Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa
SCHOOL OF HUMAN RIGHTS RESEARCH SERIES, Volume 33.

The titles published in this series are listed at the end of this volume.
ADVOCATING FOR ACCOUNTABILITY:
CIVIC-STATE INTERACTIONS TO PROTECT
REFUGEES IN SOUTH AFRICA

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

D/2009/7849/64
NUR 828

© 2009 Intersentia
www.intersentia.com

Behoudens uitzondering door de wet gesteld, mag zonder schriftelijke toestemming van de rechtshebbende(n) op het auteursrecht c.q. de uitgevers van deze uitgave, door de rechtshebbende(n) gemachtigd namens hem (hen) op te treden, niet uit deze uitgave worden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of anderszins, hetgeen ook van toepassing is op de gehele of gedeeltelijke bewerking. De uitgevers zijn met uitsluiting van ieder ander onherroepelijk door de auteur gemachtigd de door derden verschuldigde vergoedingen van kopiëren als bedoeld in artikel 17 lid 2 van de Auteurswet 1912 en in het KB van 20-6-’64 (Stb. 351) ex artikel 16b der Auteurswet 1912, te doen innen door (en overeenkomstig de reglementen van) de Stichting Reprorecht te Amsterdam.

Niets uit deze uitgave mag worden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of op welke andere wijze ook, zonder voorafgaande schriftelijke toestemming van de uitgevers.

No part of this book may be reproduced in any form, by print, photocopy, microfilm or any other means, without written permission from the publishers.
ACKNOWLEDGEMENTS

There are many individuals who kept me focused, despite my incessant tendency to become involved in myriad different projects, whether on issues in the Middle East, the Western Sahara or Dutch refugee policy. As I often struggled to find time to sit and concentrate on the book, which fell in between various consultancies and projects in different parts of the world, I was fortunate to be offered various, inspiring spaces to develop insights, and to simply write.

The original source of inspiration for this book came during the many years I spent with Lawyers for Human Rights in South Africa, both before and after the country’s transition to democracy. I had the privilege of working with many exceptional individuals in South Africa. Aíne Hughes, Marivic Garcia, Dosso Ndessomin, Pia Prütz Phiri, Jacob van Garderen, Patrick Matlou, Jing-Thomas Ayeh, Guinness Ohazuruikie, Shadrack Mhlangu, Andries Nel, Louise Du Plessis, Laura Best, Rudolph Jansen, Jody Kollapen, Ghadija Vallie, Lucrecia Seafield and Bangani Ngelza first come to mind. For the experiences, insights and friendships they offered I will be forever grateful.

At the Van Vollenhoven Institute in the law faculty of the University of Leiden, I spent a few days per week, from February to April 2004, to develop the PhD proposal and interact with staff there. Later, at the Netherlands Institute of Human Rights (SIM) in the faculty of law at Utrecht University, I shared an office, taught classes and participated in the vibrant academic life of SIM alongside numerous inspiring people, but especially Jenny Goldschmidt, Fleur van Leeuwen, Chisheche Mibenge, Genti Zyberi, Peter Malcontent, Ineke Boerefijn and Cees Flinterman.

The University of the Witwatersrand in Johannesburg has long provided a scholarly home. Jon Klaaren, Angelo Pantazis, Iain Currie, Glenda Fick, Mia Swart, Sanele Sibanda and others welcomed me as a visiting scholar to the School of Law in 2004, 2007 and 2008. Loren Landau, Darshan Vigneswaran, Tara Polzer, Ingrid Palmary and Jean-Pierre Misago of the Forced Migration Studies Programme in the Graduate School of Humanities hosted me as a research fellow in 2006. Tara even lent me her home in the exotic lowveld near Bushbuckridge, where – surrounded by
monkeys, impala and a giant leguan that lived in the roof – I made considerable progress digging through and cataloguing thousands of pages from the FMSP archives.

At the Roosevelt Academy of Utrecht University, located in Middelburg I spent a very productive three weeks in the presence of friendly, bright, motivated people. Pieter Ippel kindly lent me his office, while Renske, a student rented me her room. Many others also extended friendship, in particular Azim, Djeyhoun, Ali and Diedrik. But, it was Barbara and Herman and their family in particular who organised this well-timed retreat, banned me from e-mail and provided intellectual and personal inspiration.

