and from outside, including from its ratification of the UN and OAU Refugee Conventions. With the ratification of these documents, and South Africa’s increasing prominence in international relations, the DHA came under particular pressure from the UNHCR and other sections of government – including the Ministry of Foreign Affairs and ANC parliamentarians – to give permanent effect to these international commitments. However, the opportunities for civic interaction were constrained by structural factors from within the then-Government of National Unity. Buthelezi, of the opposition Inkatha Freedom Party, remained Minister of Home Affairs for some years, and openly clashed with the ANC on the government’s policy towards refugees and migrants. Consequently, as Crush and McDonald argued, ‘progressive immigration reform was ultimately held hostage to the broader politics of IFP appeasement’ in the Unity government.<sup>17</sup> In some cases, civic actors used this to their advantage, as in the illustration given in chapter six in which lawyers challenged the DHA’s crude ‘safe third country’ policy.

Furthermore, the DHA, following the advice of US government officials who drafted many of the Regulations to the Refugees Act, has appeared to follow the mantra of ‘irregular migration’, which holds that explicit provisions to protect refugees lead to abuse of the procedure. If this assessment is correct, it explains the reluctance of the DHA to engage civic actors in the development of the Regulations.

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<sup>17</sup> (Crush and McDonald 2001: 9).

Whatever the reasons, this proved to be a strategic miscalculation on the part of government. While civic participation in the development of the Refugees Act created a basis for co-operative civic-state interactions, the DHA's lengthy and non-consultative development of the Regulations predictably set the Department on a path of confrontation with civic actors.

The contextual challenges faced by civic actors in promoting a comprehensive administrative law regime, by way of co-operative interactions that appropriately translate South Africa's global human rights obligations, have been considerable. As Klaaren has noted,<sup>18</sup> the asylum determination procedure in South Africa, and the rule of law in general, have for some time operated in a climate where opportunities to claim rights, particularly prior to 1994, have been decidedly limited. The asylum procedure has become steadily more restrictive since its introduction in 1993.

Civic-state interactions must be seen as a cumulative process demanding ongoing reflection, possible co-operation, and, potentially, confrontation as well. By explicitly translating South Africa's international obligations and the rights contained in the constitution into the Refugees Act, civic actors have promoted a situation in which the DHA is obliged to correct its own behaviour. Where this has not succeeded, civic participation has advocated government accountability through a string of legal challenges to the DHA's policies.

### **7.3 RESPECTING STRUCTURAL BOUNDARIES IN A CULTURE OF CONSTITUTIONALISM**

The strategic importance of civic actors in respecting structural boundaries is especially important in a country that respects a culture of constitutionalism. As mentioned earlier, this creates a primary tension where civic actors may (1) support government as it expresses a desire to move in a progressive direction, but in addition (2) will wish to maintain their critical independence. In this section, the structural conditioning of civic actors is explained in relation to the possibilities for structural elaboration, followed by a discussion of the circumstances in which civic actors make strategic choices on the basis of their assessment of the state-created structural boundaries with which they interact.

#### **7.3.1 Structural conditioning of civic actors and the possibilities for elaboration**

From a structure-agency view that draws on Archer's approach of analytical dualism, it has been possible to explain the outcome of civic refugee rights advocacy. This approach assumes that specific historical events determine state-created structures, and that the exercise of civic agency has been conditioned by these structures.

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<sup>18</sup> (Klaaren 2006b).

This approach also assumes that civic actors are able to elaborate these structures through a strategic assessment, thereby contributing to structural change.

On one hand, the three main illustrative examples of this study have demonstrated that civic advocacy interventions have played a significant role in holding states accountable. On the other hand, the three examples have confirmed that state accountability is by definition state-centred; civic actors that place themselves too centrally in a civic-state interaction – such as in the Refugees Green Paper policy-making process, or the AWEPA-led regularisation project – risk eclipsing this essential role of the state or government. Consequently, while the role of civic actors in promoting legal and social normative compliance is important, it should also not be over-emphasised. The principal responsibility for realising rights always remains with the state.

Civic actors played key roles in the process of negotiated transition, and continue to fulfil multiple roles in South Africa's 'participatory democracy' by making oral and written contributions to parliamentary hearings, participating in policy task teams, and even engaging in joint civic-state implementation projects. As Arnstein argues, assessing whether this participation is 'meaningful' and 'likely to have an impact' depends from which rung of the 'ladder' the civic actors make contributions. These range from the state avoiding civic participation altogether, through forms of manipulation, to 'token' consultation and finally to 'partnership, delegated power and citizen control'.<sup>19</sup>

In navigating the narrow but significant channels for advocating state accountability, civic actors have assessed and made strategic decisions, based on their growing knowledge of global standards of refugee protection, to interact with government on the basis of structural boundaries on which civic actors believe the government might be prepared to compromise. A strategic consideration of this principal conditioning factor increases the likelihood that a civic-state interaction will lead to structural change.

In the study of refugee protection in South Africa, civic agencies' capacity to interact with and elaborate the country's legal and administrative structure providing for the reception of refugees and the determination of their legal status have arisen out of specific historical events. These events are related to a long-fought social justice struggle for dignity and self-determination and were ultimately overtaken by a process of negotiated transition, during the course of which the state abandoned minority rule, and a democratic, accountable government came into being.

As South Africa has come out of its international isolation and re-engaged with the international legal and political order, the new government has been obliged to change its approach to refugees. From an early stage, the government demonstrated a willingness to allow applications for refugee status on an individual basis, beginning with the Russian defectors. At least initially, it also welcomed critical civic voices in the elaboration of a comprehensive refugee policy through a new legal and

<sup>19</sup> Reference to Arnstein in (Hoexter 2007: 79-80).



administrative structure. This openness changed as government adopted a more defensive stance against civic criticism, but as the White Paper process illustrated, possibilities still remained for structural elaboration of the refugee policy and its implementation.

### 7.3.2 Structural boundaries and strategic choices

Successful civic-state interactions depend on the strategic choices made by civic actors on the basis of a sober appreciation of state-created structural boundaries that not only condition their agency, but also allow for structural elaboration. By extension, the roles and responsibilities of both civic and state actors must be clear. This applies to any such civic-state interaction, whether it is in the development of a nationally enforceable human rights policy, participation in an implementation project to realise human rights, or the enforcement of human rights obligations against a state. In all instances, the principal responsibility lies with the state and its government, although civic actors often play a complementary role as ‘translators’ of global rules in local contexts.

Drawing on knowledge of the specific historical circumstances surrounding a government department that is the focus of a civic interaction, a variety of strategic responses can be made. In Archer’s assessment, taking time to assess the structural challenges in which a civic interaction will take place is essentially about ‘being human’, not least because civic agency itself produces structurally conditioning factors. As Archer claims: ‘people are indeed perfectly uninteresting if they possess no personal powers which can make a difference’.<sup>20</sup> This entails a careful consideration as to who is representing a government department, what particular issue is at stake, how the government has handled itself in the past, what resources are available to the government to respond to the claims against it, and why government may be motivated at all to take action.

For example, individual government officials may have particular views or experiences that shape their interpretation of a particular policy. The issue of asylum seekers’ right to work will be especially sensitive to the DHA, which also represents the interests of South African citizens. These are but two examples of meanings, interests and/or political positions that shape how government officials frame, interpret and enforce a particular policy. Civic actors must strategically always bear these in mind.

In making strategic choices, civic actors can, and should, assume that it is always primarily government’s task to develop policy, not just as a matter of good governance, but in order to facilitate greater *buy-in* to that policy. Of course, this is not to say that civic organisations should not play a role. Indeed, governments often consult civic actors as experts or as concerned stakeholders. In some cases there may even be a legal obligation to consult. Civic actors also participate in policy-

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<sup>20</sup> (Archer 2000: 19).



making processes by confronting the state with their obligations during a legislative process.

Just as it is primarily government's responsibility to make policy, it is also government's primary responsibility to implement it. Civic actors can, and often do, participate in policy implementation projects. They train officials, advise on implementation frameworks and even provide services on behalf of government. Civic actors do this in order to encourage and support government when it has displayed a willingness to move in a progressive direction. Such interventions ought not to be conducted uncritically, since there is always a danger of government and civic responsibilities becoming blurred. While civic actors have recognised the utility of supporting government in carefully defined circumstances, they have also learned the danger of becoming unwitting apologists for maladministration.

Finally, enforcement of policy is, or ought to be, also primarily the responsibility of government through 'self-corrective' mechanisms. These may be components of the *trias politica*, with the elected legislative and independent judicial branches of government holding the executive accountable without the need for civic intervention. Enforcement may also take place through an independent, constitutionally-protected institution such as an ombudsman, semi-autonomous commission, or auditor-general. Unfortunately, more often than not such mechanisms are inadequate, and so the roles of civic actors have become crucial complements in national and global efforts to hold states accountable for their international obligations. These may include initiating a claim through judicial review in the courts, appealing to a global institution such as a human rights treaty body, publicly shaming the government through generating attention in the media, or communicating a strong, collective message by way of mass mobilisation.

The elaboration of the legal and administrative structures that defined South Africa's refugee policy also illustrates how these structures are cultural systems that are, by definition, susceptible to change. As the next section explains, civic translators have played an important role in the process of elaborating these cultural systems.

#### 7.4 MEDIATING THE TRANSLATION OF GLOBAL RULES INTO LOCAL CONTEXTS

In this book, I have tried to illustrate how civic actors have contributed to a culture of constitutionalism, which has both national and international dimensions that highlight the utility of administrative law as a principal medium for translating global rules into local contexts. Furthermore, the examples provided in this book's study of civic advocacy for refugees have shown how civic actors can mediate the translation of global norms into local contexts, critically engaging within the external relationship – as measured by social distance – that always exists between civic actors and the government, represented by divergent interests, meanings and political coalitions. From different disciplinary perspectives, these illustrative examples have shown how civic actors could have an influence, at least in a modest way, on

the content of laws and policies to protect refugees in South Africa, and on the manner in which they are implemented.

