Advocacy in the Time of Xenophobia: Exploring Opportunities for Change in South African Migration Policy and Practice

by

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ABSTRACT

ADVOCACY IN THE TIME OF XENOPHOBIA:
EXPLORING OPPORTUNITIES FOR CHANGE
IN SOUTH AFRICAN MIGRATION POLICY AND PRACTICE

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University of Guelph, 2014

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Professor Carol Dauda

In May 2008, violence against foreign nationals erupted in communities across South Africa. Dozens lost their lives, hundreds were injured, and thousands were displaced in a crisis that highlighted migration as one of the most complicated, volatile issues currently facing the young democracy. In the aftermath of the crisis, important questions have been raised regarding the complex causes of the violence and the widespread anti-foreigner attitudes that continue to find regular expression in the country. This dissertation explores the social and political space in which challenges to this status quo are being advanced. Drawing on a series of qualitative, semi-structured key informant interviews with civil society actors and policy makers, along with six months of participant observation at a migration-focused non-governmental organisation in Cape Town, this research interrogates both the opportunities and limitations for advancing a progressive vision of migration in South Africa. This is understood as a vision which promotes the upholding and expansion of rights for migrants, refugees and asylum seekers, the progressive dismantling of xenophobic social attitudes, and the reconceptualisation of migration as a potential tool for development. While important advances have been made in the migration arena since 1994, migration management remains rooted in a control and security-oriented approach,
and migration continues to be perceived primarily as a threat and a burden. Negative social constructions of migrants combine with widespread perceptions of a de facto hierarchy of rights that places citizens’ rights above those of foreign nationals, making it difficult for policy-makers and civil society actors to advance a progressive migration agenda. This is compounded by a rapidly shifting and contentious migration policy environment, in which the policies on paper often bear little resemblance to their implementation in practice. In this context, the efforts and interventions of civil society actors working in this arena, while important and necessary, are limited in their effectiveness. These actors also face ongoing and deep-seated internal challenges that delimit their capacity to effect change. For South Africa to begin to intentionally foster and harness migration’s developmental potentials will require strong political leadership, vision and commitment, along with a fundamental reconceptualisation of migration. Given current migration practices and discourse, such a shift seems unlikely for the foreseeable future.
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# Table of Contents

List of Abbreviations and Acronyms ........................................................................................................ viii

Chapter One: Introduction .......................................................................................................................... 1

Chapter Two: Methodology ....................................................................................................................... 10
  Ethnography & Participant Observation: Methodological Rewards and Limitations ....................... 11
  Semi-structured and Key Informant Interviews: Methodological Rewards and Limitations ........ 16

Chapter Three: Conceptual Considerations: Migration and Development ........................................ 21
  Conclusion: ............................................................................................................................................... 40

Chapter Four: Migration and Development in the South African Context ........................................... 42
  Unskilled Migration and Development in South Africa ....................................................................... 43
  Domestic Migration Dynamics .............................................................................................................. 46
  Undocumented Migration and Development ....................................................................................... 48
  Skilled Migration and Development Debates in South Africa ............................................................ 51
  Regional Considerations for Migration and Development ................................................................. 57
  Conclusion: ............................................................................................................................................... 60

Chapter Five: Conceptual Considerations: The Elusive Nature of “Civil Society” ............................ 62
  An Overview of Civil Society in South Africa ..................................................................................... 71
  Conclusion: ............................................................................................................................................... 83

Chapter Six: Legitimacy, Xenophobia, and the Social Construction of Migrants ............................. 85
  Migration and the Transition to Democracy ....................................................................................... 86
  Liberalism and the Social Legitimacy of Migrants’ Rights ................................................................. 94
  Xenophobia, Belonging, and Non-State Sites of Power .................................................................... 101
  Political Priority and the Social Construction of Migration ............................................................... 111
  Conclusion: ............................................................................................................................................... 123

Chapter Seven: Making the Law: Migration Policy Development Since 1994 .................................... 125
  Migration Policy in Historical Context ................................................................................................. 126
  The Refugees Act of 1998 ..................................................................................................................... 129
  The Immigration Act of 2002 ............................................................................................................... 139
  Conclusion: ............................................................................................................................................... 153

Chapter Eight: Falling Through the Cracks: Implementation Struggles in Contemporary Migration Management ......................................................................................................................... 155
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bureaucratic Inheritance, Capacity, and Rule-making in the Department of Home Affairs</td>
<td>156</td>
</tr>
<tr>
<td>Detention and Deportation: A Flawed System</td>
<td>165</td>
</tr>
<tr>
<td>Administrative Access and Asylum</td>
<td>169</td>
</tr>
<tr>
<td>New Policy Directions and Potential Rights Restrictions</td>
<td>175</td>
</tr>
<tr>
<td>Conclusion:</td>
<td>182</td>
</tr>
<tr>
<td>Chapter Nine: Opportunities and Constraints for Civil Society Actors Working Towards Progressive Change in the Migration Arena</td>
<td>183</td>
</tr>
<tr>
<td>May 2008: Crisis and Opportunity</td>
<td>184</td>
</tr>
<tr>
<td>Advocacy and Action After May 2008</td>
<td>193</td>
</tr>
<tr>
<td>The Courts as an Arena of Engagement</td>
<td>208</td>
</tr>
<tr>
<td>Conclusion:</td>
<td>216</td>
</tr>
<tr>
<td>Chapter Ten: Conclusions and Reflections</td>
<td>219</td>
</tr>
<tr>
<td>Appendices</td>
<td>232</td>
</tr>
<tr>
<td>Appendix 1: Legal and Undocumented Immigrants in and Emigrants from South Africa, 1980-2009</td>
<td>232</td>
</tr>
<tr>
<td>Appendix 2: Annual Work and Study Permits Issued by South Africa, 1984-2007</td>
<td>233</td>
</tr>
<tr>
<td>Appendix 3: Number of Refugees and Asylum Seekers in South Africa, 2001-2009</td>
<td>234</td>
</tr>
<tr>
<td>Appendix 4 South African Attitudes to Rights for Citizens, Migrants and Refugees</td>
<td>235</td>
</tr>
<tr>
<td>Appendix 5: Different Camps of Opinion/Interests in Migration Policy Arena</td>
<td>236</td>
</tr>
<tr>
<td>List of Interviews</td>
<td>237</td>
</tr>
<tr>
<td>Bibliography</td>
<td>239</td>
</tr>
</tbody>
</table>
“But the longing to get on the other side of everything already settled, this makes me, and everybody like me, a road sign to the future.”

Herman Hesse, from Wandering

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1 Hesse, Hermann. 1980. *Six Novels, including Steppenwolf, Klingsor’s Last Summer, Journey to the East, Siddhartha, Plus Other Stories and Essays*. London: Collins
## List of Abbreviations and Acronyms

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACMS</td>
<td>African Centre for Migration and Society</td>
</tr>
<tr>
<td>ANC</td>
<td>African National Congress</td>
</tr>
<tr>
<td>ASGISA</td>
<td>Accelerated and Shared Growth Initiative-South Africa</td>
</tr>
<tr>
<td>BSA</td>
<td>Business South Africa</td>
</tr>
<tr>
<td>CDE</td>
<td>Centre for Development and Enterprise</td>
</tr>
<tr>
<td>CPS</td>
<td>Centre for Policy Studies</td>
</tr>
<tr>
<td>CoRMSA</td>
<td>Consortium for Refugees and Migrants in South</td>
</tr>
<tr>
<td>COSATU</td>
<td>Congress of South African Trade Unions</td>
</tr>
<tr>
<td>CP</td>
<td>Conservative Party</td>
</tr>
<tr>
<td>DP</td>
<td>Democratic Party</td>
</tr>
<tr>
<td>DA</td>
<td>Democratic Alliance</td>
</tr>
<tr>
<td>DG</td>
<td>Director General</td>
</tr>
<tr>
<td>DHA</td>
<td>Department of Home Affairs</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
</tr>
<tr>
<td>FMSP</td>
<td>Forced Migration Studies Programme</td>
</tr>
<tr>
<td>GEAR</td>
<td>Growth Employment and Redistribution programme</td>
</tr>
<tr>
<td>GNU</td>
<td>Government of National Unity</td>
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<tr>
<td>HDR</td>
<td>Human Development Report</td>
</tr>
<tr>
<td>HIV/AIDS</td>
<td>Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome</td>
</tr>
<tr>
<td>HSRC</td>
<td>Human Sciences Research Council</td>
</tr>
<tr>
<td>IDASA</td>
<td>Institute for Democracy in Africa</td>
</tr>
<tr>
<td>IDP</td>
<td>Internally Displaced Persons</td>
</tr>
<tr>
<td>IFI</td>
<td>International Financial Institution</td>
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<tr>
<td>IFP</td>
<td>Inkatha Freedom Party</td>
</tr>
<tr>
<td>ISS</td>
<td>Institute for Security Studies</td>
</tr>
<tr>
<td>JIPSA</td>
<td>Joint Initiative for Priority Skills Acquisition</td>
</tr>
<tr>
<td>LHR</td>
<td>Lawyers for Human Rights</td>
</tr>
<tr>
<td>MDC</td>
<td>Movement for Democratic Change</td>
</tr>
<tr>
<td>MP</td>
<td>Member of Parliament</td>
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<tr>
<td>NP</td>
<td>National Party</td>
</tr>
<tr>
<td>NGK</td>
<td>Nederlaandse Gereformede Kerk (Dutch Reformed Church)</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NNP</td>
<td>New National Party</td>
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<tr>
<td>RDP</td>
<td>Reconstruction and Development Programme</td>
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<tr>
<td>RRO</td>
<td>Refugee Reception Office</td>
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<tr>
<td>RSDO</td>
<td>Refugee Status Determination Officer</td>
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<tr>
<td>SACP</td>
<td>South African Communist Party</td>
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<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
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<tr>
<td>SALGA</td>
<td>South African Local Government Association</td>
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<tr>
<td>SAMP</td>
<td>Southern African Migration Project</td>
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<tr>
<td>SANDF</td>
<td>South African National Defence Force</td>
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<tr>
<td>SAPS</td>
<td>South African Police Service</td>
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<tr>
<td>SCCT</td>
<td>Scalabrini Centre of Cape Town</td>
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<tr>
<td>SCRA</td>
<td>Standing Committee on Refugee Affairs</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
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<td>-----------------------------------------------</td>
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<tr>
<td>SJC</td>
<td>Social Justice Coalition</td>
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<tr>
<td>TAC</td>
<td>Treatment Action Campaign</td>
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<tr>
<td>UDF</td>
<td>United Democratic Front</td>
</tr>
<tr>
<td>UDM</td>
<td>United Democratic Movement</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commission for Refugees</td>
</tr>
<tr>
<td>WCRMF</td>
<td>Western Cape Refugee and Migrant Forum</td>
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Chapter One: Introduction

The eruption of violence against foreign nationals across South Africa over several weeks in May 2008 was a stark moment in the country’s post-apartheid trajectory. By the time the overt violence subsided, 62 people had been killed, 670 injured, unknown amounts of property and possessions had been destroyed or looted, and more than 150,000 people had been displaced from their homes across the country (Segatti and Landau 2011, 10). Attempts to analyse and understand both the causes and expressions of this violence continue to occupy a range of academics and observers, and rightly so, as the violence, in a sense, lifted the veil from any remaining illusions of the reconciled, post-apartheid “Rainbow Nation,” revealing instead a country still haunted by the legacies of apartheid and the unfulfilled promises of the new, democratic dispensation.

My own research attempts to build on this body of work, but is not premised on a search for the causes or expressions of the violence or the widespread anti-foreigner sentiments so deeply embedded in the country. Rather, it is an attempt to identify potential sites and opportunities for progressive political change, understood as the upholding and expansion of rights for migrants, refugees and asylum seekers, the progressive dismantling of xenophobic social attitudes, and the reconceptualisation of migration as a potential tool for development. Anti-foreigner sentiments and negative conceptualisations of migration play out not only through dramatic outbursts of violence against foreign nationals, but also, and even perhaps more significantly, through the every-day attitudes and practices within both state and society. They play out particularly in the significant gaps that characterise the relationship between official migration policies and the ways in which such policies are interpreted and implemented on the ground. Looking for sites of potential change therefore entails looking beyond the dramatic
violence of May 2008, to see who is advancing challenges to the status quo of both the discourse surrounding migration and the actual practices of migration management in South Africa. This work was therefore initially conceptualised as a specific study of the ways in which civil society organisations are engaging in migration debates in South Africa, and the effectiveness with which they are able to work towards advancing a vision of migration that could serve as a counterfoil to the dominant discourse in the country, which positions migrants largely as a threat to South Africans – as stealers of jobs, bringers of disease, harbingers of crime and corruption, and as competitors for a limited pool of other scarce resources and services. It is an attempt to help answer questions of how wide, or how limited, are these spaces for social and political change in South Africa in the area of migration politics? Who occupies these sites, in what ways, and how effectively?

However, in seeking answers for these questions, it soon became evident that the study of the potentials of civil society (itself far from a coherent and unified whole) to engage in progressive, or systemic change in this arena could not be separated from either the broader social and political forces that shape attitudes, policies and practices in the country, or from the more specific challenges of the state (also far from a coherent and unified whole) in terms of developing and attempting to implement migration policies in the post-apartheid context. To begin to meaningfully understand the potentials and limits of change meant delving into the various processes, policies, and practices that both shape and inform that space for change, and the resulting research demonstrates that the work of civil society is deeply circumscribed by these factors. In the following chapters, the evidence shows that a small pool of civil society actors remain the most vocal and persistent challengers of the status quo of migration politics and practice in South Africa, and that they have played, and continue to play, an important role
in struggles to expand and uphold migrants’ rights, and to provide migrants with much-needed services. Yet, systemic or progressive change, particularly towards a broad reconceptualisation of migration as a potential tool for development, remains unlikely. The work of civil society organisations is instead shaped and constrained by the demands of responding to rapidly shifting migration patterns within a society still grappling with the negative social and economic legacies of apartheid, and characterised by a deeply embedded mistrust and resentment of foreign nationals. Substantial gaps between migration policies and their implementation mean that civil society organisations must work in a tenuous context in which laws and legislation bear little resemblance to migration management in practice or to the lived realities of migrants, and in which migration management is framed by the state in the language of securitisation and control. This segment of civil society also faces ongoing and deep-seated internal challenges that delimit its effectiveness.

The organisation of this research reflects this complexity. The second chapter begins with an outline of the methodology behind this research, addressing some of the specific challenges, limitations and benefits of the selected approaches. Particularly, I look at the rewards and limitations of an ethnographic, participant observation approach, as well as the rewards and limitations of qualitative, semi-structured key informant interviews, both within civil society and amongst elite respondents.

Chapter three explores various interpretations of the migration-development nexus through the theoretical lenses of structuralism and political economy, post-colonial and post-structural theory, and state-nationalist perspectives. It situates the current wave of optimism surrounding this nexus within a broader history of development thinking and theory. Also included is the emerging “South-South” migration literature, which focuses on the particular
challenges, opportunities and dynamics of migration amongst countries of the so-called “South,” as part of a corrective to the domination of “South-North” research in global migration studies. From this literature, it is apparent that tensions arise between the state, with its responsibility for the drafting and implementation of effective (and usually state-centric) migration policy, and the needs or agendas of individual migrants, migration advocates, and civil society actors, who may be approaching questions of migration from very different normative interpretations.

In chapter four, I apply a migration and development lens to some specific aspects of South Africa’s migration landscape, breaking down the complexities of the phenomenon of post-apartheid migration and examining in turn some of the particular dynamics of unskilled migration flows, the challenges of domestic migration, undocumented migration flows, the management of skilled migration, and finally, the debates around the regional management of migration. While international institutions such as the United Nations and the World Bank, alongside other international development actors, highlight or celebrate the potential of migration for development, individual migrants in South Africa must constantly navigate an often overtly hostile social and policy environment in which access to rights and even personal security are far from guaranteed. In such a context, the potentials of harnessing migration as a tool for development have been consistently overshadowed by state-centred concerns of sovereignty and security.

Because this research explores the role and capacity of non-governmental organisations and other non-state actors to influence migration debates and practice, chapter five introduces and problematises the concept of “civil society,” at a broad level, and also in terms of its specific application in the South African context. This chapter presents a conceptualisation of civil society which leaves room for a range of possible relationships with the state, and various levels
of commitment to processes of democratisation and liberalisation. It tracks the transition in post-apartheid South Africa from a largely conciliatory civil society working in conjunction with the new post-1994 state, to an increasingly contentious contemporary civil society, which occupies a more ambiguous and sometimes paradoxical position in relation to the state. Finally, this chapter tracks the emergence of civil society actors working on migration issues and positions them within this post-apartheid context.

Chapter six identifies and explores some of the key social and political processes that, taken together, shape and delimit the space within which both state and civil society actors engaged in issues of migration in South Africa must operate. The transition from apartheid to democracy opened the country up to new processes, patterns and pressures of migration, which now had to be managed by the state firmly within the parameters of the new, human-rights oriented dispensation. South Africa’s re-incorporation as a global actor on the world stage also entailed a new commitment to international agreements and protocols related to migration, and the recognition of asylum seekers and refugees as a new legal category. Simultaneously, the coincidence of the transition with the fall of the Eastern Bloc and the global consolidation of neo-liberalism has meant that the country has struggled to frame its own macro-economic policies, which ultimately, in turn, frame a country’s migration policies. At the time of the transition, the country was thus faced with a rapidly changing migration environment and the absence of suitable policy with which to manage it. Policy makers and civil society actors alike were faced with the paradox of either advocating for, or designing, migration policies that upheld the new obligations of the Constitution and the human rights approach of the new South Africa, within the context of a society that did not necessarily subscribe to such an approach, particularly when it comes to the rights of migrants, refugees, and asylum seekers. Migration debates in
South Africa are also circumscribed by the widespread anti-foreigner sentiments, or “xenophobia,” and the often violent expression of these sentiments, which has become an unfortunate hallmark of the post-apartheid country. These sentiments, I argue, are not isolated within either state or society, but permeate the boundaries between the two in a mutually constitutive process. I argue that the ways in which migrants, refugees and asylum seekers are socially constructed in the context of South Africa has important implications not just for the ways in which they are considered and treated in the policy realm, but also for the ways in which civil society actors are able to mobilise and advocate for these populations. Regardless of the de jure rights of migrants, policy makers and civil society actors alike are conscious of a de facto hierarchy that, in practice, places the needs and rights of South Africans above those of non-South Africans.

In chapter seven, I explore the migration policy inheritance of the new government, and the challenges it faced in drafting post-apartheid Refugee and Immigration policies to reflect the new social and political landscape. After placing migration policy in historical context within the country, I first interrogate the policy-making processes that gave rise to the country’s first Refugees Act of 1998. While not without contention (particularly when compared to the processes that culminated in the Immigration Act of 2002), this process was relatively quick and straightforward, relying heavily on international legal norms, along with input from civil society and academic actors, to guide the development of policy. Nonetheless, the resultant policy, while widely lauded, immediately fell short in terms of implementation, leaving an overwhelmed state caught between its international and domestic legal obligations, and a growing recognition that the asylum system was far from working as it had been envisioned. The chapter then turns to a discussion of the Immigration Act of 2002. The creation of this Act represented a long,
convoluted and highly contentious undertaking, particularly within the context of the post-apartheid Government of National Unity (GNU), in which the Minister of Home Affairs, responsible for the legislation, was also the leader the Inkatha Freedom Party (IFP), the long-time political arch-rival of the African National Congress (ANC). Mistrust between parties and bitter disagreements regarding the development of the Immigration Act led to a lengthy and disjointed policy process, and an Act that did not necessarily reflect the vision of the governing party (though this vision, in and of itself, was never clear). Proposals to realign immigration policies with objectives of national and regional development were largely sidelined, and immigration legislation has remained rooted in ideas of security and control, with a continued emphasis on the detention and deportation of undocumented migrants. While there have been periodic governing party allusions to the need for a comprehensive overhaul of migration policy since the ANC took over the Home Affairs portfolio in 2004, this has not happened to date.

Irrespective of the actual legislation, both the Refugees and Immigration Act have faced interminable challenges in implementation, not least because of significant capacity and resource issues within the state that limit the state’s capacity for the effective management of migration. These are the dynamics explored in chapter eight. Bureaucratic legacies, the various human and financial resource challenges of the Department of Home Affairs (DHA), alongside confusion and contention over regulations and rule-making by officials within DHA, have led to substantial gaps between the migration policies on paper and the ways in which policies are implemented on the ground. These gaps, and their consequences, are exemplified in the country’s robust detention and deportation regime and in the systemic administrative barriers faced by migrants attempting to access the protections of the asylum system. Illegal practice and the systemic violation of migrants’ rights are endemic in this context, and failures in implementation have led
to a widely shared sentiment that the state has lost control of migration management. So far, this has not led to a fundamental rethinking of the systems themselves, but to an increasing hardening of the system, a growing emphasis on securitisation, and the framing of migrants (including refugees and asylum seekers) as blatant abusers of an overly generous system.

This is the context within which civil society actors working in the migration arena must operate. Chapter nine turns to a more specific discussion of the ways in which civil society organisations in this arena are able to mobilise and engage with migration issues. I argue that within the contemporary context of widespread state mismanagement of migration, and particularly the refugee and asylum seeker stream, civil society pursuits of structural, progressive change in this arena, while not unimportant, are nonetheless severely limited and constrained. To some extent, this sector of civil society was able to take advantage of the political opportunity presented by the 2008 outbreak of violence, particularly through increased national and international attention on migration issues in the country, and through the forging of new relationships and networks with both state and other non-state actors. However, responses to the violence also revealed a number of significant challenges for civil society, including the difficulties of moving beyond a humanitarian response towards collective politicised engagement with the issues that underscored the violence. The challenges of effective civil society engagement in this arena have continued beyond 2008. In a national context of xenophobia and widespread poverty and inequality, organisations face the dilemma of how to advocate or provide targeted services for migrants, refugees and asylum seekers without fuelling the fires of resentment amongst South African citizens. The complexity of the underlying roots of violence and resentment against migrants represents another key challenge for organisations attempting to effect systemic change, as interventions focusing on the causal roots of xenophobia can quickly
develop into interventions that speak more to the issues and needs of South Africans, rather than directly to the needs and issues of migrants. Chronic funding competition between organisations, along with diverse mandates and approaches to engagements with the state, can complicate relationships amongst civil society actors in this arena, impeding opportunities for collective action. Attempts at forming regional forums and networks are obstructed by issues of resources and time, along with unresolved issues of accountability and representation. For some civil society actors, litigation has emerged as the most effective tool of engagement and advocacy in the repertoire of collective action. There continue to be important legal victories, but there are also key limitations to the effectiveness of this approach, including the expense and risk of litigation and the disconnection between civil society legal victories and changes in practice by Home Affairs. Litigious engagements can further strain the already tenuous relationship between Home Affairs and civil society, and usually exist in isolation from other, complementary collective action strategies. Until the conceptualisation of migrants fundamentally shifts, both in state and society, away from the idea of migrants as economic threats and competitors in a zero-sum game, as criminals and carriers of disease, the contributions of civil society, while important and much needed, will likely continue to be minimal in terms of effecting systemic, progressive change in this arena. In this climate, the recasting of migration as a potential tool for national and regional development, in both policy and practice, appears unlikely for the immediate future.
Chapter Two: Methodology

Two different periods of fieldwork were undertaken for this research, from June to December 2011, and from the late September 2012 until the end of February 2013, though I remained in the South Africa throughout the analysis and writing. The research involved six months of participant observation through the migrant service and advocacy non-governmental organisation (NGO), the Scalabrini Centre of Cape Town (SCCT), combined with a series of thirty in-depth, qualitative semi-structured and key informant interviews conducted over both field research periods with a broad spectrum of NGO and civil society actors and activists, alongside a range of policy actors, parliamentarians, opposition ministers, and former high level civil servants and officials from the Department of Home Affairs. Most interviews took place in Cape Town, though I also travelled to Johannesburg and Pretoria for policy-related interviews in November 2012 and to Langebaan on the West Coast in December 2012. I subsequently transcribed and thematically coded all interviews, using Excel to organise the data. My work with the SCCT was based at the central office in downtown Cape Town and also in the peri-urban community of De Doorns. I kept a detailed field journal documenting the kinds of issues that I encountered and observed through this period. In my Scalabrini capacity, I also was invited to attend meetings of a newly-convened “Western Cape Refugee and Migrant Forum,” a meeting organised by the United Nations High Commission for Refugees (UNHCR) for representatives from the Somali diaspora in Mitchells Plain, and a series of meetings with officials from various government departments at the City of Cape Town, the Western Cape Province, and the national Department of Home Affairs, along with other relevant stakeholders. In my personal research capacity, I attended meetings within Parliament related to migration policy, including three Home Affairs Portfolio Committee meetings and one joint committee meeting during which migration and
border security issues were discussed. I also monitored news sources regularly, and collected news articles, research reports, and relevant documentation. Access to the newspaper archives at the SCCT was particularly helpful. Further to this, one interviewee provided me with unpublished commissioned research reports, while two other former high level officials within the Department of Home Affairs provided me with a range of primary internal Home Affairs documentation, including Ministerial correspondence, Cabinet memoranda, speeches, and other official correspondences.

**Ethnography & Participant Observation: Methodological Rewards and Limitations**

My research while based at the SCCT was grounded in a qualitative, ethnographic approach. As Atkinson and Hammersley write, “ethnography” usually refers to forms of social research having a substantial number of the following features:

- a strong emphasis on exploring the nature of particular social phenomena, rather than setting out to test hypotheses about them; a tendency to work primarily with “unstructured” data, that is, data that have not been coded at the point of data collection in terms of a closed set of analytic categories;
- investigation of a small number of cases, perhaps just one case, in detail [and];
- analysis of data that involves explicit interpretation of the meanings and functions of human actions, the product of which mainly takes the form of verbal descriptions and explanations, with quantification and statistical analysis playing a subordinate role at most (1994, 248).

Ethnographic methods are “those methods that seek to uncover emic (insider) perspectives on political and social life and/or ground-level processes involved therein (Bayard de Volo & Schatz 2004, 267). As Bayard de Volo notes, while it is not a common method in political science (and is usually associated more as a method of sociologists or anthropologists), if we are to be defined as political scientists by the subjects we study rather than the methods we use, “then we must be open to and educated about a broad array of methods, including ethnography”
(2009, 217). For the political scientist, suggests Bayard de Volo, one of the key contributions of ethnography as a methodology is,

the unique insight it can bring to the study of multilevel processes. Political scientists employing ethnography may ask how power dynamics circulating at the micro-level connect with those occurring regionally, nationally and globally. How do people experience politics in the form of laws, surveillance techniques, structural shifts, and political violence? (2009, 222).

This kind of insight would be crucial in developing a multi-faceted, multi-scalar understanding of migration politics in South Africa, and in beginning to understand the ways in which actors at the non-governmental level, for example, perceive and interact with actors at the policy level, and vice versa. Participant observation, which I interpret as one of the key tools of an ethnographic approach (see Bray 2008, 305), is described by De Walt and De Walt as a method in which a researcher actually takes part in “the daily activities, rituals, interactions, and events of a group of people as one of the means of learning the explicit and tacit aspects of their life routines and their culture” (2002, 1). They note that participant observation as a methodology can provide important context for the development of further research tools, such as open-ended interviews or the construction of interview guides, and that it

encourages the continual reassessment of initial research questions and hypotheses, and facilitates the development of new hypotheses and questions as new insights occur as a result of increasing familiarity with the context (De Walt & De Walt 2002, 13).

Through my affiliation with the SCCT, I intended to ground my research in the daily realities and lived experiences of migrants and people working in this sector, and to help ensure that the research topic in itself was both useful and relevant. I hoped that working with the SCCT in a mutually agreed upon capacity could not only assist in validating and grounding my research questions, but could also allow me to contribute in service to the community that was the ultimate focus of my research. I could also gain access to networks of other civil society actors,
and the opportunity to build relationships and trust that could potentially contribute to stronger research, and even help facilitate long-term research relationships. At the SCCT, I worked specifically with the De Doorns Integration Project, led by Outreach Coordinator Sergio Carciotto. The project was based in the troubled farming community of De Doorns, situated approximately 130 kilometres northeast of Cape Town in the Hex River Valley, and was conceptualised as a response to deep-seated tensions in the community between migrant farm workers (mostly Zimbabweans) and local residents. In November 2009, these tensions led to local residents chasing approximately 2500 Zimbabweans from their homes, burning, looting and destroying property amidst threats of personal violence. In the biggest humanitarian effort in South Africa since the broader national violence against foreign nationals in May 2008, tents were set up on a local sports field in De Doorns’ town centre to house those affected by the violence, as a range of actors, from various levels of officials, to civil society actors, to the UNHCR, attempted to work with both the displaced Zimbabweans and the local community on a tenable solution. The SCCT was involved during this time in helping to monitor conditions in the camp, and recognised at that time the need for sustained involvement in De Doorns, and the need to begin to address not just the symptoms of this violence, but also to try to find ways of beginning to address its root causes. I joined the De Doorns integration project in June 2011, and subsequently spent an average of approximately 25-30 hours a week over the next six months working closely on this project. My role with the SCCT ranged from office work and meeting attendance, to writing funding proposals and reports, to helping to develop and implement a monitoring and evaluation protocol and the associated tools for the De Doorns Integration Project. In De Doorns, we met most weekends with a group of usually between 5-15 local residents, mostly South Africans, though including several BaSotho members as well, who
were in the process of forming their own community-based organisation, which would ultimately give itself the name “Tholulwazi,” meaning “gain knowledge” in Zulu. We also worked on projects with the Tholulwazi team and other non-governmental organisations, from the implementation of soccer-based HIV/AIDS awareness programmes in schools to the screening of short films and documentaries related to HIV/AIDS, xenophobia or other social issues at local clinics, schools and on local farms. SCCT worked with local clinics to screen films, followed by facilitated discussions and the offer of HIV/AIDS and tuberculosis testing and counseling on site.

From a methodological perspective, being exposed, even tangentially, to the lived realities of some of South Africa’s most vulnerable citizens and migrants, and the sheer volume of people with such pressing needs and often unbelievable stories of trauma, helped me frame and give an immediate human face to the kinds of questions I was asking of both civil society and policy actors. At the SCCT and in De Doorns, on a daily basis, the realities of some of the issues in contemporary migration and the overwhelming challenges of substantive change revealed themselves, however far removed these realities were from the policies on paper, or the way migration management had been envisioned for the post-apartheid dispensation. In De Doorns, I was able to observe and interact with mostly South Africans, who were themselves grappling with questions of migration, and specifically migrant labour, and what it meant in their own lives and community. Working with SCCT also allowed me to build networks within the local NGO community. Participating in NGO meetings allowed me to gain an important perspective on the dynamics between different governmental and non-governmental actors, and to observe directly some of the key challenges they face in their interactions with issues of migration in contemporary South Africa, and with each other.
This kind of affiliation, however, also brought into focus new kinds of methodological challenges, moving me further along the spectrum of participatory observation into a realm of research in which contributing to change became part of my own personal agenda as well. For all of the depth and value this approach added to my research, there were also some important challenges and limitations. The first, and perhaps most obvious limitation, is the question of bias or impartiality in one’s research. It has long been recognised that the very nature of ethnographic research, concerned as it is with interactions with people over relatively long periods of time, with familiarity and the development of trust and relationship, lends itself to challenges of this nature; as Bayard de Volo and Shulz write, an ethnographic approach by necessity involves “letting trust and emotional engagement be of benefit to the research project” (2004, 267). This challenge is, perhaps, particularly pronounced when actively engaging in work with the community one is also researching, especially within an environment of activism or advocacy, where there are likely to be shared values, backgrounds, and common sympathies. As Fenno writes,

in doing the things that must be done to maintain desirable levels of access and rapport, the participant observer can slowly lose the ability and the willingness to criticize. Some loss of objectivity comes inevitably, as increased contact brings sympathy, and sympathy in its turn dulls the edge of criticism (1990, 80).

As with all methodologies, there are strengths and weaknesses, and acknowledging one’s positionality and attempting to be consistently aware of these challenges throughout the research process may simply be the best one can do. This approach is also, of course, philosophical and epistemological, reflecting my own beliefs that it is possible to conduct worthwhile academic research while simultaneously contributing to practical change.
There were, however, other methodological challenges that arose through this research approach. For instance, a constant challenge was negotiating the lines between my role working with the SCCT and my role as a researcher. In De Doorns, for example, the focus groups and surveys I principally developed and analysed yielded interesting and rich information, but the data was for the SCCT, and not for my own work. In Cape Town, another example of this kind of negotiation occurred during a series of meetings I was invited to attend in my SCCT capacity, at which representatives from other NGOs were present along with officials from various departments and levels of government. During these meetings, I was conscious that I was attending as an SCCT representative, and not as a researcher. The approach I took to negotiating this dilemma was to pursue information and impressions I gathered through such meetings to inform the questions and approaches to subsequent and independently arranged interviews, where my capacity as a researcher was clear and informed consent had been granted by the interviewee.

**Semi-structured and Key Informant Interviews: Methodological Rewards and Limitations**

Alongside my work with SCCT, I also conducted a series of thirty qualitative semi-structured and key informant interviews, most of them recorded, during both rounds of field work. My interviews began with members of the NGO and civil society community. Working with the SCCT helped me gain access to other civil society organisations and actors, and also helped me formulate a better grasp of the civil society landscape. While maintaining thematic coherence through semi-structured interviews, I also strove to cater each interview to each individual. Most of these interviews lasted between 45 minutes and an hour.
It became clear quite early that any serious investigation into the spaces for substantive and political change in migration politics and practice would also need to be based on an understanding of the policy environment that frames migration issues in the country. To this end, while I continued to interview NGO actors, I simultaneously began a series of policy-related interviews, with individuals who were intimately involved in post-apartheid immigration and refugee policy-making processes and with some who are involved in such debates currently. Goldstein writes that there are three basic goals that researchers have when conducting “elite” interviews:

- gathering information from a sample of officials in order to make generalizable claims about all such officials’ characteristics or decisions;
- discovering a particular piece of information or getting hold of a particular document; and
- informing or guiding work that uses other sources of data (Goldstein 2002, 669).

For my own purposes, the latter two goals defined my pursuit of such interviews. As with much to do with field work, the procurement of these interviews was a combination of persistence, patience, connections, and luck. Due to a chance conversation with a fellow traveler during my trip to South Africa, for example, I found myself days after arriving in the country sitting in the office of Mangosuthu Buthelezi, the long-time President of the Inkatha Freedom Party, a current Member of Parliament, and the first post-apartheid Minister of Home Affairs, from 1994-2004. It was under his tenure that the country’s first post-apartheid Immigration and Refugee legislation was developed and promulgated. Related to this encounter, I was also able, in the months to come, to contact his former Private Secretary for suggestions about individuals with whom I might speak in more depth about post-apartheid policy processes. This connection, as tenuous as it was, proved invaluable, in terms of facilitating introductions and gaining access to what would become a purposeful, snowballing series of “elite” interviews. Other “elite”
interviews were conducted with individuals who simply responded positively to cold-call emails, such as the then Shadow (opposition) Minister of Home Affairs and one current African National Congress Member or Parliament (MP) who also acts as Home Affairs Whip.

“Elite” interviews come with their own set of difficult methodological quandaries. While it is possible still to try to structure interviews to some extent around specific themes, I found myself agreeing with political scientists such as Berry (2002) and Aberbach and Rochman (2002) that in elite interviews, open-ended questions have the most to offer, methodologically. As Aberbach and Rochman write of their own experience, “Elites especially – but other highly educated people as well – do not like being put in the straight jacket of close-ended questions” (2002, 674). They also argue that “open-ended questions provide a greater opportunity for respondents to organize their own answers within their own frameworks” (Aberbach & Rockman 2002, 674). However, as Berry points out, open-ended questioning also invites what he calls the paradox of elite interviewing methods: that is, that “the valuable flexibility of open-ended questioning exacerbates the validity and reliability issues that are part and parcel of this approach” (2002, 679). Berry considers open-ended questioning to be the riskiest but potentially most valuable type of elite interviewing; it “requires interviewers to know when to probe and how to formulate follow-up questions on the fly. It's a high-wire act” (2002, 679). To this end, interviews were semi-structured, but left a great deal of scope to probe the particular individual experiences, recollections, and perspectives of each interviewee.

While almost all interviews were recorded digitally and transcribed, in several instances, the digital recorder clearly impeded the comfort level of the interviewee and negatively impacted the quality of the discussion. In such cases, I turned the recorder off, and wrote extensive notes
immediately following the interview. This material, then, based as it is on the filter of my memory and translation onto paper, is not as clearly reliable as the direct quotations, for example, taken from the transcriptions of recorded interviews. However the benefits of the depth, scope and intimacy of these unrecorded interviews have been well worth the methodological trade-off. Some challenges emerged through this approach in terms of interviewees who agreed at the outset of an interview to attribution, for example, along with a recorded interview, but where the natural progression of the interview led me, or both of us, to a decision to turn the recorder off. In these cases, I had permission to use the material, but it could no longer be attributed.