From February 2007, I have had the privilege to work amongst motivated and critical colleagues and students from all over the world at the Institute of Social Studies (ISS), and especially my colleagues Karim Knio and Karin Arts. Further inspiration has come from the Works Council and especially my friend and colleague Loes Keysers. Further, to all my colleagues in the ISS staff group on States, Society and World Development, and indeed other staff groups and offices, I am grateful for their support, patience and understanding while I spent more time than either I intended, or perhaps they expected.

Throughout the process, there were many other individuals who became much-valued intellectual sparring partners. In addition to my two promoters, Thomas Spijkerboer provided invaluable feedback at an earlier stage in the process. Jon Klaaren and Karim Knio provided crucial feedback on the theoretical approach I took, while Karin Arts also provided important feedback on three chapters. Useful feedback was also received from Chris Dolan on chapter five and from Jacob van Garderen on chapter six. Ann Dunlap provided key feedback on (re)structuring the introduction and conclusion in the final stages of preparing the manuscript. Guus Meijer translated the summary and Joy Misa helped with the layout for the book, both at very short notice. Naturally, any mistakes or inaccuracies in this book remain my responsibility.

For many years, my ruthless academic editor, Helen Moffett, has patiently coached me on my sometimes appalling (ab)use of the English language. Later, she introduced me to David Buchanan, who advised on the final draft that I sent to the external examiners.

Other, major sources of personal and professional inspiration have come from Anne Kass, Chris Mullin, Stuart Handmaker, Rosemary Traub, Ghadija Vallie, Adri Nieuwhof, Omar Barghouti, Mieke Zagt, Bangani Ngeleza, Julie Kilpatrick, Rifat Kassis and Majed Nassar.

There are still other friends, both long-term and new, who have been important sources of personal inspiration. Some come in pairs, including Rex and Sherri, Amjad and Bisan, Ingrid and Rob, Mark and Sophie-Marie, Jacob and Emma, Irma and Andries, Guus and Pien, Regina and Azaab and Laura and Bash. My good buddy Karim provided well-timed, and much-welcomed distractions these past couple of
years. My next-door neighbours, Hans Heimgartner and Mirjam Poley, have been truly wonderful sources of support and inspiration as I struggled away on the thesis in the last year and a half.

For my (extended) family and friends in New Mexico, and others in San Francisco and Atlanta, who hardly ever see me, I also feel very blessed.

I extend profound thanks to my two promoters, Cees Flinterman and Barbara Oomen. Their steadfast support, intellectual rigour and kind yet uncompromising advice guided me to complete this book.

And finally, to my *paranimfen*, Ineke Boerefijn and Hans Heimgartner, I am hugely grateful for their friendship, support and inspiration as I completed the dissertation and prepared for the defence.
Persoonlijke kopie van ()
# TABLE OF CONTENTS