#### 7.4.1 Legal culture and civic translators

As socio-legal scholars maintain, legal culture is itself an object of investigation. This can be either the ‘internal legal culture’<sup>21</sup> of legal academics and practitioners, courts and other institutions, or how the legal culture is shaped by external factors. As Cotterrell has put it:

participants in law are not just lawyers but all those who seek to use legal ideas for their own purposes, to promote or control the interests of others ... understand legal ideas in practical terms ... legal ideas are a means of structuring the social world.<sup>22</sup>

Evaluating the role of civic interventions to enhance state accountability for promoting and respecting refugee rights in South Africa entails a critique of many different variables that characterise the legal culture in which civic actors operate. The evaluation in chapters four and five considered the approaches and means, as well as the mechanisms, adopted by civic actors to promote the South African government’s accountability towards refugees in terms of its global and constitutional legal normative obligations. As discussed in chapter four, the government had clear interests, as shown by its inviting civic participation in the white paper task team. Clear though distinctly different interests motivated civic actors’ participation in the refugee policymaking process. Consequently, the task team became a highly productive mechanism through which the competing interests of civic actors, the state and others such as the UNHCR and ‘section nine institutions’ (most notably the South African Human Rights Commission) could be mediated.

Less productive was the mechanism employed by AWEPA and the DHA to regularise the status of FMRs, in which the interests of civic actors were far less clear; and in some cases, inextricably linked with those of the government. As a result, the potential of South African civic actors to exercise their agency was not only highly attenuated, but the due process of FMRs themselves became dangerously compromised as there was no critical monitoring presence or independent mechanism of appeal.

Moore determined three decades ago that semi-autonomous social fields exist in which social actors are affected by legal norms, but that they also adapt by establishing their own social norms. In other words, each semi-autonomous social field is capable of producing its own rules, but is also vulnerable to external forces.<sup>23</sup> Merry’s development of Moore’s ideas into a theory that explains how global norms become translated or ‘vernacularised’ into local contexts provides a useful explanation for how rights translators have emerged, translating global rules

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<sup>21</sup> (Friedman 1975).

<sup>22</sup> (Cotterrell 1998: 192).

<sup>23</sup> (S.F. Moore 1978).

through contributions in policymaking processes, including, in South Africa, through co-operation in refugee policymaking and implementation projects.<sup>24</sup>

By participating in global refugee protection discussions, a number of South African NGOs and academics became familiar with international rules designed to protect refugees; they became trans-national elites. However, their participation in the refugee policymaking process in South Africa remained conscious of local realities, which included the manner in which the refugee policy had been implemented since 1993. Consequently, they possessed what Merry terms a 'double consciousness'.<sup>25</sup> This made them effective translators of global rules, drawing on human rights as a resource both in terms of their substantive content (as a tool) and in the possibilities for the realisation of these rights (their consciousness). In addition, these legal translators had access to various legal enforcement institutions, which were discussed in chapter six. Furthermore, by employing extra-legal mechanisms, such as utilising the media to shame government, they have created greater space to engage with government on a critical basis.

#### 7.4.2 Appreciating the value of social distance

Evaluating interactions in terms of social distance is another means of assessing civic participation in the implementation of refugee policies, for understanding the potential of civic interventions in realising refugee rights in South Africa, and in realising rights in general. Social distance is measured by divergences in interests, meanings and political positions, or the externally grounded reasons for participating in a given civic-state interaction. As this book's study of civic advocacy for refugees has illustrated, the corresponding social distance between government lawmakers and civic actors has narrowed or widened according to the strategic decisions taken by civic actors, with various consequences.

The externally grounded reasons for civic participation in the process of refugee policy reform in South Africa diverged from those of the government, in terms of interests and meanings, but there were important areas of convergence in terms of political positions. During the refugee policymaking process, there were disagreements on the explicit wording of entitlements that refugees would be given as protected persons, in accordance with the country's constitutional and international obligations. On the other hand, the government largely agreed that refugee status determination be implemented through a hearings-based procedure, as proposed by civic actors. The degree of social distance created by whether or not civic actors and government diverged or converged in their political positions on a particular policy issue, therefore, varied considerably throughout the policymaking process, although convergence of political positions was clearly necessary before government would be willing to adopt a particular measure. Government always had the last word.

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<sup>24</sup> (Merry 2006b).

<sup>25</sup> (Merry 2006b: 217).

During the implementation of a status regularisation project for former Mozambican refugees (FMRs), the social distance or externalisation between AWEPA and the South African government was initially very large, as civic actors raised multiple concerns about how the project ought to be implemented. However, the interests, meanings and political positions between civic actors and the government became almost indistinguishable as the project finally took shape and a critical monitoring presence was abandoned. What began as an ostensibly government-run project became known as ‘the AWEPA project’. In the absence of a credible monitoring presence, this social distance remained narrow throughout the project’s implementation, resulting in limited space for critical responses by civic actors, and an administrative justice deficit for the FMRs.

Where refugee rights have been litigated, the social distance between civic actors and the government, as measured by their respective interests, meanings and political positions, has remained substantial, as civic actors have affirmed their role as an independent critical voice. And yet, even in these circumstances, it has not always been possible to hold the government accountable.

The courts have often proven reluctant to question the merits of a government’s policy or exercise of discretion. But even where judges have found against the government, lawyers have often had to return to the courts, sometimes repeatedly, in order to secure compliance with an order or to argue a virtually identical case to what had been litigated earlier. In short, a high degree of social distance, or independent critical voice, has not been a reliable indicator of success. Not all legal challenges necessarily produce results.

However, a distinction should be made between litigation aimed at restraining government behaviour, in which more social distance exists, and cases aimed to promote good behaviour, which tend to involve a narrowing of the social distance. Put simply, the first type of case negatively insists that a certain policy be stopped, and tends to be more likely to succeed, while the other positively encourages the government to improve itself, and has proven to be more problematic. As one lawyer has argued:

confrontations are necessary ... (and) it is easier to engage in public interest litigation when trying to stop something from happening; for example, seeking to stop the deportation of an asylum seeker by way of an urgent interdict. It is not so easy to insist that something happens.<sup>26</sup>

Structural interdicts may offer new possibilities in the latter type of case. Where structural interdicts have been ordered to encourage good government behaviour, social distance has narrowed, as competing interests and political positions between government and civic actors have been replaced by structural undertakings by government to the court that it take deliberate steps to improve a situation. Civic actors in such cases have made contributions in helping the government to improve its

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<sup>26</sup> (‘Interview with S. Magardie’ 2006).

behaviour. In the ‘access’ cases, for example, process engineers who were hired by the DHA, on the basis of a consent order, to improve management and procedures at the Refugee Reception Offices, spent considerable time interviewing the civic actors who had brought the case against the government. While it is still too early to assess its lasting impact, the structural interdict may yet prove to be a significant tool to ensure positive compliance, since the process of reporting back to the court recognises both the legitimate interests of both civic actors and the government, and the essentially voluntary nature of human rights implementation.

Ultimately, social distance can explain the potential for civic interactions to lead to structural change within the government by assessing the extent to which government has conceded to demands by civic actors in sharing their meanings, interests or political positions. This deserves further empirical study. In recent years, the DHA has faced persistent demands for reform from civic organisations, who have grown more sophisticated in their advocacy. Civic actors have – often simultaneously – appealed to the media, parliament and courts concerning abuse by government officials, departmental inefficiency, corruption and mismanagement.

The DHA has responded to these demands from civic organisations to a considerable extent, and has initiated a consultative process to amend the Refugees Act; a draft bill was released for public comment in 2007.<sup>27</sup> Following public hearings in South Africa’s Parliament that involved several civic organisations,<sup>28</sup> and responding to long-standing criticisms from civic organisations about gaps in the refugee policy and its implementation, the government released a further draft bill in March 2008.<sup>29</sup> The government has also responded to the concerns raised by civic actors by calling for the closure of the Musina detention facility, as described above. Furthermore, the DHA initiated a ‘turnaround strategy’ that involved participation from a number of civic actors, and the Minister has responded directly to questions regarding mismanagement of the DHA.<sup>30</sup>

With these acknowledgements from the government – to some extent, in response to the demands of civic actors – the social distance between civic actors and the government has narrowed as their respective interests in refugee protection and meanings about what this protection entails have converged, but not to the point that civic organisations have abandoned their critical monitoring role. Drawing on specific obligations contained in international and South African law, the June 2008 Annual Report of CoRMSA comprehensively addresses the obligations of South Africa’s local and national government to protect refugees and migrants, from the

<sup>27</sup> Government of South Africa, ‘Publication of the draft Refugees Amendment Bill 2007’, General Notice 730 of 2007, Government Gazette No. 29976, 7 June 2007.

<sup>28</sup> Parliamentary Monitoring Group, ‘Refugees Amendment Bill: Public Hearings’, Audio and written transcripts available at: <http://www.pmg.org.za/print/11282>. Last checked 29 August 2008.

<sup>29</sup> Government of South Africa, ‘Refugees Amendment Bill’, Government Gazette No. 30835, B11-2008, 4 March 2008. Available at: <http://www.pmg.org.za/files/bills/080313b11-08.pdf>. Last checked 29 August 2008.

<sup>30</sup> (‘DHA Turnaround Strategy’ 2007).

role of government in addressing the root causes of xenophobic violence to its role in facilitating access to employment and basic services.<sup>31</sup> As the report confirms, while to some extent the interests and meanings of civic actors and the government may have converged, their respective political positions continue to diverge, as civic actors remain focused on holding the South African government – and especially the DHA – accountable for its legal obligations to protect refugees and migrants.

## 7.5 CIVIC CAPACITY TO REALISE RIGHTS IN GENERAL

The interactions explored in this book concerned the role of South African civic actors in the development of the government's refugee policy, the implementation of government policy and, in certain cases, forcing government to comply with its policy through litigation. However, these civic-state interactions hold universal lessons for realising rights in general, across time (at different points in South Africa's history) and space (in other countries and other human rights struggles).

### 7.5.1 Realising rights across time (in South Africa)

This study of civic advocacy for refugees provides vivid illustrations of the interplay between civic actors and the state in promoting a culture of constitutionalism for *all persons* (in the language of the Constitution) and not just South African citizens. Refugees and asylum seekers who demonstrated in front of Union Buildings in 1996, claiming that the UNHCR and South African government should respond to their predicament, did not merely generate interest in the media. Just as the defiance campaigns in South Africa from the 1950s mobilised thousands of South Africans to re-examine their position and resist apartheid, the July 1996 demonstration critically engaged South Africans in re-examining their relationship with refugees; and it precipitated a response from civic organisations.