Respondents were selected through purposeful sampling, targeting those with specific knowledge, in search of “information-rich cases,” but also, particularly in the elite sample, through snowballing introductions (Baxter & Eyles 1997, 513). I attempted to mitigate the methodological challenges of snowball sampling in elite interviews (especially in terms of being introduced to people with more or less similar political views to each other) by actively pursuing a range of perspectives from actors of different political stripes. This was in part possible through cold calls (being sure to highlight my desire to be able to represent their particular point of view in my work), but also, through specifically requested introductions by interviewees with whom I had already developed some level of rapport. Indeed, the importance of rapport was much more central to access than I had anticipated early in my research. Fenno, writing about direct political science research with politicians, writes that rapport,

refers to the state of the personal relationship – of compatibility, of understanding, of trust – between researcher and researched. It cannot be prescribed or taught. Always it is a challenge and a preoccupation. Because you must constantly evaluate the quality of the data you are getting, you must, perforce, constantly evaluate the quality of your relationship with the
person who is giving it to you. Mostly, the way you establish good rapport is by being nice to people and trying to understand the world as they see it. You need to be patient, come on slow, and feel your way along (1990, 68).

Fenno adds that building rapport is hard work, given the many contexts and types of people you find yourself confronted with in this kind of approach (1990, 68). This, I found very true in the context of interviews that took me across the spectrum from far left-wing activists to retired government legal advisors and high-level bureaucrats, from NGO directors to Opposition Ministers, from refugees themselves to those partly responsible for developing refugee and immigration legislation, and from the camps of one political party directly into the camps of a political arch-rival. Taken together, the experience of participant observation, combined with interviews amongst a diverse range of both civil society and elite policy actors also helped to illuminate the sheer diversity of opinions and approaches to migration management within and between state and society actors, and to give lie to any notion of either a united, coherent state or a united, coherent civil society.
Chapter Three: Conceptual Considerations: Migration and Development

In recent years, the migration and development nexus has been the focus of increased academic and policy interest. I situate my own research, which is guided by overarching questions about the potential benefits and detriments of migration for the improvement of people’s circumstances and lives, within this growing body of theory. This literature raises difficult questions that are echoed in much of the broader development theory literature. For example, what does “development” actually mean, for whom, and who decides? The costs and benefits of migration, I argue, tend to shape-shift according to whether one chooses to focus on the region, the state, the family, or the individual as one’s principal unit of analysis. Much of the recent literature on the linkages between migration and development accepts the development potential of the movement of people, but also, very often, with important caveats about the importance of context.

While migration has long been studied through the disciplinary lenses of sociology, anthropology, political science, geography and economics, it has also become an increasingly prevalent and debated concept within the realm of development studies. Globally, migration is on the rise, with global “migrant stock” increasing from 75.9 million in 1960 to 190.6 million in 2005, and with numbers rising in the developing world from 49 to 86 million in this same period (Crush & Freyne 2010, 3). Growing alongside this increased movement of people is the level of attention being paid by scholars and policy-makers in recent years to the migration-development nexus, which found its place in the global policy-making limelight with the United Nations’ first High-Level Dialogue on the subject in 2006, and featured as the subject of the 2009 United Nations Human Development Report (Crush and Freyne 2010; UNDP 2009). Representations of migrants and migration in relation to issues of development have shifted and changed through
the years, with a contemporary normative shift within a growing body of literature away from a conceptualisation of migration as a phenomenon to be controlled, prevented, or mitigated, and towards a reconceptualisation of migration as a potential function of, and tool for, development. Specifically, this chapter will explore interpretations of the migration-development nexus through the theoretical perspectives of structuralism and political economy, post-colonial and post-structural theory, and state/nationalist perspectives on migration. From these competing perspectives, important tensions emerge that help to explain, in part, the challenges that arise between the state, which is responsible for the conceptualisation and enforcement of a state-centric migration policy, and the needs or agendas of individual migrants, migration advocates, and non-governmental organisations, who may be approaching questions of migration from very different normative interpretations. Finally, this chapter will address the emerging literature that focuses on the particular dynamics, challenges, and opportunities related to “South-South” migration, in part as a corrective to the over-emphasis on “South-North” issues and theory that continues to dominate migration studies.

The question of why individuals migrate is a pivotal one in the conceptualisation of migration, and therefore, in the positioning of migration in development thinking. Whether migration is an escape from untenable living conditions (economic, ecological or political) in a migrant’s place of origin, or a less desperate search for improved living conditions, most discussions of migration assume some degree of economic motivation. However, there is much disagreement in the literature as to the degree of agency prescribed to individual migrants in their decision-making, versus the degree to which migrant decisions are shaped in response to larger structural or political-economic conditions. Migration theorizing in the 1960s and 1970s tended to position migrants as individual labourers within a modernization framework, reacting
rationally to the exogenous push and pull effects of capital. Economists such as John Harris and Michael Todaro, for example, looked purely to wage and labour models to explain rural-urban migration, while the geographer Wilbur Zelinsky argued that “there are definite patterned regularities in the growth of personal mobility through space-time during recent history, and these regularities comprise an essential component of the modernization process” (Harris & Todaro 1970, Zelinsky 1971, 221-222). Silvey and Lawson explain that in modernization perspectives,

rationally calculating individuals are understood to benefit economically from migration, which they undertake voluntarily as a function of temporary regional disparities in economic development. Migrants are viewed as “agents of modernization” whose behavior is determined largely by economic factors. This theorization is clear in labor force adjustment and human-capital approaches in which migrants are conceptualized as individual genderless agents, acting according to economic rationalities (1999, 126).

This theorization of migrants as “individual genderless agents” simply acting according to economic rationalities was subsequently criticized in other political-economic theorizing, which positioned migrants less as rational actors maximizing their economic utility than as victims of the global political-economic structure. As Wood explains,

rather than treating migration as a discreet dimension of social reality that can be subjected to separate investigation, the [historical-structural] perspective assumes that population movement can only be examined in the context of historical analysis of the broader structural transformations underway in a particular social formation (Wood 1982, 301).

In contrast to the microeconomic model of migration, writes Wood, the historical-structural perspective assumes that any explanation for migration needs to explore pressures and counterpressures in the national and international economy that lead to changes in the organisation of production (1982, 302). Since it is these structural factors that influence both the degree and geographical distribution of labour mobility, Wood argues that migration ought to be primarily considered a macrosocial rather than an individual process (1982, 302). Advancing the
structuralist position, Nanda Shrestha concludes that the major shortcomings of the free and rational choice models advanced by authors such as Todero, Harris and Zelinsky, is that they conceal the broader reality and social spatial context of migration – what Shrestha sees as the ways in which “capital development and the social relations of production interact to produce migration” (1988, 184). Elsewhere, Shrestha argues that,

development issues are essentially demographic issues because population, to paraphrase Marx, is the basis as well as the subject of development. Therefore, it is no wonder that governments, throughout history, have devised policies attempting to mold human behaviour to achieve certain political and economic goals” (Shrestha 1987, 339).

Like Shrestha, Samir Amin has also argued that migration is best understood from a structural perspective, arguing that decisions to migrate always have an underlying economic rationale, deeply contingent on broader social-economic conditions; indeed, Amin argues that “modern migrations are migrations of labour, not of people” (as quoted in Baker & Aina 1995). Amin sees migrants as labourers in an established host-society, where they generally occupy positions of lower status and economic privilege than citizens of the host-society. Writing about migration in Africa, Amin argues that the phenomenon is “part of the peripheralization of Africa in global capitalist system,” and can only be explained in terms of the broad structural global economic systems and inequalities (as quoted in Baker & Aina 1995, 33).

Other scholars, however, still writing within a political economy framework, acknowledge the shortcomings in both individualist, rationalist theories of migration and broader structural or historical-materialist interpretations of migration. In the 1980s and 1990s, a “new economics of labour migration” or NELM approach emerged as a critical response to earlier, neo-classical migration theorizing. Wood (1982), for example, directly addresses the tension between microeconomic theorists and those who focus on the wider systemic push and pull
factors by proposing a shift in the unit of analysis to the household level. Rejecting microeconomic approaches to migration theory as reductionist, Wood argues that sweeping historical-structural approaches err in the opposite direction and do not pay enough attention to the factors that motivate individuals in their decision-making. He contends that the decision to migrate is assumed to be a rational one, “but no attempt is made to conceptualize the nature of the decision making process or the various elements that enter into the calculus” (Wood 1982, 306). There is thus a conceptual discrepancy in explaining migration (in which the phenomenon being explained is the movement of people) by drawing upon such broad explanatory factors as systems of production and the associated classes (Wood 1982, 307). As an alternative, NELM theorists propose that the family, or household, is a much more effective unit of analysis, bridging the gap between microeconomic and historical-structural interpretations of migration (Stark and Bloom 1985; Wood 1982). This interpretation assumes that “people, households and families act not only to maximize income but also to minimize and spread risks,” and considers the household as best positioned to diversify their resources (including labour) in order to minimize risks (de Haas 2010, 242).

Structuralist approaches to migration are vulnerable to a similar vein of criticisms that have been directed towards broader structural theories of development, including dependency theory (Cardoso and Faletto 1979; Frank 1966) and world systems theory (Wallerstein 1974). This includes the critiques that this approach may not adequately represent the individual agency of migrants, essentialising their experiences, erasing subjectivities and difference, and circumscribing the possible outcomes of migration through the potentially over-simplified positioning of migrants as victims of a structurally unjust and pre-determined global system. It can also ignore the ways in which migration both shapes and is shaped by broader economic and
social forces, a perspective explored in de Haan and Rogaly’s introduction to a set of contributions devoted to labour mobility and rural society in a 2002 volume of the *Journal of Development Studies*. Here, de Haan and Rogaly (2002) argue that while migration (understood as labour migration) is a social process structured by gender, class and ethnicity, migration itself also affects social structures and relations – an important shift away from the positioning of migrants as passive actors, and of migration as a phenomenon suspended in time, conceptualized as the movement of individuals from one place to another, rather than as a dynamic and complex social, economic, and cultural process with wide-ranging and ongoing context-specific impacts.

While not abandoning the theoretical gains offered by structural theory or political economic approaches to theorising migration, some scholars have adopted an approach that offers some degree of balance between recognizing the agency and subjectivity of migrant experiences and motivations, while simultaneously keeping sight of the larger socio-economic and structural forces that may have bearing on these decisions and motivations. Hein de Haas, for example, has identified the notion that poverty and misery are the root causes of labour migration as one of his seven “migration myths,” which, while not negating the structuralist argument that migration can be explained by global economic systems, goes some way in dispelling related representations of migrants as objects and victims, as opposed to agents who are making active choices (2005, 1271). De Haas notes that it is rarely the poorest who migrate, due to the significant costs, risks, necessary knowledge and networks involved in a decision to migrate (2005, 1271). Rather than absolute poverty, de Haas argues, “a certain level of socioeconomic development, combined with relative deprivation in the form of global inequality of development opportunities, seems to be the most important cause of migration” (2005, 1271). Bakewell also takes a nuanced approach to theorizing migration. Bakewell does not deny that
many migrants are reluctant migrants, and may indeed be caught up in a global labour market and be “powerless in the face of a vicious system” (2008, 1353). He does, however, simultaneously recognise the larger structural forces at play, such as the policies and systems that fed colonial states’ reliance on migrant labour in Africa. Bakewell argues that a purely structural perspective does little to explain why some people move while others remain behind; “nor does it make sense of why people migrate in the face of large obstacles and reasonable opportunities that would enable them to stay at home” (2008, 1354). He also notes an ongoing emphasis in many development policies on the control of mobility, along with an underlying normative assumption that circular migration, in which migrants ultimately return “home,” is the preferred outcome for all. While Bakewell concedes that,

> the theories and practice of development appear to have moved away from such blatant hangovers from the colonial past, many of these roots remain in place; in particular, the ongoing ambivalence, or at times hostility, towards human mobility that is outside the control of states” (2008, 1343).

This contention that development policies around migration – and migration policies more broadly – are still rooted in colonial legacies leads to questions of how post-colonial theorizing of migration can help build an understanding of contemporary interpretations of migration in development theory and policy.

Of specific relevance to migration debates is the post-colonial literature surrounding the contemporary implications of colonialism’s legacy of classification, mapping, and the construction of identity in relation to both the colonizer and the colonized. While Said’s (1979) “Orientalism” offered a seminal exploration of the process and purpose of constructing the “Other” Coronil’s (1996) writing on the simultaneous construction of the “Occident” complements Said’s work by focusing attention on the ways in which “western” constructions and perceptions of self, enable the “Other” to be shaped in contrast. Colonial imaginings and
categorizations of communities, history, “ethnic” and religious groups were not simply exercises in organization; rather, they served to socially construct a hierarchy of race, gender and religion, within a clearly defined geographical grid, delineating the sites within which colonial power could be exercised (Anderson 1991; McClintock 1995).

The legacies of the colonial drive for categorization and order are ubiquitous, with important implications for the construction and representation of migration as a process, and migrants as individuals. By its nature, the process of migration tends to defy the neat social and geographic categorizations that were entrenched under colonialism. Appadurai, writing about global tensions surrounding minorities (and migrants are most often minorities in their host regions or countries), advances this idea, in arguing that,

   minorities are a recent social and demographic category, and today they activate new worries about rights (human and otherwise, about citizenship, about belonging and autochthony, and about entitlements from the state (or its phantom remnants). And they invite new ways of examining the obligations of the state as well as the boundaries of political humanity, falling as they do in the uneasy gray area between citizens proper and humanity in general (cited in Chari and Corbridge 2008, 543).

In being a kind of physical embodiment of this global unease, Appadurai argues that minorities become scapegoats, and “reminders of the failures of various state projects (socialist, developmentalist, and capitalist)” (2008, 543).

   Like Appadurai, Coronil also draws upon images of undefined and shifting boundaries, expressing the idea that global changes (in culture, aesthetics and exchange) associated with post-modernity are re-drawing the map of modernity, uprooting familiar spatial categories, and creating a new fluid space in which the familiar linkages between history and territories are becoming increasingly disjointed (1996, 79). Importantly, Coronil contends that through these transformations,
contemporary empires must now confront subaltern subjects within reconfigured spaces at home and abroad, as the Other, once maintained on distant continents or confined to bounded locations at home, simultaneously multiplies and dissolves” (1996, 80).

The categories of the past, he argues, are not sufficient to accurately contend with these new collective identities and fragmented places, and the old imperial maps must now be abandoned for a new and more “critical cartography” (Coronil 1996, 80). Gupta and Ferguson also point to an ongoing post-colonial blurring of previously familiar distinctions such as those between centre and periphery, or colony and metropole (1992, 10). They argue that this kind of blurring results in a broad sense of displacement, not only for those who migrate, but also for those who remain in their place of birth, who find, through the mobility of others, that their own relationship to place, and sense of connection between place and culture, has “ineluctably changed” (1992, 10). Until this new “critical cartography” fully emerges, however, the unease identified by Appadurai, Gupta and Ferguson in association with this new fluidity of space, may be related to the ways in which migration has often been positioned within development, specifically in the problematizing of migration, the representation of migration as a disjuncture, and the underlying assumption of the desirability of human rootedness as opposed to human mobility (DeHaan and Rogaly 2002).

Especially since the turn of the millennium, many normative assumptions about migration have been challenged. There is now a growing literature surrounding the migration and development nexus, which moves away from conceptualising migration as a problem and failure of development, towards exploring migration as a reflection of, and potential instrument for, development. A turn towards optimism regarding the migration and development nexus has received significant backing from international organisations such as the World Bank, the United Nations, and a range of other development actors (Brønden 2012). The 2009 United Nations
Development Programme’s Human Development Report (HDR) entitled “Overcoming barriers: Human mobility and development,” for example, starts from the premise that being able to decide where to live is a key element of human freedom, and that migration, for many people, offers the best and sometimes the only option to improve their life chances (UNDP 2009). It argues that migration can be a highly effective means of improving and enhancing income, education, participation, and opportunities and makes a case for governments to reduce restrictions on the movement of people, both within and across borders (UNDP 2009). Scholars have also been critically probing this nexus. Questioning the normative value placed on rootedness in development theory and practice, for example, de Haas argues that the widespread “migration myth” that we live in an age of unprecedented migration is unfounded, and that it is rather the “increasing visibility of global migration for the resident populations of Western societies [that] might partly explain the popular perception that current migration is at unprecedented levels...” (2005, 1270). De Haas also emphasizes that development is inevitably accompanied by increased levels of mobility and migration, and critiques the anti-migration arguments that migration necessarily leads to destructive “brain drains” in sending countries, citing evidence that “brain drain” is rarely as dramatic or problematic as is often proclaimed; instead, de Haas points to a number of mitigating factors that may offset the losses of skilled professionals from a country, through a “counterflow of remittances, investments, trade relations, new knowledge, innovations, attitudes and information” (2005, 1272). While not endorsing such an approach, and with an important temporal caveat, Wolf has provocatively speculated that in fact the “simplest thing we can do to alleviate mass human poverty is to allow people to move freely or their labour services to be traded freely, though perhaps temporarily” (2004, 85).
Post-structural theoretical approaches have also provided a different lens to examine the ways in which both academic and popular discourse can express, reinforce, or displace ideas about migration and development. Drawing on the tools of discourse analysis, Comaroff and Comaroff (2001), for example, draw some direct parallels between the South African government’s vehement public campaigns to protect the country from “invasive alien” plant species (such as wattle, eucalyptus and pine), and the wide-spread xenophobic attitudes within the country related to “illegal alien” immigrants. Danso and McDonald have written about the ways in which migrants are represented in the South African media, which regularly evokes language of illegality, criminality, economic burden and threat, and draws on threatening aquatic and mob metaphors through terminology such as “hoardes,” “floods,” “flocking,” and “streaming” (2001, 129). Bakewell contends that discussions of migration in development have been largely rooted in a moralizing discourse “replete with examples of emotive and moralising terms about migrants,” such as complaints about the frivolous spending of remittances in home areas, judgments around the “brain drain” directed at skilled migrants who leave their country of origin, and “the assumption that migrants should [original emphasis] want to maintain their links with the country of origin” (2008, 1354). He also points to the usage in development projects of the reduction of out-migration as an indicator of development success, arguing that through this indicator, the underlying normative assumptions of development are revealed, namely, that development practitioners or policy makers know the “good life” for migrants, which is that they ought to stay and maintain traditional lives and livelihoods (Bakewell 2008, 1351).

Some post-colonial and post-structural scholars have also paid increasing attention to the gendered nature of migration and the intersection of gender, migration and development. Benería et al., for example, situate their discussion of the gender-migration-development nexus
within a context of the increasing feminization of labour since the last decade of the 20th century, and against the backdrop of an increasing asymmetry between the movement of capital and the movement of labour (2012). Feminist analysis of the migration and development nexus, they write, and more specifically feminist economics literature,

has focused on a variety of aspects, ranging from the employment of women migrants across sectors worldwide to the effects of women’s migration on gender roles, immigrant women’s wages and gender discrimination in labor markets, the formation of transnational families, and the differences between men’s and women’s remittance behavior, among others (Benería, Deere, and Kabeer 2012, 6).

In a southern African context, important work on the relationship between gender, migration and development has been undertaken by scholars such as Dodson, Peberdy, Crush and Ulicki (see, inter alia, Crush et al. 2010; Dodson and Crush 2006; Dodson et al. 2008). Nonetheless, scholars such as Nyberg-Sørensen et al. note that migration and development policies often ignore migrants’ gendered identities and practices, a sentiment echoed by Hujo and Piper who lament that gender analyses are still largely missing from discussions of the migration and development nexus (Hujo and Piper 2007; Nyberg-Sørensen, Van Hear, and Engberg-Pederesen 2002). Dannecker agrees that despite evidence of its relevance at each stage of the migration process, “gender as a constituent element of migration has not yet entered mainstream debates on migration and development...” (2009, 120). Bailey (2010) argues, in fact, that even as gendered concerns within the migrant-development nexus are often ignored, increasing levels of post-colonial and transnational (material and non-material) exchange are actually working to reinforce gender hierarchies across different scales. According to Bailey,

while the production and reproduction of postcolonial relations brings multiple agents into institutionalized contact, the path dependencies of gender norms specifically and cultural values more generally may actually facilitate a kind of epistemic hegemony. The contemporary migration-development nexus appears distinctive, and is growing and commanding a portfolio of
resources sufficient to hardwire relations between societies, economies, and
generations for a long time (2010, 381).

Emerging more broadly out of the post-colonial and post-structural literature on migration is a
difficulty in resolving the tensions between a rejection of essentialisation, categorisation and
labeling on one hand, and, on the other, a pragmatic necessity to offer analytical distinctions
between the wide range of individuals and groups that may be included within the very broad
conceptual idea of the “migrant.” Despite the myriad challenges, post-colonial and post-
structural critiques provide some very useful tools for questioning the normative assumptions
implicit in discussions of migration and development; yet these critiques can also struggle to
capture the important distinctions in this discussion, such as distinctions between those who
migrate by choice, and those who migrate out of desperate social, economic, environmental,
and/or political conditions. Also at issue is the very definition of development; Dannecker
argues, for example, that “the diversity of migration flows and patterns and the gendered
structure of these processes are leading to different development visions which are hardly ever
addressed or related to development” (2009, 119). Compounding the challenge of
conceptualising and categorising migrants and their motivations, then, is the question of
conceptualising and theorising the development visions of individuals or even different groups of
migrants.

Along with the creation of artificial categories and hierarchies of people, another
important legacy of colonialism for discussions of migration and development is colonialism’s
entrenchment of geographic boundaries and associated limits to mobility through a reified state.
This reification of the state has had significant impacts for migration, especially in parts of the
world where the imposed boundaries of the colonial state may have cut across and circumscribed
pre-existing migration histories and patterns. It also holds implications for migration
scholarship, which is often informed by what Glick Schiller has termed methodological nationalism, defined as “an ideological orientation that approaches the study of social and historical processes as if they were contained within the borders of individual nation-states” (Glick Schiller 2012, 95). Migration scholars with such a lens,

view the world and social theory through the lens of the nation-state. In so doing, they assume that stasis is a norm, that migration internal to a state is a part of stasis, but that migration across state borders is by its nature disruptive of the social fabric of the nation-state in which migrants seek to settle (Glick Schiller 2012, 95).

Colonial states, modeled on existing states, held (and continue to hold) territorial integrity and the ability to regulate the movement of those within its borders, as a key element of state power. Torpey (2000) argues, in his illuminating genealogy of the passport, that the state’s monopolisation of “the legitimate means of movement,” (essentially since the French Revolution) through the passport and associated controls over movement of citizens and non-citizens, represents a critical element of “stateness” and state formation, allowing the state to identify who it wishes to exclude, and who it wishes to include and “embrace”. Torpey traces the shifting of this monopolisation of movement away from the Church and private hands and into the hands of the state. The result of this process, largely consolidated by states in western Europe in the years surrounding the French Revolution, he writes,

has been to deprive people of the freedom to move across certain spaces and to render them dependent on states and the state system for the authorization to do so – an authority widely held in private hands theretofore. A critical aspect of this process has been that people have also become dependent on states for the possession of an ‘identity’ from which they can escape only with difficulty and which may significantly shape their access to various spaces (Torpey 2000, 4).

Brubaker and Cooper, drawing on Foucault and Bourdieu, posit that states also attempt to exercise control through the monopolizing (or attempted monopolizing) of not only the legitimate physical force but also the legitimate symbolic force, including “the power to name, to
identify, to categorize, state what is what and who is who” (2000, 15). Writing about identity and local/state tensions amongst Angolan migrants in north-western Zambia, Bakewell contends that while state control of nationality and citizenship has been “a major concern for African states after independence, when they had to establish a national identity within colonial borders, which often cut across ethnic groups,” the actual ability of the state to control nationality and citizenship is not so straight-forward (2007, 16). He notes the different ways in which Angolans living in Zambia self-identify – as Angolans, as Zambians, as both, or neither, or some combination thereof, depending on circumstances (Bakewell 2007, 12). This supports Brubaker and Cooper’s suggestion that self-identification takes place in dialectical interplay with external identification, with there being no need for the two to converge (2000, 15). Not only does the often fluid self-identification of migrants help confound statist and nationalist ideas of citizenship and autochthony, but Bakewell’s study also illuminates how the *de facto* acceptance of migrant populations by local citizens can effectively undermine the power of the state (2007, 12). Importantly, Bakewell argues that the “gap between state policy and practice is likely to be larger in cases where the state’s capacity to implement policy is extremely limited” (2007, 3).

Taken one step further, de Haas, while recognizing that the policies of the state do have distinct influences on migration volume and character, argues that in fact, states are effectively unable to “manage,” largely control or stop migration; it is an illusion, he writes, “to believe that we can put a stop to a large-scale South-North migration as long as supply and demand last and global inequalities persist” (2005, 1280). Instead, de Haas argues for an increasing recognition in migration policy and practice that in an era of mass, rapid communication, transportation and financial systems, migrants are increasingly capable of leading effectively “transnational” lives, with ties and loyalties to more than simply their place of origin *or* their destination.
Bakewell also argues that a continued state-worship and national models of development-thinking about migration can quickly lose sight of the ways in which migration often does improve an individual migrant’s situation, in terms of such aspects as quality of life, education, and even life expectancy. To illustrate, he quotes Rimmer:

No matter how remunerative migration might be, it is likely to be thought an unsatisfactory answer to the question of how Africa is to be developed. Individuals and their kin become better off, but their places of origin remain backward or under-developed. But this perception signifies only in the context of a world we divide into nations or states. In this context Sudan counts for more than the Sudanese, Nigeria for more than the Nigerian, Ethiopia for more than the Ethiopians (2003, 488).

In fact, Rimmer states outright that he believes free trade and free migration would be more effective in raising African living standards, but that, unlike aid, the ideas of free trade and free migration “encounter strong political opposition, in the one case from producer interests, in the other from nationalist ideology and racial bigotry” (2003, 469). This aligns in many respects with the “open borders” call of scholars such as Hayter (2001, 2004), who argues that border controls are inherently racist, inevitably lead to human rights abuses, and should be abolished, and Pecauld and de Guchteneire (2007), who call for “immigration without borders.” Pécoud and de Guchteneire assert that the notion that states should be able to effectively control cross-border migration stems from a “myth of a once-perfect sovereignty” that is now in danger of being undermined by the movement of people across borders (2007, 6). They argue for the free-movement of people across borders, which would also resolve a fundamental contradiction within the United Nations Declaration of Human Rights, which currently recognizes the right of emigration while remaining silent on immigration, emigration’s clear and necessary counterpart (Pécoud and de Guchteneire 2007, 1). A significant tension, then, is presented in this and much of the post-colonial literature as well, between the recognition that the state is the principal site of migration and development policy on the one hand, and on the other, the suggestion that
because of the very nature of migration, the state is either ineffectual and/or inadequate in this capacity. Regardless, the state will most certainly remain the central migration policy actor and regulator for the foreseeable future.

Much of the literature related to migration, and in particular the literature related to migration and development, is premised on the movement of migrants between “lesser developed” countries of the “South” and the “developed” countries of the “North.” Theorising migration in this way is also fraught with challenges, as the concepts of “North” and “South” or “developed” and “developing” are notoriously difficult to demarcate in any meaningful way. As Bakewell notes, not only is it difficult to determine which countries are part of the “South,” but it is also analytically problematic to assume that the disparate countries of this “South” have anything more in common with each other than they might have with countries of the “North” (2009, 1). Bakewell notes the ways in which definitions of South-South migration shift and change according to the indicators being used to delineate the categories (e.g. Human Development Index indicators, World Bank income level indicators, etc.). He also notes the challenges of separating out the interlinked migration journeys of individuals, who may transit through developing countries en route to countries of the North. To discuss or analyse these realms in isolation,

means it is easy to miss much of the picture. People’s motivations for migration, the forces which compel it, and the institutions which shape the process are all likely to have transnational dimensions that cut across the borders between North and South – wherever those borders are placed (Bakewell 2009, 7).

Nonetheless, while acknowledging the inherent challenges of such categories, an approach to migration through a “South-South” analytic lens can illuminate some salient differences in migration processes and outcomes. Ratha and Shaw estimate that South-South migration is
nearly as large a phenomenon as South-North migration, with an estimated 74 million (nearly half) of the migrants from developing countries residing in other developing countries (2007, v).

Interestingly, Ratha and Shaw’s (2007, 7) data show that rates of South-South migration are actually significantly higher than South-North migration in three world regions, including Europe and central Asia (64% within the region); sub-Saharan Africa (69% within the region); and South Asia (38% within the region). They note that almost 80 percent of South-South migration is estimated to take place between countries with contiguous borders, and note the particular challenges involved in South-South migration, including the higher costs and increased difficulties of remitting. Ratha and Shaw (2007) argue that more attention needs to be paid to the policy challenges being faced by developing countries as both migrant-sending and receiving countries – challenges made particularly difficult by a lack of robust and reliable migration-related data in many parts of the developing world. They contend that while remittances from South-South migration are smaller than South-North migrant remittances, even small increases in income “can have substantial welfare implications for the poor, and cross-migration can improve the match between skills and requirements in the countries involved, thus raising efficiency and welfare” (Ratha & Shaw 2007, 2).

Hujo and Piper point to a number of factors accounting for high levels of South-South migration, including the reduced cost of migrating shorter distances; the advantages of ethnic, community and family networks; the attraction for migrants from low-income countries to neighbouring middle income countries; the role of middle income countries as points of transit to a northern country; and the role of conflict in creating refugee flows from neighbouring countries (2007, 19). They point to a missing link between migration, social development and other social policies in the context of South-South migration, and argue that,

insofar as migration affects equity, equality, social justice and implies changing welfare needs, it requires that states find new ways to meet them.
This is especially true for development contexts, where economic liberalization only exacerbated the challenges posed to already 'underdeveloped' systems of social provisioning and the social tensions this has created (Hujo and Piper 2007, 23).

Indeed, the management of migration presents substantial governance challenges for many ‘Northern” countries, even those with long-standing policies, institutions and resources at their disposal. For many developing countries, such institutions and resources are more limited, though the demands of migration management are not.

Whether it is a South-North or South-South flow of people, the migration and development nexus is clearly currently in the global spotlight. However, it is important to note that optimism about migration and development linkages is not a new phenomenon. As de Haas points out, there has, in fact, been a general pendulum swing between optimism and pessimism in migration and development thinking over the decades, coinciding with the broader social scientific themes and trends in neo-classicalism, dependency and world system’s theory, and finally, neo-liberalism (de Haas 2012). Indeed, de Haas (2012) warns that the more recent global resurgence of optimism regarding the migration and development nexus, with its strong focus on the potentials of financial and social remittances, must be understood within the current global socio-economic context of neoliberal domination, where the emphasis on migrants as bottom-up agents of their own development may mask the implications of structural constraints to development, and the responsibilities of states for finding solutions for these constraints. Brønden has termed the migration and development nexus “the flavour of the 2000s,” and points out important concerns that the migration and development agenda, purporting a development “win” for migrants as well as sending and receiving countries, may actually “serve as a façade for a range of other purposes stemming from a North-driven agenda” (Brønden 2012, 3). She notes an important paradox inherent in notions of migrants as both agents of development, and,
simultaneously, as potential threats to host country security (Brønden 2012, 4). Amidst all of this, de Haas reminds us that:

The key issue is to take on board past policy lessons and research insights on the context-dependent nature of migration impacts and, last but not least, to set expectations right. Instead of swinging between exaggerated optimistic and overly pessimistic views, there is a need for much more nuance (de Haas 2012, 22).

Castles echoes the idea that it is a mistake to view migration and development as an intrinsically linked duo, in isolation from broader issues of global power, wealth and inequality (2008, 17). Migration alone does not bring development. Instead, the relationship between the two is contextual and deeply complex.

Conclusion:

While the literature on migration and development is rich and broad, this discussion has focused specifically on an exploration of normative interpretations of migration in and for development, exploring the concept through the theoretical lenses of political economy and structuralism, post-colonial and post-structural theory, and through an examination of the state’s position in contemporary migration policy and practice. While the development potential of migration is increasingly recognised globally, the harnessing of migration for development can be a challenging task for any state, with their entrenched interests of sovereignty, security, and territorial control. Migrants regularly challenge the state’s neat administrative categorisations, and assessing the developmental benefits of migration can be an elusive undertaking, as the benefits and detriments tend to shift according to one’s unit of analysis (i.e. individual, sending community, receiving community, sending country, or receiving country). There is also an emerging literature theorizing South-South migration as a distinct realm of scholarship, though problematically so, as “South-South” is another broad label that may, in fact, obscure more than
it illuminates. Finally, the recent pendulum swing towards global optimism regarding the migration and development nexus must be problematised and understood against the complexities of migration dynamics in both sending and receiving locations. Migrants are embedded in a complex web of social, economic and political factors that collectively contribute to the question of whether, or how, the developmental potentials of migration can be tapped. The following chapter will position South Africa within some of these complex debates, exploring its own particular migration history within a contemporary social and political context.
Chapter Four: Migration and Development in the South African Context

South Africa’s history is one of migration and the movement of people. Alongside a diverse range of indigenous ethnic groups, the country is also home to people from an incredibly diverse range of cultural and ethnic backgrounds. This includes, for example, descendants of early settlers from Dutch, British and French descent, descendants of former slaves from countries such as Madagascar, Mozambique, and Indonesia, descendants of formerly indentured Indian labourers, and a range of mostly European immigrants who settled in South Africa through the apartheid years. In the years since 1994, the country has also hosted a wide range of Africans from outside of South Africa, other international tourists, business-people, and other visitors. Migration patterns have changed dramatically in recent years, with migration within Southern Africa now much more numerically significant than migration from the region to Europe (Segatti and Landau 2011, 11). This change, Segatti explains,

reflects political changes, particularly the end of apartheid and stronger migration controls in Europe, as well as deep restructuring in the mineral extracting industries and commercial farming, the expansion of the construction and hospitality industries, and continuous political instability in the Democratic Republic of Congo, Zimbabwe, and the Horn (Segatti and Landau 2011, 11).

This section contextualises the migration and development debate within the South African (and, by necessity, to some degree, the southern African) context, exploring the competing discourses and debates around both skilled and unskilled migration and development (a macro-economic perspective), and migration as an avenue for development at the more individual level (as a micro-economic and often individual or household economic strategy). Finally, this section explores the ways in which some of the regional and international dialogue around migration and development intersect with, and influence, the South African debate. Ultimately, any significant
focus on harnessing the potentials of migration for development has been undermined by a state-centric focus on sovereignty and security.

**Unskilled Migration and Development in South Africa**

In a region of endemic poverty and much conflict, migration has long been an economic strategy, if not simply a strategy of survival, for many. The experience and tenacity of many migrants is often not matched by the kind of formal education, training, or work experience that the immigration policies of many countries actively seek to help bolster national economies, and create spin-off employment opportunities for nationals; nonetheless, the migration and labour of unskilled migrants has played a foundational role in the economy of South Africa, and in bolstering the economies of neighbouring countries. This section explores some of the links between unskilled migration and development in the South African context, through a discussion of regional mining labour migration, as well as domestic unskilled migration within South Africa. The challenges and opportunities for development presented by unskilled and undocumented international migration to South African will also be explored.

For approximately 150 years, mining labour migration, including regional labour migration, has been a feature of the southern African landscape, and any contextualised discussion of migration and development debates in South Africa must take into account the nuanced social and economic complexities that this system has woven into the tapestry of southern African societies and economies for decades. The history of who was welcomed into South Africa (and also within various parts of South Africa) and who was not has changed
enormously through the years, according to the political will and dispensation at the time. Skilled and unskilled migration into the country has historically been managed under very different sets of rules. Under apartheid, aside from the active solicitation by the apartheid regime of mostly European migrants considered to be “assimilable” into white South African cultural and political life, migration overwhelmingly took the form of migrant labour from neighbouring southern African countries, in particular Lesotho, Zimbabwe, Swaziland, Botswana, Malawi and Mozambique (Adepoju 2003). The reliance on inexpensive migrant labour to work in South Africa’s rich gold and diamond mines, as well as within its agricultural sectors, was one of the economic pillars of apartheid, but also pre-dated the formal systems of apartheid by many decades (Adepoju 2003; Crush and McDonald 2001; Crush 2008a; MacDonald 2003). This migrant labour system was carefully controlled through an emphasis on circular migration and contracted labour, through which migrants were expected to return to their country of origin following the completion of each contract. Further to this, only male migrants on their own could legally migrate across borders. This meant that wives and families of male migrants were left behind during contracts, and that women who themselves chose to migrate had to do so illegally (Crush, Peberdy, and Williams 2006, 7).

Migration debates are enmeshed with debates about the exploitation of black mine workers by the generally white mine owners, and they are also enmeshed with the history and historical legacies of apartheid-era values and legislation that enabled the system to function in the first place. Yet, it is equally true that the income from mining and other migrant labour-utilising industries have historically represented a critical income in both direct and indirect benefits for millions in the region, through remittances and the controversial system of deferred

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2 For an historical overview of South Africa’s shifting immigration policies since 1910, see Sally Peberdy’s “Selecting Immigrants: National Identity and South Africa’s Immigration Policies 1910-2008” (Peberdy 2009).
wage payments.\textsuperscript{3} It is precisely this kind of paradox that characterises migration and development debates in South Africa; for example, the maintenance of regional migrant labour patterns represents, for some, an important tool for both the maintenance of regional economic stability and for the continued provision of much-needed incomes for migrant labourers and their families in neighbouring countries, many of which paid heavy prices when the fight to either maintain or abolish apartheid spilled violently across their borders. For others, however, the maintenance of such a system, or specific aspects of it (such as the system of deferred payments) represents the entrenchment and continuation of a socially and economically exploitative history. Clearly, untangling the best path forward through such paradoxes in post-apartheid South Africa is far from straight-forward.

