

Summary

English version of ‘Pleiten voor verantwoordingsplicht: De interactie tussen burgers en overheid ter bescherming van vluchtelingen in Zuid-Afrika’

Dutch summary included in J. Handmaker, Advocating for accountability: Civic-state interactions to protect refugees in South Africa, Antwerp: Intersentia, 2009

1 Overview

This book discusses the dynamics of civic-state interactions aimed at the state’s 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 to realise rights in general.

The book is divided into seven chapters. Chapter one introduces the book, setting out the background, theoretical approach and methodology. This first chapter also introduces the book’s principal arguments. One principal argument is that civic actors – and especially human rights advocates – should support a government as it moves in a progressive direction, which 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 to their human rights obligations conditions both the strategic choices they make and the interactions they undertake to change government policy. The second principal argument is that civic actors advocating for accountability of states to their national obligations to promote, protect and fulfil human rights exercise co-operative and confrontational interactions with states. The ten-year period of civic advocacy to protect refugees that is examined in this book reveals an interesting interplay of individual and collective civic interactions with the government. The interplay between civic and state actors in advocating government accountability to refugees has not been adequately studied in a critical way. 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 actors who make these claims, and the government institutions that are obliged to answer them. Furthermore, there have been few critical attempts to assess whether civic-state interactions are capable of achieving structural change, although it has been argued by Shirin Rai 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.

2 Theorising civic-state interactions

Chapter two presents the book’s conceptual framework. This book tests three theoretical propositions that 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 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.

These three theoretical propositions draw on social, political and legal explanations for 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 Margaret 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 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 Sally Merry’s explanation of civic actors as ‘translators’ of global rules into their local vernacular contexts. Social explanations also draw upon Robert 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’. According to this approach, 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 ‘section nine institutions’, particularly the South African Human Rights Commission.

Legal explanations draw, firstly, on Rosalyn 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 in South Africa have made it possible for civic actors to hold the government directly accountable, in particular in terms 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. Accordingly, I reflect on the three main types of sanction available to resolve administrative law disputes, namely: judgements, court-ordered settlements and (structural) interdicts.

3 A history of legal advocacy

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, are 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.

With reference to this history of legal advocacy, the book’s theoretical propositions, referred to earlier, are tested against three forms of civic-state interactions to advocate state accountability for refugee rights. A distinction is made 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-state interactions, for holding states accountable through the courts, sometimes together with non-legal civic confrontations.

4 Civic-state interactions in refugee policymaking

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 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. The refugee policy process fell into two distinct ‘tracks’, the first 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, both civic- and state-led initiatives to frame the country’s first refugee policy, the Refugees Act of 1998.

Civic involvement in the development of South Africa’s refugee policy revealed the opportunities and challenges for civic actors in South Africa to co-operate with the government. 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.

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 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 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 (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.

5 Civic-state interactions in refugee policy implementation

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, 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 regularisation project involved multiple civic actors, national and international, as well as national and provincial 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, and in particular by a Dutch NGO, which co-ordinated the project.

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. The possibilities for civic agency were 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. 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.

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. 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 their 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.

6 Litigation and shaming by 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. 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.

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.

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, discussed in this chapter, 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 government and civic actors, where the credibility of civic actors and their ability to challenge government decisions are explicitly brought into question. The second source of tension is between government and the courts, which have only recently been permitted to comprehensively challenge decisions of the government on the grounds of whether they have acted in a ‘reasonable’ manner.

In other words, the courts in South Africa have faced a structural dilemma of maintaining 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.

7 Various forms of civic advocacy

Advocating for accountability may take many forms other than the three mentioned in chapters four, five and six, 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 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.

8 Strengthening civic advocacy towards structural change

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, are subjected to critical examination, though the emphasis is 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.

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 allegedly 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, this book has questioned how such a role could be strengthened. Further, it has 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.

The 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 or fulfil human rights, but have also allowed for structural elaboration (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.

8.1 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.

8.1.1 Legal culture and civic translators

As socio-legal scholars maintain, legal culture is itself an object of investigation. 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.

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 a 'double consciousness'. 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.

8.1.2 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.

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.

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 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. Following public hearings in South Africa’s Parliament that involved several civic organisations, 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. 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.

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 role of government in addressing the root causes of xenophobic violence to its role in facilitating access to employment and basic services. 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.

8.2 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).

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.

8.2.1 South African refugee policy at a crossroads

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 good policy, sound implementation and a more accountable government.

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. 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.

8.2.2 Social justice struggles in other 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 protection 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. Civic actors in Eastern Europe, whose activities prior to the early 1990s were highly constrained, have also participated in the development of refugee policies.

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. 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. 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, and against individuals who have committed war crimes against civilians in the refugee camps.

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.