The demonstration by refugees in July 1996 took place at a historical moment. Having just brought into being the country's final Constitution, South Africa was at a crossroads. Other, external factors certainly also played a role; namely, the government's obligations acquired as the result of having assented to international refugee conventions. Rather than holding government accountable, the demonstration spurred South African civic actors on, becoming mobilised to do more than just provide assistance, but also to advocate for wide-ranging improvements in the way refugees were received and integrated. In the months and years following the demonstration, South African lawyers, churches and other civic organisations eventually mobilised for a good policy, sound implementation and a more accountable government.

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<sup>31</sup> ('CoRMSA Annual Report' 2008).

South Africa now has a government policy that has translated international human rights obligations towards refugees, joint refugee-NGO initiatives that have secured key rights for refugees, and a number of landmark legal challenges through the South African courts with which to confront the government with its obligations towards non-South Africans in general, and refugees in particular.

Of course, the picture has not always been so positive. Reports have emerged of arbitrary detention and ill treatment by the police and immigration officers, poorly-motivated refusals to grant refugee status and allegations of corruption and abuse of power, as legal advocates have paid more attention to this issue.

Ten years after South Africa became a party to the international refugee conventions and the country's Final Constitution came into being, the government faced another crossroads. Building a culture of constitutionalism has demanded responses at multiple levels. At the local level, municipalities have begun to see migrants from other countries, including asylum seekers and refugees, as *citizens* of Cape Town, Durban and Johannesburg. Confronted by lawyers and as-yet-unfulfilled obligations created by structural interdicts, national government has only begun to respond seriously to technical, process and management-related problems in implementing a fair and efficient-status determination procedure. Most notably, the government has accepted the need to develop and improve policy through amendments by way of parliamentary process rather than through *ad hoc* administrative regulations.

Finally, at a global level, South Africa has, on one hand, been actively engaging in global policy discussions on migration that are edging towards containment, with so-called irregular migration as their centrepiece.<sup>32</sup> On the other hand, South Africa has noted the highly unproductive and even violent consequences of maintaining a restrictive policy that unduly prioritises national interests over its international obligations to protect migrants in general, and refugees in particular.

### 7.5.2 Realising rights across space (other struggles in different countries)

Recalling the measures used to hold the government accountable in the past on the basis of international human rights norms also resonates with other social justice struggles in different countries. The importance of clear roles and responsibilities and strategic recognition of structural boundaries has global application beyond the South African study. The strategies and moral resonance of South Africa's anti-apartheid struggle have motivated accountability advocates around the world, and not just because what happened in the country is necessarily unique. South Africa's struggle against racism and injustice and the efforts that have been made to achieve social transformation reflect universal principles that define any social justice struggle that is engaged in advocating for accountability.

For example, civic actors in Eastern European countries, many of whom are recent member-states of the European Union (EU), have mobilised for better protec-

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<sup>32</sup> (Ghosh 1998), *passim*.



tion standards for refugees and migrants by recognising EU-determined structural boundaries, and by translating global refugee protection standards into national advocacy efforts to protect refugees.<sup>33</sup> Civic actors in Eastern Europe, whose activities prior to the early 1990s were highly constrained, have also participated in the development of refugee policies.<sup>34</sup>

In the Middle East, civic actors also play important roles in refugee protection. While a deeply problematic geo-political situation and ongoing military occupation prevents a local, rights-based solution to the plight of Palestinian refugees, and serious structural constraints make it virtually impossible to advocate for accountability against Israel, civic actors around the world, including academics, lawyers and pressure groups, have managed to generate widespread global awareness about the issue of Palestinian dispossession.<sup>35</sup> Furthermore, by recognising these structural limitations and shifting to supra-national mechanisms instead, civic actors have strategically advocated for recognition of Palestinian residency and refugee rights against particular UN agencies international legal process. Unable to have any impact at the local level, civic actors have translated Palestinian rights to UN organisations and treaty bodies, including the UN Committee on the Elimination of Racial Discrimination.<sup>36</sup> Third states have also become an important forum for civic actors, making legal claims against companies that participate in violations of Palestinian refugee and residency rights,<sup>37</sup> and against individuals who have committed war crimes against civilians in the refugee camps.<sup>38</sup>

33 As (Lavanex 1999) has argued, refugee rights advocacy and policy development in Eastern European countries has been intrinsically linked with their desire to become part of the European Union. With the possibility of gaining admission to the EU taking on greater momentum, countries such as Bulgaria have steadily brought their country's policies into line with EU expectations, including the European Union's human rights requirements, while simultaneously having to contend with great political uncertainty regarding the gradual harmonisation of asylum policies at the level of the EU. Much of this work has been conducted together with the European Council on Refugees and Exiles. See: <http://www.ecre.org>. Last checked on 29 August 2008.

34 UNHCR, 'Summary report of the Varna joint meeting', Bulgaria, 28 February 2002. Available at: [http://www.unhcr.bg/events\\_records/2002/varna\\_workshop/summary\\_report\\_varna.pdf](http://www.unhcr.bg/events_records/2002/varna_workshop/summary_report_varna.pdf). Last checked on 29 August 2008.

35 For example, the Badil Resource Centre on Palestinian Residency and Refugee Rights has worked with grass-roots activists and solidarity partners around the globe to advocate respect for international law towards Palestinian refugees. See: [www.badil.org](http://www.badil.org) Last checked on 6 September 2008.

36 Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by states parties under Article 9 of the Convention (Israel), Seventieth session 19 February – 9 March 2007, CERD/C/ISR/CO/13, March 2007; Badil Resource Centre on Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2006-2007*, Bethlehem, 2007.

37 In 2007, a lawsuit was brought against the French company Veolia for their participation in the construction of a light-rail system in Palestinian territory that has been illegally annexed by Israel. See: (McCarthy and Chrisafis 2007)

38 (Machover and Maynard 2006).



Whether in South Africa, Eastern Europe or Palestine, and regardless of whether civic actors are engaged in a political struggle or a process of social transformation in co-operation with government, all these events can be seen as various forms of social justice struggle. In any social justice struggle, the key to civic actors being able to hold states and governments accountable for their human rights obligations lies in civic actors making strategic choices.

Making strategic choices has various implications for civic actors, as this book's study of realising refugee rights in South Africa has illustrated. First, civic actors must appreciate the social, political and legal context in which they operate; this historical appreciation reveals certain structural boundaries to realising rights that are nearly always imposed by the state. Second, civic actors must critically assess these structural boundaries that condition their behaviour, but also have the potential for structural change or 'elaboration', through civic actors interacting with the state in formal and also informal interventions. Third, civic actors must appreciate the social distance that always exists between themselves and the government, measured by divergences in meanings, interests and political positions. Through a critical engagement in this 'external' relationship, it is possible for civic actors to capitalise on these divergences in advocating a state's accountability for realising human rights. Whether the social distance ought to be narrowed or broadened at a particular moment depends on (1) the context in which this takes place, (2) the structural boundaries that exist, and (3) the desired outcome.

A critical engagement with the government allows civic actors to take advantage of that *narrow, but significant space* for achieving structural change. In this social, political and legal space, the potential for advocating the accountability of a state to promote, protect and fulfil human rights can flourish.



## **SAMENVATTING**

### **PLEITEN VOOR VERANTWOORDINGSPLICHT: DE INTERACTIE TUSSEN BURGERS EN OVERHEID TER BESCHERMING VAN VLUCHTELINGEN IN ZUID-AFRIKA**

#### **1 OVERZICHT**

Dit boek bespreekt hoe burgers en overheid elkaar wederzijds beïnvloeden inzake de verplichtingen van de staat om mensenrechten te bevorderen, te beschermen en te verwezenlijken. Met de focus op de strijd voor vluchtelingenrecht in Zuid-Afrika gedurende de eerste jaren van de periode van democratie na 1994, wordt onderzocht en verklaard onder welke omstandigheden de interactie tussen burgers en staat kan leiden tot structurele veranderingen en wat deze interactie ons kan leren over het potentieel van burgers om in het algemeen rechten te verwezenlijken.

Het boek is verdeeld in zeven hoofdstukken. In hoofdstuk 1 wordt het boek ingeleid en worden de achtergrond, de theoretische benadering en methodologie besproken. Dit eerste hoofdstuk introduceert ook de belangrijkste argumenten. Eén van de hoofdargumenten is dat burgeractivisten – en vooral pleitbezorgers van mensenrechten – een overheid moeten steunen als die zich in progressieve zin ontwikkelt, wat op gespannen voet staat met de gedachte dat ze onafhankelijk moeten blijven en hun capaciteit moeten behouden om regeringen aan te klagen als die de normen met betrekking tot de bescherming van mensenrechten schenden. Dit eerste spanningspunt dat zich voordoet aan burgeractivisten die proberen staten te houden aan hun mensenrechtenverplichtingen, heeft grote invloed zowel op de strategische keuzes die ze maken als op de acties die zij ondernemen om het overheidsbeleid te veranderen. Het tweede hoofdargument is dat de activisten die pleiten voor de verantwoordelijkheid van staten om te voldoen aan hun nationale verplichtingen met betrekking tot de bevordering, bescherming en verwezenlijking van mensenrechten, zowel coöperatieve als confronterende betrekkingen met de staat aangaan. De in dit boek onderzochte periode van 10 jaar van maatschappelijke pleitbezorging voor de bescherming van vluchtelingen geeft een interessante wisselwerking te zien tussen individuele en collectieve interacties tussen burgers en overheid. De wisselwerking tussen burgers en overheid met betrekking tot de strijd voor de plicht van regeringen om verantwoording af te leggen aan vluchtelingen is niet in voldoende mate kritisch onderzocht. In het algemeen hebben studies over de

bescherming van mensenrechten de neiging zich te richten op het juridisch-normatieve aspect van zulke wettelijke claims – d.w.z. op de manier waarop de maatschappij zou moeten functioneren volgens de wet – zonder aandacht te schenken aan de sociale interactie tussen de burgeractivisten die deze claims maken, en de overheidsinstellingen die daarop moeten reageren. Bovendien zijn kritische pogingen om te beoordelen of de interactie tussen burgers en overheid in staat is om structurele veranderingen tot stand te brengen schaars, hoewel Shirin Rai heeft aangevoerd dat, om doeltreffend te zijn, burgeractivisten die hun sociale omgeving willen veranderen meer ‘deliberatief’ moeten zijn, en zowel de risico’s als de mogelijkheden van een bepaalde interventie moeten afwegen.