Debates about unskilled migration in South Africa must also be situated within a context of widespread domestic poverty, unemployment and underdevelopment. The 2011 National Census data, for example, revealed an official unemployment rate of 29.8\%, a rate which rose to 40\% on the expanded definition of those who were available to work but had not looked for work during the reference time (in other words, the expanded definition captures those who have largely given up looking for work). The census data found that only 34.6\% of the working age black population in South Africa was in work (Census 2011, 2012). Within this context, the employment of foreign unskilled labour in mining, agriculture, and other sectors has contributed to high levels of tensions and anti-foreigner resentment within South Africa. The complaint that foreigners are “taking our jobs” is an omnipresent narrative in the country.

\textsuperscript{3} In the mining sector, some bilateral agreements between South Africa and labour-sending countries also outlined a system of deferred wage payments for miners. In Lesotho, for example, a compulsory deferred payments system negotiated in the 1970s required miners to remit 60\% of their wages through the bank (Adepoju 2008, 39). While deferred payments represented a significant contribution to the foreign exchanges of miners’ home countries, they were often deeply resented by miners themselves.
Domestic Migration Dynamics

Foreign labour migration was a keystone of apartheid industrial policy, but domestic labour migration was also pivotal to upholding the structure of South Africa’s industrial and resource economy, and highly influential in its impact on the country’s political economy. The apartheid regime’s social engineering of the movement of people through, for example, its system of pass laws and its creation and administration of the nominally independent “homelands” or Bantustans, was part and parcel of a complex system designed, at least in part, to facilitate and control the movement of black labour in the country. As with regional migrant labour, male labourers very often left wives and families behind in rural areas, especially in the Eastern Cape and KwaZulu, to work in the mines of Gauteng. Domestic migrant labour continues to be an important source of income for both migrants and their families. However, patterns of domestic migration have also shifted substantially with the lifting of apartheid-era movement control legislation (the Pass Law was repealed in 1986) and the formal end of apartheid. Population flows within the country have created their own sets of new challenges for governance and development, with some regions experiencing striking in-flows of migrants, while others experience significant out-flows. Segatti argues that in fact, “domestic migration is far more significant than international migration in terms of the local governance challenges it raises” (Segatti and Landau 2011, 17). It is important, however, to note that there are significant shortcomings in any data attempting to track not only movement between South Africa and external countries, but also within South Africa itself. Nonetheless, a 2011 Statistics South Africa report notes that between 2006 and 2011, an estimated 215 000 people will have migrated out of the Eastern Cape, while Limpopo province is estimated to experience the out-migration of just over 140 000 people. In those same years, Gauteng and the Western Cape province are
estimated to have received approximately 367 100 and 95 600, respectively (Statistics South Africa 2011). In a commissioned 2002 Western Cape provincial report, Bekker writes that the key domestic migration streams for the African population,

originate from southern Transkei and the Eastern Cape cities and farms, and flow into Cape Town and the Districts in the east and south of the province. These streams are powerful and fast, and probably represent the largest and most rapid demographic flow in South Africa. Going by the survey sample, just under three quarters of the present adult African population of the Western Cape would have been born in the Eastern Cape (2002, 10).

This report, which pointed to the shifting of demographics and an associated draining of resources, appears to have stirred up significant anti-migrant sentiments among some officials in Cape Town (Wa Kabwe-Segatti 2008, 127). Wa Kabwe-Segatti notes such officials “may be in the minority, but even officials wishing to more proactively absorb new residents – who are often poor and vulnerable – face considerable challenges in determining how to do so” (2008, 127). Domestic migration flows have put a perceived pressure on provincial and municipal governments, in particular, to develop strategies for service delivery that will meet this growing demand, alongside strategies for redressing shortcomings for base populations. Regardless of the actual benefits or challenges of increased levels of domestic migration in some regions of South Africa, in a climate of hostility and resentment against foreign migrants in particular (explored in more detail in chapter six), domestic migration may also contribute to increased competition for jobs and resources, especially because the areas where many unskilled foreign nationals settle and look for the means of survival are the same communities in which South Africa’s poorest citizens, including recent domestic migrants, live. Indeed, despite the many challenges foreign-born migrants face in re-settling and carving out lives and livelihoods in their new locations, new data from one Johannesburg-based study suggests that foreign-born migrants demonstrate better urban livelihood outcomes than internal migrants and long-term residents (Myroniuk and Vearey
2014). While foreign-born migrants face numerous documented and demonstrable barriers to economic and social inclusion and access to rights, this research raises important questions regarding the structural disadvantages that are also faced by internal migrants and long-term residents, and what these disadvantages mean for livelihood outcomes and relations between these groups.

Interestingly, Landau notes the propensity within some official discourse towards a “demonizing” of newly urbanized citizens in South Africa, citing, for example, the 2004 State of the City speech by Johannesburg’s Executive Mayor, who expressed the view that “while migrancy contributes to the rich tapestry of the cosmopolitan city, it also places a severe strain on employment levels, housing, and public services” (Landau 2010, 221). The concern of officials here, Landau notes,

is not so much with those from outside South Africa as with those from within who are more likely to drain than augment the lifeblood of those already rooted in the city. In private meetings, and occasionally in public ones, some officials wistfully pine for a return to influx control and stronger border policies. President Zuma’s renewed emphasis on rural development reflects this familiar (if often implicit) political logic. For municipalities, ward councillors, and local leaders, the old logic is reborn: uncontrolled urbanization is a financial, political, and security threat; for reasons of politics and morals, people should remain where they belong and the state is responsible for ensuring that they do so (Landau 2010, 221).

This has strong echoes of a key theme in the trajectory of migration and development thinking, in terms of a traditional emphasis in both state and developmental thinking on the intrinsic value of people “staying put,” and the conceptualisation of migration as a failure of development, as opposed to a potential strategy for development.

**Undocumented Migration and Development**

If domestic migration is conceptualised as a failure of development, it would seem unlikely that international migration of unskilled migrants, and especially of undocumented
unskilled migrants, would be also be conceptualised as anything other than a threat and a burden, by citizens and policy-makers alike. Indeed, undocumented migration is an emotive flashpoint in the contemporary South African social and political landscape, with resentments and hostilities spilling over into the much-publicised weeks of violence against foreign nationals in May of 2008. From the perspective of the migration-development nexus, the issue of undocumented, often unskilled migrants presents a maelstrom of paradoxes, and once more, the benefits and the challenges shift according to the analytical lens used to look at the issue. From the perspective of the individual migrant and their families, undocumented migration could represent the continuation of decades of cross border movement and trade to supplement incomes, or it could be an act of desperation in the face of limited or untenable economic activities at home. It may be that undocumented migrants are fleeing personal or political persecution, conflict or war in a region of much turmoil, and are unaware of or unwilling to risk navigating the formal asylum seeker avenue for entry to South Africa. It may also be that some are, in fact, engaged in criminal activities and do not want to appear at all on official radars. Others believe South Africa is simply a transit point to destinations further afield, and see no reason to seek formal documentation for a temporary transit point. There are myriad reasons why people migrate through informal channels, making official decisions about how to attempt to regulate or deal with these informal channels a particularly difficult exercise. From the perspective of the individual migrant, whether documented or not, the end goal is almost always the direct improvement in the standard of living of both the migrant and potentially the migrant’s family, and indeed, many undocumented or irregular migrants are successful in generating an income in South Africa, and may potentially yield spin-off benefits through their economic activities.

4 During my fieldwork in 2011, a colleague met with a group of Tanzanians living under a bridge in Cape Town’s foreshore, who had no intention of staying in South Africa but were merely working and living at the foreshore until they could find a way to board a ship bound for Europe.
From the perspective of the state, however, undocumented migration represents a threat to an essential aspect of “stateness,” the ability to exercise control over a geographic territory and the borders that delineate that space (Torpey 2000). The state, then, may view undocumented migration as a threat to development, in that the uncontrolled presence or influx of non-citizens may undermine the state’s ability to effectively deliver services to its citizens, and may erode the confidence of the citizens in the state’s capacity to exercise the essential functions of the state. From the perspective of citizens, in a post-apartheid South African context, the presence of undocumented migrants may represent not only a perceived direct threat in terms of job and resource competition, but may also hold symbolic salience in terms of presenting a threat to a newly-forged South African national identity and associated rights. Migrants may also function as a scapegoat to help explain the failure of many, to date, to reap the hoped-for (and promised) benefits of an African National Congress-led post-apartheid state. Indeed, in July 2011, the ANC Member of Parliament and Chairperson of the Parliamentary Portfolio Committee for Home Affairs (the Committee responsible for overseeing matters related to immigration and refugee legislation), Maggie Maunye, made national news with her remarks related to the presence of foreign nationals in the country. Maunye asked the Committee:

Really, this intake, for how long are we going to continue with this as South Africans? Is it not going to affect our resources, the economy of this country? I think that as the Portfolio Committee, we need to sit down and discuss this openly; on how long are we going to going to continue with the intake without the support of other countries... You know, we see on TV Spain turning refugees back to their countries, and here you will be told of human rights laws; you know the constitution is against that and all sorts of excuses, and here we have people who are living in poverty daily, people who are unemployed. We’ve never enjoyed our freedom as South Africans. We got it in 1994 and we had floods and floods of refugees or undocumented people in the country, and we always want to play as if no, there’s nothing like that (Makinana 2011).
After an outcry by civil society organisations such as the Consortium for Refugees and Migrants in South Africa (CoRMSA) and Lawyers for Human Rights in widespread media reports, Maunye subsequently apologised for her remarks in a statement issued through the office of the ANC Chief Whip, called “Maggie Maunye apologises for ‘xenophobic’ remarks” (Office of the ANC Chief Whip 2011). The office of the Chief Whip states that,

Maggie Maunye, has carefully reflected on the comments she made at the committee meeting of 29 June 2011, which may have been construed to be xenophobic. She realises that her remarks, which sought to underscore South Africa's challenges pertaining to the immigration control, may have been insensitive to the plight of many foreign African nationals whose presence in this country is legitimate or a consequence of hardships in their native countries (Office of the ANC Chief Whip 2011).

Nonetheless, Maunye’s initial remarks clearly touched a nerve with South Africans, and scores of readers’ comments on related articles in the media revealed much support for Maunye’s perspective. The resentment and hostility towards foreign migrants, and in particular undocumented migrants, in South Africa runs deep, raising important questions about the balance between migration as a tool for development, on one hand, and migration as a potentially destabilising catalyst in a society in which such anti-foreigner sentiments, in particular, are so deeply embedded and volatile.

**Skilled Migration and Development Debates in South Africa**

Another important contextual reality of contemporary South Africa’s migration landscape is its position not just as a migrant-receiving country, but also as an important migrant-sending country. Skilled labour debates are also embedded deeply within South Africa’s fraught social and economic history, and must also be considered against the background of apartheid’s legacy of entrenched racial privilege, and the ongoing sensitivities in
the country around the success or lack thereof in the effective “transformation” of deeply unequal social, political and economic realities in the post-apartheid era.

South Africa, by many accounts, is experiencing a skills crisis. The Centre for Development and Enterprise (CDE) argues that,

[t]he country’s domestic skills production system is grossly inefficient: children fare badly in almost every international test of literacy and numeracy; the training of technicians and artisans has all but ground to a halt; and universities produce far too few engineers, managers, and other skilled people. To make matters worse, skilled people have been leaving the country at an alarming rate (Centre for Development and Enterprise 2010, 10).

The CDE notes that while “there are no reliable estimates of the number of skilled people that the country needs... we are confident that it is well over the estimate of 502 000 published by the Department of Labour in 2008” (Centre for Development and Enterprise 2010, 10). The challenges of skills creation in the country have been compounded by the sustained emigration of skilled South Africans abroad, especially since 1994, in a “brain drain” that has seen the loss of much expertise and specialised knowledge from the country. Reliable emigration data, like much migration-related data, is difficult to come by, but some scholars have drawn upon the census data of migrant-receiving countries to arrive at an estimate of emigration levels from South Africa. The CDE report draws on such work by Stern and Szalontai, who estimate that,

more than 520 000 South Africans had emigrated between 1989 and 2003, with the numbers growing by about 9 per cent a year. About 120 000 of those emigrants had professional qualifications, amounting to about 7 per cent of the total stock of professionals employed in South Africa, and more than eight times the number of professional immigrants in the same period (Centre for Development and Enterprise 2010, 10).

Further, as Ellis notes, skilled emigration from South Africa results in a significant multiplier effect; he cites, for example, the estimate that each skilled South African who emigrates creates ten redundancies, which may consequently cost South Africa hundreds of millions of rands per
year in lost revenue (Ellis in Wa Kabwe-Segatti 2008, 70). Motivations for the emigration of highly skilled people from across racial groups are multiple and complex, and include reasons such as concern about costs of living, high taxation rates, fear of crime (and especially violent crime), and a sense of declining standards of public and commercial services in South Africa (Ellis in Segatti & Landau 2011, 119). While difficult to quantify, it is likely that some of these same concerns not only encourage people to leave the country, but may also dissuade others who are contemplating immigrating to South Africa. There has, however, been some recent research indicating a significant return of South African expatriates. One December 2013 report by Adcorp, a private workforce management and outsourcing company, estimated that despite an ongoing skills shortage of 820,000 skilled position vacancies across the country, approximately 359,000 high-skilled South Africans have returned to the country since 2008 (Adcorp 2014).

Despite the long, loud protestations of business about skilled labour shortages, questions of skilled labour immigration in South Africa since the end of apartheid have been, and remain, politically sensitive, and until recently (and many would argue, even now), government has been largely reluctant to address the demands of business for easier access to international skilled labour. Some of these debates played out in the controversies that surrounded post-apartheid immigration policy-making processes, especially in the late 1990s and early 2000s, as will be further explored in chapter seven. As Ellis and Segatti point out, the “problem” of skilled labour shortages is,

construed along very different lines depending on the constituencies. Business insists on acute shortages of scarce and critical skills in many sectors and calls for policy changes liberalizing the hiring of highly skilled foreign personnel (at least as a temporary solution). The government accuses business of refusing to see the long-term negative effects of liberalization on local workers and of discriminating against young black graduates (Ellis & Segatti in Segatti & Landau 2011, 71).
The CDE (2010) goes so far as to label those who present the latter argument as being “skilled labour denialists” (likely a play on the very much discredited AIDS denialist position of, most famously, former South African President Thabo Mbeki). Regardless of how it is politically framed, the reality of South Africa’s skills shortage is more likely due to a combination of factors, as Ellis and Segatti point out. They point to the work of Erasmus and Breir (2009), who highlight at least four main factors contributing to South Africa’s current skills shortages, including,

the legacy of apartheid’s Bantu education system, which resulted in under-representation of Africans in the scientific professions; the decline in apprenticeships and the failure of post-apartheid policies in this area; the loss of senior capacity as a result of affirmative action; and poor working conditions in specific sectors, particularly health (Ellis & Segatti in Segatti & Landau 2011, 71).

Of particular sensitivity, then, is the fact that not only does the skilled labour shortage represent one of the many, intensely challenging legacies of apartheid through an abysmal record of education for black South Africans, but also the reality that the effectiveness of the education system in the “new” South Africa remains enormously problematic. The South African government’s own 2012 National Assessment results showed, for example, that grade nine pupils scored on average 13% in mathematics, with Limpopo grade nine learners scoring an average of only 8.5% (Nkosi and John 2012). The Department of Basic Education has also recently been taken to court repeatedly by civil society organisations such as Equal Education, the Legal Resources Centre and Section 27, around the failure of the Department to set and meet minimum norms and standards for schools, including textbooks and furniture5. The improvement

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5 See, for example, Equal Education’s November 2012 lawsuit and out of court settlement with the Minister of Basic Education Angie Motshekga around minimum norms and standards for school infrastructure (John 2012).
of educational outcomes is a long-term project, leaving significant gaps in the skilled work force in contemporary South Africa.

Despite government ambivalence towards the recruitment and facilitation of skilled labour migration into South Africa, in 2006, the government launched its enhanced economic strategy, the “Accelerated and Shared Growth Initiative-South Africa” (ASGISA). This strategy aimed to coordinate existing policies to accelerate a sustained high rate of economic growth in the country with the ultimate aim of halving unemployment and poverty by 2014 (Ellis in Wa Kabwe-Segatti 2008, 123). The associated calculations of the economic growth necessary to achieve this goal were 4.5% per annum to 2009 and 6% per annum from 2010 to 2014, though even more ambitiously, President Jacob Zuma told a Chinese audience in late 2010 that current plans being developed were meant to help South Africa achieve a 7% economic growth rate in the “near future” (Centre for Development and Enterprise 2010, 9). However, the current growth rate of South Africa was estimated in November 2012 to be closer to 2.5% for 2012, according to the South African Reserve Bank, with forecast rates of 2.9 percent for 2013, and 3.6 percent for 2014 (Central Bank News 2012). Within ASGISA is a further initiative, the Joint Initiative for Priority Skills Acquisition (JIPSA), which is aimed specifically at the development of skilled workers. However, as Ellis argues,

JIPSA is designed to coordinate the work of relevant government departments in harmony with the policy on immigration administered by the Department of Home Affairs. Home Affairs, however, is in such a serious state of disorganisation that it remains a moot point whether it will be able to develop and administer a policy appropriate to these considerations of labour recruitment. Furthermore, Home Affairs in many ways remains a bastion of anti-immigration sentiment (Ellis in Wa Kabwe-Segatti 2008, 123).

With the launch of ASGISA, then President Thabo Mbeki acknowledged that South Africa would face a net skills deficit of 1.2 million positions until 2014, a statement which led to an
official change of policy in terms of the attitude of the government towards skilled labour; however, in both policy and practice, very little has changed (Segatti and Landau 2011, 24).

The question of skilled migration and development raises very difficult questions for South Africa, in terms of the migration and development nexus. While the education and training, recruitment and employment of skilled South Africans remains a political ambition of the current government, and understandably so, the chronic and serious skills shortage in South Africa is evident. The government once again faces a challenging paradox in its migration policy-making choices, especially in terms of addressing the immediate skills shortage crisis. On the one hand is the option of the politically unsatisfactory recruitment of international skilled labour into the country (especially white skilled labour, with all its associated political sensitivities). On the other hand, if nothing is done, the government will have to face the growing dissatisfaction, inefficiency and incapacity of business to operate successfully and competitively within the country, with all the associated economic reverberations that this may engender. From a macro-economic perspective, the international competitiveness of business and the growth of an increasingly liberalised economy is indeed the economic path that post-apartheid South Africa has officially embarked upon towards the social and economic development of the country, but in practice, the inequities and injustices of apartheid have left long shadows that render unpalatable what must seem to many the continued privileging of the already privileged, and the re-entrenchment of existing inequalities. Further to this, a more open or active skills recruitment policy would also, in all likelihood, increase the numbers of skilled migrants immigrating to South Africa from neighbouring or regional states, thereby “poaching” much needed skills from those countries and potentially hindering regional development. Once
again, the migration and development debate shifts according to perspective, and the definition of development one chooses to employ.

**Regional Considerations for Migration and Development**

The regional movement of people in and around southern Africa has been steadily increasing in recent years, though reliable migration data is very difficult to come by. Nonetheless, in 2010, southern Africa was estimated by the UN to be home to approximately 2.1 million migrants, or about 10.9% of Africa’s 19.2 million migrants, and the rate of migration is accelerating; Segatti notes that while “migrant stock” in southern Africa decreased from 1990-2000, it then began to increase by 3.8% per year over the following five years, and then by 7.3% per year between 2006-2010 (Segatti and Landau 2011, 12). Refugees account for only a very small share of all migrants in southern Africa, at 2.1%, a figure lower than in Western Africa and indeed, much lower than all other sub-regions (for Middle/Central Africa, for example, the figure is 37.7%); nonetheless, South Africa also led “the world in pending asylum seekers’ applications, which numbered more than 300,000 in 2009” (Segatti & Landau 2011, 12).

While the development potentials of effectively managing regional migration have certainly been the subject of discussion and debate at the regional and continental level, there has been little forward movement in terms of translating these discussions into policy or practice. Discussions at the southern African level have largely taken place at the level of the Southern African Development Community (SADC), a regional bloc whose origins can be traced to the Southern African Development Coordination Conference of 1980. In this conference, nine regional states met to form an alliance, largely as a political response to the regional

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6 See the African Union’s Migration Policy Framework for Africa (AU 2006).
destabilisation policies of South Africa’s apartheid regime (Williams 2006, 2). This alliance was expanded and transformed into the 15 member SADC\(^7\) in 1992, during the process of democratic transition in South Africa, with objectives geared towards achieving regional development and economic growth, enhancing regional standards of living, working towards the evolution of common political values, systems and institutions, building and strengthening historical, social and cultural regional ties, and achieving collective regional self-reliance and harmonisation between member states (Williams 2006, 3).

The 1992 treaty implied the removal of restrictions to the movement of people, as well as trade, but consensus among member states towards allowing people to move freely through the region remains elusive. In 1996, the Draft Protocol on the Free Movement of Persons was introduced to SADC members, which proposed the phasing-in over a ten year period of the free movement of SADC citizens between member states (Williams 2006, 7). This Protocol was stalled and blocked, in particular by the wealthiest of the SADC member states, including South Africa, Botswana and Namibia, and was subsequently redefined away from the language of free movement, as the Draft Protocol on the Facilitation of the Movement of Persons in SADC (Williams 2006, 7). Challenges to agreeing on a SADC regional approach to migration include the realities of significant regional economic disparity and an unwillingness of member states to sacrifice or transfer any meaningful sovereignty to a level above the state itself. While they share some common goals, SADC states are bound together not so much by principles of democracy and common values as by the principles and historical legacies of solidarity and anti-imperialism (Nathan 2012). For example, Nathan points to SADC’s ongoing failure to play a

\(^7\) SADC members currently include Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, Zimbabwe, South Africa, Madagascar, Namibia, Seychelles, Mauritius, and the Democratic Republic of Congo.
useful regional peace-making role and its difficulty in establishing a common regional security regime. He attributes this to three major problems, including,

- the absence of common values among member states, which inhibits the development of trust, common policies, institutional cohesion and unified responses to crises; the reluctance of states to surrender sovereignty to a security regime that encompasses binding rules and decision-making; and the economic and administrative weakness of states. These are all national problems that cannot be solved at the regional level. Paradoxically, the challenge of common security in southern Africa is less a regional than a national challenge (Nathan 2006, 605).

While Nathan is specifically addressing issues of security and justice, the shortcomings he points out are broad SADC issues, and may also help explain why a successful regional approach to the management of migration has been so elusive. Indeed, Segatti recognises some of these issues specifically within the context of regional migration management amongst SADC countries, noting the “enduring prevalence of sovereignty in the face of weak institutional capacity at the regional level and the preference for the integration of labour markets and security management through bilateral agreements” (Segatti and Landau 2011, 24).

Also at issue are the difficult questions of who will benefit from the kind of development associated with regional migration. Such questions are inextricably bound up with much more emotive questions of belonging, entitlement, and identity. As Williams succinctly summarises, it is at the “intersection of migration, citizenship and national identity and development that the concepts related to the free movement of persons become complex and sometimes controversial” (2006, 6). SADC citizens migrating to South Africa continue to experience high levels of resentment, discrimination and violence at the hands of South African citizens, which raises some concerns regarding the potential implications of the free movement of people for social stability. Nonetheless, the current lack of legal options for lower skilled SADC residents to work in South Africa has been a significant driver of undocumented migration to South Africa, and
potential regional solutions continue to be debated and discussed. In her 2013 Home Affairs budget speech, for example, the current Minister of Home Affairs, Naledi Pandor, announced her current consideration of a SADC work permit or similar instrument as an alternative visa option for entry and work in South Africa for lower skilled SADC members (Pandor 2013). Whether or not such a visa becomes a reality remains to be seen.

**Conclusion:**

The migration landscape in South Africa is complicated and fluid, embedded in a wide array of socio-economic, historic, and political forces that shape and colour the terrain. In South Africa, unskilled labour migration, both documented and undocumented, has a long history, much of it rooted in the labour patterns that kept significant components of the apartheid economic engine running. Domestic migration patterns have also shifted quite dramatically in recent decades, creating new dynamics and challenges for both sending and receiving regions within South Africa. The country also faces significant skilled labour shortages, largely a result of apartheid’s dismal educational legacy for the majority of the country’s population, combined with factors of skilled emigration and “brain drain” dynamics. Regional migration has increased dramatically in recent years, but there remain significant practical impediments for regional governments in developing and implementing an effective co-operative regional migration approach. Within this complicated and often paradoxical context, the explicit management of migration for development has seldom been a pivotal consideration. Questions of the perceived beneficiaries and the perceived “losers” of migration processes are raised, but it is generally from a zero-sum approach. While international organisations such as the UN and the World Bank laud the development potential of migration, the management of migration in South Africa is a highly controversial, complex and emotive topic. Contests over what such development might
mean, and for whom, are far from resolved. While these are indeed complex issues, the
potentials of harnessing migration as a tool for development in post-apartheid South Africa have
been consistently overshadowed by state-centred concerns of sovereignty and security.
Chapter Five: Conceptual Considerations: The Elusive Nature of “Civil Society”

Civil society is well-recognised as a deeply contested and frustratingly elusive concept. This chapter explores some of the vastly different conceptualisations of the nature and the role of civil society. Key threads in the literature include debates about civil society’s autonomy from the state, its representativeness and accountability, and its ultimate relationship with democracy and democratisation. Many of these themes are also explored in the more specific literature probing the relevance of the concept in an African context, though the size and diversity of the continent makes any theoretical discussion grounded in an African context necessarily problematic. Ultimately, I argue for a broad conceptualisation of civil society that leaves room for a range of possible relationships with the state and with agendas of democratisation and liberalisation. Against this conceptual background, I then turn to a brief overview of key themes in the South African civil society literature, with a particular focus on the transition of state-civil society relations from the apartheid years to post-apartheid years. While oppositional civil society was actively suppressed by the apartheid state, the post-apartheid years have witnessed the emergence of a much more ambiguous and often paradoxical relationship between civil society and the state. Within this context, a segment of South African civil society has emerged in the post-apartheid years with an emphasis on advocating for migrants, refugees and asylum seekers in the country. These actors are currently the most vocal advocates for an approach to migration management that would protect the rights and wellbeing of migrants, and that could help unleash the developmental potentials of migration. In order to understand the opportunities and challenges faced by this segment of civil society in its work, it is first necessary to position them within the broader civil society literature.
Most commonly, civil society is envisaged as an arena of voluntary public association existing outside of the state, the market and the private sphere. In this conceptualisation, civil society is positioned largely in opposition to the state, enhancing democratic participation and accountability, promoting social capital, and acting as a kind of check and balance against the powers of a potentially authoritarian state. While much contemporary academic exploration of the concept tends to highlight this perspective, portraying civil society as a positive force for democracy and democratisation, civil society has also been conceptualised very differently by other scholars, who instead see it as a kind of vehicle through which a hegemonic order is maintained. In this Gramscian interpretation, civil society is critiqued for both its unrepresentativeness, as well as its complicity in the maintenance of established power relations (Dryzek 2012, 101). Civil society, from this perspective, is envisaged as an often undemocratic “array of educational, religious, and associational institutions that guarantee the ideological ascendancy (hegemony) of a ruling class” (Bratton 1989, 416).

The ideal of civil society as an associational sphere that is autonomous from the state is a hallmark of many attempts to define the concept, particular in a Western context. In this tradition of thought, it is the autonomy of civil society, in particular, which enables it to stand in opposition to the state when necessary, to strengthen democratic engagement and civic culture, and to act as a kind of watchdog for democratic values. While autonomy is a central and defining feature of civil society, as Shils points out, it is never a complete autonomy (1991, 15). Rather, the boundaries of this autonomous sphere are necessarily “drawn and maintained by tradition, laws and the constitution” (Kotze & Du Toit 1995, 20). For Gramsci, civil society and the state were in fact entirely enmeshed and mutually constitutive, with political society (or the state) dependent upon civil society as a central agent of maintaining and reinforcing the hegemony of a
liberal democratic state (Buttigieg 2005). The state-civil society relationship, and the autonomy of civil society in relation to the state, has been one of the key elements of wider academic debates surrounding the relevance and usefulness of the concept of civil society, but it is particularly pronounced within debates about the concept’s applicability within Africa. Fioramonti argues that in the context of many developing countries, in particular, the relationship between the state and civil society can be particularly complex,

especially in sectors such as development and service delivery, where many organizations not only act on behalf of the state on the basis of a mutual agreement, but also necessarily have to tender for government initiatives and depend on public funding to survive (2005, 68).

While this critique is leveled at civil society in both developing and Western countries, there may be greater opportunities in the latter to exist independently of the state in a context where resources may be more easily garnered through other avenues, and where the state is generally stronger in terms of service delivery and policy implementation. Chabal and Daloz are amongst the most ardent critics of the analytical relevance of the term for Africa, questioning the actual separation of state and civil society relations throughout much of the continent and pointing instead to examples of their interconnection and mutual enmeshment (1999). For Chabal and Daloz, this renders civil society a principally Western concept with little salience for the realities of the clientelistic or neo-patrimonial politics and weak states of Africa. Similarly, Hearn, while not questioning the existence or relevance of civil society in an African context, also questions the actual autonomy of civil society in Africa, arguing that the “current development paradigm in Africa predominantly concerns bringing civil society into a closer and closer relationship with states and has very little to say about the importance of keeping a critical distance” (2001, 44).

Other scholars take a more pragmatic approach. Mw Makumbe, for example, while similarly skeptical of the autonomy of civil society in an African context, is reluctant to entirely dismiss
the relevance or analytical value of the concept for Africa, noting civil society’s real and potential contributions:

It is easy to argue in principle that civil society organisations should be, or eventually become, self-supporting, that dependence on international donors is not much better than dependence on the state. But the fact is, many of the most important and democratically promising civil society groups in Africa – those engaged in election and human rights monitoring, civic education, policy-oriented research, institutional rethinking, the political empowerment of women, and campaigns for political reform – simply could not exist today without foreign funding, and will probably be dependent on it for many years to come (Mw Makumbe 1998, 312).

The challenges of autonomy and of keeping a critical distance from the state and foreign donors also emerge as important themes in the civil society literature specifically related to South Africa, to be discussed later in this section.

Questions of representation and accountability are also key to conceptual debates about the nature of civil society, particularly when it comes to non-governmental organisations (NGOs), whose global numbers have mushroomed in the past three decades. The rise of NGO numbers and influence has stemmed partly from the opening up of the necessary social and political space for civil society to operate, particularly following the end of the Cold War. In many parts of the world, this period has also been associated with the ascendancy of neoliberal economic policies and the rolling back of the state, along with the concomitant social and economic fallout in terms of gaps in the state delivery of services, gaps which many NGOs have endeavoured to mitigate (Bond et al. 2010). There has also been an increasing availability of global funding for NGOs, a normalisation of NGOs as legitimate political actors in their own right, and an associated increase in political access to key decision makers and decision-making institutions (Reimann 2006). International financial institution (IFI) and donor support for the strengthening of civil society has often been intertwined with the recognition of civil society’s
role in helping to replace, at least partially, the service delivery role of the state, a logic which Bond et al. argue has come to affect the approach of even “the more ‘alternative’ or progressive donors, that have not consciously embraced it” (2010, 6).

With the increasing global visibility and leverage of NGOs, and in light of the foreign origin of much civil society and NGO funding (particularly those working in the developing world), it is not surprising that members of the public, the media, academia and politicians have begun to raise questions regarding NGO accountability, and to question the entitlement of NGOs “to assert such visible and apparently influential roles in different political arenas” (Jordan & van Tuijl 2006, 3). While not dismissing the importance of the accountability question, other scholars warn that an over-emphasis on accountability may not be particularly useful or realistic, and can even serve as something of a red herring, detracting attention from more important aspects of civil society’s potential contributions or shortcomings. Dryzek, for example, argues that issues of accountability and representativeness must be understood comparatively, and within the context and political climate in which much of global civil society must often operate:

Compared to some ideal model of egalitarian democracy, global civil society may do badly. Compared to other realities in a global order dominated by large corporations, hegemonic states, neoliberal market thinking, secretive and unresponsive international organizations, low-visibility financial networks, and military might, global civil society does rather well. The criticisms of unrepresentativeness do not do justice to what is possible and what is not in global politics. The egalitarian democracy in whose name the criticisms are made has never existed in global politics, and there are good reasons for that (Dryzek 2012).

While many civil society organisations, and NGOs in particular, are often financially accountable to donors and are not directly politically accountable through the vote, they nevertheless do often serve or represent some of the most vulnerable or marginalised populations and individuals in societies. Critiques of NGO accountability, while generally important and
valid, must also take into account that for many of the populations that interact with NGOs, political accountability through meaningful political representation by elected officials is often equally chimerical.

Debates around the representativeness and accountability of NGOs and other elements of civil society also tie into another important thread in the civil society literature, which explores the relationship between civil society and processes of democratisation and democracy. One of the first political philosophers to make this connection was Alexis de Toqueville, who posited a relationship between strong free associations and democracy in *Democracy in America*, first published between 1835 and 1840. Given the tendency of governors in a democracy to enlarge their powers, de Tocqueville argued that free associations could help to serve as a buffer between state and citizens, helping to prevent the potential despotism of governments (Woldring 1998, 367). An active civil society is also identified by Linz and Stepan as one of five key interacting arenas essential to democratic consolidation, in their examination of the impact of previous regime type on transition paths and prospects for democratic consolidation, while Putnam’s seminal work *Making Democracy Work* highlighted the importance for democracy of civic traditions and associated levels of social trust in Italy (Linz and Stepan 1996; Putnam 1993). However, while the positive relationship between civil society and democracy is convincing in some contexts, the slipperiness of the concept makes such broad generalisations challenging, at best. While some elements of civil society may indeed contribute towards the realisation of a democratic vision and progressive change, help to hold governments accountable, or act as a check on state power, other elements of civil society may actively work in opposite directions, holding unsavoury or unreservedly undemocratic views. Organisations may also be hierarchical or oppressive in and of themselves. As Bond *et al.* note, on different occasions, “civil society
can be a force that turns grievances into progressive social change, or alternatively generates reactionary politics” (2010, 2). In the African context, Orvis pursues a middle ground, arguing that analyses that dismiss the concept of civil society as being un-rooted in, or unrepresentative of African societies are understating its importance, just as analyses that position African civil society as an internally democratic powerful agent for democratization, with an inherent capacity to hold the state accountable, are overstating its potential (Orvis 2001). For Orvis, the “pessimistic critique” of the usefulness of the concept of civil society within Africa, accurately criticizes many excessively optimistic expectations for African civil society. But by restricting itself to the common definition of civil society it fails to see that African civil society, properly conceived, has deeper social roots than normally admitted and a more complex, though certainly not wholly beneficial, relationship with political liberalization and democracy (2001, 23).

For Orvis, civil society in an African context, democratic or not, is a real and salient concept that must be analysed on its own terms, rather than being held up and measured against traditional Western ideals of the concept (Orvis 2001). Patron-client networks, ethnic organizations, and traditional authorities, for example, may not be considered part of civil society by most Western definitions, but can constitute a legitimate and important aspect of “actual existing” African civil society, which does not necessarily align with liberal democratic norms, and can indeed run counter to such norms (Orvis 2001, 17). This is partially explained by the presence of three co-existing and often competing broad political norms that Orvis argues characterise contemporary African states and African politics: liberal democratic norms; moral ethnic norms; and prebendal norms. The idea of co-existing and potentially competing norms is also advanced in Osaghae’s work on civil society in Africa, which draws on Ekeh’s theory of the “two publics”8 to explain

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8 In Ekeh’s theory of the two publics, colonialism is viewed as a pivotal process in explanations of contemporary post-colonial African politics, having resulted in a society characterised by “two publics” – a moral primordial public, which pre-dates colonialism, and an amoral civic public, bequeathed by colonialism (1975). Throughout
why he believes “primordial attachments have remained fundamental to the structuration of civil society, and why state-civil society relations have largely been fractured, instrumentalist, and dialectical in the post-colonial period” (Osaghae 2006, 233). Given these co-existing norms and potential conflicts, the challenge, Orvis argues, is “to create a concept clearly part of the Western tradition, precise enough to have analytical utility, and able to include and reflect the rich associational life of contemporary Africa” (Orvis 2001, 20). Clearly, however, the relationship between civil society and democracy, or processes of democratization, is far from straightforward. Nonetheless, as Orvis asserts, regardless of whether or not civil society is itself democratic or works to advance democracy, it nonetheless remains “an important sphere for analytical inquiry, with political implications of some sort” (2001, 22).