Acknowledgements

**CHAPTER 1**

**INTRODUCTION**

1.1 Addressing a primary tension in human rights advocacy

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

1.1.2 Human rights claims are both contested and interactional

1.2 Theorising civic interactions to advocate state accountability

1.3 Three forms of civic-state interactions for advocating for accountability to refugees

1.4 Sources, methods and methodology

1.4.1 Literature survey and grey material

1.4.2 Interviews, primary sources and personal observations

1.4.3 Challenges of assessment

1.5 Overview of the book

**CHAPTER 2**

**ADVOCATING FOR ACCOUNTABILITY THROUGH CIVIC INTERACTIONS**

2.1 Overview

2.1.1 Exercising civic capacity: shifts in the political context

2.1.2 Structural boundaries and the issue of legitimacy

2.1.3 Civic participants as translators

2.1.4 Three theoretical propositions
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.2 The capacity of civic actors to hold states accountable is a product of structural changes</td>
<td>24</td>
</tr>
<tr>
<td>2.2.1 Human rights revolutions: a historical context</td>
<td>26</td>
</tr>
<tr>
<td>2.2.2 International law as process: individual and collective civic actor participation</td>
<td>29</td>
</tr>
<tr>
<td>2.2.3 National law as process: civic promotion and enforcement of state accountability</td>
<td>36</td>
</tr>
<tr>
<td>2.2.4 Civic claims in international and national legal process</td>
<td>40</td>
</tr>
<tr>
<td>2.3 Theorising the importance of structural boundaries</td>
<td>41</td>
</tr>
<tr>
<td>2.3.1 The limits of structuration theory</td>
<td>42</td>
</tr>
<tr>
<td>2.3.2 Exploring the interplay: adapting an analytical dualism approach</td>
<td>43</td>
</tr>
<tr>
<td>2.3.3 Types of civic agency</td>
<td>44</td>
</tr>
<tr>
<td>2.3.4 State-created structures</td>
<td>45</td>
</tr>
<tr>
<td>2.3.5 Media structures – sanctions by way of public shaming</td>
<td>47</td>
</tr>
<tr>
<td>2.3.6 Motivations for civic agency</td>
<td>48</td>
</tr>
<tr>
<td>2.4 Civic actors mediate the relationship between international and national norms</td>
<td>50</td>
</tr>
<tr>
<td>2.4.1 Law as process: human rights and socio-legal theory</td>
<td>51</td>
</tr>
<tr>
<td>2.4.2 Translating human rights in a local context</td>
<td>53</td>
</tr>
<tr>
<td>2.4.3 Legal process is interactional</td>
<td>54</td>
</tr>
<tr>
<td>2.4.4 An integrated socio-legal framework for assessing civic-state interactions</td>
<td>56</td>
</tr>
<tr>
<td>2.5 Conclusion</td>
<td>57</td>
</tr>
</tbody>
</table>

**CHAPTER 3**

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

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1 Introduction</td>
<td>61</td>
</tr>
<tr>
<td>3.2 Policy shifts: abandoning racially-based control of people</td>
<td>63</td>
</tr>
<tr>
<td>3.2.1 Influx control (internal and external)</td>
<td>64</td>
</tr>
<tr>
<td>3.2.2 The Aliens Control Act 1991: arbitrary and unchallengeable</td>
<td>65</td>
</tr>
<tr>
<td>3.2.3 Four pillars of South Africa’s old migration policy</td>
<td>66</td>
</tr>
<tr>
<td>3.2.4 Paving the way for a refugee policy</td>
<td>72</td>
</tr>
<tr>
<td>3.3 Political struggle: the origins of civic actors in South Africa</td>
<td>74</td>
</tr>
<tr>
<td>3.3.1 Pressures that led to the demise of white minority rule</td>
<td>75</td>
</tr>
</tbody>
</table>
Table of Contents

3.3.2 New forms of civic expression 77
3.3.3 Court challenges – politics by other means 78
3.3.4 Civic partners in political transition 79

3.4 Civic co-ordination: the emergence of a refugee rights advocacy network 80
3.4.1 Regionally-based structures 81
3.4.2 Working outside the structures 83
3.4.3 National advocacy 84
3.4.4 Research centres 85
3.4.5 Lawyers’ networks: policy feedback, advice and representation 86
3.4.6 Refugee networks 87
3.4.7 Working with local government 87

3.5 From political struggle to social transformation 88

CHAPTER 4

NO EASY WALK: CIVIC PARTICIPATION IN REFUGEE POLICYMAKING 91

4.1 Introduction 91

4.2 An emerging space for civic participation in policymaking 92
4.2.1 Participation in international legal process 93
4.2.2 Locally-relevant policy responses 96

4.3.1 South Africa’s nascent refugee policy 98
4.3.2 Constitutionality questions 101

4.4 Civic co-operation in forming a refugee policy in South Africa (1996-2006) 102
4.4.1 Early debates on DHA’s draft policy and the first Refugee Bills (track 1, phase 1) 103
4.4.2 The draft Green Paper on International Migration (track 2, phase 1) 106
4.4.3 Debates over chapter four of the draft Green Paper (track 2, phase 2) 107
4.4.4 The White Paper Task Team (track 1, phase 2) 108
4.4.5 Parliamentary debates (track 1, phase 3) 112
4.4.6 Towards a new administrative order 114