## **2 DE THEORETISCHE DOORDENKING VAN DE INTERACTIE TUSSEN BURGERS EN OVERHEID**

In hoofdstuk 2 wordt het conceptuele kader van het boek geschetst. Drie theoretische stellingen worden getoetst ter verklaring van de interactie tussen burgers en overheid m.b.t. de strijd voor verantwoording van de staat. Het boek stelt, ten eerste, dat het vermogen van burgeractivisten om de verantwoordingsplicht van de staat te bevorderen en af te dwingen, afhankelijk is van structurele veranderingen in het normatieve juridische kader op nationaal en internationaal niveau. Ten tweede, dat de grenzen die de structurele relatie tussen burgeractivisten en de staat bepalen, op zeer specifieke manieren verschuiven en dat burgeractivisten die verschuivingen moeten respecteren als zij strategisch willen zijn in hun inspanningen ter bevordering of handhaving van de verantwoordingsplicht van de staat. Ten derde, dat burgeractivisten een cruciale rol spelen bij de vertaling van internationale juridische normen naar de lokale context.

Deze drie theoretische stellingen zijn gebaseerd op sociale, politieke en juridische verklaringen voor de interactie tussen burgers en overheid. Sociale verklaringen verwijzen naar het soort rollen dat burgers op zich nemen in hun strijd om de overheid sociaal en juridisch verantwoording te laten afleggen. Verklaringen in termen van structuur versus handeling stoelen op de benadering van Margaret Archer, namelijk van het analytisch dualisme, die (1) door de staat geschapen structuren beschouwt als producten van specifieke historische gebeurtenissen; (2) postuleert dat deze structuren bepalend zijn voor het handelen van burgers in hun relatie tot de overheid; en (3) stelt dat de interactie tussen burgers en overheid de mogelijkheid in zich draagt van structurele uitbouw (of structurele verandering). De stelling dat de interactie tussen burgers en overheid kan leiden tot structurele veranderingen correspondeert met de visie van Sally Merry op burgeractivisten als ‘vertalers’ van mondiale regels naar een alledaagse lokale context. Sociale verklaringen putten ook uit de interactionele benadering van Robert Kidder, die van buiten opgelegde wetten ziet als externe normen en beginselen ‘die de macht van externe juridische actoren om alternatieven aan te dragen vergroot (en) daarmee de kwetsbaarheid van het interne systeem verhoogt’. Volgens deze benadering kan de

mate van ‘externalisering’ of sociale afstand tussen de wetgever, bijvoorbeeld een administratieve ambtenaar, en de burgerlijke partij die een claim heeft, worden geïllustreerd aan de hand van verschillen in betekenisgeving, belangen en politieke standpunten.

Politieke verklaringen beschouwen de ruimte voor maatschappelijke pleitbezorging als de uitkomst van omwentelingen op het gebied van wetgeving, pleitbezorging en wetshandhaving. Deze politieke analyse omvat een beoordeling van de relatie tussen, en de specifieke rol van, de drie belangrijkste Zuid-Afrikaanse instellingen, te weten het Ministerie van Binnenlandse Zaken, verantwoordelijk voor immigratie en grensbewaking, alsmede het verlenen van vluchtelingenstatus; de parlementaire Commissie voor Binnenlandse Zaken; en de zogenaamde ‘sectie 9 instellingen’, met name de Zuid-Afrikaanse Commissie voor de Mensenrechten.

Juridische verklaringen zijn gebaseerd op, in de eerste plaats, Rosalyn Higgins’ notie van de deelname van burgers aan het internationale juridische proces; dat de conventionele noodzaak van een subject/object onderscheid overbodig maakt. Bovendien heeft de uitbreiding van de mogelijkheden tot administratieve toetsing in Zuid-Afrika, voortgekomen uit de democratische en grondwettelijke regelingen van na 1994, het mogelijk gemaakt dat burgers de overheid rechtstreeks ter verantwoording kunnen roepen, met name onder verwijzing naar de Zuid-Afrikaanse grondwet. Dit werd versterkt door de Wet op de Bevordering van de Rechtspleging van 2000 en jurisprudentie op het gebied van het publiek recht. De ontwikkelingen in de Zuid-Afrikaanse grondwet en het administratief recht worden belicht. In dat kader worden de drie belangrijkste soorten ter beschikking staande sancties nader bekeken voor het oplossen van administratieve geschillen, te weten: gerechtelijke uitspraken, door de rechtbank opgelegde schikkingen, en (structurele) verordeningen.

### **3 EEN HISTORISCH OVERZICHT VAN JURIDISCHE PLEITBEZORGING**

Hoofdstuk 3 schetst de geschiedenis van juridische pleitbezorging in Zuid-Afrika, met name waar het gaat om de bescherming van vluchtelingen. Het plaatst het onderhavige onderzoek van maatschappelijke inzet ten behoeve van vluchtelingen in het ruimere verband van de geschiedenis van Zuid-Afrika’s migratiebeleid, en met name van de vier pijlers waarop het was gebaseerd vóór 1994. Dit wordt gevolgd door een algemene geschiedenis van maatschappelijke pleitbezorging in Zuid-Afrika, uitmondend in het beleid ter bescherming van de rechten van vluchtelingen. Het belang van de regelingen van ná 1994, en met name de totstandkoming van de Zuid-Afrikaanse grondwet en de voorziening voor ongekende bevoegdheden tot rechterlijke toetsing, wordt uiteengezet. Ten slotte wordt in dit hoofdstuk uitgelegd hoe deze geschiedenis van migratie en pleitbezorging door burgers goed gecoördineerde maatschappelijke structuren omvatte ter ondersteuning van vluchtelingen en asielzoekers en om te lobbyen voor hun bescherming.

Onder verwijzing naar deze geschiedenis van juridische pleitbezorging worden de theoretische stellingen van het boek, waarnaar eerder is verwezen, getoetst aan drie vormen van interactie tussen burgers en overheid gericht op verantwoording door de staat voor de rechten van vluchtelingen. Er wordt onderscheid gemaakt tussen coöperatieve vormen van interactie ter bevordering van de verantwoordingsplicht van de staat voor de bevordering, bescherming en vervulling van de binnenlandse en internationale wettelijke verplichtingen, en confronterende vormen om de staat ter verantwoording te roepen door middel van rechtzaken, soms in combinatie met niet-juridische vormen van maatschappelijk verzet.

#### **4 DE INTERACTIE TUSSEN BURGERS EN OVERHEID BIJ DE TOTSTANDKOMING VAN HET VLUCHTELINGENBELEID**

In hoofdstuk 4 wordt een eerste illustratie gegeven van de interactie tussen burgers en overheid, en wel de maatschappelijke inbreng bij de ontwikkeling van Zuid-Afrika's vluchtelingenbeleid, culminerend in de Vluchtelingenwet van 1998. Dit totstandkomingsproces van het vluchtelingenbeleid vond voor het grootste deel plaats in een tijdsbestek van twee jaar tussen 1996 en 1998, en omvatte een veelvoud aan interacties tussen burgeractivisten en de overheid. Het proces van totstandkoming van het vluchtelingenbeleid valt uiteen in twee verschillende 'sporen'; het eerste spoor heeft geleid tot de Vluchtelingenwet van 1998, terwijl het andere, dat niet direct tot een dergelijk resultaat leidde, aanzienlijke secundaire bijdragen daartoe heeft geleverd. Beide sporen illustreren, op verschillende manieren, hoe burgeractivisten compromissen moesten sluiten, ten gunste van, of in verzet tegen initiatieven om het eerste vluchtelingenbeleid van het land, de Vluchtelingenwet van 1998, vorm te geven – initiatieven die afkomstig waren van het maatschappelijk veld dan wel van de overheid.

De betrokkenheid van burgers bij de ontwikkeling van het Zuid-Afrikaanse vluchtelingenbeleid heeft aan het licht gebracht dat er kansen en uitdagingen liggen voor burgeractivisten in Zuid-Afrika om samen te werken met de regering. Zuid-Afrika is in veel opzichten een voorbeeld van participatieve democratie, wat de regering een verplichting oplegt om ervoor te zorgen dat er een zekere mate van maatschappelijke betrokkenheid is bij de beleidsvorming. Hoewel de rechter in Zuid-Afrika van een aantal verplichtingen heeft bepaald dat ze kunnen worden afgedwongen, kan de regering in veel gevallen naar bevind van zaken handelen als het gaat om de vraag welke vorm deze publieke betrokkenheid dient aan te nemen.

Wanneer een proces te eenzijdig was in termen van de dominante rol van burgeractivisten – zoals in het Green Paper proces met betrekking tot vluchtelingen – trok de Zuid-Afrikaanse regering de legitimiteit ervan in twijfel, zoals aangetoond door haar weigering tot invoering. Evenzo, wanneer de overheid had nagelaten het maatschappelijke veld te raadplegen, zoals het geval was bij de formulering van de Verordeningen behorende bij de Vluchtelingenwet, betwistten burgeractivisten de uitkomst van dat proces als onwettig. Waar burgeractivisten daarentegen actief

hadden meegewerkt aan een door de regering geïnitieerd beleidsinitiatief, zoals het geval was met het vluchtelingen White Paper, werd de legitimiteit van het proces, alsmede de uitvoeringsmogelijkheden, dienovereenkomstig vergroot. In grote lijnen waren zowel de overheid als het maatschappelijke veld tevreden met het resultaat van het White Paper proces, te weten de Vluchtelingenwet.

Duidelijkheid over de respectievelijke rollen van maatschappelijke en overheidsactoren heeft het mogelijk gemaakt om de motivatie voor hun deelname aan de beleidsvorming en uitvoering op een bepaald historisch moment te verhelderen. Dit heeft op zijn beurt geïllustreerd hoe het bestaan van sociale afstand, op dat moment, de strategische mogelijkheden voor een gewenst resultaat in een bepaalde periode heeft bepaald, althans vanuit het perspectief van burgeractivisten die meewerken aan een gegeven geval van beleidsvorming of -uitvoering.