Given these rich definitional and conceptual debates, some scholars have argued that rather than relying on any all-encapsulating definition of civil society, it is actually more useful to acknowledge the plurality and co-existence of myriad civil societies, as “zones where countless narratives or scripts intersect” (Glaser 1997, 12). Fioramonti, in fact, argues that the term “civil societies,” in the plural, is a better one for describing what he calls an “internally diverse world of organizations, associations and social movements, with different values and sometimes divergent goals, whose contribution to the process of democratization must be critically analyzed” (2005, 82). Buttigieg also warns against a theorisation of civil society colonialism, the structures and institutions of the civic public were largely framed by anti-colonial leaders as amoral, to be used for the benefit of the primordial public. While these institutions of the civic public were taken over by a post-colonial African bourgeoisie, they have not replaced the primordial public, and the two continue to co-exist in some degree of conflict with each other.

While agreeing with Fioramonti that the term “civil societies” more accurately captures the plurality and diversity associated with the concept, for the purposes of this dissertation, the term “civil society” in the singular will be used for consistency, due to its common usage amongst the non-governmental organisation actors, state actors, and academic material consulted for this research.
which conflates civil society with popular oppositional movements, warning that such an approach,

results in an oversimplification of the immensely intricate, interdependent relations between society (or “the people”) and government (or the State), and in a reductive understanding of the myriad connections and divergences among the various elements that constitute civil society (2005, 36).

Recognising the heterogeneity of civil society, including the multiple values and ambitions of its various parts, paves the way for approaching civil society “as a kind of empty public space, protected by formal state guarantees of individual liberty and social order, and open to multiple uses by free and equal citizens” (Glaser 1997, 5). Bratton has also called for a more neutral definition of civil society that does not prejudge the nature of the relationship between state and civil society (Bratton 1989). Understanding the domain of civil society as a kind of “empty space”, rather than the preserve of progressive activism or autonomous democracy-building organisations and associations, leaves the agenda open for more critical, empirically-grounded interrogations of the concept, and the actual role of civil society, or civil societies, in a specific context. This space may be filled by socially and politically progressive organisations and associations, but there is no guarantee whatsoever that this will be the case. Buttigieg, for example, makes the point that in theory, all individuals and groups are free to organise and work towards change in any aspect of the existing order, but in reality, civil society is not a level playing field, and not all groups or individuals have an equal chance of being heard and effecting change (2005, 45). He points to the “vast array of resources that the economic and political powers that be and their allies have at their disposal,” which allows them to effectively penetrate and influence civil society (2005, 45). Civil society, from this starting point, can be oppositional to the state or inextricably intertwined with it, or it can be some measure of both at the same time. This kind of perspective shifts the analytical focus from the issue of the balance of power.
between state and civil society to “the issue of the terms of their interdependence allowing for more insightful empirical research on specific instances of civil society organizations in developing countries” (Fioramonti 2005, 68). Such an approach also leaves open the space for important questions about the power differentials within civil society itself.

**An Overview of Civil Society in South Africa**

Agreement about the role of contemporary civil society and what the term actually means in the South African context is no less elusive than in the broader academic literature on civil society. As Glaser has noted,

> civil society is not a thing or instrument or collective actor or deliberative forum or even, strictly speaking, a ‘watchdog’ - in all of which guises it has nevertheless made its appearance in the South African literature (1997, 5).

This section offers a brief overview of the civil society debates in South Africa. Key issues informing South African debates, as with broader civil society debates, include the nature of the relationship between civil society and democracy, and questions of autonomy and state-civil society relations.

Of particular interest and relevance in terms of this research is the emergence in the late 1990s and early 2000s of an element of civil society, largely informed by liberal democratic norms, in which organisations’ work often highlights and challenges the substantial gaps between the political and constitutional promises of the “new” South Africa, and the realities of lived experiences. Such organisations occupy a challenging space in the contemporary South African political landscape. In contrast with the early post-apartheid years, where much of civil society worked in collaboration with the ANC-led government, or indeed, even relocated from civil society to work within the government, this element of civil society occupies more of a contentious and oppositional role in relation to the state. The emergence (and political reception)
of such groups raises important questions about state-society relations in contemporary South Africa, and the nature and degree of the available political space within which these organisations can operate. As Buur enquires,

[are there spaces, even uneasy ones, for a diversity of forms of democratic participation other than the ones sanctioned by the new state and the party in charge of the state? If such spaces exist, what form do they take? Can a formal liberal democracy like South Africa – not only founded on one law but also achieved through violent struggle – infuse itself with forms of democratic organisation based on other values? (Buur 2005, 254).

The space envisaged by the post-apartheid government for civil society is ambiguous, at best, largely informed by an ideal of civil society as non-confrontational and co-operative. In this interpretation, civil society organisations are envisioned as implementing partners of the state’s own vision of development. The emergence of a more adversarial and often litigious element of civil society has strained state-civil society relations and created what Fioramonti calls “a new dilemma arising from the diversity of civil societies and their relation with the state” (2005, 83). He argues that the result of this emerging conflict will have an important part to play in determining the development of democracy in South Africa (Fioramonti 2005, 83).

South Africa has a long and well-documented history of civic and non-governmental organisation (NGO) engagement, some of which played a significant role in the resistance to and ultimate downfall of apartheid. Given this, it is not surprising that there is quite a robust and growing literature surrounding the role of civil society in South Africa in the pre- and post-apartheid years (inter alia Ballard et al. 2005; Bond et al. 2010; Desai 2002; Fioramonti 2005; Habib 2005; Hearn 2000; de Jager 2006). In the past few decades, leading up to and following the formal end of apartheid, civil society in South Africa has undergone enormous transitions, with two distinct periods emerging (Habib 2005). The first period arose out of an input of unprecedented funding, largely from international donor contributions, which supported the
growth of a highly active civil society in pursuit of an anti-apartheid agenda. This growth was partially enabled by the opening up of the necessary political space throughout the 1980s, as a result of a series of pragmatic political and economic reforms undertaken towards a relative liberalisation of the political system under former President P.W. Botha (Habib 2005). Before these reforms, adversarial or critical civil society was suppressed in South Africa, and civil society was instead composed largely of organisations or institutions that often worked in quite the opposite direction, towards the institutionalisation and entrenchment of apartheid. Habib notes that prior to P.W. Botha’s liberalisation reforms,

the dominant elements in civil society were organizations and institutions that were either pro-apartheid or pro-business. Agencies critical of the state and the socioeconomic system were actively suppressed or marginalized from the formal political process. The major political contest within civil society seemed to be between pro-apartheid institutions like the Broederbond and Nederlaandse Gereformede Kerk (NGK) [Dutch Reformed Church] and liberal-oriented organizations such as the Institute of Race Relations and the National Union of South African Students (2005, 674).

Botha’s reforms, however, did not mean that the overwhelmingly adversarial civil society that emerged in this new space was welcomed, or even tolerated, by what in many respects remained a violently oppressive state, and in fact, the state crackdown on oppositional civil society through the 1980s was often particularly severe (Habib 2005, 675). At the same time, civics, focused on organising local residents around both local material and broader political goals, had emerged in the late 1970s “as local associations campaigning for improved living conditions in black townships and opposing municipal authorities foisted on townships by the white minority state” (Glaser 1997, 6). Civics not only attempted to address everyday issues of citizens’ daily lives,

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10 The Afrikaner Broederbond (Brotherhood) was a secret Afrikaner nationalist organisation, formed in 1918 to advance the interests of Afrikaners in South Africa. It was an all-male organisation, with substantial political and economic influence throughout apartheid. It transitioned in 1993 to become the Afrikanerbond.
but also placed them in the larger context of the ultimately successful fight against apartheid (Bond et al. 10, 21).

The end of apartheid brought with it significant shifts in the role and configuration of South African civil society. International donor money was largely re-channeled away from NGOs and other apartheid opposition groups into the new ANC government, and with the fall of apartheid, the *raison d'etre* of many civil society organizations largely vanished, replaced with expectations of representation and co-operation from the new government (Ballard et al. 2005). During this second phase, many key civic and civil society actors were formally incorporated into the ANC government at multiple levels, and non-profit organisations were regularised. By 1997, the South African NGO Coalition (Sangoco) estimated that more than 60 percent of senior NGO staff had moved to government and the private sector since 1990 (Habib & Taylor 1999, 79). The net effect of these kinds of shifts was “the establishment of a fiscal, legal, and political environment that has facilitated the development of a collaborative relationship between the state and formal NGOs” (Habib 2005, 679). While cautioning against generalisations, Bond *et al.* note that,

many NGOs that survived the decline in available resources were gradually transformed through four inter-related changes: they became less accountable to their constituents, their identity shifted, their relationship with government was redefined, and their capacity to deliver declined. In order to survive financially, NGOs increased their levels of professionalization to compete with private agencies for government tenders. While shaping their activities to meet tender requirements, NGO aims were increasingly subsumed by the agendas of government departments, sometimes stretching mission statements past recognition (2010, 22).

While many key civil society actors were incorporated into business and government, and many others assumed a new, collaborative relationship with the post-apartheid state, this certainly has not applied to civil society as a whole. The struggle against apartheid had prompted the coming
together of a very wide array of different civil society organisations and movements under the broad anti-apartheid umbrella. Interestingly, in some ways, the resistance movement had claimed and demanded “a uniformity which did not exist and which contradicts the very notion of civil society, one of whose premises is diversity” (Friedman & Reitzes 1996, 60). Without a common, unifying cause in the post-apartheid years, and with the opening of the necessary political space, a diverse range of civil society organisations and actors have emerged with a diverse range of agendas, tactics, and relationships with the state.

Recently, some researchers have been tracking the re-emergence of less collaborative forms of civil society in South Africa, including social movements, that have increasingly begun to challenge the government on a number on issues such as access to healthcare, the provision of housing and utilities, and unemployment (Ballard et al. 2005; Desai 2002). Bentley describes this as the end of the “honeymoon” period between civil society and the post-apartheid state, in which civil society now “frequently acts against government to hold it to its obligations under the Constitution” (Bentley, Nathan, & Calland 2013, 44). The internationally recognized NGO Treatment Action Campaign (TAC), for example, emerged in 1998 as a powerful advocate for improved treatment, care and support for people living with HIV in South Africa, and soon became known for its strong, oppositional and advocacy positions, challenging the government publically and in the courts regarding its slow and insufficient response to the crises of HIV/AIDS, and vocally campaigning against the official AIDS denialism of the time. In more recent years, movements such as the Anti-Privatisation Forum, the Landless People’s Movement, and the “shack dwellers” movement Abahlali baseMjondolo in KwaZulu Natal have emerged, taking an adversarial stance against state policies at multiple levels of government. These, and other organisations, often deploy the language of rights as outlined in the 1996 final Constitution
and the Bill of Rights, and for many, the courts have become a battleground to contest the actions (or inactions) of government in areas such as health, education, and refugee and migrant rights.

The contemporary South African state is characterised by relatively robust political and judicial institutions, which, alongside its strong Constitution and Bill of Rights, afford at least some measure of protection for civil society organisations, even those who act in opposition to the state. However, the extent of the actual autonomy of much of contemporary South African civil society has been called into question by many observers and academics. As noted above, the transition from apartheid in South Africa also brought about a significant transition for civil society. The incorporation of much of civil society into private business and state institutions meant that while the advent of constitutionalism and democracy in the country theoretically created the formal structures and political space within which a new, unconstrained civil society could operate, civil society as an autonomous sphere instead paradoxically experienced something of a collapse amidst shifting donor funding priorities and expectations of a government with which organisations could collaborate. The ANC government’s Reconstruction and Development Programme (RDP), for example, specifically envisaged a key role for civil society actors in the transformation and development of the “new” South Africa. The RDP, launched in 1994 as the key post-apartheid socio-economic policy platform, was designed in consultation with Tripartite Alliance partners, the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP). It began as an election manifesto and developed into,

a formal policy programme setting out the ANC’s broad ‘transformation’ vision, as well as specific targets to be met in a wide range of social and economic spheres both in the first year and within the first five years (Blumenfeld 1997, 67).
Civil society, according to the RDP, would be required to transition from a role of state opposition into one that fostered a developmental agenda and which helped the new ANC government to take up the many formidable challenges of the post-apartheid state, through the implementation of the strategies outlined within the RDP. The RDP also called for measures to be “introduced to create an enabling environment for social movements, CBOs and NGOs in close consultation with those bodies and to promote donations to the non-profit sector” (ANC 1994, sec. 5.13.5). While the RDP intended to foster the empowerment of civil society and recognised its contributions and potentials, the role the ANC envisioned for civil society was nonetheless closely linked to the implementation of its own policy agenda, and clearly assumed the end of an oppositional role for civil society. The RDP, however, was in many respects a short-lived programme. While it initially received very strong political support, within a year “this support had begun to erode, and within two years, the separate ministry set up to implement the programme had been abolished, and the RDP thereby severely downgraded” (Blumenfeld 1997, 65). In part, the RDP was undermined in its first year by underspending, administrative and bureaucratic incapacity, slow delivery, and some measure of fraud and corruption, but perhaps more importantly, the economic policies informing the RDP sat uncomfortably alongside the ANC’s macro-economic promises of growth and the creation of an investment-friendly economic environment (Blumenfeld 1997). By August 1995, a new cabinet committee chaired by then Deputy President (and future President) Thabo Mbeki was struck to develop or recommend economic policies that would place greater emphasis on economic growth. What emerged in 1996 was the new Growth, Employment and Redistribution programme (GEAR), which embraced many aspects of an orthodox Washington Consensus style macro-economic approach, including trade liberalisation, deregulation, and an emphasis on deficit reduction and
fiscal conservatism. The shift from the RDP to GEAR was highly controversial and for many who had fought against apartheid from a socialist or communist perspective, it was also deeply unpalatable. The embrace of a neoliberal macro-economic framework caused deep divides between and within the governing party, and its partners in the tripartite alliance, the South African Communist Party and the Congress of South African Trade Unions. Fioramonti argues that the rhetoric of the government towards civil society also shifted from the RDP to GEAR, with the ANC demonstrating an increasingly ambiguous position towards civil society (2005, 79). The ANC’s recognition of civil society as partners in development was difficult to reconcile with its interpretation of civil society organisations as implementers of ANC policy, rather than autonomous actors with their own (potentially oppositional) agendas. Moreover, the role of NGOs as “watchdogs” of the government was at this time officially opposed by the ANC (Fioramonti 2005). In his speech at the 50th ANC Conference in Mafikeng in 1997, President Mandela, for example, derided those NGOs who had emerged as critical voices in the post-apartheid period, and accused some NGOs of being instruments of foreign governments with little popular legitimacy:

We must also refer to sections of the non-governmental sector which seek to assert that the distinguishing feature of a genuine organisation of civil society is to be a critical "watchdog" over our movement, both inside and outside of government. Pretending to represent an independent and popular view, supposedly obviously legitimised by the fact that they are described as non-governmental organisations, these NGO's also work to corrode the influence of the movement. Strangely, some of the argument for this so-called "watchdog" role was advanced from within the ranks of the broad democratic movement, at the time when we all arrived at the decision that with the unbanning of the ANC and other democratic organisations, it was necessary to close down the UDF [United Democratic Front]. Thus we ended up with the situation in which certain elements, which were assumed to be part of our movement, set themselves up as critics of the same movement, precisely at the moment when we would have to confront the challenge of the
fundamental transformation of our country and therefore, necessarily, the
determined opposition of the forces of reaction. They lack the issue-driven
mass base that is the defining feature of any real NGO and are therefore
unable to raise funds from the people themselves. This has also created the
possibility for some of these NGO's to act as instruments of foreign
governments and institutions that fund them to promote the interests of these
external forces (Mandela 1997).

Significantly, in this particular interpretation of state-civil society relations, the ANC still
identifies itself as “a movement” rather than a governing political party. Those who may oppose
the ANC or even aspects of the ANC’s agenda for transformation are positioned as opponents of
the movement itself, leaving little room for civil society actors to legitimately express dissent
around specific policy decisions, or state actions and inactions. Oppositional NGO voices, in this
rendering, are positioned as illegitimate and anti-transformation “forces of reaction.” Mandela’s
critique of NGOs as possible instruments of foreign governments or institutions is echoed in the
work of Hearn, who argues that in many respects, some important elements of civil society since
1994 have become a conduit for international funds earmarked for democracy assistance, with
the specific aim of the promotion of liberal democratic principles. Hearn highlights the fact that
during the struggle against apartheid, many South Africans fought for a kind of democracy that
included not just political freedom, but also included increased control of the economy. This,
she argues, has not materialised with the post-apartheid entrenchment of neoliberalism;
international donor assistance that supports and strengthens liberal, as opposed to social,
democracy, must be viewed for what it is: political aid with a political agenda (Hearn 2000).
Hearn laments the “highly uncritical view of liberal democracy among Africanists, among many
sectors of civil society in Africa, and, not surprisingly, among Western aid agencies,” and
questions whether this embodies the kind of democracy that is actually desired by the majority of
South Africans (2000, 818).
The ANC’s ambiguous relationship with civil society in South Africa has continued, with distinctions continuing to be made between civil society organisations who work in collaboration with the ANC, particularly in implementation roles, and those that challenge the state and its policies. This does not apply only to internationally funded NGOs working in a liberal tradition, but also to the emergence of the new social movements in South Africa, which have posed a particular challenge to the ANC in terms of negotiating its relationship with civil society. The ANC government’s general response to such social movement challenges has been “to portray these movements and their activists as criminals and anarchists” (Fioramonti 2005, 81).

Referring to general strikes organised in 2001 and 2002 by unions and social movements, largely in protest of the ANC’s privatisation agenda, the President Mbeki responded by arguing that such protests ran counter to the democratic mandate of the ANC, and that those who position themselves in opposition to the ANC are acting against “our movement”:

Yet there are others who have decided that both the ANC and the masses of our people are wrong. These, who see themselves as our comrades, say that we must change the policies adopted at our 50th National Congress, reaffirmed at our National General Council and National Policy Conference, and mandated as national policy by the people in 1999. They say that whereas the ANC and the masses are blind, they have the eyes to see the disastrous folly of the decisions and the ways of the ANC and these masses. [...] They should also have known that the people know that, historically, those who opposed and worked to destroy the ANC, and tried to mobilise the workers to act against our movement, were the same people who sought to entrench and perpetuate their oppression (Mbeki 2002).

As in Mandela’s interpretation of the appropriate role of civil society, Mbeki’s response also frames oppositional civil society, even those elements that had been strongly aligned with the ANC during and immediately following apartheid, as an enemy of the ANC as a movement, also not making the distinction between the ANC as a movement and the ANC as the governing party. He also equates this element of civil society to those who sought to maintain and entrench the oppression of apartheid. For Mbeki, to question or criticise the ANC appears to be
tantamount to questioning the will of the people, ultimately undermining the ANC’s authority to rule. Civil society is not seen here as an autonomous realm capable of, and indeed expected to, critique the government or express alternative perspectives – rather, such critiques are viewed as misguided and bordering on traitorous. Paradoxically, through its policies and legislation, the ANC government provides the necessary political space for the existence of a diverse civil society, even engaging selected elements of it, at times; however, the ANC-led government also “considers itself to be the ‘only leader of the people’ by virtue of democratic elections and therefore the only legitimate voice representing the views of the people” (de Jager 2006, 101).

The growing divide between organisations and movements that positioned themselves in opposition to state policies, and those who worked to implement them, was symbolically highlighted in 2002 in Johannesburg at the World Summit on Sustainable Development when, the former gathered together under the rubric of the Social Movements Indaba, while the latter collectively grouped under the Civil Society Forum. The most visible result of this division was the organization of two distinct marches: the march organized by the Social Movements Indaba and allied formations attracted around 20 000 people, while the ANC-backed Forum march attracted fewer than 4 000 (Fioramonti 2005, 81).

Not only were there fault-lines running through civil society in South Africa in post-apartheid South Africa, but significant divisions were also becoming more and more apparent within the ANC itself. Perhaps the most public display of these divisions to date occurred during the 52nd ANC leadership conference at Polokwone in 2007, which saw a dramatic political showdown between supporters of President Thabo Mbeki and those who supported the more populist Jacob Zuma for the leadership of the ANC. The latter was widely perceived to be closer to the grassroots, far more pro-poor in his political approach and perspectives, and on much better terms with COSATU and the SACP than Mbeki and his government had been (Reitzes 2010). Given this, Zuma’s ascendance to the Presidency in 2009 raised some hope amongst civil society
actors and observers for a renewed relationship between the ANC-led government and civil society after the alienation and challenges of the Mbeki years, in particular (Reitzes 2010; Taljaard 2009). However, Reitzes, writing soon after Zuma’s coming to power, noted that,

many civil society activists have the negative experiences of the Mbeki era, when they perceived themselves to be shut out by the ANC, fresh in their memories, and qualify the more euphoric expectations of the Zuma ANC. They anticipate that after an initial 'honeymoon' period, and apparent expansion of space for civil society engagement with the Zuma administration, there will be a subsequent contraction of this space, and relations will revert to those which dominated the Mbeki era (2010, 7).

This contraction of space for engagement certainly appears to be true of contemporary relationships between the state and many civil society actors involved in issues of migration, as will be explored in chapter nine.

In the migration arena, the conceptual challenges of defining civil society are readily apparent, as there remains a wide diversity of civil society engagement in migration issues, not all of which is progressive. There are, for example, complex linkages between civil society and xenophobia, such as the relationship between community level service delivery protests and incidents of xenophobic violence that can easily arise from these protests (von Holt et al. 2011). At the same time, xenophobic attitudes are not uncommon amongst the rank and file members of civil society organisations or social movements, even if such attitudes are not endorsed by leadership structures. While recognising this diversity, this dissertation hones in on a particular segment of civil society that maintains a specific focus on migration, and particularly refugee and asylum seeker issues. This segment largely emerged within civil society in conjunction with the rise of post-apartheid South Africa’s new human rights orientation, constitutionalism, and the development of refugee legislation, and with the emergence of refugees and asylum seekers as a growing and active population in the country. A widespread consultation process associated
with the development of post-apartheid migration legislation through the late 1990s (to be discussed in chapter seven) “created space for the various activist, business and scholarly interest groups to define their positions and assert their objectives on migration” (Wa Kabwe-Segatti 2008, 76). A range of organisations and coalitions began to emerge, including legal advocacy groups, non-governmental organisations, and associations of migrants and refugees. While there is much diversity within this segment, there are also many broad, shared goals, particularly around upholding and expanding migrants’ access to rights, and in advocating for improvement in the life circumstances and wellbeing of migrants. The opportunities and constraints facing this segment of civil society for its work in contemporary South Africa will be discussed in detail in chapter nine.

**Conclusion:**

Finding one all-encapsulating definition of “civil society” is likely to remain a futile pursuit, given the multi-faceted nature of its many parts and its various interests, along with the general elusiveness of any clearly demarcated borders between civil society and the state. Whether civil society is a forum for the pursuit of radically reformed social agendas, or whether it is largely an agent of the *status quo*, protecting and upholding the entrenched interests of state and capital, remains a highly contested debate. Questions of the representativeness and accountability of civil society, and the relationship between civil society and processes of democratisation, continue to inform academic inquiry. This chapter has argued for a conceptualisation of civil society that takes as a starting point this plurality, and that acknowledges the co-existence of myriad civil societies comprised of a wide range of actors, agendas, and relationships with the state.
The end of apartheid has raised important questions about the role of civil society in South Africa’s new democracy. It has also raised questions regarding the relationship between civil society and the post-apartheid state, and the role of the state in fostering a vibrant and diverse civil society that is capable of effectively contributing to the myriad social, economic and political challenges faced in contemporary South Africa. Following the largely united front of civil society in the anti-apartheid struggle, the post-apartheid years have seen a fragmentation of civil society into a diverse range of voices and interests, some that have opted to work cooperatively with the state largely as implementers of the ANC government’s policies, some that have positioned themselves in more of an oppositional role to state policies, and some that have attempted to straddle these positions. The post-apartheid ANC-led government, in turn, has shown much ambiguity in its approach to civil society, often embracing those elements which work cooperatively with it while dismissing or even villainizing those who challenge ANC decisions or policies and stand in opposition to the state. It is within this complicated context that a segment of civil society has emerged in the post-apartheid years with a specific focus on the issues of migrants, refugees and asylum seekers.
Chapter Six: Legitimacy, Xenophobia, and the Social Construction of Migrants

South Africa’s formal domestic and international commitments to protecting the rights of migrants, refugees and asylum seekers changed dramatically with the end of apartheid. The transition to democracy was accompanied by rapidly shifting migration streams and patterns, and new state commitments to a liberal, rights-based constitution that extended (at least in principle) to all people, including migrants, refugees and asylum seekers. South Africa also made new commitments to international migration-related and human rights protocols, which had to be reflected in domestic legislation. The early years of the transition also saw significant shifts in the ANC’s economic strategies, as the party moved away from its earlier, more socialist ambitions towards a liberal (or even neo-liberal) macro-economic approach. These widespread and rapid social and economic changes, however, have not been uncontested, and formal state commitments and obligations continue to be challenged and undermined by underlying and often conflicting societal values and domestic political pressures. In this chapter, I argue that migration debates in post-apartheid South Africa must be understood against the backdrop of deeply embedded and still-unresolved liberal-radical debates, which have shaped political perspectives in South Africa for decades. These debates raise important legitimacy questions regarding the extent to which the largely liberal social and economic values adopted by the post-apartheid state reflect broader societal values and systems of meaning. The politics of migration management, I argue, have been caught up within these historically rooted debates and dynamics, framed by the absence of a general consensus within both state and society regarding these broader questions of guiding macro-economic and social values.

One of the most poignant illustrations of this lack of consensus has been the prominence of xenophobia and its various expressions in post-apartheid South Africa. Ongoing anti-
foreigner resentments and violence have thrown into sharp relief the contradictions between formal state policies around the protection of the rights of migrants, and the lived realities of migrants and residents of the communities in which they live. At the same time, expressions of xenophobia from within various communities across South Africa, often organised and undertaken with relative impunity, point to different, non-state sites and structures of authority and meaning, raising questions about the limitations and reach of the post-apartheid state. While direct crime and violence against foreign nationals represent blatant expressions of xenophobia, this chapter presents evidence that the negative social construction of migrants in post-apartheid South Africa has more subtle impacts as well. These negative social constructions have important implications not only for the ways in which migrants are considered and treated in the policy realm, but also for the ways in which civil society actors are able to mobilise and advocate for these populations. Evidence shows that regardless of the *de jure* rights of migrants, policy makers and civil society actors alike are conscious of a *de facto* hierarchy that, in practice, continues to place the needs and rights of citizens firmly above those of non-citizens.

**Migration and the Transition to Democracy**

Migration policy and practice in post-apartheid South Africa has been shaped by an array of new and sometimes conflicting domestic and international pressures, obligations, and expectations. However, the negotiations and transition that led to the ANC’s official embrace of a new liberal and human rights-based constitution, along with economic liberalism (or, many would argue, neo-liberalism), could not erase the years of struggle history and ideological differences that would continue to challenge the post-apartheid government.
The fall of apartheid coincided with the collapse of the Eastern Bloc, curtailing the ANC’s more revolutionary approach to ending apartheid and rendering earlier, much more socialist visions of a post-apartheid South Africa increasingly elusive. For decades, the struggle against apartheid had been intrinsically interwoven with the global politics of the Cold War, some of which played out in surrogate theatres within post-colonial African states. During these years, the South African apartheid state walked a difficult and tenuous line. While it allied itself firmly with the anti-communist stance of the West, and garnered much support amongst American allies in this regard, the blatant racially oppressive policies of the apartheid government became more and more unpalatable to the West, especially in the face of growing international condemnation and campaigning. The apartheid state’s intense fight to maintain the privileges and political order of apartheid became enmeshed with its fight against the *rooi gevaar*,\(^{11}\) as the ANC was funded in large part by Moscow (though it enjoyed the financial support of many Western donors as well), and maintained close ties with the South African Communist Party, which even today maintains members in high political posts in the South African government.\(^{12}\) While the ANC and its affiliated organisations (such as the United Democratic Front) housed individuals from a broad range of intellectual and ideological traditions, the strong ideological and financial influence of the SACP, especially on the ANC in exile, was very much disproportionate to the number of its members (Ellis 2012). Many within the ANC believed that nothing less than a revolutionary insurrection and seizure of power from

\(^{11}\) The Afrikaans phrase meaning literally “red danger,” in reference to the perceived communist threat.

\(^{12}\) Recent research by Stephen Ellis (2011, 2012) reveals that the SACP’s influence on the politics of the ANC in exile goes even deeper than has been previously thought; Ellis even provides substantial evidence that Nelson Mandela himself was a card-carrying member of the SACP for some years, a claim which he had always denied. This claim was in fact confirmed by the SACP following Mandela’s death in December 2013. Ellis presents a convincing argument regarding the considerable weight of the SACP’s influence in promoting and pushing the launch of Umkhonto we Sizwe (MK), which became the armed wing of the ANC, noting SACP consultations in China with Mao Zedong that actually predated and subsequently shaped the armed struggle debate within ANC senior organs.
the apartheid state would bring about the kind of social and economic transformation they wished to effect, but the collapse of the Eastern Bloc made the realisation of this dream increasingly chimerical. Instead, it soon became clear that the transition from apartheid to democracy would be effected through negotiations.

While perspectives on the negotiations and their political backdrop will undoubtedly continue to emerge in South African historiography, it is difficult to imagine that the congruence of multiple domestic and international processes that led to the negotiations left room for anything other than a settlement in which the economic and political institutions that served the apartheid regime would remain largely intact, to be taken over at the helm by the new ANC-led government. The negotiated transition leading to the first multi-racial elections of 1994 was a long, complex, and arduous undertaking, a detailed exploration of which is outside the scope of this work. Some scholars and commentators critique the ANC for having “sold out” through the negotiations on its revolutionary and socialist promises (see, for example, Bond 2000; Saul 2001). Others describe the party as having quite efficiently navigated and manipulated the political terrain from a position of power, in what essentially were bilateral negotiations between the ANC and the National Party, sidelining, as much as possible, other non-aligned stakeholders

13 Barry Gilder, a former MK combatant and Soviet-trained ANC intelligence agent who would go on to become Director General of the Department of Home Affairs from 2003-2005, writes in his recent autobiography about the apprehension and confusion that many in exile felt upon hearing news of the forthcoming negotiated settlement. “We debated these developments extensively in Botswana,” he writes, “but our general conclusion was that the apartheid regime was not to be trusted and there was no way they would agree to a settlement that approximated the post-apartheid South Africa we dreamed of” (Gilder 2012, 203). While Gilder writes later about a growing acceptance, in some sense, of a “negotiated sidling into power,” he also notes that “perhaps naively, we believed that we would achieve through the ballot box what we had not quite achieved through revolutionary struggle – a complete takeover of the reins of power to enable us to begin the transformation of our country...” (2012, 224-225).

14 Even the ANC’s initial “Reconstruction and Development Programme” (RDP), an ambitious and multi-faceted left-leaning post-apartheid platform, was replaced as early as 1996 by the macro-economic strategy of the Growth, Employment and Redistribution (GEAR) policy, modeled closely on Washington Consensus macro-economic tenets, suggesting either a significant change of direction in terms of economic policy, or, perhaps more likely, the ANC’s acknowledgement of limited available space for an true effective overhaul of the economic and political order in the international post-Cold War climate.
and political actors (see, for example, Jeffery 2009; Waldmeir 1998). As a result, the negotiations addressed issues such as the terms of the negotiations themselves; the values and balance of power to be enshrined in the new constitution; issues of federalism and related controversial issues of ethnic self-determination; the procedural terms by which the constitution would be written in the first place; and, the terms under which the civil service would also transition under the new government. Every step of this terrain was a veritable landmine of social, political, and economic sensitivities.

The domestic and international pressures and processes that led to the opening up of South Africa, politically and economically, meant that the entire terrain of migration politics shifted significantly. The immediate and long-term challenges to migration management and the formulation of relevant policy for these new circumstances were many. The former special advisor to the Minister and one of the key architects of the new post-apartheid Immigration Act, noted that in the field of immigration, previously arbitrary administration decisions and actions now needed to comply with a rigid and human-rights based constitution.\footnote{Interview, Hon. Mario Oriansi-Ambrosini, Cape Town, October 6, 2011.} In addition, with the demise of apartheid, and the subsequent shedding of the country’s international pariah status, South Africa also became a signatory to a Basic Agreement with the United Nations High Commissioner for Refugees in 1993, a party to the 1969 Organisation of African Unity Convention on the Specific Aspects of Refugee Problems in Africa in 1995, and to the 1951 Geneva Convention Relating to the Status of Refugees in 1996 (Barutciski 1998, 701). These international obligations have also circumscribed and underwritten the available policy options. However, as will be argued in chapter eight, the failure to honour the protocols through the
implementation of refugee legislation in practice is an important component in understanding the current crisis in refugee management.

Along with these shifting administrative and legal parameters, rapidly changing migration patterns in the post-apartheid state have also presented new challenges for governance. Since 1994, annual approved entries into South Africa (including entries for purposes such as work, study, business, holiday, and contracts), have climbed steadily and considerably, though interestingly, annual numbers of legal permanent immigrants have generally substantially dropped post-apartheid (see Appendices 1 and 2). In terms of undocumented migrants, South African Police Service statistics for 2007, 2008 and 2009 estimate the presence of between 3-6 million in the country (Segatti & Landau 2011, 156), while the official 2011 national census data show a total of 1,692,242 foreigners out of a total national population of approximately 50 million, or about 3.3% of the population (Landau et al. 2013). The African Centre for Migration and Society recognises this may be an undercount, but estimates that the total percentage is still unlikely to top 4% (Landau et al. 2013). Some of the most striking migration figures of the post-apartheid dispensation, however, relate to refugees and asylum seekers, a category that did not officially exist in South Africa until the promulgation of the Refugees Act of 1998. Department of Home Affairs (DHA) data from 2001-2009, for example, show a substantial increase in the number of asylum seekers in this period, rising from 4,860 in 2001 to 364,638 in 2009 (see Appendix 3). The number of refugee status approvals, however, remains disproportionately low in comparison with the rising numbers of asylum applications received, with fewer refugee status approvals being granted in 2009 than in 2007, when the number of asylum applications was far less, at 58,584. This points to an already large and growing backlog of unprocessed asylum applications (Segatti & Landau 2011, 158). Political turmoil in neighbouring Zimbabwe (which
many argue the South African government has, at best, done little to abate) has certainly added significant numbers to the asylum seeker backlog, despite attempts by the South African government to regularise Zimbabweans living in South Africa through formal documentation processes. Importantly, the ACMS notes that asylum seeker numbers have, in large part, escalated because there currently is no legal, effective way for economic migrants to enter South Africa, and argues that with such a mechanism in place, asylum seeker levels would drop to levels that would be easily manageable (Landau et al. 2013). Citing the Department of Home Affairs’ 2011 statistics, they note, for example, that the recent, relative stabilization of Zimbabwe resulted in a 64% decrease in asylum applications in 2011 (Landau et al. 2013).

South Africa’s emergence from apartheid, in conjunction with its economic power-house status, has certainly created new “pull factors” for migrants, and new migrant streams, but South African perceptions of the numbers of migrants in their midst are often highly over-estimated. Crush and Pendleton note that amongst the countries in their regional survey,

there is not only a generalized perception that in-migration has increased but that the numbers involved are massive and out of control. Respondents in all countries surveyed consistently exaggerate the numbers of non-citizens in their country. Most people believe that between 1 in 3 and 1 in 4 people in their country are foreigners…. Even taking into account undocumented migration, these figures bear absolutely no relationship to the real situation (2004, 12).

Surveyed South Africans also believed that nearly 48% of the non-citizens in South Africa were illegally present; this, they write, is almost certainly an exaggeration and a likely result of the ongoing conflation of illegality and immigration, in the minds of many South Africans (Crush &

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16 Throughout the dispensation and documentation processes (which began in April 2009 with a much less clear ending date) the government declared a temporary moratorium on the deportation of undocumented Zimbabweans during a window in which they could, in theory, present at the Department of Home Affairs (DHA) and regularise their status. These processes have met with some success but have also been beset by significant management and administrative challenges. For an overview of some lessons learned from these documentation processes for Zimbabweans, see Amit 2011b.
Pendleton 2004, 13). Nonetheless, these kinds of assumptions and misperceptions inform the ways in which South Africans think about and react to issues of migration, and, regardless of the reality, the very perception of the reality takes on an importance of its own.

As well as confusion about the numbers of migrants, there is also significant uncertainty amongst South Africans, both within the state and more broadly, regarding the different categories or streams of migrants. While definitions of the different streams of migrants within the Refugee and Immigration Bills, along with international protocols and obligations, are quite specific, there is a limited understanding of these categories and the various motivations of migrants amongst South Africans across the spectrum. As Crush and Pendleton show in their survey of regional attitudes to migration in southern Africa, even where there is a differentiation of refugees from economic migrants,

a very large percentage of respondents in all countries surveyed, between 63% and 79%, say that 40% or less of refugees are actually genuine. This indicates a generalized skepticism about refugees and refugee claimants (2004, 15).