4.5 Analysing civic participation in policymaking 114
4.5.1 Civic capacity and refugee policy making: choosing reinvigoration over reformulation 116
### Table of Contents

4.5.2 Recognising structural boundaries in constructing a refugee policy 117  
4.5.3 Mediating the translation of international legal norms in the refugee policymaking process 118  
4.5.4 Further delays, from policy to implementation 121  

**CHAPTER 5**  
**WHO’S RESPONSIBLE? CIVIC PARTICIPATION IN REFUGEE POLICY IMPLEMENTATION**  
5.1 Introduction 123  
5.2 A tenuous place of refuge 124  
5.2.1 The UNHCR establishes an office in South Africa 125  
5.2.2 Assessing the Mozambican voluntary repatriation programme 127  
5.2.3 Lack of legal documentation for those remaining 128  
5.3 Civic co-operation in the status regularisation project 128  
5.3.1 Preparations for the regularisation project 131  
5.3.2 Delays in implementation 137  
5.3.3 Doing justice to the matter? Blurred roles and overlapping responsibilities 138  
5.4 Analysing civic participation in policy implementation 145  
5.4.1 Civic capacity in refugee policy implementation 146  
5.4.2 The importance of structural boundaries in refugee policy implementation 147  
5.4.3 Social distance in refugee policy implementation 148  
5.5 Beyond legal frameworks to increasing legal consciousness 150  

**CHAPTER 6**  
**LITIGATING AND SHAMING: CIVIC PARTICIPATION IN REFUGEE POLICY ENFORCEMENT**  
6.1 Introduction 153  
6.2 Towards accountability: an emerging space for civic confrontation with the state 153  
6.2.1 Two sources of civic organisation in South Africa 154  
6.2.2 Building credible administrative systems and convincing a reluctant judiciary 159  
6.2.3 Civic agents and state structures 161  
6.2.4 Litigating accountability 164
6.3 Mobilising access to refugee status determination procedures through the courts 165
  6.3.1 Access to a fair procedure 166
  6.3.2 Ensuring entry to South Africa 168
  6.3.3 Special access needs of children 171
  6.3.4 Physical access to the refugee reception offices 171
6.4 Mobilising refugee access to economic and social rights through the courts 173
  6.4.1 Securing the right to work and study for asylum seekers 173
  6.4.2 Challenging discriminatory employment practices 174
  6.4.3 Securing the right to social grants 177
6.5 What changed? From recognition to relief 177
  6.5.1 Final relief through judgement 178
  6.5.2 Interim or final relief through settlements (court-ordered) 179
  6.5.3 Structural interdicts 181
6.6 The enforcement of refugee rights through non-legal means 183
6.7 Civic participation in policy enforcement 185
  6.7.1 Civic capacity and government accountability in litigating refugee rights 186
  6.7.2 Strategic assessments within defined boundaries in litigating refugee rights 186
  6.7.3 Translating legal norms for holding the government accountable by litigating refugee rights 188

CHAPTER 7
CONCLUSION 191
7.1 Civic capacity, structural boundaries and the scope for structural change 193
  7.1.1 Civic-state interactions in refugee policymaking 194
  7.1.2 Civic-state interactions in refugee policy implementation 195
  7.1.3 Litigation and shaming by civic actors 196
  7.1.4 From structural conditioning to structural change: translators, social distance and public law 198
7.2 Context shapes the possibilities for civic-state interactions 198
7.3 Respecting structural boundaries in a culture of constitutionalism 200
  7.3.1 Structural conditioning of civic actors and the possibilities for elaboration 200
Table of Contents

7.3.2 Structural boundaries and strategic choices 202
7.4 Mediating the translation of global rules into local contexts 203
  7.4.1 Legal culture and civic translators 204
  7.4.2 Appreciating the value of social distance 205
7.5 Civic capacity to realise rights in general 208
  7.5.1 Realising rights across time (in South Africa) 208
  7.5.2 Realising rights across space (other struggles in different countries) 209

Samenvatting (Summary in Dutch) 213
Bibliography 231
Index 249
Curriculum Vitae 253