Bij de totstandkoming van de Vluchtelingenwet van 1998 was het opvallend dat zowel maatschappelijke als overheidsvertegenwoordigers in de White Paper werkgroep, evenals de meeste waarnemers van het proces, erkenden dat het Ministerie van Binnenlandse Zaken (DHA – Department of Home Affairs) het beleid moest vaststellen, zolang tenminste ook terzake doend overleg had plaatsgevonden. Met andere woorden, de mogelijkheden voor uitoefening van maatschappelijke inspraak werden bepaald door de bestaande bestuurlijke en wettelijke kaders. Bovendien werd er algemeen van uitgegaan dat de Zuid-Afrikaanse regering verplicht was om uitvoering te geven aan haar ratificatie van de internationale Vluchtelingen Conventies. Deze erkenning van de inkadering door overheidsstructuren betekende echter niet dat burgeractivisten een en hetzelfde standpunt innamen. Er waren in de praktijk veel verschillen van mening over hoeveel het vluchtelingen White Paper en de betreffende wet expliciet moesten verwijzen naar de rechten van asielzoekers en vluchtelingen, evenals naar de verplichtingen van de overheid. En toch was het nog mogelijk om te pleiten voor structurele verandering (of verdere ontwikkeling) van de juridische en administratieve structuur van de DHA. De juridische structuur voortgekomen uit het White Paper proces omvatte beginselen van het internationale recht met betrekking tot de procedure voor statusbepaling en beginselen van rechtmatigheid vervat in de Zuid-Afrikaanse grondwet. De administratieve structuur omvatte verschillende interne beroepsmogelijkheden, alsmede toezicht door de Vaste Parlementscommissie en de Raad van Beroep voor Vluchtelingenzaken.

## **5 DE INTERACTIE TUSSEN BURGERS EN OVERHEID BIJ DE IMPLEMENTATIE VAN HET VLUCHTELINGENBELEID**

In hoofdstuk 5 wordt het tweede voorbeeld van de interactie tussen burgers en overheid gegeven, op basis van vergelijkbare theoretische uitgangspunten als die in het vorige hoofdstuk. Onderzocht wordt hoe het maatschappelijk veld meewerkte aan de uitvoering van een project van 2000 tot 2002 tot regularisatie van de juridische status van voormalige Mozambikaanse vluchtelingen, van wie de meesten in de jaren '80, ten tijde van de burgeroorlog in Mozambique, in Zuid-Afrika waren

aangekomen – zonder formele erkenning van Zuid-Afrika. Hoewel een aantal van deze vluchtelingen had deelgenomen aan een repatriëringsprogramma van het Hoge Commissariaat voor Vluchtelingen van de Verenigde Naties (UNHCR) in het begin van de jaren '90, en nog veel meer door de Zuid-Afrikaanse autoriteiten waren gedeporteerd, verbleven nog verscheidene honderdduizenden voormalige Mozambikaanse vluchtelingen in Zuid-Afrika zonder enige vorm van juridische documentatie. Bij dit regularisatieproject waren meerdere burgeractivisten betrokken, zowel nationale als internationale, alsmede nationale en provinciale ambtenaren. In het hoofdstuk worden voorbeelden gegeven die illustreren hoe de maatschappelijke inbreng ernstig werd bemoeilijkt, en in feite zwaar ondermijnd, door van staatswege opgelegde structurele kaders, die door de betrokken burgeractivisten niet effectief werden bestreden, in het bijzonder niet door een Nederlandse NGO die het project coördineerde.

In tegenstelling tot het beleidsvormingsproces van het vluchtelingen White Paper, waren de mogelijkheden voor burgeractivisten om invloed uit te oefenen op de richting van het DHA-beleid bij de uitvoering van het programma voor voormalige Mozambikaanse vluchtelingen beperkt. De mogelijkheden tot maatschappelijke inbreng werden beperkt door Zuid-Afrika's historische betrokkenheid bij de gewelddadige burgeroorlog in Mozambique, en door de wettelijke en administratieve structuren die deze vluchtelingen een formele status hadden ontzegd. Evenzeer betekende de wens van de Zuid-Afrikaanse regering om dit onrecht t.o.v. de regering en het volk van Mozambique te herstellen, dat het mogelijk was voor burgeractivisten om te pleiten voor een correctie van dit onrecht en voor het scheppen van de juridische en administratieve kaders voor toekenning van een wettelijke status als ingezetene aan de voormalige vluchtelingen.

Bijgevolg heeft een Tripartiete Commissie, bestaande uit vertegenwoordigers van de regeringen van Mozambique en Zuid-Afrika, samen met de UNHCR, zich toegelegd op het oplossen van de situatie voor de honderdduizenden Mozambikaanse vluchtelingen die in Zuid-Afrika waren beland. De twee belangrijkste toezeggingen van de Commissie waren om degenen die wilden terugkeren naar Mozambique te repatriëren, en om 'amnestie' te verlenen of de juridische status te regulariseren van de voormalige Mozambikaanse vluchtelingen die in Zuid-Afrika wensten te blijven.

Toen burgeractivisten, en met name AWEPA, belangstelling toonden voor het begeleiden van de uitvoering van het regularisatieproject, was het duidelijk dat de structurele voorwaarden voor een rechtmatige administratieve afhandeling nauwelijks waren vervuld. Het notoire gebrek aan politieke wil van de kant van de DHA, en de wankel wettelijke en bestuurlijke structuur die uiteindelijk tot stand kwam om het project uit te voeren, waarbij AWEPA uitgebreide onderhandelingen achter gesloten deuren moest voeren, schiep een situatie waarin de mogelijkheid voor inbreng van lokale activisten en voormalige Mozambikaanse vluchtelingen zeer was ingeperkt. Bijzonder ongemakkelijk voor lokale burgeractivisten was de rol die



AWEPA speelde door hun belangen te laten samenvallen met die van de Zuid-Afrikaanse regering. Het gebrek aan onderscheid van de kant van de AWEPA-coördinator tussen het belang van zijn organisatie en de belangen van de DHA, in combinatie met AWEPA's centrale coördinerende rol, verlaagde op kunstmatige wijze de sociale afstand tussen de DHA en lokale burgeractivisten. Deze situatie maakte het uiterst moeilijk voor de lokale burgeractivisten om het gedrag van de DHA ambtenaren aan de kaak te stellen en te garanderen dat het administratieve proces rechtmatig verliep.

Bovendien, het belang van een geloofwaardig toezicht werd te weinig benadrukt, evenals de bezorgdheid over 'overlevingsfraude'. Tenslotte, een moratorium op uitwijzingen werd door de overheid in de ijskast gezet en vervolgens volledig terzijde geschoven, zonder tegenwerpingen van AWEPA. Tot overmaat van ramp, toen burgeractivisten uiteindelijk hun zorgen over de projectuitvoering tot uitdrukking brachten, viel AWEPA hen openlijk af in aanwezigheid van de overheid. Deze combinatie van factoren bracht de onafhankelijkheid van de lokale burgeractivisten in het geding en had tevens catastrofale gevolgen voor duizenden voormalige Mozambikaanse vluchtelingen, aan wie een geregulariseerde status werd ontzegd in structurele omstandigheden die niet voldeden aan de basisnormen van een rechtmatig administratief proces.

## 6 RECHTZAKEN EN TE SCHANDE MAKEN VANUIT DE MAATSCHAPPIJ

In hoofdstuk 6 wordt een derde illustratie van de interactie tussen burgers en overheid gegeven; onderzocht wordt hoe het maatschappelijk veld zich inzette om de Zuid-Afrikaanse regering rechtstreeks te wijzen op haar nationale en internationale verplichtingen. Dit hoofdstuk illustreert de dynamische manier waarop mensenrechten worden gemobiliseerd en geclaimd via juridische en administratieve wegen. De belangrijkste zaken in het vluchtelingenrecht uit een periode van tien jaar worden onder de loep genomen, zowel zaken die administratief door het Ministerie van Binnenlandse Zaken werden afgehandeld, als zaken voor de Zuid-Afrikaanse gerechtshoven, afgehandeld door middel van administratieve en rechterlijke toetsing. Deze juridische procedures betroffen het afdwingen van een rechtmatige procedure voor het toekennen van vluchtelingenstatus en de toegang tot basisvoorzieningen, alsmede het aan de kaak stellen van discriminatie tegen vluchtelingen bij het vinden van werk. De juridische procedures werden vaak gecombineerd met andere – niet-juridische – vormen van confronterende maatschappelijke actie.

Samenwerking met de overheid was relatief 'nieuw' voor burgeractivisten, afkomstig als zij waren uit een traditie van politieke strijd, gevolgd door een grondwettelijke overgangsperiode op basis van onderhandelingen uitmondend in een democratische regime; meer confronterende maatregelen – zoals procederen en de overheid openlijk aanvallen tot zij haar verplichtingen jegens vluchtelingen nakwam – waren veel meer vertrouwd terrein.

In de geschiedenis van de anti-apartheid strijd waren twee specifieke richtingen voor maatschappelijke actie zichtbaar geworden, die beide tot op zekere hoogte werden doorgetrokken in de verhoudingen van na 1994, hoewel de pleitbezorging voor vluchtelingenrechten meer tot een bepaalde richting neigde dan tot de andere. Burgeractivisten die gewend waren te procederen over vluchtelingenrechten, wisten goed gebruik te maken van de uitgebreide mogelijkheden voor rechterlijke toetsing van administratieve beslissingen zoals opgenomen in de grondwet, maar pogingen om de regering publiekelijk te schande te maken waren navenant schaarser. Aan de ene kant is dat verrassend, gezien het feit dat, zoals geïllustreerd in hoofdstuk 3, een lobby die gerechtelijke procedures combineerde met een maatschappelijke mobilisatie campagne (en strategisch gebruik van de media) in het algemeen tot betere uitkomsten leidde. Aan de andere kant kan dit worden verklaard door het feit dat (1) het DHA haar administratieve structuur radicaal moest veranderen, en (2) de publieke opinie – en de media – over het algemeen afwijzend stond tegenover vluchtelingen en migranten.