There is also confusion about, and conflation of, the various categories of migrants amongst state actors. A January 2013 headline on the home page of the Department of Home Affairs website, for example, announced the new Minister of Home Affair’s pending visit to the “Lindela Refugee Centre” in Krugersdorp, while in reality, the Lindela Repatriation Centre is a privately-run detention facility for undocumented migrants, from which such migrants are regularly deported (DHA 2013). Even more revealing, at a Home Affairs Parliamentary Portfolio Committee17 meeting in September 2011, the Chair suggested a presentation that would help

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17 The role of the Portfolio Committee in the structure of the South African government is to “consider Bills, deal with departmental budget votes; and oversee the work of the department they are responsible for, and enquire and make recommendations about any aspect of the department, including its structure, functioning and policy” (DHA n.d.)
clarify for committee members the difference between the refugee and asylum seeker categories and processes, suggesting that members were not already sufficiently familiar with these subjects, despite the Committee’s critical oversight role.\textsuperscript{18} A further example of this is expressed by the former Shadow Minister for Home Affairs, Annette Lovemore:

\begin{quote}
I can tell you that the Minister\textsuperscript{19} classifies [Zimbabweans] as economic migrants. She said that she went to Zimbabwe recently and there were a lot of people […], a lot of white people enjoying a holiday in Zimbabwe, so how can we come and tell her that ‘these people’ might be fleeing any kind of persecution or whatever. Well you know, they might actually be MDC [Movement for Democratic Change] members – they might actually be persecuted within their communities and within their political groupings, or whatever it might be.”\textsuperscript{20}
\end{quote}

Such a statement from the Minister would represent a significant misinterpretation or misunderstanding of the principles of asylum, as the fact that a country might be considered safe for certain groups or safe enough for tourists to visit by no means invalidates individual asylum claims. Partly, these kinds of beliefs or attitudes may be a reflection of inexperience, as following the end of apartheid, there was very little precedent for dealing with issues of refugees and asylum seekers, aside from an under-resourced and discretionary approach in the last years of apartheid.\textsuperscript{21} Such a lack of institutional and technical experience in refugee matters was highlighted as a key challenge by retired senior Home Affairs Chief Director of Refugees and later Chair of the Standing Committee for Refugees Claude Schravesande, who noted that previously “nobody dealt with refugees, because there weren’t any.”\textsuperscript{22} He made the point that

\begin{footnotes}
\textsuperscript{18} Meeting of the Home Affairs Portfolio Committee, September 20, 2011.
\textsuperscript{19} At the time of this interview, the Minister of Home Affairs was Hon. Nkosazana Dlamini-Zuma.
\textsuperscript{20} Interview, Hon. Annette Lovemore, MP, Cape Town, September 21, 2011.
\textsuperscript{21} The transition from apartheid made it possible for South Africa to recognise refugees and accede to the 1951 Geneva Convention in 1993; until the Refugee Act was promulgated in April 2000, this was managed through a direct agreement with the United Nations rather than through specific refugee legislation (interview, Schravesande, 2012).
\textsuperscript{22} Interview, Claude Schravesande, Langebaan, December 7, 2012.
\end{footnotes}
this was true not just of government, but also, importantly, of the legal sector, non-governmental organisations, and private institutions.\textsuperscript{23}

The transition from apartheid introduced a host of new and unforeseen challenges for migration management, alongside new legal parameters within which migration needed to be managed. In the midst of rapidly shifting migration dynamics, the new ANC-led government was faced with the task of overhauling its migration policies to align with its new domestic and international commitments, and its human rights orientation, as well as its new macro-economic strategies. However, there remained much contention regarding these new directions, and charting a workable path forward was far from a simple undertaking.

\textbf{Liberalism and the Social Legitimacy of Migrants' Rights}

Debates about the best economic trajectory for the country, along with debates about appropriate social values and norms, remain highly controversial in post-apartheid South Africa. Some of the key contestations can be understood against the background of the still-unresolved liberal-radical debates that have shaped political perspectives in South Africa for decades. These debates point to important legitimacy questions regarding the extent to which the largely liberal social and economic values formally adopted by the post-apartheid state actually reflect broader societal values and systems of meaning. The politics of migration management have been caught up within these debates and dynamics, framed by the absence of a broad consensus within both state and society regarding these larger questions of guiding macro-economic and social values.

\textsuperscript{23} Ibid.
Some of these legitimacy questions are highlighted in contestations regarding the various rights and values enshrined in the country’s 1996 constitution, widely considered to be amongst the world’s most liberal constitutions. As Posel (2004, 231) notes, complex and ambiguous relationships have emerged in South Africa to what she terms “the new constitutional hegemony,” with a proliferation of competing notions of social order and justice. From one perspective, the constitution’s delineation and formal protection of the newly won liberties and rights is poignantly representative of the successful struggle against apartheid, and yet, from another perspective, democratic constitutionalism is,

a set of prescriptions and proscriptions, both moral and legal, which sit rather uncomfortably with some popular preferences and predelictions. Democracy, from this standpoint, is a new mode of surveillance, which is confining and restricting (Posel 2004, 232).

Comaroff and Comaroff (2003) acknowledge a similar tension. They note that post-apartheid South Africa’s constitution is “founded on the most comprehensive, most liberal, most enlightened notions of democratic pluralism... [and is] unusually attentive to universal enfranchisement and human rights” (Comaroff & Comaroff 2003, 446). Yet, they argue, given the very social fabric of South Africa, there have always been doubts about post-apartheid South Africa’s ability to constitute the “One Nation” or “One Law,” to which the Constitution aspires; instead, they point out that “almost from the start, a ‘crisis of culture’, a counter-politics of ethnic assertion against the jurisdiction of the state, has rumbled beneath the surface of the new polity, threatening to disrupt the founding premises of its Bill of Rights” (Comaroff & Comaroff 2003, 446). The tensions to which Comaroff and Comaroff refer, between ethnically based centres of authority and codes of behaviour, on the one hand, and the individual human-rights legalistic protections and guarantees of the constitution, on the other, are an important example of the terrain of struggle between the state, with its own aspirations for fostering and increasing its
legitimacy as the *bona fide* representative of its citizens, and those elements of society that still hold and maintain at least some of that legitimacy themselves, outside of state structures and mores. Legitimacy, Joel Migdal argues, is one of the three key indicators of the social control of a state, alongside,

- compliance (the degree to which the population conform with its demands)
- participation (the ability of the state to organise the population for specialised tasks in the institutional components of the state organisation)

Legitimacy, for Migdal, is the most potent factor in determining the strength of the state, entailing an acceptance of the “state’s rules of the game, its social control, as true and right; an acceptance of the symbolic order associated with the idea of the state as people’s own system of meaning” (2001, 52). While the ANC enjoys enormous legitimacy in South Africa in many ways (evidenced in its dominating returns at the polls since 1994), there remain important questions as to the degree to which the post-apartheid state does reflect “people’s own system of meaning” and whether the state’s rules of the game have, in fact, been accepted by citizens, or indeed, by many state actors themselves.24

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24 One illustration of parliamentarians’ disgruntlement with some of the protections afforded by the constitution took place at a Department of Home Affairs Portfolio Committee on February 12, 2013, when the Chair asked a presenter from the Law Society of South Africa, William Kerfoot, about the case of Emmanuel Tsebe and Jerry Phale, two nationals of Botswana accused of murder in that country who had fled to South Africa and were arrested. Under domestic and international law, despite Botswana’s requests, South Africa could not extradite the accused because of Botswana’s continued application of capital punishment, without an undertaking specifying that the death penalty would not be applied. Botswana refused the undertaking and the case for extradition, brought by the Department of Home Affairs and contested by Lawyers for Human Rights, went to South Africa’s Constitutional Court, which upheld that the two could not be lawfully extradited. The Chair asked Kerfoot whether Tsebe and Phale were considered refugees. Kerfoot explained that they were not, and outlined the legal underpinnings of the case and the Constitutional Court decision, saying “We have a Constitution, we have a Constitutional Court, which has abolished the death penalty.” Various Members of Parliament from the Committee replied with comments such as “True, but it’s not fair!” and “Chair, we are bound by our Constitution and we must abide by it, but really, it’s not fair, because those people committed murder there, in Botswana.” Another MP commented that this meant South Africa was impinging on the sovereignty of Botswana (Home Affairs Portfolio Committee Meeting, February 12-13, 2013). This demonstrates both an unclear understanding of refugee law (in this case, a conflation of refugees with criminals fleeing prosecution in their country of citizenship)
In the post-apartheid South African context, the Constitution protects and upholds a number of values that actually run counter to the will of most citizens. While South Africa abolished the death penalty in 1997, for example, a 2006 Angus Reid poll found that 72% of South Africans wanted to see the reinstatement of capital punishment (“South Africans Support Death Penalty” 2006). Another illustration is the decision by lawmakers to include sexual orientation within the national non-discrimination clause of the Constitution; Massoud lauds this progressive decision, but also notes that “it did not reflect the attitudes of most South Africans, who did not support gay rights. The government created a gap between its tolerant laws and the conservative social attitudes of its citizens”\(^\text{25}\) (Massoud 2003, 301). A further poignant example of disconnection between legislated rights-based protections and the wider attitudes of South Africans is citizen attitudes towards the rights of migrants. In an extensive regional survey of citizen attitudes to immigration and refugee policy in southern Africa, the Southern African Migration Project’s 2006 survey data show, for example, that the right to legal protection (i.e. not being detailed without a trial, and having access to legal representation) is supported strongly for citizens in South Africa (94%), but the percentage who think it should always be granted drops significantly for migrants/visitors (33%), refugees (24%) and “illegal immigrants” (12%) (Crush 2008, 33) (see Appendix 4). These gaps between citizens’ perceptions and the rights-based model of the state open up important potential sites of social and political conflict.

Both non-governmental actors and policy-makers in the migration arena are aware of the contradiction, though with different perspectives on the subject. One NGO employee in Cape

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\(^{25}\) Interestingly, however, Massoud argues that it was into that gap that civil society organisations stepped, and with some success, in attempting to bridge this divide between the new laws and the widely conservative social values of South Africans (Massoud 2003).
Town noted that a number of principles enshrined in the Constitution, and also underlying the international refugee conventions, are not currently reflected in larger societal values:

If you had to have a referendum on the death penalty or abortion or gay rights, the death penalty would be brought back, gay rights wouldn’t exist, [and] abortion would be illegal, for sure. So it doesn’t hold water.... We’ve forced these liberal concepts onto a society that is still ten steps behind.... The buy-in isn’t there to all these conceptions.26

One current MP and former special advisor to the Minister of Home Affairs acknowledges there have sometimes been massive gaps between post-apartheid public policy and public opinion, but argues that this has opened the way for attitudinal shifts within society towards the progressive positions set down in policy:

Especially the ANC has moved towards very progressive positions, way ahead of its constituents. There’s no doubt that the majority of South Africans wanted the death penalty, were against the recognition of the rights of homosexuals, were against abortion, were in favour of corporal punishment in school, et cetera. Being a human rights advocate, I know that one must jump ahead of one’s own constituents, ahead of where the people are at, and given enough time, they meet you there where you jumped to. You must anticipate progress to facilitate its coming to pass.27

As Massoud notes, in the area of gay rights, it was precisely this “space between a progressive legal code and a conservative society [that] became the arena for action by non-governmental organizations between 1994 and 1998” (2003, 301). There is, however, no guarantee that within this gap, the state’s hoped-for outcome will be achieved, and deep-rooted resistance to policies, whether overt or covert, can be difficult to overcome. As Migdal writes,

political leaders have faced tremendous obstacles in their drive to assert such control, obstacles that they have often failed to overcome. Leaders of other social organizations have been unwilling to relinquish their prerogatives, their ability to devise rules governing some aspects of people’s lives, without a fierce struggle. These other formal and informal social organizations have joined forces with parts of the states themselves, and developed practices contradicting the official laws and regulations of the state (2001, 49).

26 Interview, Cape Town, August 2011.
27 Interview, Hon. Mario Oriani-Ambrosini, MP, Cape Town, October 6, 2011.
However, battles over migration politics in South Africa have not simply, or even principally, been around exclusively social values, beliefs, and mores.

These battles are also underwritten by the contention, both within the state and society, around economic policy and directions in the post-apartheid era, rooted in broader questions of the way in which the “new” South Africa ought to be managed and governed, and how best to meaningfully address the myriad social and economic challenges in the country. The ANC’s post-apartheid embrace of a Washington Consensus-style macro-economic framework, along with growing popular perceptions of corruption, patronage and mismanagement, have left many supporters increasingly disillusioned with the ANC, and created new fissures and tensions in society and within government itself. Analysts such as Saul (2001) argue that the ANC turned its back on the socialist ideals of the organisation, once it came to political power, and contend that the embrace of a neoliberal macro-economic order has only exacerbated and entrenched existing poverty and inequality. Rather than uplifting the standards of living of the majority, it is argued, this system at best benefits and enriches only a new black elite stratum in the country. Others believe that an internationally integrated, open market economy with as little government interference as possible was not just the only choice, it was also the best choice for the macro-economic stability of South Africa and ultimately, for its projects of transformation and the lifting of so much of the country’s population out of poverty. These tensions within government were, and remain, considerable, governed as it still is by the tripartite alliance consisting of the ANC, the SACP and COSATU. Such tensions are also underwritten by a long and often acrimonious controversy in South Africa which, as Nattrass writes, “has taken many guises and ranged over disciplinary boundaries” and has often been called either the 'race-class' or the 'liberal-radical' debate (1991, 654). In this debate, “radical” most often refers to those
subscribing to a structural Marxist perspective, while “liberal” largely refers to those with a conventional, non-Marxist political economic perspective (Nattrass 1991, 654). While this debate is nuanced, complex and emotive, structural Marxists largely viewed apartheid and capitalism as two sides of the same coin, while the liberal perspective advocated a free market, capitalist economy and often saw the political, social and economic fetters of apartheid, in fact, as a constraint to economic growth and, ultimately, redistribution.28 The issue of whether it was even possible for capitalists to be allies in the fight against apartheid, has in effect often provided the dividing line between radicals who saw the fight against apartheid as the fight for socialism and liberals who regarded communism as distastefully as they did apartheid. The latter tended to see in the radical analysis an explicit or implicit argument for the elimination of the market, and radicals in turn saw conventional economists as unconscious or even conscious agents of big business (Nattrass 1991, 656).

While noting in 1991 that it was possible to discern some dialogue towards the bridging of these poles through potential social-democratic solutions, Nattrass nonetheless points out that clear ideological differences between many protagonists remained (1991, 656). In contemporary South African social and political discourse, still heavily racialised, the word “liberal” is often preceded by the word “white,” and often also in association with a media that is increasingly perceived by the ANC as being overly critical, and at times even hostile, to the governing party29. “Liberalism,” in South Africa, remains a term often laden with connotations of whiteness, colonialism, capitalism, and Western political ideals and values. This is also apparent in the ANC’s consistent pejorative framing of the opposition Democratic Alliance as a party of

28 See Merle Lipton’s “Liberals, Marxists and Nationalists: Competing Interpretations of South Africa’s History” for an in-depth introduction to this debate (Lipton 2007).
29 In 2011, for example, the Secretary-General of the ANC, Gwede Mantashe (who is also Chairperson of the SACP), referred to the print media as the party’s main opposition (Mkokeli 2011), while in 2010, ANC spokesman Jackson Mthembu expressed his position on the ANC’s proposed media tribunal, saying "if you have to go to prison let it be. If you have to pay millions for defamation, let it be. If journalists have to be fired because they don't contribute to the South Africa we want, let it be" (Daniels 2012).
white liberals, playing on both the deep-seated mistrust of white politicians by the majority of South African voters, and the contextual connotations of “liberalism,” as described above. While the social-democratic redistributive strategies of the ANC through social grants and housing must not be under-emphasised, the political and legal guarantees of the Constitution, alongside the embrace of the Growth, Employment and Redistribution Strategy in 1996, has nonetheless positioned South Africa firmly in the global arena as a liberal democracy. It remains important, then, to acknowledge and examine the fault-lines that run through both state and society in terms of its *de facto* embrace of the liberal democratic model, for their potential political implications in terms of migration politics in the country.\textsuperscript{30} Examining these fault-lines can shed light on both migration policy and practice in post-apartheid South Africa, in terms of the debates and proposals around policy-making, but also in terms of how those policies have been taken up and implemented (or not) at ground-level. Further, these dynamics help to shape the terrain of contestation over migration politics, both within the state and society, whether it is in the Department of Home Affairs, within Cabinet, through the courts, or through individuals or groups of individuals acting outside of the law.

**Xenophobia, Belonging, and Non-State Sites of Power**

Ongoing violence against foreign nationals living in South Africa, especially those from other African countries, has drawn attention to the stark disconnection between the formal rights and protections afforded to migrants by the state, and competing values and norms within

\textsuperscript{30} Indeed, as Klotz argues, in the context of examining South Africa as an immigration state, “failing to place South Africa among liberal democracies leads to analytical errors of omission” (2012, 193). Klotz finds an important comparative distinction with relevance for immigration policy, in particular, between South Africa’s liberal democracy and other liberal democracies such as Canada and Australia, which, she argues, helps to explain some of the current contradictions in South Africa’s immigration policy regime. For Klotz, this aspect is the absence in South Africa of a “rights-market” coalition that would bring advocates for rights-based protections for migrants together with business advocates, in the call for a more open and market-friendly immigration regime.
society. While suspicion and hostility towards foreign nationals, or those perceived to be “others,” is by no means a new phenomenon in South Africa (and, of course, finds expression in many parts of the world) its recent expression in South Africa has proven to be particularly hostile and violent, especially since the advent of democracy in the country. Longitudinal survey data attempting to break down and measure specific attitudinal indicators of xenophobia show a complex and shifting range of beliefs and prejudices amongst South Africans (Crush and Pendleton, 2013). While there have been some positive developments, there are many consistent and worrisome anti-foreigner attitudes, and South Africans remain deeply hostile and resistant to migrant populations in the country (Crush and Pendleton, 2013). Xenophobic violence in South Africa reveals deep and entrenched weaknesses in the post-apartheid state, and raises important questions about not only the state’s willingness, but perhaps more importantly, the state’s capacity, to design and implement a migration management regime that meets its constitutional and international legal obligations.

The idea that resentment, intimidation and violence against foreign nationals in the country began and ended with the dramatic and well-publicised violence over two weeks in May 2008 is amply dispelled by evidence of sporadic, well-documented incidents of violence since 1994 (Crush 2008, 44). It is also dispelled by a look further back into South Africa’s immigration history. Nonetheless, the scope and scale of the violence and unrest that unfolded in May 2008 was unprecedented, and tensions around the presence of foreign nationals and
perceived “others” in the country remain high. Violent expressions of these tensions continue to pose a very real risk to the safety and security of migrants living in South Africa.\textsuperscript{31}

The challenge of how to conceptualise and begin to understand this kind of violence has been taken up by numerous scholars, commentators and theorists, posing very difficult questions about the social legacies of apartheid, the high levels of violence in South African societies, the entrenched and seemingly intractable levels of poverty and inequality, elite manipulation, and the nation-building project. Indeed, the eruption of (and responses to) the May 2008 violence have been read by some as a kind of barometer by which to measure or reflect upon the very legitimacy and viability of the new democracy:

No matter how much officials and citizens may overlook their significance, the 2008 attacks reflect an important point in the country’s post-apartheid, post-authoritarian existence: a moment when the government’s legitimacy and the post-apartheid order were called into question by a world watching horrific images of families fleeing from buildings and men who had been set alight. These episodes were not part of a civil war, or a revolution, but they nonetheless revealed cracks in the country’s legal order and social compact” (Landau 2011, 2).

The complexities and nuances of the May 2008 violence, however, situated and contextualised within the macro and micro-politics of each incidence, and within each community, belie any kind of easy theoretical rendering.

One explanatory approach looks to a South African sense of exceptionalism and difference from the rest of the African continent to at least partially explain the high levels of xenophobic sentiment. South Africa’s relative economic wealth and industrialized economy has led many South Africans to compare their country favourably against other African countries,

\textsuperscript{31} Indeed, one 2013 news report chronicled the decision of some 2000 Somali nationals over the course of the year to risk the return to war-ravaged Somalia; while some believed conditions had stabilised somewhat in Somalia, others simply perceived it to be a safer option than staying in South Africa (Wild 2013).
particularly in terms of infrastructure, resources and services. Peberdy argues that a hostile climate for refugees and immigrants is created by this perception of relative wealth, augmented by state and media characterizations of immigrants and refugees as “takers, not creators of opportunity,” and as burdens on resources and services (2001, 25). South Africa’s unique economic history and influence on the continent has led to what Neocosmos identifies as a discourse of exceptionalism, in which he points to a near hegemonic notion within South African public culture that South Africa is,

   not really in Africa and that its intellectual and cultural frame of reference is in the USA and Europe. Given that South Africa is industrialized, democratic, advanced in relation to other countries of the continent and a paragon of reconciliation and political liberalism, Africa is seen as the place of the other (2008, 590).

This national presumption of superiority over the rest of the continent is also recognized in Klotz’s work on immigration policy in South Africa (2000, 837). It is plausible that the expectations created by this sense of exceptionalism and superiority foster a sense of entitlement amongst South Africans to the benefits of “belonging” to such an exceptional country on the continent, and that they encourage the development of a subsequent discourse of exclusion for those constructed as outsiders and imposters.

While the discourse of exceptionalism is widespread within the country, there is considerable disconnection between this self-image and the realities of the stark inequalities and widespread poverty that exists the ground. Given this, Nyamnjoh (2006) argues that any understanding of xenophobia in South Africa must also account for the ways in which the global neoliberal economic order imposes increasing imbalances within and between nation states, despite the anticipated trickle down flows, and the ways in which this gulf between the “haves” and the “have-nots” finds expression in the country. The dynamics of inequality and economic
deprivation are experienced daily at the local level by a large impoverished black South African population, still reeling from the social and economic injustices and legacies of apartheid. As Handmaker and Parsley argue, recognising “the competition for scarce resources and the perception that non-nationals pose a significant threat in terms of limited opportunities and resources” is central to understanding xenophobic tensions (2001, 45). Cross et al. (2008) also argue that intense competition for resources in an already saturated informal sector is critical to any explanation of xenophobia. While not dismissing the importance of the perceptions and realities of economic competition amongst the poorer populations in South Africa or apartheid’s legacies of racialised poverty, other scholars have noted that this does not offer a complete, or entirely convincing explanatory argument. Neocosmos, for example, argues that these explanations cannot account for the particular targeting of foreigners:

Why we may ask if people feel economically deprived should they scapegoat foreigners? Surely this must have something to do with both the political weakness of “foreigners” and with the failure to blame others such as whites, the bourgeoisie, politicians or even capital (domestic or foreign) (2008, 4). Instead, Neocosmos posits that the targeting of foreigners is linked to questions of political identities, and should be viewed as the result of political discourse and a consciousness “which has been allowed to arise in post-apartheid South Africa, as a result of a politics of fear prevalent in both state and society” (2008, 587).

Related to this, and central within much of the literature surrounding immigration and xenophobia in South Africa are questions and theories related to the construction of identity and citizenship, especially within the context of nation-building strategies. The institutions of apartheid were built upon the social and political construction of “other,” the related construction of hierarchy, and the distribution of rights and resource entitlements based on the category to which each individual was purported to belong. In the post-apartheid era, South Africa’s re-
positioning within a global neoliberal economy and embrace of liberal constitutional values has raised new questions and tensions surrounding the definition of South African identity, and the rights and benefits that are associated with that identity (Klotz 2000, 834). While South Africans are not unique in the struggle to define a national identity through the construction of distinct “insider” and “outsider” divisions, the country has developed a particularly narrow conception of what constitutes “insider” status, based almost exclusively on autochthony and indigeneity as the foundation for citizenship (Neocosmos 2006; 2008; Nyamnjoh 2006, 2007; Peberdy 2001).

The discourse of belonging and otherness in post-apartheid South Africa continues to be rooted, at least to some degree, in hierarchy and degrees of perceived difference. This, perhaps, is not surprising, given that bitter contestations over citizenship and belonging, and how one goes about (officially or unofficially) determining such belonging, have a long history in South Africa. Racially defined, such contestations underscored much of the logic and impetus of apartheid. Survey data shows that migrants from North America and Europe are regarded (marginally) more favourably than migrants from SADC countries, who are, in turn, regarded more favourably than those from African countries beyond SADC (Crush 2008, 4). Interestingly, the same survey data shows that within Africa,

migrants from Botswana, Lesotho and Swaziland are regarded in the most favourable light. Thirty-nine percent of those surveyed, for example, hold a favourable view of Basotho. Mozambicans (who only 14% of South African view favourably) and Zimbabweans (12%) are viewed much less favourably. Most unpopular of all are Angolans, Somalis and Nigerians (Crush 2008, 4).

This hierarchy of foreignness, or otherness, is also noted by Nyamnjoh in his explanation of the term “Makwerekwere,” a common and deeply pejorative term for a foreigner, used by many South Africans. He argues that,

in terms of skin pigmentation, the racial hierarchy of humanity under apartheid comes into play, as Makwerekwere are usually believed to be the
darkest of the dark-skinned, and to be less enlightened even when more educated than the lighter-skinned South African blacks (Nyamnjoh 2006, 39). Just as apartheid policies, based on artificial and fluid categories of skin pigmentation and ethnicity, suffered for their illogical foundations and the ultimate inability of such demarcations to truly capture and control difference, xenophobia in South Africa based on the physical attributes and a strict definition of “foreignness” also falls apart at the seams when examined more closely, presenting risks not just to non-citizens, but to South African citizens as well. In May 2008, for example, at the height of the anti-foreigner violence in South Africa to date, a full third of the fatalities were actually South African citizens. Continuities with apartheid conceptualisations of difference and belonging, however, do not entirely explain why anti-immigration sentiment and xenophobia has not only remained a prominent force in post-apartheid years, but has actually strengthened and entrenched itself at nearly all levels of society. In the search for an explanation, a number of immigration scholars working in the South African context have turned to theories of identity and processes of nation-building (Crush & McDonald 2001; Klotz 2000; Neocosmos 2006, 2008; Peberdy 2001). Crush and McDonald argue that while the years following the end of apartheid meant that South Africa could embark on its first “truly democratic and racially inclusive nation-building project... that very process has involved the reconfiguration and redefinition of the boundaries of inclusion and exclusion” (2001, 10). In a similar sentiment, Klotz argues that “…migration policy – especially the demarcation of ‘illegal aliens’ – serves to define nationality, citizenship and acceptable cultural characteristics of society, that is, who belongs to the community” (2000, 833). South Africa’s socially and politically constructed notions of exclusive citizenship based on indigeneity and autochthony leaves little room for acquired citizenship, based, for example, on economic contribution, permanent or temporary residence, or political contribution.
Whatever the combination of factors that explains the prevalence and expressions of xenophobia, the phenomenon reveals deep and important fissures within post-apartheid South African state and society, and calls into question the state’s willingness, or capacity, to carry out some of the most essential tasks of “stateness,” particularly in exercising its Weberian monopoly of the legitimate use of violence. According to Landau, recent research focused on communities at the centre of the storm in 2008 clearly illustrates that despite South Africa’s status as one of the strongest and most coherent states on the continent, it nonetheless, rarely operates as a unitary system capable of exercising sovereignty through its laws and authorised agents. Secondly, it suggests that the practices of state actors are not necessarily bound by the state’s official policy, law and principles. Even the police, the essential element of state power, can operate on their own logics and in line with forms of social rather than constitutional legitimacy. Lastly, it demonstrates that, in many cases, the most significant practices of regulation and governance are not necessarily state-centred, state authored, or informed by clearly articulated and unified strategies of control (2011, 15).

This kind of rendering of the state resonates with the definition put forward by Migdal, of the state as “a field of power marked by the use and threat of violence and shaped by (1) the image of a coherent, controlling organization in a territory, which is a representation of the people bounded by that territory, and (2) the actual practices of its multiple parts” (2001, 15). The image of the state – the policies, the institutions, the officials, the uniforms – are present, but when the surface is scratched, myriad sub-structures and sites of power are revealed which may not only be misaligned with the image, but which may even be actively working in opposite directions.

Non-state sites of power are well-entrenched in South Africa, with street committees, civics, and organised resistance to the apartheid state having introduced into communities a range of non-state governance structures and institutions. Historically framed by the ANC as the
mechanisms of a new participatory democracy and “people’s power,” such structures often included committees that could make life or death decisions regarding the fates of local agents of the state, people suspected of being state-informers, and even those who declined to participate in calls for boycotts and stay-aways. Making the state “ungovernable” was one of the key tenets of the ANC strategy to undermine the power of the apartheid state. These kinds of community-level structures and institutions continue to shape the post-apartheid South African political landscape, often taking the form of community policing initiatives, or vigilante “justice.” Monson argues that there is a significant risk that the mechanisms of participatory democracy in the post-apartheid state could be subsumed by private interests, given the country’s “legacy of suspicion of and scepticism about official structures and its precedents for the formation of alternative, informal authorities with their own claims to legitimacy” (2011, 185). Monson and Arian, for example, call attention to the fact that in the Western Cape, violence and anti-foreigner mobilisation is “a chronic condition,” as is recourse to popular justice (2011, 47). Part and parcel of this is what Misago calls a “culture of impunity,” in South Africa, noting that despite repeated attacks of foreigners across the country since 1994, there have been few charges against the perpetrators and even fewer convictions; in some instances, he notes, state agents have even actively protected individuals accused of violence against foreigners (2011, 96). In terms of the May 2008 violence, as of 2011 there had been only one murder conviction, despite the fact that over 60 people lost their lives, a fact which Misago argues clearly illustrates that “government lacks the determination or the capacity to hold the perpetrators of the violence accountable” (2011, 96).

Violence against foreign nationals, particularly through organised collective action, represents multiple layers of challenges to the authority and legitimacy of the state. In her work
exploring the specific social and political dynamics of some of the communities in which anti-
foreigner, or xenophobic, violence was experienced, Monson notes the emergence of what she
calls various “alternative territorial regimes as a form of sovereignty,” showcased during the
violence of May 2008 (2011, 178). She reveals various constellations of power within Gauteng
communities that present different levels of challenges to the autonomy of the state. In some
instances, residents’ perceptions of the inadequacy and ineffectiveness of immigration policing
led members of the community to organise searches and evictions of undocumented migrants.
These residents were, in some sense, adhering to the overall principles of state law in that their
targets were identified as undocumented migrants, but felt that in light of the perceived state
failure to enforce its own laws, “responsibility for law enforcement – or some version of it – fell
to the citizenry” (2011, 182). In research from Itireleng, Monson notes not the ineffectiveness,
but rather the complicity of police, who worked alongside local leadership structures during the
violent evictions (Monson 2011, 187). This, she suggests, does not necessarily represent the
“unrule” of law, but instead may indicate the emergence of non-state law, responsible to the
unwritten codes of local laws which frame such actions as “a form of compensatory and
redistributive local justice, as opposed to the rehabilitative justice favoured by the state”
(Monson 2011, 187). In other instances, it was not so much direct police complicity that opened
the space for local forms of the “unrule” of law to emerge as it was police inaction or
indifference. In such cases, Misago argues that “the fact that the police and local authorities
knew attacks were being organised and took no preventative action is evidence of the degree to
which the police allow communities to self-govern” (Misago 2011, 98).

Whether communities perceived themselves as supplementing the capacities of the state,
or rather sought to impose and enforce their own rules and “laws” grounded in social, rather than
legal or constitutional legitimacy, the kinds of organised evictions and attacks on foreign nationals witnessed in May 2008 (and which remain an omnipresent threat in South African communities) speak to an important misalignment between the image of the state and its actual practices, and speak also to the blurriness of state-society boundaries in this arena. At one level, writes Misago,

the violence appears to be a form of anti-state protest. However, portraying it in this way creates a false dichotomy between state and society and unduly reifies each. The variations in authority patterns, institutional structures and political incentives means that we must be thinking of politics and states in the ‘plural’ rather than in the ‘singular’ (in terms of their roles and responsibilities at national, provincial and local levels). We must also see the violence as generative, helping to shape future political institutions, incentives and leaders (2011, 106).

While the existence of multiple, simultaneous sites and structures of authority within a state is not unique to South Africa, the implications of this kind of co-existence are largely ignored by policy-makers, who assume that what they produce in terms of legislation will be implemented – and implementable – on the ground. However, it is precisely within this gap that anti-foreigner sentiments steep, take shape, find structure and emerge.

**Political Priority and the Social Construction of Migration**

Such high levels of xenophobia and the entrenched negative social constructions of migrants in post-apartheid South Africa have an important impact on migration policy and practice in the new democracy. The state’s contradictory approach to acknowledging the existence or scope of xenophobia in the country makes it difficult to directly or adequately address the issue. At the same time, almost all research participants within non-governmental organisations, along with some within government, point to a perception of deeply embedded anti-foreigner attitudes amongst many policy-makers, politicians and civil servants. Regardless
of the actual measures of such sentiments within the state, policy actors are clearly cognisant of the broad social unpopularity of migrants, and acknowledge the existence of political pressures to prioritise the needs of South Africans over immigrants, refugees and asylum seekers in their policy decisions. Similar pressures are experienced by civil society actors working in this arena, where they face the challenge of advocating for a socially and politically unpopular population, and must constantly mitigate perceptions of promoting the rights and well-being of non-South Africans at the direct expense of South Africans. These findings bring into sharp relief, at a practical level, the kinds of contradictions and tensions experienced between the constitutional, international and domestic commitments binding South African policy-makers, and the day-to-day pressures and attitudes that shape behaviour and decisions.

Despite a plethora of evidence documenting its existence and expressions, the post-apartheid state’s official approach to xenophobia has been somewhat contradictory, compromising the development of government programmes, campaigns, or interventions that could begin to address the issues and improve the overall climate for migrants in South Africa. In 1998, the state supported the “Roll Back Xenophobia,” led by the South African Human Rights Commission, one of South Africa’s Chapter 9 institutions, established under the constitution to promote and protect democracy. Launched in conjunction with the National Consortium for Refugee Affairs and the United Nations High Commissioner for Refugees, the campaign hosted advocacy and media campaigns, and “developed working relationships with key government departments to monitor xenophobia” (Cohen 2013, p. 61). The continued prevalence of xenophobia calls into question the overall effectiveness of the campaign, which came to an end in 2007, but it nonetheless represented some state-sponsored attempt to engage with these issues. The Immigration Act of 2002 also formally addressed the issue, including as a
function and objective of immigration control, the prevention and deterring “of xenophobia within the Department, any sphere of government or organ of State and at community level.”

The Act also called for the education of communities and civil society regarding the rights of foreigners, illegal foreigners and refugees, and the undertaking of other activities to prevent xenophobia.

When the violence of May 2008 erupted, state elites unanimously condemned the violence, but also largely attributed the attacks to criminality, rather than xenophobia. Famously, in a July 2008 speech, President Mbeki asserted that:

> [t]hese masses are neither antipathetic towards, nor do they hate foreigners. And this I must also say - none in our society has any right to encourage or incite xenophobia by trying to explain naked criminal activity by cloaking it in the garb of xenophobia. [...] I dare say that if anyone convenes residents of Nkomazi in Mpumalanga, Hammanskraal, Atteridgeville, Alexandra Township, Diepsloot, Orange Farm, Ekurhuleni, Motherwell, Khayelitsha, Inanda, and stays to listen to these ordinary South Africans, none will hear our people say we should attack immigrants, or that they hate these because they are foreigners (Mbeki 2008).

There is no dearth of evidence to counter Mbeki’s claims, but the framing of violence against foreign nationals simply as an issue of criminality ignores the much more complex and nuanced confluence of factors that leads to such specific targeting of foreign nationals. It also creates obstacles in the search for potential solutions. One NGO actor and researcher, Vincent Williams, however, noted that when interacting with state actors, the public and private position regarding xenophobia are often different:

> [When] you start talking about doing things to counter xenophobia, they frown: “Why? There’s no xenophobia. What problem are you addressing?” [...] They’ll admit in private that yes, we need to do things about changing attitudes and behaviour, but in public, the line, the official line, is that

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32 Immigration Act No. 13 of 2002, section 2(1)(e).
xenophobia's not as big a problem as some of us make it out to be. So there's an opportunity closed already.\(^{34}\)

According to Williams, this can partly be explained by broader political agendas within the state. For example, he pointed to Mbeki’s scathing reaction to a small section within the African Peer Review Mechanism report released months before the May 2008 attacks, which noted the prevalence of xenophobia in South African society. Mbeki flatly denied the truth of this assessment, a denial which Williams posited may have related to his African Renaissance agenda:

\[
\text{You're not going to admit as a government that in fact your own citizens, and their behaviour, run contrary to what you are pushing as your primary continental agenda, which is about issues of integration and cooperation and whatever... We cannot admit to xenophobia if we are the drivers of the African Renaissance agenda.}\(^{35}\)
\]

Other civil society actors also highlighted the deep-seated political difficulties of acknowledging xenophobia. One NGO employee, for example, felt that a reluctance to really look deeply at the issues facing South Africa had to do with the need to maintain the illusions of the post-apartheid “Rainbow Nation” narrative of exceptionalism:

\[
\text{I think it's got to do with how we want to view ourselves as a country, you know, as the Rainbow Nation. Even though everyone slams the Rainbow Nation as being completely false all the time, we still fall into it. I think we see ourselves as exceptional. Like this exceptional African story. [...] And I think the political leadership likes to hold onto that as well. We embrace this hectically liberal constitution; we buy into the conception of human rights, though the implementation in practice is very difficult. Acknowledging xenophobia would actually be an acknowledgment of the fact that those things we hold dear aren’t actually happening in practice. Like we’re not this exception, you know?}\(^{36}\)
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This was echoed by another NGO actor, who argued that the aspirations of the country’s new constitution were little more than a sustaining myth:

\[\text{34 Interview, Vincent Williams, Cape Town, August 17, 2011.}\]
\[\text{35 Interview, Vincent Williams, Cape Town, August 17, 2011.}\]
\[\text{36 Interview, Cape Town, August 2011.}\]
But I think all of our service delivery protests and xenophobia – these are just shining lights on the enormous cracks that lie beneath the surface. And it’s another reason why nobody wants to talk about it – because Zuma’s government, Thabo Mbeki’s government, even Madiba’s government – nobody wanted to admit the extent of the rot.37

From this perspective, recognising xenophobia, let alone actively engaging with the subject, would necessarily reveal the significant tensions between the promises of a new, post-apartheid democratic South Africa, and the state’s actual capacities to meet such promises.