Of de in dit hoofdstuk besproken mogelijkheid dat structurele veranderingen vooruit lopen op concrete en blijvende verbeteringen – of structurele uitwerking – in de normen voor de bescherming van vluchtelingen, valt nog te bezien. Structurele houding creëren tussen de rechterlijke macht, de overheid en burgeractivisten een bijzondere verhouding, waarbinnen zo'n uitwerking zou kunnen plaatsvinden. Echter, deze verhouding bevat ook verborgen spanningen. De eerste, en meest voor de hand liggende bron van spanning is die tussen de overheid en burgeractivisten: de geloofwaardigheid van burgeractivisten en hun vermogen om beslissingen van de regering te betwisten kwamen expliciet in het geding. De tweede bron van spanning was die tussen de overheid en de rechterlijke macht, die pas sinds kort de ruimte had gekregen om besluiten van de regering aan te vechten op grond van de vraag of de regering 'in redelijkheid' had gehandeld.

Met andere woorden, de rechters in Zuid-Afrika hadden te maken met een structureel dilemma, en wel het handhaven van een 'delicaat evenwicht' tussen, aan de ene kant, de overheid de gelegenheid geven om haar rol te spelen bij het bepalen van de inhoud van het beleid en de uitvoering ervan, en aan de andere kant, te fungeren als een grondwettelijke toets op machtsmisbruik van de kant van de regering.

## 7 VERSCHILLENDE VORMEN VAN MAATSCHAPPELIJKE PLEITBEZORGING

Pleiten voor verantwoordingsplicht kan vele andere vormen aannemen dan de drie genoemd in de hoofdstukken 4, 5 en 6, die zijn gekozen op grond van de beschikbare empirische gegevens. Bovendien, maatschappelijke actie is niet noodzakelijkerwijs gericht op de staat die de mensenrechten schendt; voorbeelden van andere mogelijke doelwitten zijn journalisten, werkgevers of het grote publiek. Echter, maatschappelijke pleitbezorging houdt zeer vaak een beroep in op mondiale normen en hun 'vertaling' naar een lokaal relevante context. Bij het pleiten voor het afleg-

gen van verantwoording door middel van juridische middelen – hetzij via deelname aan de beleidsvorming hetzij via rechtszaken – de belangrijkste middelen om mondiale normen te vertalen zijn het constitutioneel en administratief recht.

Bij de toepassing van de theoretische stellingen van het boek op deze drie maatschappelijke actievormen, betoog ik dat de gevolgen van acties die verantwoordingsplicht pogen te bevorderen door met de staat samen te werken, divers van aard zijn, maar dat deze acties niet noodzakelijk tot structurele veranderingen leiden, en als ze dat al doen, is het bijna nooit zonder compromissen. En omgekeerd, terwijl er slechts zeer beperkt mechanismen bestaan om te proberen de staat te dwingen tot het afleggen van verantwoording (via confrontaties), is hun potentieel om tot structurele veranderingen te leiden aanzienlijk, indien ze strategisch worden gebruikt.

## **8 VERSTERKING VAN MAATSCHAPPELIJKE ACTIEVORMEN DIE LEIDEN TOT STRUCTURELE VERANDERINGEN**

In hoofdstuk 7 keert het verhaal van de juridische pleitbezorging in Zuid-Afrika weer tot zijn uitgangspunt terug. Het richt zich op de onderliggende normatieve vraag in dit boek, namelijk de vraag hoe de dynamiek van maatschappelijke pleitbezorgingsacties die beogen de staat ter verantwoording te roepen voor de bevordering, bescherming en naleving van de rechten van vluchtelingen in Zuid-Afrika zou kunnen worden versterkt; de omstandigheden waaronder zulke pleitbezorgingsacties tot structurele veranderingen leiden; en wat deze interacties ons leren omtrent hun potentieel om rechten in het algemeen te verwezenlijken. Tekortkomingen in de structurele basis van overheidsinstellingen en het normatief kader, evenals in het handelen van burgerorganisaties, worden aan een kritisch onderzoek onderworpen, maar de nadruk ligt op structurele veranderingen. Bovendien toont het afsluitende hoofdstuk aan dat, hoewel de situatie in Zuid-Afrika in vele opzichten uniek is, in zover zij voortbouwt op een lange traditie van maatschappelijk verzet en confronterende vormen van actie, de ervaringen van de pleitbezorging voor rechten van vluchtelingen in Zuid-Afrika van belang zijn voor de studie van de bescherming van vluchtelingen in het algemeen, en kan dienen als algemene, leerzame voorbeelden van maatschappelijke inspanningen ter bescherming van mensenrechten wereldwijd.

In tegenstelling tot het tijdperk van vóór de democratie, toen protesten tegen een besluit van de regering nagenoeg ondenkbaar waren, heeft het administratief recht bewezen een dynamisch mechanisme te zijn, dat kan worden aangewend om de overheid rechtstreeks aan te spreken over de inhoud van haar beleid. Het is een krachtig schild tegen vermeend slecht geïnformeerde, bevooroordeelde of willekeurige beslissingen in individuele aanvragen voor vluchtelingenstatus. Het is ook een doeltreffend wapen gebleken, zowel voor het stoppen van een restrictief toelatingsbeleid, als bij het opkomen voor economische en sociale rechten, zoals het

recht van vluchtelingen om te studeren, hun recht op sociale uitkeringen, en hun recht op werk in bepaalde sectoren.

Dit boek zet niet alleen het potentieel uiteen van maatschappelijke actie voor het verwezenlijken van de rechten van vluchtelingen, maar stelt ook de vraag aan de orde hoe een dergelijke rol zou kunnen worden versterkt. Verder heeft het de vraag opgeworpen wat dit ons heeft geleerd over de mogelijkheden van maatschappelijke interventies in de verwezenlijking van rechten in het algemeen. Pleitbezorging door burgeractivisten voor de rechten van vluchtelingen in Zuid-Afrika toont aan hoe de verantwoordingsplicht van de staat kan worden bevorderd, of in meer beperkte omstandigheden kan worden afgedwongen, middels coöperatieve en confronterende vormen van interactie tussen burgers en overheid.

De drie voorbeelden van interactie tussen burgers en overheid laten zien dat de sociale ruimte voor maatschappelijke actie specifieke historische wortels heeft, die de kaders hebben bepaald waarbinnen mensenrechten kunnen worden bevorderd, beschermd of verwezenlijkt, alsmede structurele uitwerking (structurele verandering) mogelijk hebben gemaakt. Burgeractivisten hebben een belangrijke bemiddelende rol gespeeld bij de toepassing van de internationale regels voor het ontwikkelen, uitvoeren en kritisch volgen van het nationale beleid. Deze studie van maatschappelijke pleitbezorging voor de rechten van vluchtelingen in Zuid-Afrika heeft ook het belang onderstreept van sociale afstand als een strategische factor voor de burgeractivisten bij de beoordeling van de mogelijkheden voor interactie met de overheid ter bevordering van de verantwoordingsplicht jegens vluchtelingen. Tot slot heeft deze studie het nut benadrukt van het publiek (administratief en constitutioneel) recht als een middel om mondiale regels naar alledaagse lokale contexten te vertalen en om de staat te dwingen zich te verantwoorden in termen van de internationale mensenrechtennormen.

## **8.1 Bemiddeling bij het vertalen van mondiale regels naar lokale contexten**

In dit boek heb ik geprobeerd te illustreren hoe burgeractivisten hebben bijgedragen aan een cultuur van constitutionalisme, met nationale zowel als internationale dimensies, die het nut onderstreept van het administratief recht als een belangrijk medium voor de vertaling van algemene regels naar lokale contexten. Bovendien hebben de voorbeelden die zijn gegeven in deze studie van maatschappelijke inzet ten behoeve van vluchtelingen, laten zien hoe burgeractivisten kunnen bemiddelen bij de vertaling van mondiale normen naar lokale contexten, daarbij kritisch blijvend binnen een externe relatie zoals die altijd bestaat tussen burgers en overheid – zoals gemeten door de sociale afstand, belichaamd door de uiteenlopende belangen, betekenissen en politieke coalities. Vanuit de verschillende disciplinaire invalshoeken, hebben deze voorbeelden laten zien hoe burgeractivisten invloed kunnen uitoefenen, althans in bescheiden mate, op de inhoud van wetgeving en op het beleid ter bescherming van vluchtelingen in Zuid-Afrika, en op de wijze waarop zij in praktijk worden gebracht.

*Rechtscultuur en maatschappelijke vertalers*

Voor sociaal-juridische wetenschappers is de juridische cultuur zelf object van onderzoek. Evaluatie van de rol van maatschappelijke interventies ter versterking van de verantwoordelijksplicht van de staat bij de bevordering en eerbiediging van de rechten van vluchtelingen in Zuid-Afrika, impliceert een kritisch onderzoek van veel verschillende variabelen die kenmerkend zijn voor de juridische cultuur waarin burgeractivisten opereren. De evaluatie in de hoofdstukken 4 en 5 richtte zich op de methoden en middelen, alsook de mechanismen, die door burgeractivisten werden aangewend ter bevordering van de verantwoordingsplicht van de Zuid-Afrikaanse regering jegens vluchtelingen in termen van wereldwijd geldende normen en grondwettelijke verplichtingen. Zoals besproken in hoofdstuk 4, had de regering duidelijke belangen, zoals blijkt uit het feit dat zij burgers uitnodigde deel uit te maken van de White Paper werkgroep. Eveneens duidelijke, zij het heel andere, belangen motiveerden de burgeractivisten ertoe deel te nemen aan de beleidsvorming omtrent vluchtelingen. Bijgevolg werd de werkgroep een zeer productief platform waarop de concurrerende belangen van burgeractivisten, de overheid en anderen, zoals de UNHCR en 'sectie 9 instellingen' (met name de Zuid-Afrikaanse Mensenrechten Commissie) tegen elkaar konden worden afgewogen.

Het mechanisme dat door AWEPA en het DHA werd ingezet om de status van voormalige Mozambikaanse vluchtelingen te regulariseren, was minder productief en de belangen van de burgeractivisten kwamen er veel minder duidelijk in tot uiting; in sommige gevallen waren ze onlosmakelijk verbonden met die van de regering. Het gevolg was dat het handelingspotentieel van Zuid-Afrikaanse burgeractivisten niet alleen sterk was verzwakt, maar een eerlijke rechtsgang voor de voormalige Mozambikaanse vluchtelingen zelf kwam gevaarlijk in het gedrang aangezien er geen kritische controle of onafhankelijk beroepsmechanisme was.