Almost all non-governmental actors interviewed for this work, along with some state actors themselves, also spoke of widespread, deeply ingrained and systemic anti-foreigner sentiments within the state. One NGO actor, for example, stated unequivocally:

It is my firm belief that our civil service, our public servants and the government does have an ingrained xenophobic twang, as it were, that there is definitely a core element of mistrust of foreigners, and one of the great ironies is that all the stereotypes [of foreigners are those] that used to be made by whites against black people about being lazy, smelly, taking jobs, taking women – these are the stereotypes that are not just shared by poor people in Khayelitsha, they're also shared by government officials. [...] It's not just the poor people in the township that think like that. They're just the ones with the pangas and the matches....38

Several interviewees pointed to the kind of discourse that characterises the meetings of the Parliamentary Portfolio Committee for Home Affairs, which is often laden with direct and indirect suspicion of, and hostility towards, foreigners in the country. As discussed in chapter four, the Chair of this Committee in 2011 inferred that the reason South Africans had not enjoyed their freedoms since 1994 was due to the influx of foreigners into the country (Office of the ANC Chief Whip 2011). At a February 2013 Portfolio Committee meeting, another governing party Member of Parliament spoke about foreigners committing crimes, being involved in corruption and taking Reconstruction and Development Project (RDP) housing away from South Africans (an opposition Member of Parliament’s call for a point of order on the

37 Interview, Rebecca Chennells, Cape Town, August 2, 2011.
38 Interview, Rebecca Chennells, Cape Town, August 2, 2011.
grounds that such comments were xenophobic was turned down by the Chair). Another opposition Member of Parliament remarked that immigrants, on the look-out for any work they could get, were “bottom-feeders,” while also taking the position that “a refugee is not interested in decent work; a refugee wants any work”\textsuperscript{39} That anti-foreigner sentiments in South Africa are prevalent across socio-economic, gender and racial divisions is empirically borne out by survey data (Crush 2008b). Recognising the interconnectedness of state and society, it would be surprising if these kinds of anti-foreigner sentiments were not reflected within state institutions and amongst state actors.

However, policy makers, even those who are advocates of migration or hold sympathies for the issues of migrants, are nonetheless clearly cognisant of the broad social unpopularity of migrants, and acknowledge the existence of political pressures to prioritise the needs of South Africans over immigrants, refugees and asylum seekers in their policy decisions. The social construction of target populations’ framework, advanced by Ingram, Schneider and deLeon, provides a useful entry point into understanding the kinds of pressures faced by policy actors in this regard. For Schneider and Ingram, the social construction of target populations refers to the “cultural characterizations or popular images of the persons or groups whose behaviour and well-being are affected by public policy” (1993, 334). These characterizations, they posit, are both normative and evaluative, using symbolic language, stories and metaphors to portray certain groups within the broader population in either positive or negative terms. They argue that the social construction of target populations (that is, those elements of a population a policy is meant to impact or affect) has a, 

powerful influence on public officials and shapes both the policy agenda and the actual design of policy. There are strong pressures for public officials to

\textsuperscript{39} Home Affairs Portfolio Committee meeting, February 12 and 13, Parliament, Cape Town, 2013.
provide beneficial policy to powerful, positively constructed target populations and to devise punitive, punishment-oriented policy for negatively constructed groups. Social constructions become embedded in policy as messages that are absorbed by citizens and affect their orientations and participation patterns" (Schneider & Ingram 1993, 334).

Specifically, Schneider and Ingram point to two dimensions of target population construction which are central to their framework. The first of these dimensions is the political power of the target group, which analyses the extent of the group’s political resources, “such as whether it is large, united, easy to mobilize, skilled, well-positioned, focused on issues of concern to it, and accustomed to voting, contacting public officials, and so on” (Ingram, Schneider, & DeLeon 2007, 101). The second dimension “refers to the valence or the positive or negative social construction of the group as more-or-less worthy and deserving and as contributing more-or-less to the general welfare” (Ingram, Schneider, & DeLeon 2007, 101). On top of being the targets of widespread societal resentment, many migrants (in particular undocumented migrants and refugees) in South Africa are generally economically marginalized, with no citizenship rights or voting privileges, and little political representation. As Klotz points out, groups of legal migrants and asylum seekers in South Africa do not have natural advocates within the parliamentary process, “if for no other reason than they lack rights of citizenship and thus, electoral salience” (2000, 842). They are also regularly conceptualised in public and private spheres as bringers of corruption, disease and unwanted competition, threatening to undermine the hard-won social and economic rights of citizens. Importantly, however, as Landau notes, the exclusion from entitlements (for example, to courts, justice, and access to resources and representation) is not a phenomenon specific to foreigners; it is also an exclusion often faced by poor South Africans as well. However, he argues, “what separates non-nationals
from citizens is the degree to which exclusion is both bureaucratically institutionalised and socially legitimate” (Landau 2011, 8).

Politicians are keenly aware of the potential political costs of advocating for migrants, refugees and asylum seekers in South Africa. This supports Schneider and Ingram’s contention that social constructions become part of what they call the re-election calculus when public officials “anticipate the reaction of the target population itself to the policy and also anticipate the reaction of others to whether the target group should be the beneficiary (or loser) for a particular policy proposal” (1993, 335). In the case of South African migration politics, for example, former Home Affairs Shadow Minister Annette Lovemore acknowledged that the political considerations of working with, or advocating for, migrant, refugees and asylum seekers were considerable:

...the political side of it is massive. It really, really is. I mean, you have to realise that politicians are only here because people have voted them into power. And that they have to satisfy their electorate.... I spend a lot of time dealing with asylum seekers. I’ve been working with Somalis in Port Elizabeth which is my home town, and a lot of time dealing with people who are on temporary resident permits and are having problems, etc., and people often ask me, why, because they’re not going to vote for you anyway. And you know? I am a politician, and me being here relies on the people that are actually going to vote for me, not on the refugees or the temporary people, you know, temporarily sojourning in our country. So I mean, that’s a massive issue. It really, really is.40

Former Director-General of Home Affairs Barry Gilder also noted in an interview how, in his experience, immigration issues in a post-apartheid context were particularly emotive, and how individual Members of Parliament felt the pressure to respond to the perceptions and anxieties of their constituents:

...given our past, immigration was a very emotional issue, particularly illegal immigration. Emotional in the sense that we’d just come out of apartheid, and the key thrust of government’s policy was [to] redress the imbalances and

40 Interview, Hon. Annette Lovemore, MP, Cape Town, September 21, 2011.
injustices of the past, to create jobs and houses and healthcare for the
majority who had been denied it in the past. So the perception on the ground
of those who had been denied in the past was that foreigners coming in were
competing with them for these rights that they had been struggling for, for
centuries or decades or whatever. And in my own time at Home Affairs, for
example, sitting in Portfolio Committee meetings, at presentations, and
listening to the debates, you could hear that pressure from the individual
Members of Parliament who spoke on behalf of their constituents.  

Clearly, while the pressures of adhering to international conventions and human rights protocols
have been part of the political landscape of migration management since the end of apartheid,
these pressures have to be understood in juxtaposition to simultaneous pressures on public
officials to be responsive to perceptions of constituent demand and opinions. Lovemore noted
this tension:

Of course we are signatories to all these various conventions and protocols,
which put us squarely in a human rights place as far as unskilled migrants are
concerned. So it all sounds great, but how do you put that in place without
threatening South Africans who feel that foreigners are going to take their
jobs. And those South Africans are the voters. They are the voters.

Another Member of Parliament and member of the Portfolio Committee for Home Affairs made
a similar argument, in the context of a discussion about legal action taken by civil society
organisations against the Department of Home Affairs: “I think the government do worry about
the court cases, but I think they listen much more to the people in the townships, because they’re
the voters.”

While the decisions or actions of politicians and policy-makers are influenced by the
public’s negative social construction of migrants, the decisions or actions that are taken can then,
in turn, reinforce those negative constructions. Social construction and policy design theory
incorporates some aspects of historical institutionalism and discussion of policy feedback effects

41 Interview, Barry Gilder, Johannesburg, November 7, 2012.
42 Interview, Hon. Annette Lovemore, MP, Cape Town, September 21, 2011.
43 Interview, Hon. Graham McIntosh, MP, Cape Town, August 14, 2013.
to offer a theoretical framework for understanding how some burdensome policies and negative social constructions can create a mutually reinforcing and non-virtuous cycle. Ingram et al. present the proposition that “policymakers, especially elected politicians, respond to, perpetuate, and help create social constructions of target groups in anticipation of public approval or approbation,” raising questions about the ways in which policy is both a cause and effect of the positive or negative social construction of target populations (2007, 106). The idea that policy affects politics, and vice versa, is also articulated by Pierson, for example, in his recognition that some of the most important effects of policies may, in fact, be cognitive; the “massive scope of public policies,” Pierson notes, “assures that they play a significant role in our efforts to understand and act in an enormously complex world” (1993, 624). One civil society actor and researcher commented on precisely this kind of feedback dynamic in regards to the genesis and reproduction of xenophobia in South Africa:

...we asked people, well, where do you hear this stuff about foreigners taking jobs and all these other nasty things? And they say, well, we read it in the newspapers or we hear it on TV. We say well, who’s saying it? Oh, people in government are saying it. So then you talk to people in government, and you ask them, how come you have this tolerant attitude towards xenophobia, and they say, well, we are responding to the people on the ground. It’s like, whoa – what is happening here? Because the people on the ground are actually taking their cue from the politicians, and the people in government. And the people in government are claiming to be responding to what people on the ground are telling them!44

Another migration NGO actor echoed a similar sentiment, noting the important point that political leadership is rooted within communities, and that political leaders are also informed by “their own prejudices, their own constituency, where they come from and what they hear. They

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44 Interview, Vincent Williams, Cape Town, August 17, 2011.
also reflect it and buy into it themselves. They’re not like, leading... [...] It’s a complex relationship."

For some, the presence of anti-foreigner attitudes, especially within government, is located in a strong sentiment that South Africa has ‘enough of its own problems,’ with the associated perception that foreigners represent a further burden on the already limited resources of the state and its capacity to meet the needs of South African citizens. In this context, the priorities simply do not lie with formulating policy or developing programmes to address the needs of non-citizens. As one interviewee who works closely with various levels of government and with civil society noted,

I’ve been at some meetings where a lot of attitudes...were conveyed, coming from Provincial level, quite high up: “You know, we have enough of our kind of issues. [...] our policies are far too lenient” and lots and lots of criticism about the issues... I think a lot of it comes from frustration of really not even being able to deal with our own issues around local people....

This is also a theme at a national level. Current Shadow Minister of Home Affairs, Manny de Freitas, for example, described what he admired about the work of previous Home Affairs Minister, Nkosazana Dlamini-Zuma, revealing what he perceives as the political realities of working within the current Home Affairs structures, which houses both civic affairs and immigration line functions:

And what she did was she started at the top of the list – she drew up a list of priorities – and that’s the kind of list I would have drawn. You first do the bread and butter. In other words, you look after your citizens – you know, applications for I.D.s, improve the processes, make the place look better, bring up your staff morale – do the real basics, and then move on. And the reality is, whether you like it or not, things like immigration and refugees are going to be lower on the list. That’s the reality. And as sad, and as horrible

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45 Interview, Cape Town, August 2011.
46 Interview, Cape Town, October 2011.
as it is for human rights and immigration activists to hear, that’s just the reality, because you need to look after your citizens.\textsuperscript{47}

Such a reflection openly acknowledges the existence of an informal, \textit{de facto} hierarchy of rights, which effectively places South African citizens clearly at the top of the priority list. This emerges as a common thread through interviews with non-governmental and state actors alike. One non-governmental actor, for example, described working with policy-makers, the Portfolio Committee and government as really challenging, “because you encounter institutional xenophobia, you encounter protectionist attitudes and mindsets: South Africa for South Africans. We need to protect our own. And refugees and migrants fall at the bottom end of the scale.”\textsuperscript{48}

In the same interview, this NGO employee noted the difficulty, both personally and professionally, of advocating for the rights of refugees and migrants to work against a backdrop of widespread unemployment in South Africa:

\begin{quote}
That's another question to me and that's something that I, even personally, have to grapple with. And you know, you do it from a human rights perspective, and you use human rights to say, 'it's a right to work', and that's great, because you have an international, legal, liberal framework that dictates how you work – but on the ground, how can I go to a Portfolio Committee on Labour and say to them 'We need to be recognising the rights of migrants and refugees.' How am I going to do that in reality? And what is the response? Massive unemployment. How can I justify, on an actual level to them, to make arguments for that?\textsuperscript{49}
\end{quote}

This response points to a recognition, even amongst migrant and refugee advocates, that the language of rights, and the obligations of an “international, legal, liberal framework” are not necessarily the guiding principles when it comes to actual decision-making processes on the ground, especially in the context of the widespread un-met needs of citizens.

\textsuperscript{47} Interview, Hon. Manny de Freitas, MP, Cape Town, October 10, 2012.
\textsuperscript{48} Interview, Cape Town, August 2011.
\textsuperscript{49} Ibid.
Conclusion

With the onset of the new democracy, migration patterns to and from South Africa began to shift rapidly. New strategies and policies of migration management needed to be reworked to reflect these new migration flows, as well as the values and principles of the post-apartheid nation, the rights enshrined in the new Constitution, and the country’s newly-signed international protocols and obligations. While the country in many ways has formally liberalised since the end of apartheid, both socially and economically, it has not done so without controversy and dissent. This is true not just of the post-apartheid government’s formal embrace of a broadly neoliberal macro-economic policy, which has sat uneasily alongside agendas of transformation, but is also true of some of the values and legally protected rights formally laid out in the Constitution which are not always a reflection of widespread values or social mores in the country. Instead, there remains within both state and society significant debate, and even contention, regarding what these rights should look like in practice and who should be the beneficiaries. For migration, this has meant that the formal rights of migrants, including refugees and asylum seekers, are legally protected, but it has not meant that there is widespread societal or even state buy-in for such rights and protections. Indeed, the complex, complicated phenomenon of xenophobia is deeply rooted in both state and society, raising interesting and important questions about sites and expressions of non-state power, and limitations to the state’s capacity, or willingness, to effectively manage migration issues in the country.

Within this climate, actors in both state and non-state sectors experience the challenges of attempting to design and uphold policy, or to advocate effectively, for migrant and refugee/asylum seeker interests. Policy makers and politicians are conscious of the political risks of designing or advocating for progressive policies or programmes for migrants,
particularly in the context of the widespread, unmet needs of South Africans. Civil society actors indicate a similar dilemma in their own advocacy work. Despite the existence of enshrined constitutional and human rights for all, interviews with both state and NGO actors reveal a kind of perceived *de facto* hierarchy of rights in the context of limited resources, which in practice, effectively places South African rights above those of non-citizens.
Chapter Seven: Making the Law: Migration Policy Development Since 1994

With the end of apartheid, it quickly became apparent to the new government that existing legislation governing migration in South Africa was wholly inadequate to meet the requirements of the new democracy. Policymakers and civil society actors alike were forced to grapple with the many complex policy questions raised by migration, set against the dramatic social, economic and political changes taking place in the country. In many ways, while framed in the new language of rights, administrative justice, and equity, the national imperatives of migration management did not dramatically alter with the onset of the new democracy, but instead remained rooted in a control and security-oriented approach.

There have, nonetheless, been some important advances. One of the most significant post-apartheid developments in this arena was the drafting of the Refugees Act of 1998, which illustrated the new government’s human rights ideals and its attempts to meet its new obligations under international laws and norms. However, the development of the Refugees Act also illustrated the inexperience of both state and civil society actors in this area, and extensive involvement by civil society actors in this process revealed new and shifting tensions in state-civil society relations in the post-apartheid years. The policy-making process revealed important normative differences both within the state, and between state and civil society actors, regarding the best way to manage the asylum regime. These debates, however, paled in comparison to the contention over immigration policy-making, which was characterised by substantial differences of opinion within the state regarding some of the goals and strategies of immigration management. Such divisions were further complicated by the post-apartheid politics of the Government of National Unity, and highlighted the difficulties of developing a shared,
progressive vision of migration management. With no real legal mechanisms for unskilled migrants to work in the country, and a continued emphasis on security and control, undocumented migration and its counterpart – an expensive and inefficient detention and deportation regime – has become a cornerstone feature of South Africa’s immigration landscape. This has also led to the use of an already faltering asylum system as a means of legal entry with associated work and study privileges by many who do not fit Geneva Convention criteria.

**Migration Policy in Historical Context**

Understanding contemporary migration policy issues requires briefly setting the context in which migration policies in the country have historically been conceptualized, designed and implemented. In her book on the history of South Africa’s immigration policies since 1910, Peberdy (2009) presents an account of inclusion and exclusion through the decades, arguing that major shifts in immigration policy have followed wherever there has been a significant change in power, associated with shifting nationalisms and therefore shifting national immigration priorities. She traces the immigration policies from the British-controlled Union of South Africa in 1910, to the changing immigration priorities of the Nationalist Party government (driven by Afrikaner nationalism), through to the more recent shifts in immigration policies informed by the “African nationalism” of the post-1994 years. Selection criteria and immigration policies, Peberdy argues,

> starkly reveal the powerful myth making of nation states and their fears that non-members or non-citizens have the potential to contaminate the national body, as well as their perceptions of who constitutes the nation (2009, 2).

During the apartheid years, immigration policies were specifically designed along racialised lines to support the segregationist goals of the regime. Crush and McDonald posit that twentieth century immigration policies under white minority rule in South Africa rested on four pillars:
“racist policy and legislation; the exploitation of migrant labour from neighboring countries; tough enforcement of legislation; and the repudiation of international refugee conventions” (2001, 2). As mentioned in a previous chapter, at times, all immigration to South Africa was strictly curtailed, while other periods were characterised by the active courting of selected immigrants, based on racial and religious criteria, and an explicit requirement that immigrants, by law, had to be “likely to become readily assimilated” into the country’s white population (Crush & McDonald 2001, 2; Peberdy 2001; Segatti & Landau 2011, 61). As welcoming as South Africa’s apartheid era immigration regime was, at times, to state-approved white immigrants, it was equally unwelcoming towards black immigrants.

One of the last main pieces of apartheid-era legislation was passed in 1991, in the form of a new migration policy called the Aliens Control Act, which codified numerous legislative amendments that have consistently reinforced the strict control of the flow of people across South Africa’s borders (Klotz 2000, 831). Peberdy and Crush describe the act as an attempt to “entrench the past in the future,” through which all existing immigration legislation was consolidated (1998, 33). The principle author of the Aliens Control Act framed the motivation for its design as an attempt to make legislation more accessible for the incoming, inexperienced ANC-led government:

I actually said to the Director-General, I said look, there’s now a fact that South Africa’s going to be integrated, we’re going to have a new integrated staff, people who don’t know much about the laws and so on, and I think we should write an easier thing now, an accessible piece of legislation. So I’ve done that – the Aliens Act in 1991.51

50 Awie van der Westhuizen, a retired civil servant from the former Department of Immigration, spoke of the high level of state support given to immigrants sought by the state during the 1970s, describing aspects of his job which ranged from meeting new immigrants at the airport and taking them to their hotel (paid for by the state), to helping get them their papers in order, coordinating employment, and even helping them with accommodation rentals (Interview, Pretoria, November 8, 2012).
51 Interview, Attie Tredoux, Pretoria, November 9, 2012.
Crush and McDonald write, however, that this legislation, “rooted in the imperatives and ideology of late apartheid [proved] to be a blunt, ineffectual and often unconstitutional instrument for migration management in post-apartheid South Africa” (2001, 1). In 1995 and 1996, amendments were made to the Aliens Control Act, which, according to the Deputy Minister of Home Affairs, were meant to “improve control over immigration” (Peberdy 2001, 17). While some of the amendments represented a tightening of requirements, these reforms also indicated an effort to bring immigration policy closer in alignment with the country’s new constitution (which was officially approved in 1996), such as an amendment that altered a previous provision that undocumented migrants could be held in detention indefinitely and without judicial review. Nonetheless, following the adoption of the final Constitution in 1996, the Aliens Control Act was declared unconstitutional and liable to constitutional review by 2002 (Wa Kabwe-Segatti 2008, 69). This placed the government in a particularly challenging situation in the interim, having to manage migration with the blunt and dated legal instrument it had inherited, while simultaneously working towards the development of a new legislative framework. This, however, was to prove a long, fraught, and arduous task.

The principal responsibility for the overhaul of migration policy for South Africa fell largely to the Department of Home Affairs, under the leadership of the Inkatha Freedom Party’s President Mangosuthu Buthelezi. In November 1996 the Department appointed a task team to develop a Green Paper on International Migration,\footnote{A Green Paper is a comprehensive discussion document compiled by the South African government to explore a policy issue and make suggestions for policy directions.} which was published in the Government Gazette in May of 1997. Following a process chaired by Dr. Wilmot James,\footnote{Dr. James was at this time the Executive Director of the Institute for Democracy and South Africa (IDASA).} the Green Paper recommended the initiation of two separate but related migration policy streams – one for
refugee and asylum seeker policy, and one for immigration policy, governing migration functions such as the issuance of student visas, work visas, tourist visas and permanent residency permits.

**The Refugees Act of 1998**

The development of refugee legislation involved widespread consultation and the involvement of state, civil society, and academic actors at the domestic and international level. While the process revealed some conflicting agendas and priorities between the state and civil society actors involved, as well as different normative approaches to realising South Africa’s international and domestic obligations towards the protection of refugees, the result was a largely progressive Refugees Act of 1998, which came into effect in 2000. Unlike almost all its regional counterparts, South Africa’s asylum system rejects encampment options in favour of allowing asylum seekers and refugees freedom of movement, along with the right to work and study in the country. The Act was drafted to include administrative checks and balances, as well as avenues for decision appeals to ensure fairness and to prevent *refoulement*\(^{54}\), including the formation of a Standing Committee for Refugee Affairs charged with reviewing those decisions by Refugee Status Determination Officers that found an asylum claimant’s application to be manifestly unfounded\(^{55}\). Almost immediately, however, issues of implementation along with a questioning of the theoretical underpinnings of the Act, began to erode confidence amongst key state actors regarding the relevance of the Refugees Act itself in the South African context. The state remains caught between the ideals and international obligations of refugee protection, as outlined

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\(^{54}\) *Refoulement* is the illegal return of an asylum claimant to a country in which his or her life may be at risk, and *non-refoulement* is a cornerstone principle of international refugee law.

\(^{55}\) A manifestly unfounded claim is one in which the decision-maker believes the claim to be clearly fraudulent.

Prior to the development of the Refugees Act, there had already been some important, if insufficient, movement towards the recognition of refugees in the country. In 1991, for example, following the unbanning of the ANC and the release of Nelson Mandela, the South African government signed an agreement with the UNHCR to try and address the issue of the repatriation of South Africans living in exile; other agreements were signed from 1993 onwards between the South African government, the UNHCR and the government of Mozambique regarding the repatriation of Mozambican refugees living in South Africa (Smith 2003, 4; Wa Kabwe-Segatti and Landau 2008, 64). The apartheid government’s policies of regional destabilisation had positioned South Africa as both a producer of political exiles, and as a host to populations fleeing disruption and violence in neighbouring countries. Claude Schravesande, a retired senior official in the Department with substantial responsibility for refugee affairs at the time, recalled that the return of ANC exiles to South Africa was an important step towards the government’s recognition that they needed an adequate policy to deal with refugee questions, as it raised critical questions about how to address the influx of returning South African exiles, both legally and bureaucratically.\(^56\) He recalled the confusion in the Department around how to determine whether returning exiles were indeed who they said they were, and how to prevent the processes around the repatriation of South African exiles from becoming a window of opportunity for other people who wanted to enter the country illegitimately.\(^57\) In these early days of setting up systems, Schravesande recalled, he had only four people working with him to address refugee

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\(^{56}\) Interview, Claude Schravesande, former Deputy Director of Home Affairs, former Chief Director of Refugee Affairs, and later Chair of the Standing Committee for Refugees until his retirement. Langebaan, South Africa, December 7, 2012.

\(^{57}\) Ibid.
issues, something that was still only what he called a “sideline” of his work; dealing with refugee affairs, he noted, “was not seen as something serious except by me, because I was trying to do it!”\textsuperscript{58} As the transition from apartheid continued, the South African government signed a Basic Agreement with the UNHCR in 1993, and became party to the 1969 Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa in 1995, and the 1951 Geneva Convention relating to the Status of Refugees in 1996. However, until the promulgation of the Refugees Act, refugee affairs were administered through the mechanisms of the Aliens Control Act. Treatment of refugees before 1998 was thus “regulated by administrative procedures that allow[ed] considerable discretion and abuse” (Barutciski 1998, 701).

The process of developing specific refugee legislation, though certainly not without some measure of contention, was much less controversial than the development of the Immigration Act. As the Special Advisor to the Minister during this period recalled, the need to discorporate refugee affairs from immigration policy was recognised early, as,

\begin{quote}
\textit{in respect of the former there was a clear existing policy framework set out by the Geneva Refugee Convention and its 1951 Protocol, and, to an extent, it was just a matter of implementing that framework.} \textsuperscript{59}
\end{quote}

While this glosses over the very real debates that took place surrounding the development of the Refugees Act, it nonetheless highlights the pivotal role that existing international laws and norms played in guiding the development of legislation pertaining to refugees and asylum seekers in South Africa.

There were two quite different tracks in post-apartheid refugee policy formulation. In the first track, in 1995 and 1996, the DHA developed and circulated its own versions of a possible Refugee Bill amongst academic experts and civil society actors for consultation, followed by two

\textsuperscript{58} Ibid.
\textsuperscript{59} Interview, Hon. Mario Oriani-Ambrosini, Cape Town, October 6, 2011.
workshops in November 1996 to discuss the draft bill (Handmaker 2009, 104). However, this initial track was put on hold by the 1996 announcement of a task team charged with drafting the Green Paper on International Migration, encompassing recommendations regarding immigration and refugee management. This Green Paper process was led by an NGO, the Institute for Democracy and South Africa, with a task team that included representatives from the Department of Home Affairs, the South African Human Rights Commission, the University of Cape Town Legal Aid Clinic, Lawyers for Human Rights, the UNHCR, and the Gender Commission. The process included extensive involvement and written representations from a range of other international experts, academic institutions and civil society organisations, and the Green Paper, published in 1997, contained a comprehensive chapter on refugee protection. Following the publication of the Green Paper, a task team was appointed in April 1998 by Minister Buthelezi to write a Refugee White Paper, upon which the Refugee Bill would be largely based. However, Handmaker describes the Green Paper process as “an almost completely parallel process [which] fed into an academic discussion that bore little substantive relation to the refugee policy that ultimately emerged,” and the inputs of civil society, particularly in the Green Paper process, did not necessarily translate into the White Paper and Draft Bill that would follow (2009, 103). He argues that the very fact it was an NGO- and academically-driven process made it much likelier that government actors, who ultimately bore the responsibility for policy decisions and implementation, would bypass its recommendations in the formulation of the actual legislation (Handmaker 2009, 108).

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60 Written representations, for example, were submitted by the Regional Office of the UNHCR; Human Rights Watch; Amnesty International (Cape Town); Legal Resources Centre (Cape Town); The Law Society of the Transvaal; Centre for Applied Legal Studies, University of the Witwatersrand; Centre for South African Studies, University of the Western Cape; Lawyers for Human Rights; South African Human Rights Commission; Southern African Migration Project; Cape Town Refugee Forum; Catholic Welfare and Development; Careers Research and Information Centre; Department of Home Affairs: Subdirectorate: Refugee Affairs; Permanent Residence Section; District Office, Pretoria (Cabinet Memorandum No. 13 of 1998).
The involvement of academic and civil society actors in the design of refugee legislation was to some degree a necessity, as the new government lacked experience in refugee and asylum seeker management. It may also have been a reflection of what Bentley has called the “honeymoon” period of relations between civil society and the state, underwritten by the assumption that the state and civil society would be able to work co-operatively towards what were ultimately shared goals of social and economic justice (Bentley, Nathan, & Calland 2013, 44). However, assumptions that the interests of domestic and international civil society and the interests of the state were more or less compatible around the development of refugee legislation are also challenged by some of the tensions that emerged within the process, as different motivations and agendas between civil society and state actors began to reveal themselves. The former generally put a strong emphasis on a human rights approach and the acquisition of maximum protection for refugees, while state actors were necessarily bound by their need to remain in control of the process and its outcomes (Smith 2003). Unlike civil society organisations, the new government was also required to seek out a balance between its domestic and international obligations towards refugee protection and other real and perceived state interests.

There is also evidence that some state actors ultimately had a very different normative vision for refugee legislation than most civil society actors. Smith (2003) argues, for example, that during legislation formulation processes, state actors were consistent in their calls for a limitation of refugee freedoms and rights and the need for associated institutions of refugee management to be placed firmly within the ambit of government control, whereas the civil society bodies were arguing for full refugee protection and rights, and for the relative independence of refugee management structures. Indeed, in an August 13, 1998 Cabinet
memorandum (No.13 21/2/5/B1 1998), before the Refugees Act was promulgated, the priorities of the state in terms of its refugee legislation are clearly spelled out:

On the one hand, the policy is constructed so as to reflect but also to enable the fulfillment of the international and constitutional obligations; on the other, it touches on a number of other directly and indirectly related state and national interests and priorities. The most important of these priorities concerned:

(i) the migration control objectives  
(ii) law and order  
(iii) concerns over gun-running, drug-trafficking and racketeering, money-laundering, international crime syndicates and cartels;  
(iv) various other aspects of national and state security  
(v) social and economic interests, as well as  
(vi) bilateral, regional and international relations.

Here, the emphasis is placed largely on the state’s concern with control, law, order, security and crime prevention, representing very different priorities than those held by many civil society actors involved in the process. Smith also points to significant levels of internal dissent coming from what he terms “conservative elements” within the Department of Home Affairs itself during the drafting of the Refugees Act. One submission from the Subdirectorate of Refugees, for example, included suggestions that all asylum seekers would have to pay 500 rands$61 to learn the outcome of their refugee status determination process, which would be non-refundable if the claim was denied (Smith 2003, 19). This measure was proposed in order to serve as “a remedy for the current massive numbers, which are entering SA, with intentions to exploiting [sic] the economy of the country” (Smith 2003, 19). Aside from violating basic principles of refugee protection, such a fee would have certainly represented a prohibitive cost for many asylum seekers, and would likely have encouraged undocumented migration as an alternative means of entry, and opened up new opportunities for graft within the asylum system. The same memorandum called for setting up refugee camps, arguing that,

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$61$ Approximately $50 USD at the time of writing.
South Africa seems to be the only country which allows its refugees to move around, thus we experience such numbers of refugees. Strict control has to be in place and all the loopholes should be minimized at all cost (Smith 2003, 19).

These attitudes are revealing of a mindset within the Department and the Subdirector for Refugee Affairs, no less, that already held existing views of refugees and asylum seekers as constituting a flood of people intent upon exploiting South Africa’s economy, and in need not of adequate protection and the associated systems of management, but of strict control and discipline.

Along with such normative questions, there was also the pivotal legal question of how to define a refugee within the specific context of regional migration patterns. This represented a significant challenge in the formulation of refugee legislation, and one which has continued to cause considerable consternation and confusion for policy-makers. The process was guided by international legal categories, such as the definition of a refugee put forward in the 1951 Geneva Convention Relating to the Status of Refugees, and the expanded definition offered by the Organisation for African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa. However, even before the Refugees Act came into effect, some observers were drawing attention to the significant challenges that such legal categorisation of migration flows might create for South Africa. Barutciski, for example, argued that the simple

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62 The 1951 Geneva Convention Relating to the Status of Refugees defines a refugee as someone who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (Geneva Convention Relating to the Status of Refugees, 1951).

63 The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa expands upon the Geneva definition of a refugee. In this convention, the term “refugee” also applies “to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality” (OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969).
establishment of legal categorical distinctions between voluntary and involuntary migrants did not necessarily translate into an adequate solution for South Africa’s particular migration challenges, and that what made migration management infinitely more challenging in the country was the “hundreds of thousands of migrants [who] fall into a more ambiguous category that is hard to address by dividing migrants into ‘refugees’ and ‘non-refugees’ as suggested by international legal definitions” (1998, 705). Barutciski noted that the necessary corollary of these strict legal categories was the ability to enforce these distinctions in practice, and he questioned the South African state’s capacity to maintain the credibility of the new legal categories by ensuring not only that refugees were sufficiently distinguished from other migrants, but also by being ready and able to remove asylum seekers whose applications for refugee status were rejected (1998, 703).

Despite the decision to employ international legal categories in national refugee legislation, the much broader and more ambiguous category of migrants has indeed continued to befuddle South African management of migration, and the kinds of associated consequences and challenges of which Barutciski had warned quickly became apparent in the implementation of the new refugees legislation. Indeed, within several years of the promulgation of the Refugees Act, the Minister and his advisors began to re-evaluate some of the very premises upon which the Act was based. The Minister’s former special advisor recounts that following the passage of the 1998 Refugees Act:

We moved ahead full steam, soon to realise that the system didn’t work and could not work. It was a disaster and is still a disaster. It cannot work. It will never work for as long as the pull forces are as strong as at present, and the push forces on the rest of the continent remain unchanged.⁶⁴

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⁶⁴ Interview, Hon. Mario Oiani-Ambrosini, Cape Town, October 6, 2011.
By the 50th anniversary of the 1951 Geneva Convention in 2001, the Department of Home Affairs at the Ministerial level had begun to question the relevance of aspects of the Geneva Convention on international platforms. In part, this was based on the issues of refugee definitional criteria, as the challenges inherent in the state’s attempts to legally disaggregate migration motivations became more apparent. At a ministerial meeting in Geneva to mark the 50th anniversary of the Convention, Buthelezi noted that the difference between refugees and those displaced by economic factors was becoming “increasingly less relevant in the tragedies of those who are forced to migrate under the extreme duress, insufficient protection and assistance from the overall society to which they belong” (Buthelezi 2001). He noted that petition for asylum remained the only channel open to people who did not fit the Convention refugee definition, and suggested that a revisiting of the difference between refugees and economically displaced people may be an important aspect of re-thinking the Geneva Convention (Buthelezi 2001). The Department of Home Affairs, at the Ministerial level, had found what the former ministerial advisor terms “an unlikely bedfellow” in Philip Ruddock, then the Australian Minister of Immigration and Multi-Cultural and Indigenous Affairs:

The Australians were unhappy about the Convention and wanted our assistance; for the South African opposition to the Convention made their position more politically correct. Together we began looking at changing things during a couple of preparatory meetings in Pretoria and Canberra. At the 50th Anniversary of the Convention in 2001, in Geneva, South Africa and Australia were the only two countries which stood up and said that the

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65 During a visit to Australia in 2003, the Australian Minister of Immigration and Multi-Cultural and Indigenous Affairs, Philip Ruddock, took Minister Buthelezi and his team to visit the refugee camps near Sidney. The Minister’s former special advisor recounts: “He [Ruddock] told us: ‘These people keep coming and coming, and look, we keep them in this jail here. And they keep coming. We are thinking to send pictures to Africa so they know that there is nothing here waiting for them here but this jail.’ And Buthelezi began laughing and laughing and said: ‘My friend, you are clueless’. In fact, albeit behind fences and walls, every refugee had a beautiful room often with air conditioning, was not locked [in] but was free to circulate and socialize throughout the camp, had wife and children, could play sports including tennis and ping pong, had three meals a day, televisions everywhere, and no work to do. Buthelezi added: ‘to most Africans this place is like a luxury hotel. If you think that the images of this would discourage Africans from coming here, you don’t understand’ (interview, Hon. Mario Oriani-Ambrosini, MP, Cape Town, October 6, 2011).
Protocol is wrong and needs to be changed, stating the need to re-examine the entire Convention.\textsuperscript{66}

The Minister and his team began exploring other approaches to refugee protection, including the principle that people must apply for asylum in the first country in which they arrive that offers such protection (the “first safe country” principle), and that countries such as South Africa or Australia “should have the power of creating camps in that country of first asylum, at their own expenses, and on the same basis as they can create refugee camps in their own countries.”\textsuperscript{67} The idea of the “first safe country” principle has since been sporadically (and even illegally) applied in South Africa by Home Affairs officials and has been erroneously defended by Minister Nkosazana Dlamini-Zuma in 2011 as a requirement of international law, though there is, in fact, no general, recognised first safe country principle in international law (Amit 2011a).\textsuperscript{68}

By as early as 2001, then, the highest levels of the Department of Home Affairs, which held responsibility for the design of the Refugees Act and its implementation, did not actually believe that the Refugees Act was adequate, sufficiently relevant to the South African context, or actually implementable. Reservations have continued at the highest levels. One civil society actor noted in 2011 how:

\begin{quote}
the Minister herself said in Parliament a couple of months ago [...] that after 1994 we signed on to all the UN Conventions, because we wanted to be free and open and embrace human rights issues. You know, approach all those issues from the new South Africa. Human rights first. You know? And she said we signed the UN Convention on Refugees without fully understanding
\end{quote}

\textsuperscript{66} Interview, Hon. Mario Oriani-Ambrosini, MP, Cape Town, October 6, 2011.
\textsuperscript{67} Ibid.
\textsuperscript{68} While a minority of states have implemented the “first safe country” principle, they have done so through treaties and legislation, not through international refugee law. As Amit points out, such treaties and legislation are still subject to the parameters of international refugee law, and require that the receiving country may not send asylum seekers back to a third country, without taking into account the individual circumstances of the asylum seeker and being able to guarantee adequate administration of the asylum claim in the third country (Amit 2011a). Sending an asylum seeker to a third country that may in turn return the asylum seeker to his or her home country without due process constitutes indirect \textit{refoulement} under international law (Amit 2011a).
the repercussions and what it would actually in fact mean for South Africa, and if we had to go back, we probably wouldn’t have signed it.\textsuperscript{69}

As will be explored in the following chapter, there have been significant and ongoing shortcomings in the implementation and administration of the Act. The result has been a state caught between its international and domestic legal obligations, on the one hand, and a growing skepticism regarding both the relevance of the Refugees Act in the South African context and the capacity of the South African state to actually effectively implement this legislation, on the other.

**The Immigration Act of 2002**

While the Refugees Act had some solid international parameters as guidelines, the Immigration Act represented an entirely different challenge, with a complex range of factors to consider, particularly given the emotive nature of migration debates and the symbolic weight of these debates with regards to nation-building narratives and processes. A widespread consultation process towards new immigration legislation began in 1996, but it was not until 2002 that post-apartheid South Africa’s first Immigration Act was passed within a maelstrom of controversy. As Vigneswaran writes, “despite significant pressures on government to develop new initiatives and show results, the defining characteristics of immigration policy making over the past decade have been disorder, disunity, and despair” (2011, 129). Much more so than with the Refugees Act of 1998, policy-making processes around the Immigration Act revealed deep limitations within the state, and quite significantly undermined the image of the state as a coherent and integrated whole. Instead, important sites of contention were exposed in terms of both the policy process and the content of the new immigration legislation. While a detailed

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\textsuperscript{69} Interview, Cape Town, August 2011.
account of the formulation of post-apartheid immigration policy is beyond the scope of this
dissertation, the challenges involved in the development of the Immigration Act are worth
considering, and cannot be entirely separated from the Refugees Act in terms of analysis. While
they are separate pieces of legislation, they are nonetheless inter-related, conceptualised and
designed to complement each other.\footnote{The administrative failures of the asylum system, for example, encourages, or forces, some would-be refugees to enter or remain within the country as undocumented migrants, where they fall under the ambit of the Immigration Act and face potential arrest, detention and deportation. Alternatively, lacking other options for legal access to the workplace in South Africa under the Immigration Act, many migrants who do not meet the definitional requirements of a refugee under the Refugees Act may choose to enter the country through the asylum seeker system anyway, particularly as it offers the rights to work and study while a claim is being processed (which, given system backlogs in both claims and appeals processing, can take many months or even years). Understanding some of the central dynamics and controversies surrounding immigration management, then, is a necessary corollary to understanding the dynamics of refugee and asylum seeker management in contemporary South Africa, as the shortcomings of each affect the other.}

Debates during the formulation of the Immigration Act reveal a deep ambivalence within
the state about the role of migration, particularly in terms of its relationship with broader, heated
debates around economic liberalisation. This was even further complicated by the challenges of
policy-making within the context of Government of National Unity (GNU), which set the stage
for a particularly contentious and complex process of legislation-making, in terms of process and
proposed content. Ultimately, the Immigration Act of 2002 did not necessarily reflect the vision
or policy preferences of the governing party, and has since been subjected to a series of
amendments, though in the ongoing absence of an overarching, coherent ANC migration policy
or strategy. The policy environment remains a confusing and contested terrain. Shortcomings in
the management of migration in South Africa have, in the meantime, contributed to widespread
perceptions that the state has lost control of migration, that South Africa’s borders are irreparably
porous, and that floods of migrants (documented and undocumented) are streaming into the
country, competing with citizens for scarce employment and resources. This, in turn, has entailed an ongoing emphasis on a securitised approach to migration management in the country.

Given the political changes in the country, legislation could not be tinkered with incrementally, but needed to be overhauled completely. The former special advisor to the first post-apartheid Minister of Home Affairs described this as a “huge nightmare” and an “epistemological problem,” noting how rare it is that a country must come together to decide how to address the fundamental policy aspects that govern immigration, as opposed to making incremental changes. 71 Many political analysts and migrant groups hoped that the new democracy and the coming to power of the ANC would give rise to a more open immigration policy. However, such expectations were “based on the false expectation that the advent of democracy and the change in regime coincided with a change in core national interests, which of course they did not” (Wa Kabwe-Segatti 2008, 74).

The formulation of the Immigration Act, particularly in the context of the GNU, proved to be a substantial challenge both in terms of the historical context and mistrust engendered by relations between the ANC and the IFP72, but also in terms of very real differences regarding approaches to migration management that were articulated through the policy-making processes. The GNU was an attempt by the post-apartheid state to present the image of a unified, coherent whole, in which the political differences of the past could be set aside so that the new government could begin its work of social and economic transformation. However, in terms of developing coherent immigration legislation, the GNU became a political battleground between

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71 Interview, Hon. Mario Oriani-Ambrosini, Cape Town, October 6, 2011.
72 Building on an earlier iteration of a Zulu cultural movement launched in the 1920s by Zulu King Solomon kaDinizulu, Buthelezi’s maternal uncle, (Cope 1990), Inkatha was launched in 1975 by Prince Mangosuthu Buthelezi as the “Inkatha National Cultural Liberation Movement” in order to remain within the technical legalities of apartheid law. It became the Inkatha Freedom Party in 1990.
those within the state who envisioned the attraction of skilled labour, in particular, as a key
driver of laissez-faire economic growth, and who sought to decentralise immigration functions
and limit state discretion, and those advocating centralised and bureaucratic state control over
migration functions. These perspectives carried with them a particularly sensitive emotional
charge, rooted in the country’s tumultuous history and the long-standing liberal-radical debates
in South Africa, as explored in the previous chapter.

The particular constellation of political power that initially characterised the post-
apartheid government took shape through the Kempton Park/World Trade Centre negotiations in
the early 1990s, with roots in one of the breakthrough clauses that saw a power-sharing
arrangement struck in the form of a Government of National Unity. The GNU provided
proportional Cabinet posts to opposition members who reached a 5% vote threshold in the 1994
election. Thus, when the Inkatha Freedom Party (IFP) took 10.54% of the national vote in the
1994 elections, its leader, Prince Mangosuthu Buthelezi, was appointed by then President
Mandela as the post-apartheid nation’s first Minister of Home Affairs.

The relationship between Buthelezi’s IFP and the ANC is a deeply complex and
emotionally charged topic in South Africa. At its nadir in the 1980s and early 1990s, this
relationship had deteriorated to what some scholars have characterised as a low-intensity civil
war, claiming the lives, by some counts, of approximately 20,000 people (Jeffery 2009). This
seemingly unbreakable cycle of violence and retribution took place mostly in what was to
become the province of KwaZulu Natal and in the hostels around the reef in Gauteng, with
atrocities committed by members of both the ANC and Inkatha (Beall, Mkhize, and Vawda
2005). While Inkatha and the ANC shared much common history, the two organisations broke
ranks in the late 1970s and into the early 1980s around several key differences that would set the
stage for the unravelling of relations between them over the next decade, in particular. Buthelezi and Inkatha, for example, formally rejected the armed struggle of the ANC, supported an open, free market economy, and refused to support the ANC’s call for international economic sanctions and school strikes (Jeffery 2009). In the midst of the Cold War politics of the day, Buthelezi’s embrace of capitalism marked him out as a potential ally by Western factions, and his perceived closeness with politically conservative Western leaders such as Margaret Thatcher and Ronald Reagan positioned him squarely against any hoped-for socialist or communist revolution of the ANC and its partners. In 1976, with the tacit support of ANC leadership at the time, Buthelezi accepted the position of Chief Minister of KwaZulu within apartheid’s unviable and illusory “homelands” system. However, battles against apartheid intensified and relationships soured between the two organizations. Violence between the ANC and the IFP became a regular occurrence. The ANC labeled Buthelezi an apartheid collaborator and a puppet of the apartheid regime, accusing him of fomenting disunity and violence at a time when all black South Africans should be uniting behind the ANC. Contention between the ANC and Inkatha continued unabated, and even intensified, after the release of Mandela in 1990. Jeffery notes that from 1985 to 1987, deaths from political violence averaged 946 per year, before escalating to an average of 1 276 per year from 1988-1989; from 1990 to 1993, death rates climbed significantly to 3 387 per year” (1999, 12).73

Against this backdrop, negotiations for the transition to a post-apartheid, democratic South Africa began. The conflict began to shift from differing ideological and practical

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73 Jeffery’s thesis, developed in her 2009 book “People’s War: New Light on the Struggle for South Africa” argues in part that the intentional elimination of domestic political competition such as the IFP, the Pan-African Congress (PAC) and the Azanian People’s Organisation (AZAPO), was one of the tenets of the ANC’s “people’s war” strategy, based on Vietnamese military and political strategies adopted by the ANC after their visit to Vietnam in 1978 (Jeffery 2009).
approaches to the opposition of apartheid towards conflicts about how the new dispensation ought to be negotiated, organised and governed, with questions of federalism largely at the heart of the debate. The ANC rejected any notion of group rights or privileges, and of ethnicity as a basis for power, and feared that a decentralised federal state might allow for the rise (or maintenance) of strong ethnically-based provinces or constituencies that could prove a challenge to centralised ANC authority (Christopher 2012, 4). The Zulu nation, under the leadership of Buthelezi, was the most potent example of a strong regional and in many ways, ethnically-based power, and during the course of the negotiations, the IFP represented a persistent voice in the call for a federal post-apartheid state (M. de Haas and Zulu 1994, 434). Citing frustration at the effectively bilateral nature of the terms of negotiations and the refusal to allow the participation of the Zulu King Goodwill Zwelithini, the IFP ultimately withdrew in protest from the formal World Trade Centre/Kempton Park negotiations; the party also refused to take part in elections until the eleventh hour, given their objections to what they believed to be an indefensibly flawed process of negotiations leading up to them (Jeffery 2009; Waldmeir 1998).

The appointment of Buthelezi as Minister of Home Affairs, traditionally one of the most significant Ministerial posts in government, was thus politically calculated to assuage the ongoing political tensions between the IFP and the ANC. As former Director-General Barry Gilder put it,

appointing Buthelezi as Minister was an attempt to overcome the violence between the ANC and the IFP that had preceded the 94 elections and overlapped beyond the election. So it was a political move. It had to be a portfolio which [...] had some stature.”

Another former high level ANC-aligned official recounted how he had personally approached then Deputy President Thabo Mbeki in 1997 to ask him specifically about Buthelezi’s

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74 Interview, Barry Gilder, Johannesburg, November 7, 2012.
According to this former senior official, Mbeki’s response was that, ultimately, the ANC had not recognised the strategic importance of the Department of Home Affairs, and by the time this was realised, the possibility of removing Buthelezi was too politically dangerous to consider, given the still volatile political situation in KwaZulu Natal (KZN) and the level of voter support he still enjoyed. While Buthelezi retained his Ministerial post until 2004, this was, in large part, in order to sustain a veneer of post-apartheid unity, and his authority was systematically undermined by the majority ANC throughout his tenure (Vigneswaran 2008, 792). Some argue that the ANC deliberately under-funded the department “to show Buthelezi up,” while others, argue that the under-resourcing was not so much personal as it was due to the fact that the Minister was simply not of the governing party; Gilder, for example, suggested that “an ANC Minister would have been able to lobby more effectively within the ANC National Executive, within Cabinet, within Parliament, for better resourcing.”

Alongside funding constraints, the tensions and animosity that existed between the Ministry staff and some of the ANC-appointed Directors-General (DG) in the Department during these GNU years were palpable, and often bitter. The role of DG is that of the highest-ranking civil servant within a national Department, responsible at the highest level for Departmental administration and operations, with responsibility for overseeing the implementation of the political directives of the Minister. In the case of Home Affairs during the GNU, however, for much of the period during which the initial post-apartheid immigration policy was being considered and formulated, this relationship was far from optimal, and at times, had completely broken down. From the time of Buthelezi’s appointment in 1994 until his departure from the

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75 Interview, Johannesburg, November 2012.
76 Interview, Johannesburg, November 2012.
77 Interview, Hon. Mike Waters, Cape Town, October 9, 2012
78 Interview, Barry Gilder, Johannesburg, Nov 7, 2012
Ministry in 2004, for example, the Department of Home Affairs had no less than five Directors-General, and in between these contentious appointments, the position was filled by an acting Director-General. These appointments created ongoing significant stumbling blocks in the lines of communication and authority from the Minister downward into the Department. Mistrust and suspicion ran deep between those within or aligned to the IFP camp and those within or aligned to the governing party; this was both personal and political.

While the conflicts, personal animosities and levels of mistrust trumped many interviewee’s recollections in terms of the more specific aspects of the policy debates around migration management, there were, nonetheless, important substantive differences and very real policy debates that took place, and the contentious nature and personality politics of the GNU do not alone hold sufficient explanatory power for understanding the fraught immigration policy processes and outcomes of the post-apartheid period (Peberdy 2009). Klotz argues that analysts should be cautious to ensure that such micro-politics do not obscure the more important macro-political debates surrounding immigration in the post-apartheid era – debates, she argues, which more fundamentally centred “on a battle over where to accept liberalization of the labour market” (2012, 200). Indeed, broad battles around economic liberalisation were playing out well beyond the immigration debates, particularly as South Africa transitioned from the more

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79 The most troubled of the Minister-DG relationships was with ANC intelligence operative Billy Masethla, from 1999-2002, during which time the Minister compiled and tabled in the National Assembly a detailed dossier of 64 complaints against Masethla related to insubordination, failure to comply with, or outright defiance of ministerial orders, fabrication, and attempts to embarrass the Ministry (SAPA 2002).

80 One former top official in the Department noted that the Minister’s special advisor, an Italian-American constitutional lawyer, Mario Oriori-Ambrosini, was particularly mistrusted by the governing party, and even suspected by some within the ANC of being a “handler” for Buthelezi (Interview, Johannesburg, November 2012). This suspicion, unfounded in evidence, was likely based in part on the role that Oriani-Ambrosini had played on behalf of Inkatha as a legal advisor to Buthelezi during the constitutional negotiations, combined with a deeply ingrained ANC suspicion of perceived foreign (and particularly American) involvement in South African affairs. For immigration policy development, in particular, this suspicion and the associated mistrust most certainly did not make for smooth political negotiating.
redistributive Reconstruction and Development Programme to the neoliberal Growth, Employment and Redistribution macro-economic framework, as discussed earlier. These debates played out not just between the ANC and other political parties, but they also played out within the ANC and between the ANC and its tripartite alliance partners as well. This was undoubtedly true in regards to immigration debates as well, and yet the most visible and rancorous divisions within the state played out between the ANC and the IFP-held Ministry of Home Affairs. Very much in keeping with their broader free-market oriented ideology, for example, the latter sought to introduce changes to managing immigration that would decentralise and even privatise certain immigration management functions and structures, and would ease the policies and procedures for the attraction of skilled labour by outsourcing certain work-permit issuing functions to corporations, with the oversight of chartered accountants.\(^{81}\) IFP proposals largely sought to remove as much discretion as possible from officials and from the Minister, and sought to bring together a migration management forum called the Immigration Advisory Board, which would consist of representatives from local government, business, and labour, originally with some executive functions, specifically in terms of regulations-making.

Many of these proposals were met with strong resistance by the governing party, creating considerable tensions and conflict within the state, echoing historical motifs of contention between the ANC and the IFP. Former DG Barry Gilder drew a direct line between the pre- and post-1994 threads of IFP-ANC ideological contention, noting that before the 1994 elections, during the negotiations process, the IFP was,

\[ \text{pushing very hard for a federalist post-apartheid state, and my impression was that through Home Affairs and through the Immigration Bill, they tried to} \]

\(^{81}\) Interview, Hon. Mario Oriani-Ambrosini, Cape Town, October 6, 2011.
push that in terms of decentralising Home Affairs functions to Provinces, Municipalities and so on.\textsuperscript{82}

As with the broader debates around federalism, in many ways, this kind of approach was anathema to the ANC, which viewed it as a direct threat to their preference for strong, centralised governance in the pursuit of the capacity to effect post-apartheid transformation.\textsuperscript{83} Gilder noted that the financial and ideological justifications for immigration policy proposals that would decentralise or devolve state functions and powers represented

\begin{quote}
\textit{a classic case of disagreement, to use a very soft term, between the ANC and the other political parties, in this case the IFP. The ANC, as I’m sure you’re aware, coming in after 94, having to undo apartheid, really needed as much of a hand on organs of state to effect transformation on a whole range of things. And as you know, it’s even been a debate within the ANC and more broadly, and through the tiers of government, the Provinces, the divisions of power between the three tiers of government – it’s not an issue, in my view, of control for control’s sake; it’s an issue of, you know, you’ve got such a huge project to undo apartheid that we need to be able to control it, and make sure [...] that it’s run by people who are committed to and understand the transformation agenda. So the privatisation of government functions was a no-no to the ANC.}\textsuperscript{84}
\end{quote}

While it is certainly not uncommon for there to be different and often entrenched camps of opinion around a specific policy-making arena, it is very unusual to have a Minister in charge of such a pivotal task as the drafting of immigration policy for the country at such ideological odds with the governing party.

Aside from the opinions and positions of the IFP-held ministry and its allies, and those of the ANC, other non-state actors were also attempting to influence the outcomes of these debates. In her work on immigration policy-making in the post-apartheid period, Wa Kabwe Segatti notes three distinct camps that emerged within the policy-making arena (see Appendix 5). Her mapping of various interests speaks to the kinds of coalitions that formed both outside of

\textsuperscript{82}Ibid.
\textsuperscript{83}Interview, Barry Gilder, Johannesburg, November 7, 2012
\textsuperscript{84}Ibid.
the state, as well as between state and non-state actors in terms of advocating for particular approaches to migration management. Wa Kabwe Segatti positions the IFP in a neoliberal camp, alongside business and business-oriented think-tanks, while the ANC, the Department of Home Affairs, and other government circles are placed in a camp which gives preference to issues of state security and sovereignty, and favours strong bureaucratic management. Interests beyond the state included some academic and civil society actors, whose input was sought in extensive consultations throughout the process of legislation-making. These actors were largely advocating an approach to migration centred on management and regional integration, rather than securitisation and control. In the Green Paper, for example, the authors recognised the importance of remittances for regional development, and stressed the vested interest of South Africans in “ensuring that the economies of the other SADC states become vibrant and strong” (Green Paper 1997, sec1.4.5).

The challenges of navigating these diverse opinions may have been mitigated by the early introduction of a strong and clearly articulated policy-direction from the governing party, but no such direction was forthcoming. A number of factors likely contributed to the ANC’s lack of a clear approach to immigration, including the complexity of immigration as a policy arena, divided opinions within the party, and the rapidly shifting patterns of migration in post-apartheid South Africa. Added to this was the relative dearth of migration-related data, inexperience amongst the ANC in terms of engaging with immigration issues, and the enormity of other

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85 Despite extensive consultation, the actual impact of civil society and academic actors’ input on the content of the final Immigration Act is questioned by some scholars. Crush and McDonald, for example, write that “there is not a great deal of evidence that this particular consultation process has shaped the new legislation in significant ways” (2001, 1). Nonetheless, the space that was opened up through government consultation processes did allow for “the emergence and/or consolidation of several research structures and think-tanks that not only produced data in a field characterised by a dearth of knowledge [...] but also largely shaped, in conjunction with other interest groups (namely business and trade unions), the various policy options elaborated in the 1990s and 2000s” (Wa Kabwe-Segatti 2008, 78).
competing social, economic and political challenges associated with the transition from apartheid. Buthelezi’s appointment as Minister of Home Affairs in a Government of National Unity may also have created further disincentives or obstacles to the development of an ANC migration policy or approach. Led by his Ministry, extensive public and stakeholder consultations regarding migration management were already taking place, along with the drafting of the Green Paper on International Migration and subsequent White Papers on refugee and immigration issues. The ANC may have been reluctant to undertake any duplication of work, as it would have also been reliant on such processes in order to formulate an immigration policy approach of its own. Further to this, it was at times undoubtedly politically expedient for the ANC to have Buthelezi in a position of responsibility for this controversial policy arena, particularly in terms of the emotive security-oriented aspects of his approach to migration, which consisted of “stringent control and systematic repatriation of undocumented migrants” (Wa Kabwe-Segatti 2008, 81). Former ANC-aligned Home Affairs Director General Barry Gilder recalled arguing strongly during his tenure for the ANC to develop an immigration strategy or policy of its own which reflected its broader policies and views. In the context of the GNU, without such an overarching guiding policy to provide parameters and direct the process, the ANC was, to some degree, beholden to the policies that emerged from the non-ANC held Ministry of Home Affairs. As Gilder noted,

"...making policy and developing legislation is a very detailed process, and the people, most often in the Department itself who are doing it, obviously have a lot of influence over what goes in. By the time it gets to the Portfolio Committee, whether it’s as a Green or White Paper or a Bill, it’s a fairly detailed fait accompli, and if it doesn’t reflect governing party policy, at that point, it’s a bit difficult to change it without going back to the drawing board [...] but the lack of an ANC policy meant that there was no guiding document"

86 Interview, Barry Gilder, Johannesburg, November 7, 2012
or approach which could be imposed by Cabinet or Parliament on a non-ANC Minister.\footnote{Ibid.}

In explaining why the ANC “neglected immigration as an issue,” Gilder noted that balancing competing interests in immigration policy-making is always a delicate task, and that as a young democracy with a very particular and difficult apartheid history, immigration, and particularly illegal immigration, was a very emotional issue in South Africa.\footnote{Ibid.} He suggested that the new ANC government’s focus was on redressing the imbalances and injustices of the past through the creation of jobs, housing, and the provision of access to healthcare, and that for those “on the ground [...] who had been denied in the past,” foreigners coming in to the country represented competition for those newly won rights.\footnote{Ibid.} This suggests that the emotive and controversial nature of immigration policy-making, combined with its complexity, was something the ANC was both reluctant to address and unsure how best to approach. As Gilder summarised, “...it’s been, as I say, a very difficult balancing act, and perhaps the ANC wasn’t ready to make a policy. And I think that is the reality, that’s where we are today.”\footnote{Ibid.}

During Parliamentary and Cabinet review processes leading up to the Immigration Act of 2002, the ANC was able to ensure that at least some of its own preferences were written into the legislation, including the continuation of a strong, centralised role in migration management for the Department of Home Affairs. While from the ANC’s perspective the Act was far from an ideal piece of legislation, the deadline set by the Constitutional Court in its declaration of the unconstitutionality of the Aliens Control Act had to be met. Nonetheless, the contention then spilled over into the subsequent regulations-making process, culminating in the highly unusual

\footnote{Ibid.}
circumstance of President Mbeki suing his own Minister, Buthelezi, in 2004 regarding the gazetting of these regulations. The 2004 national elections saw the end of Buthelezi’s tenure as Minister, as the ANC took over Home Affairs. After almost ten years of ongoing migration policy-making processes, a 2004 memo from the DG to the new ANC Minister, Nosiviwe Mapisa-Ngakula, called for an immigration policy review process, as a matter of urgency:

...it is believed that there is a need for a fundamental review of Immigration Policy by the government. The immigration policy-formulating process that led to the current Act and its Regulations was imperfect and does not adequately reflect the views of the governing party, is not sufficiently aligned with broader government policies, and was not adequately consulted with other role-players in government (Gilder 2012, 378).

Such a fundamental review has yet to occur, though a review of the impact of international migration is amongst the resolutions passed at the ANC’s Manguang Conference in December 2012 (ANC 2012a). The Department of Home Affairs has commissioned the Human Sciences Research Council to undertake relevant research towards this end in 2014.

In 2004, amendments were announced to the 2002 Act. These amendments did not offer a significantly different approach to migration management, making some technical and legal clarifications and simplifying some of the more complex aspects of the 2002 Act, as well as tightening provisions around the issuance and renewal of visitor permits, and tightening control over work-related activities (Crush and Williams 2005, 25). Further amendments to the principal Act in 2007 and 2011 have yet to come into force due to a lack of regulations, though these are expected by mid-2014. While the real impact of these amendments will only be assessable once the final regulations are released, these amendments appear to be much more about tightening up loopholes or perceived loopholes in current immigration legislation, rather than offering any fundamentally different approach to the management of migration.
Despite the contention and confusion that have characterised immigration policy making processes in post-apartheid South Africa, there have certainly some points of agreement and important advances. Post-apartheid immigration legislation, for example, included much greater attention to due administrative process, including the removal of administrative discretion in decision-making, requirements of written notice of administrative decisions, and associated rights of appeal against arbitrary decisions. Importantly, it also outlined clear, legislated limits to detention times for undocumented migrants. The Act introduced increased mechanisms for the migration of skilled labour into the country, through various new visa and permit types. Further to this, the 2002 Act contained explicit calls for the rooting out of xenophobia both within communities and the state (though there has been little evidence that such campaigns have garnered much traction or attention, let alone results). However, immigration legislation has left almost no room for the migration of unskilled labour into the country, and has retained a strong emphasis on both the deterrence of undocumented migration, and enforcement mechanisms for dealing with undocumented migrants. Ironically, despite this ongoing emphasis on sovereignty, security and control, the state has proven unable to effectively prevent undocumented migration, which has contributed to a growing sense of insecurity and loss of control, reinforcing, in turn, calls for even stronger measures of control and securitised approaches to migration management.

**Conclusion:**

In many ways, the end of apartheid marked a new chapter in migration management in South Africa. However, the Aliens Control Act of 1991, along with decades of the discretionary, racialised management of migration in the country, left challenging legacies for policy-makers and others involved in policy-making processes. Nonetheless, the new democracy created the space for the development of a new asylum regime for South Africa, as well as the opportunity to
fundamentally re-think the country’s approach to immigration. The Refugees Act of 1998 drew heavily on international parameters and the input of domestic and international academic and civil society actors, and while the process was certainly not without contention and significant differences of opinion amongst state actors, and between state and non-state actors, the resultant Act was widely heralded for the protections and freedoms it afforded to asylum seekers and refugees. Immigration policy formulation processes were much more contentious, complicated by the fractious relationships that characterised the GNU. However, debates about the direction of immigration policy were also substantive, highlighting the tensions between the political and economic liberalisation of South Africa, especially in terms of the labour market, and the government’s simultaneous aspiration to effect transformative change through centralised state power and control. Importantly, the Immigration Act of 2002 and subsequent amendments have maintained an emphasis on the strict control the immigration of unskilled labour into the country, with very limited mechanisms to accommodate legal entry for work purposes. This has been accompanied by a stringent detention and deportation regime. With no legal mechanism for entry to South Africa, many unskilled or low-skilled workers enter the country as either undocumented migrants, or through the asylum system, compromising the integrity of both the immigration and asylum regimes. However, the policies themselves cannot alone explain the outcomes and actual practices of migration management in post-apartheid South Africa. Ongoing challenges in the effective administration and implementation of both the Immigration Act and the Refugees Act have likely contributed to perceptions that migration is out of control in the country, and that increasingly stringent measures of security and control are needed.
Beyond the already formidable challenges involved in the development of refugee and immigration legislation loomed the challenges of implementation. The legislation relating to both refugee and broader migration streams was developed with the assumption of a bureaucracy that held the will and the capacity to effectively implement it. There was, however, a significant disconnection between the legislation emanating from the highest levels of the state, and the ways in which this legislation was being interpreted and put into practice at lower levels of administration, particularly within the Department of Home Affairs (DHA). While gaps between policy and practice in the implementation of migration legislation exist in significant ways outside of the boundaries of Home Affairs (especially within the realm of policing91), this chapter focuses on the bureaucratic inheritance of the post-apartheid DHA. I argue that the shortcomings of migration management in practice must be understood within the context of ongoing and historically embedded capacity and resource limitations, alongside continuing practices of administrative discretion. The chapter explores two key areas of migration management, to illustrate the expressions and outcomes of these limitations. The first is the management of the detention and deportation regime, in which the country’s control and security-oriented approach to migration management finds its most poignant expression. The second is the administration of the asylum system, characterised by systemic barriers to access and by deeply inadequate administrative systems that regularly undermine the integrity of the system and put asylum seekers at risk of refoulement. Finally, the chapter explores some of the contemporary shifts in both de facto and de jure policy. While the crises in migration

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91(For explorations of the challenges of policing migration in post-apartheid South Africa, see Klaaren & Ramji 2001; Sutton & Vigneswaran 2011; Vigneswaran 2011a, 2011b).
management are recognised by state and civil society actors alike, policy shifts appear to
demonstrate that the state is pursuing an ever tighter agenda of securitisation and control, leaving
little room for a fundamental reconceptualisation of migration as a potential tool for both
national and regional development.

**Bureaucratic Inheritance, Capacity, and Rule-making in the Department of Home Affairs**

Just as post-apartheid migration policies were a product, at least to some degree, of
apartheid policies and history, so too was the civil service and the very Department that was
meant to implement the new legislation. The guarantee of a five-year fixed term of job security
for the existing civil service, from the handover of power in 1994 until 1999, represented an
important, though much criticized, breakthrough in the difficult Kempton Park/World Trade
Centre negotiations. The retention of apartheid-era civil servants was undoubtedly politically
unpalatable for many within the new ANC-led government, yet as smooth a transition as possible
into the new era of governance also necessarily required some degree of continuity and
transference of the administrative knowledge and skills embedded within the existing civil
service into the new political regime. From the perspective of former Home Affairs Director
General Barry Gilder, many aspects of this transition were enormously problematic:

...for those of us charged with taking over the organs of state, the negotiations
and transition processes had dealt us an almost impossible hand. We
inherited structures and processes and systems unsuited to the tasks at hand.
We inherited public servants who still largely believed the public was made
up of less than 20% of the population, who had varying levels of skills, who
did not think we should have even won the elections in the first place, and
many of whom sought indeed to deprive us in the administrative sphere that
which we had won in the political realm. We inherited a culture of patronage
and corruption and disdain for the public, of authoritarianism and
bureaucracy. We inherited an ideology diametrically opposed to the broadly
progressive one we strove to introduce into government and society (Gilder
2012, 337).
The post-apartheid public service was one that was accustomed to the apartheid system of governance, not representative of the population at senior decision making levels, and was and still is beset with problems from lack of skills and resources to more serious problems of corruption (Miller 2005, 8).

These kinds of post-apartheid tensions were certainly not reserved to the DHA. However, the very nature of the Department lent it to particular challenges, as Home Affairs played an important role in the implementation of apartheid policies, through, for example, the implementation of the one of the most hated of apartheid’s administrative tools, the pass laws, or *dompas* system. One former post-apartheid senior Home Affairs official spoke about the challenge of inheriting control of the department he viewed as having been largely responsible for the implementation of apartheid, and the difficulties of inheriting personnel within this department whom he believed must have necessarily supported apartheid in order to do their jobs. However, he noted, upon coming into power, the ANC did not yet know what worked or did not work from an administrative and governance perspective, and they could not simply start a new department from scratch; like it or not, they had to work within the structures of what they had inherited, especially those which had been agreed to through the negotiated transition. The former Ministerial Advisor also noted in an interview the challenges he experienced in working with the inherited bureaucracies:

> Governments can change, new constitutions can come, revolutions can take place, but somehow, bureaucracies maintain their existence. It’s almost as if something gets imbued in the paint of the office buildings and then comes out infecting the new generations of civil servants. Often both procedures and mindsets survive the deepest of change. The Russia of the Czars became the

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92 The pass laws required that all black South Africans over the age of 16 carry ID books with them at all times when in “white” areas, failing which they could be arrested and imprisoned. The system was meant to regulate and control the movement of black South Africans, and was one of the most potent and hated symbols of the wider apartheid system.

93 Interview, Johannesburg, November 2012.

94 Interview, Johannesburg, November 2012.
Russia of the Communists. The Chinese imperial administration became the
Chinese Communist administration. To a certain extent, a great extent,
liberation did not change the administrative mindset of Home Affairs and the
Department of Labour.95

Even while new ideas and directions in migration management were being formulated at high
levels within the Department, there was little guarantee they would find buy-in as they filtered
down through departmental ranks.

Capacity challenges in the Department were exacerbated by the apartheid state’s history
of staffing the civil service with white, and often Afrikaans, civil servants, and by the new post-
1994 attempt to bring black employees into the civil service. Under the apartheid administration,
Home Affairs, in general, did not attract the highest level of skilled and educated individuals,
and post-apartheid, the Department maintains its reputation as the “employer of last resort”
issue “originally stemmed from a government refusal to set matriculation as the standard for
entry-level positions so as to provide employment opportunities for less educated members of the
white population” (Vigneswaran 2008, 795). While the changing of the political guard in 1994
meant that no longer would low entry standards be used to maintain white privilege, the post-
apartheid Department of Public Affairs nonetheless refused the Department of Home Affairs’
requests to raise the minimal educational requirements for the entry-level officers that would be
needed to enforce new immigration policy directions (Vigneswaran 2008, 795). Vigneswaran
posits that “the new administration was intent on bringing in black employees to rewarding civil
service positions and so resisted this effort to recruit better skilled immigration officials” (2008,
795). One former senior Home Affairs official argued that the appointment of people into
positions for which they lacked experience has been “one of the biggest mistakes” of the post-

95 Interview, Hon. Mario Orian-Ambrosini, Cape Town, October 6, 2011.
apartheid government, and argued that a lack of middle management is now significantly hindering the functionality of the Department. All of this was compounded by the capacity and experience lost in the often early retirements and resignations of existing (white) civil servants in the immediate post-apartheid years. Further to this, the re-organisation and rationalisation of governance structures that took place in the immediate post-apartheid years meant that even while the scope and purview of Home Affairs’ responsibilities had greatly increased, especially in terms of migration management, there was no capacity within Home Affairs for new hires, or even secondments to meet the new demands, which instead,

...had to be regulated and provided with an administrative response, against the backdrop of a government which froze the establishment of any new administrative structure, because the process of rationalisation was extremely demanding... So while all this was rationalised, the Mandela administration first, and the first Mbeki administration afterward, froze the establishment of new positions and no-one could hire new people or force the secondment of existing civil servants away from their line function.

Ongoing under-resourcing, however, has continued to impact the Department, both in terms of human and financial capacity.

The already limited capacities of the DHA have been further stretched by the scope of its mandate, which includes responsibilities for two key line functions, civic affairs and migration. As Vigneswaran argues,

the main result has been that budgetary and human resources have been drawn away from immigration policing to other duties, including distributing identification documents to people in rural areas, conducting mass

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96 Interview, Attie Tredoux, Pretoria, November 9, 2012.
97 In a climate of deep-seated mistrust and suspicion between senior public servants and their political counterparts, for example, no less than 28 Directors Generals, who occupied the most senior public servant position at the national level in South Africa, left the public service between 1994-1998 (Miller, 2005, 9).
98 Interview, Hon. Mario Oriani-Ambrosini, Cape Town, October 6, 2011.
99 DHA’s migration line function includes responsibility for all ports of entry, visas and permits, the asylum system, migration enforcement, and deportations. Its civic affairs line function includes all administration associated with identity documents, births, deaths, marriages, and even voter registration.
identification campaigns in the lead-up to elections, and dealing with peak migration flows through ports during special events (2011a, 131).

A separation of line functions within Home Affairs and the devolution of some of its functions to the municipal level represented one possible solution to some of the chronic under-resourcing dilemmas of Home Affairs. While this suggestion was put forward during Buthelezi’s tenure, it was not supported by the governing party, nor was there support for a subsequent proposal put forward in the White Paper on International Migration for a separate Immigration Service, as a semi-independent, arms-length professional institution to manage immigration. Wilmot James, a current DA MP and former chairperson of the Green Paper process, posited that the proposal for an Immigration Service was,

> anathema to the ANC, who wanted centralised control [...] sometimes for good reason, because we’re such a divided society, you sometimes require some sort of central drive to hold the country together. But it’s also about power on the part of the ANC, so they didn’t want to lose anything. They didn’t like the fact that provinces had so much semi-independence – it made them nervous. So it was a trade-off, and so the idea that you have a semi-independent body responsible for regulating immigration was just something that they couldn’t stomach, so there was just no way they were going to let that through in terms of the legislative side of what came out of the White Paper. So the Immigration Act was stripped of that idea, and didn’t include it.100

Such an analysis was echoed and elaborated upon by Gilder, who posited that the rejection of the proposal to separate the migration and civic affairs functions of Home Affairs arose in part from the ANC’s resistance to decentralisation and the perceived associated impact of its ability to effect meaningful transformative change through strong, centralised control.101

A rapidly changing and often confusing policy environment has provided still another challenge to the coherence and effectiveness of the state’s capacity to manage migration. In this

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100 Ibid.
101 Ibid.
context, the informal rules of migration management remain fluid and subject to significant
discretion by the implementers of formal state policies. Since 1994, administrators and officials
within Home Affairs with responsibility for implementing legislation have had to contend with
interim amendments to the Aliens Control Act of 1991, the introduction of a new Refugees Act
in 1998, the much delayed and controversial passage of the Immigration Act of 2002, and a
series of subsequent legislative amendments. In addition, there have been ongoing high-level
discussions, and even consultations, around a broader strategic overhaul of migration policy, and
the Department “has stated for several years that it is in the process of conducting a strategic
policy review on which basis it aims to revise asylum legislation and practice,” though nothing in
this vein has been made public (ACMS & LHR 2013, 12; Gabara 2009).