Door deel te nemen aan de wereldwijde discussies omtrent de bescherming van vluchtelingen, werd een aantal Zuid-Afrikaanse NGO's en academici bekend met de internationale regels op dit gebied; zij traden toe tot een transnationale elite. Echter, in hun deelname aan de ontwikkeling van het vluchtelingenbeleid in Zuid-Afrika bleven zij zich bewust van de lokale realiteit, waaronder de wijze waarop het vluchtelingenbeleid sinds 1993 in praktijk was gebracht. Bijgevolg beschikten zij over een 'dubbel bewustzijn'. Dit maakte hen tot effectieve vertalers van wereldwijd geldende regels, puttend uit de mensenrechtenbron in termen van hun inhoud (als instrument) en mogelijkheden voor hun verwezenlijking (hun bewustzijn). Daarnaast hadden deze juridische vertalers toegang tot de verschillende organen voor rechtshandhaving. Bovendien, door het inzetten van niet-juridische mechanismen, zoals het gebruik van de media om de overheid aan de schandpaal te nagelen, schiepen zij hebben meer ruimte voor een kritische omgang met de regering.

### *De erkenning van de waarde van sociale afstand*

Evaluatie van de betrekkingen in termen van sociale afstand is een ander middel ter beoordeling van de maatschappelijke participatie in de uitvoering van het vluchtelingenbeleid, om inzicht te krijgen in de mogelijkheden van maatschappelijke interventies ter verwezenlijking van de rechten van vluchtelingen in Zuid-Afrika, en in de verwezenlijking van rechten in het algemeen. Sociale afstand wordt gemeten door verschillen in belangen, betekenissen en politieke standpunten, oftewel de externe gronden voor deelname aan een bepaalde interactie tussen burgers en overheid. Zoals deze studie van maatschappelijke inzet ten behoeve van vluchtelingen illustreert, wordt de bijbehorende sociale afstand tussen de overheid als wetgever en burgers verkleind of vergroot in overeenstemming met de door burgeractivisten genomen strategische beslissingen, met uiteenlopende gevolgen.

De externe gronden voor participatie van burgers in het hervormingsproces van het vluchtelingenbeleid in Zuid-Afrika waren andere dan die van de overheid, in termen van belangen en betekenissen, maar wat politieke standpunten betreft waren er belangrijke gebieden van overeenkomst. Tijdens het beleidsvormingsproces voor vluchtelingen waren er meningsverschillen over de expliciete formulering van de rechten die een vluchteling zou krijgen als beschermd persoon, in overeenstemming met de nationale constitutionele en internationale verplichtingen. Aan de andere kant heeft de regering er grotendeels mee ingestemd dat de vluchtelingenstatus zou worden bepaald door middel van een procedure op basis van hoorzittingen, zoals voorgesteld door burgeractivisten. De mate van gecreëerde sociale afstand hing ervan af of de politieke standpunten van burgers en overheid in een bepaalde kwestie al dan niet uiteen liepen dan wel convergeerden; het varieerde derhalve aanzienlijk in de loop van het hele beleidsvormingsproces, hoewel convergentie van standpunten duidelijk nodig was voordat de overheid bereid was om een bepaalde maatregel over te nemen. De regering had altijd het laatste woord.

Tijdens de uitvoering van het project ter regularisatie van de status van voormalige Mozambikaanse vluchtelingen, was de sociale afstand of externalisering tussen AWEPA en de Zuid-Afrikaanse regering aanvankelijk erg groot, gezien het feit dat burgeractivisten voortdurend hun bezorgdheid kenbaar maakten over de manier waarop het project moest worden uitgevoerd. Echter, de belangen, betekenissen en politieke standpunten van burgeractivisten en overheid werden bijna niet te onderscheiden toen het project definitief vorm kreeg en een kritisch controlemechanisme verdween. Wat begon als een ogenschijnlijk door de regering gerund project werd bekend als 'het AWEPA project'. Bij het ontbreken van geloofwaardig toezicht, bleef deze sociale afstand klein tijdens de gehele looptijd van het project, wat resulteerde in een beperkte ruimte voor kritische reacties van burgeractivisten, en een tekortschietende administratieve rechtsgang voor de vluchtelingen.

Daar waar vluchtelingenrechten voorwerp zijn geweest van gerechtelijke procedures, is de sociale afstand tussen burgers en de overheid, zoals gemeten door hun respectieve belangen, betekenissen en politieke standpunten, aanzienlijk gebleven,

aangezien burgeractivisten vasthielden aan hun rol als onafhankelijke kritische stem. En toch, zelfs in deze omstandigheden is het niet altijd mogelijk geweest om de regering tot verantwoording te roepen.

De rechtbanken stelden zich vaak terughoudend op als het ging om de beoordeling van de merites van een beleidsmaatregel van de regering of het gebruik van discretionaire bevoegdheden. Maar zelfs wanneer de rechtbank de overheid in het ongelijk stelde, moesten advocaten zich in veel gevallen, en soms herhaaldelijk, opnieuw tot de rechter wenden om naleving van een uitspraak af te dwingen of een zaak aanhangig te maken die vrijwel identiek was aan een die eerder was voorgelegd. Kortom, een hoge mate van sociale afstand, of een onafhankelijke kritische stem, is geen betrouwbare indicator van succes gebleken. Niet alle gerechtelijke procedures leveren noodzakelijkerwijs resultaat op.

Toch moet er een onderscheid worden gemaakt tussen procedures gericht op inperking van overheidsop treden, waarbij de sociale afstand groter is, en gevallen gericht op de bevordering van correct optreden, die de neiging hebben de sociale afstand te verkleinen. Eenvoudig gezegd, het eerste type geval dringt erop aan, in negatieve zin, dat een bepaald beleid wordt gestopt, en heeft een grotere kans van slagen, terwijl het andere type geval de overheid positief aanspoort tot verbetering, en heeft bewezen problematischer te zijn.

Structurele interdicts kunnen nieuwe mogelijkheden bieden in het laatste type zaak. Wanneer structurele interdicts zijn opgelegd ter bevordering van correct optreden van de overheid, is de sociale afstand kleiner geworden, aangezien de concurrerende belangen en politieke standpunten van burgers en overheid zijn vervangen door structurele toezeggingen van de overheid aan de rechtbank doelbewuste stappen te nemen ter verbetering van een bepaalde situatie. Actievoerders hebben in dergelijke gevallen bijgedragen om de overheid te helpen haar gedrag te verbeteren. In de ‘toelatings’ gevallen, bijvoorbeeld, hebben de specialisten die door het DHA waren ingehuurd ter verbetering van het beheer en de procedures op de Opvangcentra voor Vluchtelingen, intensief overlegd met de activisten die de zaak tegen de regering hadden aangespannen. Hoewel het nog te vroeg is om het duurzame effect te beoordelen, kunnen de structurele interdict een belangrijk instrument blijken te zijn om te zorgen voor positieve naleving, aangezien het proces van terugrapporteren naar de rechtbank de legitieme belangen van zowel burgers als overheid erkent, en gezien het in essentie vrijwillige karakter van de naleving van mensenrechten.

Uiteindelijk kan sociale afstand verklaren dat actievoeren het vermogen heeft tot structurele veranderingen binnen de overheid te leiden, door te kijken naar de mate waarin de regering heeft toegegeven aan de eisen van actievoerders door hun betekenissen, belangen of politieke standpunten te laten samenvallen. Dit verdient verder empirisch onderzoek. In de afgelopen jaren is het DHA geconfronteerd met aanhoudende roepen om hervorming van de kant van maatschappelijke organisaties, die steeds verfijnder sophisticated zijn geworden in hun actievoeren. Actievoerders hebben zich – vaak tegelijkertijd – gericht tot de media, het parlement en de gerech-



telijke instanties inzake machtsmisbruik door ambtenaren, inefficiëntie van ministeries, corruptie en wanbeheer.

Het DHA kwam in aanzienlijke mate tegemoet aan deze eisen van maatschappelijke organisaties, en begon een proces van consultaties om de Vluchtelingenwet aan te passen; in 2007 werd een wetsontwerp vrijgegeven voor openbaar commentaar. Na openbare hoorzittingen in het Zuid-Afrikaanse Parlement, waarbij verschillende maatschappelijke organisaties waren vertegenwoordigd, en in reactie op aloude kritiek van maatschappelijke organisaties m.b.t. lacunes in het vluchtelingenbeleid en de uitvoering ervan, gaf de regering in maart 2008 nog een wetsontwerp vrij. De regering reageerde ook op de bezwaren van actievoerders door op te roepen tot sluiting van het Musina detentiecentrum, zoals hierboven beschreven. Bovendien startte het DHA een ‘terugdraai strategie’, waarin een aantal burgeractivisten deelnam, en de Minister reageerde direct op vragen over wanbeheer van het departement.

Met deze tegemoetkomingen van de overheid – tot op zekere hoogte als reactie op de eisen van actievoerders – werd de sociale afstand tussen burgeractivisten en de overheid kleiner naarmate hun respectievelijke belangen in de bescherming van vluchtelingen en de interpretaties van wat deze bescherming met zich meebrengt convergeerden, maar niet tot het punt dat maatschappelijke organisaties hun rol als kritisch waarnemer opgaven. Op basis van de specifieke verplichtingen die zijn opgenomen in internationaal en Zuid-Afrikaans recht, gaat het Jaarverslag van CoRMSA van juni 2008 uitvoerig in op de verplichtingen van Zuid-Afrika’s lokale en nationale overheden inzake de bescherming van vluchtelingen en migranten, vanaf de rol van de overheid bij het aanpakken van de diepere oorzaken van xenofoob geweld tot aan haar rol in het faciliteren van toegang tot de arbeidsmarkt en tot basisvoorzieningen. Zoals het verslag bevestigt, terwijl de belangen en de interpretaties van burgers en overheid mogelijk tot op zekere hoogte samenvielen, bleven hun politieke standpunten uiteenlopen, aangezien burgeractivisten erop gericht bleven de Zuid-Afrikaanse overheid – en met name het DHA – ter verantwoording te roepen voor haar wettelijke verplichtingen ter bescherming van vluchtelingen en migranten.

## **8.2 De capaciteit van actievoerders in de realisatie van mensenrechten in het algemeen**

De in dit boek onderzochte interactie betreft de rol van Zuid-Afrikaanse burgeractivisten in de ontwikkeling van het vluchtelingenbeleid van de overheid, de uitvoering van het dat beleid en, in sommige gevallen, de afdwinging via de rechter dat de overheid zich aan haar beleid houdt. Echter, deze interactie tussen burgers en overheid bevat universele lessen voor de verwezenlijking van rechten in het algemeen, door de tijd heen (op verschillende momenten in Zuid-Afrika’s geschiedenis) en door de ruimte (in andere landen en andere strijd voor mensenrechten).



Deze studie van maatschappelijke inzet ten behoeve van vluchtelingen biedt een sprekende illustratie van de wisselwerking tussen burgers en overheid bij het bevorderen van een cultuur van constitutionalisme voor alle personen (in de taal van de Grondwet) en niet slechts Zuid-Afrikaanse burgers. Vluchtelingen en asielzoekers die in 1996 demonstreerden voor de Union Buildings regeringsgebouwen in Pretoria, met de oproep aan de UNHCR en de Zuid-Afrikaanse regering om iets aan hun situatie te doen, wekten niet alleen de interesse van de media. Net zoals de campagnes van lijdzame tegenwerking in Zuid-Afrika in de jaren '50 duizenden Zuid-Afrikanen mobiliseerden om zich opnieuw op hun situatie te bezinnen en in verzet te komen tegen de apartheid, zo speelde de demonstratie van juli 1996 een cruciale rol om de Zuid-Afrikanen tot een nieuwe kijk te bewegen op hun relatie tot vluchtelingen, en bracht het een snelle reactie teweeg van de kant van burgerorganisaties.

#### *Het vluchtelingenbeleid van Zuid-Afrika op een tweesprong*

De demonstratie van vluchtelingen in juli 1996 vond plaats op een historisch moment. Net nadat de definitieve grondwet van het land het licht had gezien, bevond Zuid-Afrika zich op een tweesprong. Andere, externe factoren speelden zeker ook een rol, met name de verplichtingen die de regering op zich had genomen door in te stemmen met internationale vluchtelingenverdragen. In plaats van de regering ter verantwoording te roepen, spoorde de demonstratie Zuid-Afrikaanse activisten aan om meer te doen dan alleen hulp te bieden, en ook te pleiten voor verrijkende verbeteringen in de manier waarop vluchtelingen werden opgevangen en opgenomen in de samenleving. In de maanden en jaren na de demonstratie, zetten Zuid-Afrikaanse advocaten, kerken en andere maatschappelijke organisaties zich in voor goed beleid, een goede uitvoering en een betere verantwoordingsplicht van de kant van de regering.

Zuid-Afrika heeft nu een overheidsbeleid dat internationale mensenrechtenverplichtingen jegens vluchtelingen heeft overgenomen, gezamenlijke initiatieven van vluchtelingen en NGOs die de belangrijkste rechten voor vluchtelingen hebben veiliggesteld, en een aantal richtinggevende juridische uitspraken van de Zuid-Afrikaanse rechtbanken om de regering te confronteren met haar verplichtingen ten aanzien van niet-Zuid-Afrikanen in het algemeen en vluchtelingen in het bijzonder.

Natuurlijk is het beeld niet in alle opzichten zo positief. Er zijn rapporten opgedoken van arbitraire detentie en mishandeling door de politie en door immigratiefunctionarissen, slecht gemotiveerde weigeringen vluchtelingenstatus te verlenen, en beschuldigingen van corruptie en machtsmisbruik.

Tien jaar nadat Zuid-Afrika partij was geworden bij de internationale vluchtelingenverdragen en het land een definitieve Grondwet had aangenomen, zag de regering zich geplaagd voor een nieuwe keuze. Het bouwen aan een cultuur van constitutionalisme heeft effecten op meerdere niveaus geëist. Op lokaal niveau zijn gemeenten begonnen migranten uit andere landen, waaronder asielzoekers en vluchtelingen, als *ingezetenen* van Kaapstad, Durban en Johannesburg te zien.

Geconfronteerd door advocaten en met nog niet vervulde verplichtingen voortkomend uit structurele verordeningen, heeft de nationale regering slechts schoorvoetend een begin gemaakt technische, procesmatig en management-gerelateerde problemen aan te pakken bij de uitvoering van een eerlijke en efficiënte procedure voor statusbepaling. Het meest opmerkelijke feit is dat de regering heeft ingestemd met de noodzaak om beleid te ontwikkelen en te verbeteren door middel van wijzigingen die tot stand komen via parlementaire weg en niet via ad hoc administratieve regelingen.

Ten slotte, op mondiaal niveau is Zuid-Afrika enerzijds actief betrokken bij mondiale beleidsdiscussies om migratie in te perken, met zogenaamde onregelmatige migratie als hoofdthema. Aan de andere kant heeft Zuid-Afrika de zeer onproductieve en zelfs gewelddadige gevolgen ervaren van het handhaven van een restrictief beleid dat ten onrechte voorrang geeft aan de nationale belangen boven internationale verplichtingen ter bescherming van migranten in het algemeen en vluchtelingen in het bijzonder.

#### *De strijd voor sociale gerechtigheid in andere landen*

De maatregelen die in het verleden zijn aangewend om de regering verantwoording te laten afleggen op basis van internationale mensenrechtennormen resoneren met de strijd voor sociale rechtvaardigheid in verschillende andere landen. Het belang van duidelijk afgebakende taken en verantwoordelijkheden en de strategische erkenning van structurele grenzen geldt wereldwijd, ook buiten de Zuid-Afrikaanse studie. De strategieën en morele weerklank van de Zuid-Afrikaanse anti-apartheid strijd hebben actievoerders voor democratische verantwoording over de hele wereld gemotiveerd, en niet louter omdat de gebeurtenissen in Zuid-Afrika altijd zo uniek waren. Zuid-Afrika's strijd tegen racisme en onrecht, en de inspanningen die zijn verricht met het oog op sociale transformatie laten universele principes zien die gelden voor elke strijd voor sociale rechtvaardigheid die zich richt op het afleggen van verantwoording.

Bijvoorbeeld, burgeractivisten in Oost-Europese landen hebben ingezet voor een betere bescherming voor vluchtelingen en migranten door de erkenning van door de EU vastgestelde structurele kaders, en door het vertalen van de wereldwijd geldende normen naar nationale inspanningen om vluchtelingen te beschermen. Burgeractivisten in Oost-Europa, wier activiteiten voorafgaand aan het begin van de vroege jaren '90 zeer beperkt waren, hebben ook meegewerkt aan ontwikkeling van vluchtelingenbeleid.

In het Midden-Oosten spelen burgers ook een belangrijke rol in de bescherming van vluchtelingen. Hoewel een zeer problematische geo-politieke situatie en de voortdurende militaire bezetting een lokale, op het recht gebaseerde oplossing voor de benarde situatie van Palestijnse vluchtelingen verhindert, en ernstige structurele beperkingen het vrijwel onmogelijk maken om te pleiten voor het afleggen van verantwoording van de kant van Israël, zijn actievoerders van over de hele wereld,

waaronder academici, juristen en pressiegroepen, erin geslaagd om wereldwijd bewustzijn op te wekken ten aanzien van de kwestie van de Palestijnse landonteigening. Bovendien, door het erkennen van deze structurele beperkingen en door in plaats daarvan de aandacht te verleggen naar supranationale mechanismen, zijn politieke activisten op strategische wijze opgekomen voor de erkenning van de rechten van Palestijnse vluchtelingen en hun recht op ingezetenschap, tegen de internationaalrechtelijke standpunten van bepaalde VN-organisaties in. Niet in staat om enig resultaat te boeken op lokaal niveau, hebben activisten de rechten van de Palestijnen voor VN-organisaties en verdragsinstanties gebracht, waaronder de VN-Commissie voor de Uitbanning van Rassendiscriminatie. Derde landen zijn ook een belangrijk forum geworden voor de activisten, die gerechtelijke procedures beginnen tegen bedrijven die zich schuldig maken aan schendingen van het vluchtelingenrecht en het recht op ingezetenschap van de Palestijnen, en tegen personen die oorlogsmisdaden hebben begaan tegen burgers in de vluchtelingenkampen.

Of het nu in Zuid-Afrika, Oost-Europa of Palestina is, en ongeacht of burgers zijn verwikkeld in een politieke strijd of een proces van sociale transformatie in samenwerking met de overheid, al deze gebeurtenissen kunnen worden gezien als verschillende vormen van strijd voor sociale rechtvaardigheid. In iedere strijd voor sociale rechtvaardigheid is het strategisch keuzes maken de sleutel voor het succes van actievoerders om staten en regeringen verantwoording te laten afleggen voor hun mensenrechtenverplichtingen.

Het maken van strategische keuzes heeft verschillende gevolgen voor de activisten, zoals deze studie over de verwezenlijking van het vluchtelingenrecht in Zuid-Afrika illustreert. Ten eerste moeten actievoerders de sociale, politieke en juridische context waarin zij opereren doorgronden; zo'n historisch onderzoek blijkt bepaalde structurele beperkingen aan het licht te brengen voor de verwezenlijking van rechten, bijna altijd opgelegd door de staat. Ten tweede moeten actievoerders een kritische beoordeling maken van deze structurele beperkingen, die voorwaarden stellen voor hun handelen, maar ook de mogelijkheid in zich hebben tot structurele verandering of 'uitwerking' door middel van formele en informele interventies van burgers in samenspel met de overheid. Ten derde moeten actievoerders de sociale afstand die altijd bestaat tussen hen en de overheid in ogenschouw nemen, zoals die tot uitdrukking komt in de verschillende interpretaties, belangen en politieke standpunten. Door kritisch met deze 'externe' relatie om te gaan, is het mogelijk voor actievoerders om voordeel te trekken uit deze verschillen bij het bepleiten van de verantwoordingsplicht van de staat voor de verwezenlijking van mensenrechten. Of de sociale afstand moet worden verkleind of vergroot op een bepaald moment is afhankelijk van (1) de context waarin dit plaatsvindt, (2) de structurele beperkingen die er bestaan, en (3) het gewenste resultaat.

Een kritische relatie tot de regering stelt actievoerders in staat om te profiteren van die kleine, maar significante ruimte voor het tot stand brengen van structurele veranderingen. In deze sociale, politieke en juridische ruimte, kan het potentieel

Samenvatting

voor het bepleiten van verantwoordingsplicht van de staat ter bevordering, bescherming en verwezenlijking van mensenrechten tot bloei komen.

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## CURRICULUM VITAE

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