Implementers have also had to deal with the confusing and often substantial delays
between the passing of amendments and the gazetting of the associated regulations that give
force to the legislation. Despite more recent amendments to the Immigration Act, for example,
the last gazetted regulations were written in association with the 2004 Amendment Act. The
2007 Amendment Act, has never formally been put into force, nor has the 2011 Amendment Act,
for want of associated regulations. While the release of associated regulations that relate to both
the 2007 and 2011 amendments appears imminent, the amount of time between the amendments
and the regulations creates considerable opportunities for confusion at the level of
implementation. Attie Tredoux, the former Head of the Legal Section for Home Affairs and a
key actor in the development of both the Aliens Control Act of 1991 and the Refugees Act of
1998, believes that regulation drafting has become a very significant issue for the department.102
Indeed, part of Tredoux’s current legal practice now involves representing clients against Home
Affairs, often in situations in which the Department is implementing pieces of the amended Acts

102 Interview, Attie Tredoux, Pretoria, November 9, 2012.
which have actually not yet come into force through the issuance of associated regulations.\textsuperscript{103} The lack of regulations, which often have substantial powers regarding how the legislation will be interpreted, has created much confusion both within and outside of the state, particularly given the opinion amongst many civil society actors that the real political power increasingly lies in the regulations as opposed to the Act itself. Struggles over the processes of regulation-making within the state have characterised the post-apartheid migration policy arena. One early proposal from the IFP-held Ministry, for example, was that the function of regulation-making be formally taken out of the Department and placed under the authority of an Immigration Advisory Board (IAB), a Minister-appointed body consisting of representatives from other departments, local government, business, and labour and law. For the governing party, however, the executive functions of the IAB\textsuperscript{104} were unacceptable, representing a “usurping” of the power of the Minister, the Director General, and the Department.\textsuperscript{105} The immigration legislation thus ultimately retained regulation-making authority within the Ministry.

Amongst opposition parties and civil society, there is growing concern regarding the balance of power between the legislation and the regulations; increasingly, they argue, the actual legislation has become increasingly vague, while more power has been placed in the regulations, which are made by the executive and with no imperative for external consultation or Parliamentary Committee oversight. Alluding to the 2011 Immigration and Refugees Amendment Acts, one civil society actor commented:

\begin{quote}
...the legislation doesn’t really hold all of the changes that are going to happen. So you’ve got regulations attached to the legislation, and the regulations actually say how the laws will be carried out really, and the problem with the new law is that they’ve left a lot of discretion up to the
\end{quote}

\textsuperscript{103} Ibid.
\textsuperscript{104} Despite its legislated role, the IAB Board fell into disuse following the change in Ministry from Buthelezi to the ANC Minister Nosiviwe Mapisa-Nqakula in 2004.
\textsuperscript{105} Interview, Barry Gilder, Johannesburg, November 7, 2012.
Minister in the regulations. [...] it’s almost like making laws – LHR [Lawyers for Human Rights] called it “bad law-making” because literally, they’re making the law in the regulations as opposed to the legislative body of government approving the law through the Portfolio Committee processes. So you’re just by-passing that.106

Similarly, former Home Affairs Shadow Minister Annette Lovemore noted the difficulty of engaging in substantive debate around actual legislative amendments, when increasingly the interpretive powers lie in the regulations, which are developed and released at the Minister’s discretion.107 Citing legal advice her party had solicited, Lovemore suggested that the heavy reliance on regulations was potentially unconstitutional, and represented law-making by regulation.108 Setting aside the issues of discretion and constitutionality, the ongoing issue of the absence of regulations to give force to recent legislative amendments is, in and of itself, highly problematic, engendering much confusion within civil society and, undoubtedly, amongst officials and implementers around what the law actually entails and how best to implement it.

Within this policy environment, de facto rules and regulations rooted in refugee and immigration legislation are in frequent competition with de jure rules and regulations developed from within the Department of Home Affairs. Indeed, the exercise of discretion by Department officials, outside of legal parameters, is widespread:

The Department of Home Affairs does not possess the oversight mechanisms to regulate the performance of enforcement duties. In part, this problem stems from the transition to democracy. The Department of Home Affairs has been struggling to create a unified and centrally managed organization out of the disparate and spatially segmented apartheid bureaucracy. As a result, its local branches appear to decide on their own how they will enforce immigration law. Officials have only a loose understanding of their mandate, which may diverge significantly from the principles espoused by departmental policy documents (Vigneswaran 2011a, 131).

106 Interview, Cape Town, August 2011.
107 Interview, Hon. Annette Lovemore, Cape Town, September 21, 2011.
108 Ibid.
Internal directives within the Department remain an important avenue of *de facto* rule-making, and are certainly not always aligned with the actual legislation, but for those outside of the Department, understanding the origin, content and impact of directives is an exceedingly difficult undertaking, largely for lack of transparency and access. For example, while the immigration legislation was being formulated and the Aliens Control Act of 1991 was still in force, the former Ministerial advisor notes that the Aliens Control Act was, in fact,

but a small fraction of the legislative framework, the bulk of which was in the so-called Consular Manual or the Immigration Manual [...] and a plethora of ever-changing and incoherent directives from the Minister, the Director General and even the Chief Director of Immigration.\(^{109}\)

One former member of the Immigration Advisory Board noted that at one point, the Board was provided with a copy of the Consular Manual, only to discover the extent to which the policies in practice bore little relation to the law:

...we got a copy [...] but it was actually not for the public, and it was outrageous, because it wasn’t in line with the actual law. And somebody thought it up and put it out – printed it, gave it to all the officials. And it was just wrong. And after that, and for as much as I can remember, except for a very, very short period of about a year, or half a year, we have had no official access, or the public has had no official access, to the internal directives.\(^{110}\)

An attorney working for a migration NGO in Cape Town echoed such concerns about the illegality, inaccessibility and influence of the internal directives in contemporary *de facto* migration policy:

What the law says is nothing compared to the little memos and pieces of paper that no civil society person is ever allowed to see, and I’m telling you it’s those little white pieces of paper that govern migration in this country, and I shudder to think what is written on them sometimes because we just see the outcomes, which is like deporting Somalis back to Mogidishu on the borders.\(^{111}\)

\(^{109}\) Interview, Hon. Mario Oriani-Ambrosini, Cape Town, October 6, 2011.

\(^{110}\) Interview, Anonymous, Cape Town, November 2011.

\(^{111}\) Interview, Rebecca Chennells, August 2, 2011.
The use of such directives that are outside of, or in conflict with, existing legislation highlights the gap between the laws themselves and the implementation of these laws, and raises important questions about the nature of rule-making within the state, and the capacity of “the commanding heights” of political leadership to translate law into practice in the “trenches” of officialdom (Migdal 2001, 117). These kinds of gaps and shortcomings have contributed to the deeply ineffective implementation of refugee and immigration legislation, leading to worrying breaches of both domestic and international law, and the systemic violation of migrants’ rights. These transgressions continue to be well-documented by researchers and some civil society organisations.

**Detention and Deportation: A Flawed System**

The Lindela Detention Centre, in Krugersdorp, Gauteng, is the hub of South Africa’s extensive detention and deportation regime, where irregular migrants are detained until being repatriated to their home countries. This regime is illustrative of the substantial gaps between immigration policy and its implementation, and highlights the negative, and sometimes dangerous, implications of the state’s securitised and control-oriented approach to migration management. The detention and deportation regime is expensive, ultimately ineffective, and routinely violates the rights of migrants, including refugees and asylum seekers. It is not uncommon for asylum seekers or refugees to be caught in the state’s wide detention and deportation net, but other undocumented migrants, including tens of thousands of Zimbabweans, are also subjected to a system that often strays considerably in practice from the legislation and official policies meant to guide it.
Many undocumented migrants who are detained and deported simply return to South Africa as soon as possible, across the same porous borders. Indeed, Everatt has characterised the process as being “essentially a revolving door whereby migrants can be back in South Africa within 24 hours of being repatriated” (2010, 11). This is particularly true of approximately 1-1.5 million Zimbabwean migrants in South Africa,\(^{112}\) who occupy a particularly difficult political space in terms of regularising their status in the country. As political and economic conditions in Zimbabwe deteriorated, particularly around 2008 and 2009, numbers of Zimbabweans entering South Africa increased dramatically; new asylum claims sky-rocketed from 64,373 in 2008 to 364,638 in 2009, but many more entered the country as undocumented migrants (see appendix 3). The granting of refugee status to Zimbabwean nationals represents a thorny political issue for the South African government, given the ANC’s controversial path of engagement through “quiet diplomacy” with Mugabe’s regime, and lack of support for the West’s widespread condemnation and sanction of Mugabe’s Zimbabwe.\(^{113}\) Recognising Zimbabwean asylum seekers as *bona fide* refugees would represent a tacit admission that conditions in Zimbabwe have become so politically tenuous that it has, indeed, become a refugee-producing country. While some Zimbabweans are indeed fleeing political persecution, others have fled to South Africa largely due to the country’s economic collapse and the lack of economic opportunities in the country. For others, it is a combination of these factors. Despite these blurry lines, the South African state has elected to approach Zimbabweans primarily as economic migrants, as opposed as asylum seekers and refugees to be managed under the Refugees Act.

\(^{112}\) The estimate of 1-1.5 million is based on a study by the African Centre for Migration and Society (Polzer 2010). However, there is no reliable data available regarding the number of Zimbabweans in the country, with estimates ranging from one to three million. This is complicated by inadequate data collection systems and the phenomenon of undocumented migration (Rademeyer 2013).

\(^{113}\) Lipton offers an interesting discussion of South Africa’s foreign policy stance in relation to Zimbabwe, exploring the tensions between the ANC’s stance on human rights and democracy and its stance on Zimbabwe (Lipton 2009).
To address this issue, Home Affairs launched a Special Dispensation to regularise the status of Zimbabweans in South Africa in April 2009, accompanied by a moratorium on the deportation of Zimbabweans in South Africa, but by mid-September, 2011, less than 135,000 permits had been issued out of the 275,762 applications that had been received (PMG 2011). Despite these outstanding applications and previous assurances from Home Affairs that deportations would not resume before the process was complete, in early October 2011, a memo was circulated among the police, army and Refugee Reception Offices that the moratorium on the deportation of Zimbabweans had been lifted, much to the chagrin of civil society organisations dealing with migrants and refugees, who were not informed of this decision (Child 2011). Hundreds of thousands of Zimbabweans were again vulnerable to arrest, detention and deportation. The logic of the considerable human and financial cost accrued through the arrest, detention and deportation regime (costing at least R90 million, or approximately US$8.7 million per annum) is highly questionable, given that many deportees simply return to South Africa within a matter of days (Mataboge 2013).

The detention and deportation regime also highlights the conflation that occurs in the implementation of specific aspects of the Immigration Act of 2002 and the Refugees Act of 1998. The merging in practice of what were designed to be two separate management frameworks has meant that individuals who ought to be protected under the provisions of the Refugees Act are instead subjected to the more punitive detention and deportation provisions of the Immigration Act, once again leaving asylum seekers and even documented refugees vulnerable and at significant risk of refoulement. As Amit writes,

Although the power to detain is discretionary, DHA has employed detention as the primary tool of immigration enforcement, opting to apply a general policy of detention and deportation to all suspected illegal foreigners rather than exercise discretion. This general policy has also been applied to asylum
seekers, despite the fact that the Immigration Act’s power to detain does not extend to asylum seekers (2012c, 23).

Under the Refugees Act, asylum seekers and refugees must not be detained for the purposes of deportation, and therefore cannot legally be detained at Lindela, however, the DHA routinely ignores this differentiation, resulting in the detention of individuals who should be protected under the provisions of the Refugees Act (Amit 2012c, 8). A 2012 case review of 90 legal cases brought against the Department of Home Affairs by the NGO Lawyers for Human Rights over 23 months between 2009-2010 reveals a range of violations under the Refugees Act, including, among others, arrest of asylum seekers at the border; arrest of asylum seekers who enter with false documentation; arrest despite a stated intention to apply for asylum; denial of protection to asylum seekers whose asylum permits expired while in hospital or in police custody; the sending of asylum seekers to Lindela directly from prison; the arrest of asylum seekers with valid asylum permits; and, the arrest of refugees with valid refugee permits (Amit 2012c, 9). The research findings also cite violations of the terms of the Refugees Act for existing and would-be asylum seekers inside Lindela, including a substantial list of violations of administrative justice, such as coercing detainees to sign notices of deportation or forms they did not understand, and detaining individuals beyond the legally allowable 120 day maximum (Amit 2012c, 10). Sutton and Vigneswaran also note that “many of the detainees are arbitrarily and illegally denied access to the outside world,” citing survey data which shows that many detainees do not even have access to a phone and of those that do, most do not have sufficient money to make a call (2011, 633).

The current system also leaves considerable room for corruption, with bribes regularly paid by migrants to officials to avoid arrest, or to get out of jail (Sutton and Vigneswaran 2011, 634).

Given the expense, mismanagement and general ineffectiveness of the detention and deportation regime, some academics, researchers, and civil society organisations have long
called for an alternative visa option for entry and work in South Africa for lower skilled Southern
African Development Community (SADC) members. As previously mentioned, the Minister of
Home Affairs currently appears to be weighing this out, announcing in the 2013 Home Affairs
budget speech her consideration of a SADC work permit or similar instrument (Pandor 2013). In
the meantime, as Segatti and Landau note,

although there is consensus across government that current law and policy are
inadequate and require substantial reworking, there is de facto acceptance that
government agencies and officials must continue to implement control-
oriented policies and practices, including through arrests, detentions, and
deportations (2011, 4).

However, for asylum seekers and refugees, in particular, the kinds of debates and policy shifts
currently taking place represent a significant turn towards an increased emphasis on
securitisation and control, and the restriction, rather than the protection or expansion, of rights.

**Administrative Access and Asylum**

The institutions and administrative structures required to effectively implement the
Refugees Act have consistently fallen short of what is needed to meet South Africa’s legal
obligations and to uphold and protect the rights of asylum seekers and refugees. Administrative
barriers are widespread and take numerous forms, including various barriers to accessing the
asylum system (both for those who make it into South Africa and others who are turned away at
the borders), and a range of systemic administrative barriers encountered during the application
and asylum decision-making processes.

For many asylum seekers and refugees, even the initial steps of gaining access to the
asylum system can be a formidable challenge. Despite tens of thousands of new asylum
applicants per year, and the continued administrative needs of all existing claimants, there are
currently only three remaining Refugee Reception Offices (RRO) in operation in South Africa, in
Musina, Pretoria and Durban, after the Department of Home Affairs’ highly contested closures of RROs in Johannesburg, Port Elizabeth and Cape Town in 2011 and 2012. These closures have been undertaken as part of the Department’s new policy directions to move all refugee reception functions to the northern land borders of South Africa. Building on earlier work, recent research from the African Centre for Migration and Society (ACMS) at the University of the Witwatersrand surveyed over 1400 refugees and asylum seekers, revealing ongoing and substantial barriers for asylum seekers in terms of access, services, and administrative justice in South Africa (Amit 2012c). The survey was conducted between November 2011 and March 2012, following the closure of the Johannesburg RRO and before the closure of the Cape Town RRO, while the Port Elizabeth RRO closed during the course of the research; the report thus suggests that “many of the problems highlighted below are likely to have grown worse as the effects of these closures are felt and are likely to resurface in any reopened or relocated facility” (Amit 2012c, 7). Amongst many other findings, this research shows that almost two thirds of respondents did not receive asylum seeker permits the first time they presented at a Refugee Reception Office (RRO); that on average, an asylum seeker or refugee required three visits to resolve a single issue; that 53% of respondents reported having to spend the night outside of an RRO to gain access; and, that some RROs are refusing to allow access to individuals who do not possess an asylum transit permit, in clear contravention of refugee law (Amit 2012c, 10).114 Further to this, the law currently requires that asylum seekers present

114 An asylum transit permit is a Section 23 Permit issued under the Immigration Act. It is a non-renewable 14-day permit issued by officials at the port of entry to an individual declaring his or her intention to apply for asylum in South Africa. The permit-holder must then report to a Refugee Reception Office within 14 days in order to formally lodge and asylum claim.
themselves at a Refugee Reception Office within 14 days\textsuperscript{115} of arriving in the country. Yet, new asylum seekers from different regions or of different nationalities are required to present only on specific days of the week, further limiting individuals’ opportunities for accessing the over-extended asylum system.\textsuperscript{116}

While access to RROs can be difficult or impossible for many asylum seekers and refugees inside the country, others are denied even this possibility, having been turned away at the borders based on the illegal practice of group exclusion, in which individuals are denied entry into South Africa based on their nationality alone. While the Refugees Act of 2008 explicitly states that no asylum seeker may be denied entry at a border post,\textsuperscript{117} a 2011 report by IRIN, for example, points to the \textit{a priori} rejection by border officials of Somalis and Ethiopians seeking entry to apply for asylum in South Africa, while a joint 2013 report by ACMS and Lawyers for Human Rights (LHR) documents the denial of entry at the Beitbridge and Lebombo border posts between March 2011 and July 2012 of Zimbabwean asylum seekers without valid travel documents (IRIN 2011; Polzer Ngwato 2013).\textsuperscript{118} Preventing asylum seekers from accessing protection is not only a violation of domestic law and customary international law, but the denial of entry may also put some asylum seekers at risk of \textit{refoulement}. This kind of \textit{a priori} group exclusion is a contemporary illustration of the kind of policy-by-directive explored in chapter seven, irrespective of the relationship between the directive, or \textit{de facto} policy shift, and the law.

The authors of the ACMS/LHR report note their concern that the Department of Home Affairs

\textsuperscript{115}The 2011 Refugees Amendment Act has shortened this transit period from 14 to five days, though this is not yet in force, pending the release of regulations of associate with the Amendment Act.

\textsuperscript{116}In 2011, for example, at the Marabastad RRO in Gauteng, new asylum seekers East Africa could apply only on Wednesdays, while in Cape Town, one NGO documented in an RRO monitoring report that for new asylum seekers, “Monday is for those from the DRC and other central African countries, Tuesday is for Somalis, Wednesday for West Africans and South Asians, and Thursday and Friday for Zimbabweans” (IRIN 2012; PASSOP 2011).

\textsuperscript{117}See section 2 of the Refugees Act of 1998.

\textsuperscript{118}Valid travel documents are not required for individuals intending to register an asylum claim.
“has started implementing various practices which introduce elements of group-based limitations on new and existing applicants for asylum, without any formal policy process or consultation” (ACMS & LHR 2013, 20). They also note that such policies may be based on misunderstandings of international law, in particular a misinterpretation of the first or third safe country principle (Amit 2011; Polzer Ngwato 2013, 21).

Asylum seekers who do enter the country and are able to access Refugee Reception Offices face a host of further administrative challenges that compromise the integrity of the asylum system and the ability of South Africa to meet its obligations under international law. Asylum seekers arriving at RROs in South Africa often have very little understanding of what the asylum system entails and how to navigate their way through the system, but many receive very little, if any assistance, from officials regarding explanations of the requirements of the application process (Amit 2012, 11). Further challenges include: inadequate translation services; difficulties in renewing asylum permits and replacing lost or stolen permits; the risks created by the practice at some RROs of fining for expired or lost permits (leaving many individuals who are unable to pay undocumented and at risk of refoulement); and significant issues of corruption at RROs, such as incidents of asylum seekers being forced to pay officials to gain access to RROs or to obtain services (Amit 2012, 11). The quality of decisions taken by Refugee Status Determination Officers (RSDO) is also called into question, with RSDOs spending an average of 17 minutes with an applicant to determine his or her refugee status, though over half of these interviews lasted less than 15 minutes; three quarters of the survey respondents reported that “what was written in their status determination decisions did not adequately reflect the information they provided during the interview;” yet more than half of the respondents said they did not understand how to appeal their asylum claim decision (Amit 2012, 12). A separate
ACMS research report based on an examination of 240 status determination decisions issued in 2011 by RSDoS from each of the RROs at the time found that,

...the status determination process continues to be marked by scant evidence of individualised, well-reasoned decision-making. The belief within the DHA that the still high demand at the refugee reception offices stems from the abuse of the system by economic migrants has given rise to an anti-asylum seeker bias that is evident in the status determination process. As a result, migration control has displaced protection as the primary goal of the asylum system (Amit 2012b, 10).

Amongst other issues, the research revealed clear legal errors, references to the wrong claimant or country in decisions, the failure to provide adequate reasons for a status determination decision, an inaccurate assessment of country conditions, and the failure to provide protection in cases of gender-based persecution (Amit 2012b, 10). These kinds of administrative failures can have grave consequences for the lives and wellbeing of individual asylum seekers, and may also lead to *refoulement* and the violation of domestic and international law.

While the quality of refugee status determination decisions is often highly questionable, the wait times for decisions can also cause considerable challenges for those attempting to navigate the asylum system. The Refugees Act provides for the processing of asylum claims within 180 days of receipt, but in practice, processing times for asylum decisions, as well as for appeals or reviews of rejected applications, can take years, largely due to the existence of formidable backlogs\textsuperscript{119}. A 2012 audit, for example, found that the Refugees Appeal Board faced a backlog of over 87,000 appeals for applicants whose refugee status determination application had been deemed unfounded, while the Standing Committee on Refugee Affairs (SCRA) found itself with a backlog of almost 69,000 applications that had been deemed “manifestly

\textsuperscript{119} Sutton and Vigneswaran note that “the average applicant waits 640 days before sitting an interview with a Refugee Status Determination Officer. For some, the period of limbo and waiting does not end here. About 1 in 6 applicants waits a further year before receiving a decision on their status. Many then wait further periods in the appeals process” (2011, 633).
unfounded,120 and therefore legally required to be reviewed by the SCRA under the Refugees Act (SANews 2012). The now retired Chair of the SCRA, Claude Schravesande, noted that in the years following the enactment of the Refugees Act, very few manifestly unfounded applications came through to them, despite the legal mandate – sometimes as few as 85 per year.121 After investigating the issue, Schravesande found that rather than searching for and retrieving the files of asylum applicants, thus potentially closing the file if a status determination decision had been made, overwhelmed and undertrained Home Affairs officials often found it easier and quicker to simply renew the individual’s asylum seeker permit; many officials, he found, had a very poor understanding of what “manifestly unfounded” even meant, or what was supposed to happen to applications that had been rejected as manifestly unfounded.122 He noted that rejected applications could sit in the files for years, while the asylum claimant would simply come in month and after month and have their permit renewed.123 The reverse has also been documented, in which approved applications are simply not returned to the asylum seeker (Amit 2012c, 39).

These kinds of administrative failures not only have potentially grave consequences for the lives of individual asylum seekers and refugees, but they may also contribute to the prevalent sense that the asylum system is in shambles and must be fixed. However, as with migration management more broadly, emerging policy directions indicate that attempts to address these systemic failures will also take the form of increasingly stringent measures of control and securitisation.

120 A manifestly unfounded application is an asylum application that a Refugee Status Determination Officer has determined that the claim is clearly abusive or fraudulent.
121 Interview, Claude Schravesande, December 7, 2012, Langebaan, South Africa.
122 Ibid.
123 Ibid.
New Policy Directions and Potential Rights Restrictions

Many of the same debates, social attitudes, economic concerns and capacity issues that informed the debates leading to the formulation of the country’s first Refugees Act of 1998 and Immigration Act of 2002, as outlined in the previous chapter, continue to present policy-makers with significant and often seemingly intractable policy dilemmas. This has been further complicated by the implications of policy failures since apartheid, including a concomitant hardening of attitudes against migrants, as undocumented migrants as well as refugees and asylum seekers are regularly framed within both state and society as blatant abusers of the system. The ANC’s 2012 Peace and Stability policy discussion document, ahead of its elective conference in Manguang in December 2012, acknowledges the shortcomings of migration management, and offers some (albeit partisan) explanations for these failures, which stretch back to the dynamics of the Government of National Unity as discussed in the previous chapter:

South Africa has not been able to build sufficient capacity to manage immigration effectively by developing coherent immigration policies and legislation. South Africa, unlike most countries in the region, adopted regional and international conventions without reservations, thus missing an opportunity to adapt them to meet the challenges confronting the state; and to governmental development goals. The management of migration has been largely based on legislative compliance and has failed to take into consideration dynamic changes such as the growth in transnational crime and new migration flows. Immigration needs to be managed holistically and proactively in order to be secure and effective. A major reason for the failure to manage immigration securely and effectively was the failure in 1994 to realise that the Home Affairs is a highly strategic security department. Instead, it was placed under the executive authority of a minister from an opposition party (ANC 2012, 4-5).

The challenges and shortcomings of migration management in post-apartheid South Africa, as argued in the previous chapter, are nuanced and complex in origin, and cannot simply or principally be attributed to a lack of coherent legislation or the politics of the Government of National Unity. Thus, while the causal factors are not adequately addressed by the ANC in its
strategy document, the party does recognise challenges in policy coherence and an overall “failure to manage immigration securely and effectively” (ANC 2012, 5).

Despite this recognition, the direction of migration management in South Africa is still characterised by a general climate of uncertainty, stemming not just from the lack of regulations, informal policy directives, and lack of implementation of existing legislation, but also by the lack of a clear direction moving forward with regards to migration management priorities in South Africa. As one former member of the Immigration Advisory Board noted, while there has often been mention of a major high level policy overhaul, there has not been any clarity about process or timelines, nor has there been any significant consultation with stakeholders:

...and then of course in parallel, this whole process of really looking at immigration policy seems to take place at some level. [...] But there’s always mention of it – you know, “we’re doing this now, and this is imminent, and this is urgent, and this Amendment Act has to come through now, and we’re looking at the bigger picture anyway, so we’ll address all of your concerns then...”

The intention to overhaul migration policy in a more comprehensive way may be one reason for the delay of regulations associated with the Immigration and Refugee Amendment Acts of 2011. In the interim, however, a number of de facto policy shifts have become apparent in the state’s contemporary management of migration, particularly in the refugee and asylum seeker stream. Many of these shifts have raised significant concerns for asylum seekers and refugees, along with many civil society actors and academics working in this field. A 2013 report co-authored by Lawyers for Human Rights and the African Centre for Migration and Society, for example, draws attention to the fact that many of the shifts in practice have transpired ahead of explicit policy documents and statements of strategic intent, arguing that,

124 Interview, Cape Town, November 2011.
where strategic aims have been identified, there is either no evidence that the problem exists to a significant degree (such as asylum seekers posing a security threat to South Africa), or there is no logical connection between the problem and the proposed solution (Polzer Ngwato 2013, 13).

Many of the practices emerging ahead of formal policy shifts are in contravention of either domestic or international law, or both, and the report chronicles a number of cases in which the DHA is “acting against and in contempt of specific court orders” (Polzer Ngwato 2013, 13).

Along with practices of group exclusion and access barriers, as discussed above, one recent shift in the state’s approach to the management of asylum includes renewed discussion around the limitations of basic rights of asylum seekers, including the right to work and study. As one opposition Member of Parliament and Home Affairs Portfolio Committee member noted, “On the Portfolio Committee, the anger amongst some of the members is that we should not have given the refugees asylum status so easily, and nor should we have allowed them to work.”

However, the right for asylum seekers to work and study was not easily won, having been established in Supreme Court of Appeal decision in 2003, which found that a policy denying the right to work and study for asylum seekers unlawfully violated the conditions for having a dignified life (Handmaker 2009, 174). There are, however, indications that the DHA and the ANC are considering attempting to revoke these rights, including a series of statements to this effect made by Home Affairs officials, including the Director of Asylum Seeker in the DHA, Lindile Kgasi, and wording in the ANC’s 2012 Peace and Stability policy document which not only suggests that “work and study permits with limitations will have to be applied for under the immigration act” but also questions asylum seekers’ rights to be self-employed in informal trading (ANC 2012, 6; Polzer Ngwato 2013, 34). This document questions whether by-laws

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125 Interview, Hon. Graham McIntosh, MP, Cape Town, August 14, 2013.
126 “Minister of Home Affairs and others vs. Watchenuka and another” Case No. 2004 (4) SA 326 (SCA).
regulating informal trading and small shop (spaza) ownership should apply equally to asylum seekers and citizens, noting that informal trading “should not be legal under the Refugees act given that asylum seekers are persons whose status has not been determined” (ANC 2012, 6).

Partly, these restrictions appear to be rooted in a conflation by policy makers of refugees, migrants, and undocumented migrants, and a sense that all migrants are generally abusing or taking unfair advantage of the systems and rights in place. One MP and Home Affairs Portfolio Committee member noted he thought that some amongst the Portfolio Committee,

> ...resent the fact that people come to the country, abuse the system, and then they seek to get the system to protect them.... [...] So in a sense they benefit from the system, they come here, illegally, against the law, knowing that they want to circumvent the system, and then they use the systems to protect themselves, when in fact they had no business coming here in the first place.\textsuperscript{127}

The discourse of “abusing the system” is applied with broad strokes, and leaves those with \textit{bona fide} asylum claims relegated to the same category as undocumented migrants.

Another key pillar of contemporary policy shifts and associated practice has been the closure of several Refugee Reception Offices since mid-2011 (in Cape Town, Port Elizabeth and Johannesburg), in conjunction with the DHA’s announced policy intention of moving all refugee reception functions to the northern land borders of South Africa. This represents a very significant shift in the functioning of South Africa’s asylum system. The closures increase the already substantial contemporary challenges of access to the asylum system, as new asylum seekers living in Cape Town, Port Elizabeth and Johannesburg can no longer access associated administrative services in these major urban centres:

> Given the centrality of the RROs to the functioning of the overall asylum system, and the qualitative difference between urban and rural border locations, this intended move and the closure of existing offices is not merely

\textsuperscript{127} Interview, Hon. Graham McIntosh, MP, Cape Town, August 14, 2013.
a technical, operational decision, but one which impacts on the basic principles of the asylum system, namely access (for initial applications, renewals, status determination interviews and appeals) and administrative efficiency and fairness. It also has severe economic and safety implications for asylum seekers and refugees, especially as the continuation of administrative inefficiency and unfairness within the process is likely (Polzer Ngwato 2013, 37).

The position of the Department of Home Affairs and the ANC appears to be that because the vast majority of asylum seekers arrive through the northern border, facilities for dealing with asylum claims should be located there; as Home Affairs Portfolio Committee whip, ANC MP Andre Gaum, explained,

...most refugees enter the country via the northern borders, so that’s where the reception offices should be, and not... There’s no point in almost encouraging them to travel throughout the whole country before they one day get to a refugee reception office and apply there.128

However, there remains a host of concerns expressed by academic and civil society actors, along with key questions regarding the details of how this relocation would work in practice, such as whether asylum seekers would be required to remain in the vicinity during the processing of their claims, and if so, where they would live and how they would be able to support themselves. Important concerns remain regarding how and where renewals would be undertaken, and what the process would entail for asylum seekers arriving at other ports of entry, including seaports or airports. There are also unanswered questions regarding the impact of such a move on existing asylum seekers, and processes around such ongoing administrative functions as permit renewals, status determination interviews, and appeal hearings (Polzer Ngwato 2013, 43). Despite the importance of this shift and its potential implications, there has, to date, been very little information available from the DHA regarding this policy shift, the larger strategic vision within which it is situated, and how it will function in practice. The DHA’s closure of each of these

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128 Interview, Hon. Andre Gaum, Parliament, Cape Town, October 26, 2011.
three RROs was precipitated by court challenges against Home Affairs by local neighbouring businesses complaining that the presence of the RROs was a nuisance, but rather than addressing issues of concern at the RROs or relocating the RROs to another location within the city, the DHA has closed the RROs entirely. The closures were also met with further court challenges from civil society organisations in each city, including the Consortium for Refugees and Migrants in South Africa in the Johannesburg case, the Somali Association of South Africa Eastern Cape in Port Elizabeth, and the Scalabrini Centre in the case of the Cape Town closure. These cases argued that the closures were illegally undertaken, focusing on procedural issues in DHA’s decision-making processes, as well as issues of administrative justice; the DHA lost each case, and the decision to close the RROs in each city was declared unlawful and set aside (Polzer Ngwato 2013, 40). In the case of the Cape Town closure, Supreme Court of Appeal Judge JA Nugent declared:

> I cannot help being sceptical of the protestations in the affidavits that the closure of the office was unavoidably foisted upon the authorities by the unavailability of suitable premises. [...]The termination of the lease for the Maitland premises may have been the trigger for the closure, but the closure appears to have been consistent with the on-going evolution of government policy for dealing with applications for asylum.\(^{129}\)

However, despite binding court orders to do so, the Department of Home Affairs has not re-opened RROs in Johannesburg, Port Elizabeth or Cape Town, nor has it provided equivalent services. Instead, the Department launched appeals processes and ignored interim court orders, leaving the Department in murky legal territory in terms of whether its actions (or inactions) constitute contempt of court.

> Current practice and contemporary shifts in policy, both de facto and de jure, are firmly rooted in a state discourse that is framed not in the language of development and potential, but in

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\(^{129}\) Minister of Home Affairs and others vs. Scalabrini Centre and others, Case No: 735/12 & 360/13, para 33.
the language of securitisation. Thus, while civil society actors continue to engage with state actors around migration management issues on multiple levels, such as providing input or giving presentations to Parliamentary Portfolio Committees, making submissions to formal legislative processes, and attending stakeholder meetings around relevant issues and interests, many civil society actors also express a high degree of frustration, along with deep levels of mistrust and suspicion of the state’s actions and intentions regarding refugee and asylum seeker management in particular. One civil society actor, for example, believed that current policy directions represented,

a massive shift that is going to demonstrate to us how hardline our government is getting, anti-immigration, anti-foreigner sentiment. I think it's picking up on a general trend. They are being incredibly cagey and secretive about it, but from what it looks to me... [it] is going to be deeply, deeply problematic, a lot of the changes, and it is going to affect asylum seekers and refugees negatively.  

Another interviewee believed that state management of migration was becoming increasingly controlling and strict:

They're starting from this framework of migration as a security threat, and that's how they view the whole thing, and that feeds through all their decisions – keeping people out, making hurdles to jump through, ignorant statements, the way foreigners are viewed, the way migrants are viewed. Literally, that’s the starting point of their policies and the way they manage. And it’s just only going to get worse.

Some felt that new policy directions and policy shifts were geared towards making it more difficult for refugees to access the asylum system, but that reforms which simply continued to build upon an already broken system, without addressing the underlying structural issues, would simply result in adding new layers of failures and rights abuses upon old ones.

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130 Interview, Rebecca Chennells, Cape Town, August 2, 2011.
131 Interview, Cape Town, August 2011.
Conclusion:

The outcomes and considerable shortcomings of migration management in post-apartheid South Africa cannot be explained by the policies alone. Issues of bureaucratic inheritance, under-resourcing, and lack of capacity within the Department of Home Affairs have also contributed to the ineffective implementation of policies. Further, a long-standing departmental culture of discretionary practice, combined with a chronically unstable policy environment, have given rise to an institutional culture in which migration is, at times, being managed by internal directives and informal policy shifts, regardless of their relationship to law. The result is a contemporary migration management regime characterised by systemic violations of migrants’ rights, as illustrated by the myriad shortcomings of the detention and deportation regime, and by the kinds of administrative barriers that regularly prevent asylum seekers and refugees from accessing the protection to which they are legally entitled. In large part, the state’s response to the obvious shortcomings in migration management has been a greater emphasis on the tightening up of perceived loopholes, and on securitisation and control, as expressed in current informal policy shifts and de facto practices. Rather than fostering the potential of migration to contribute to development locally, nationally and regionally, current de facto policies and practice result in the restriction or denial of many migrants’ rights. Such practices make it far less likely that migrants will be able to effectively improve their own lives or those of their families through strategies of migration. Beyond that, some documented practices regularly place asylum seekers at risk of refoulement, and the associated dangers of being returned to a country from which one has fled. It is within this troubled and contentious arena that those civil society organisations focused on both advocacy and service delivery for migrants in South Africa must operate.
Chapter Nine: Opportunities and Constraints for Civil Society Actors Working Towards Progressive Change in the Migration Arena

Exploring the scope for progressive social and political change in migration management requires taking into account the broader dynamics and limitations already outlined in previous chapters, but it also requires exploring the sites of contention, where various actors or organisations are challenging the *status quo*. This chapter explores the scope of opportunities and challenges faced by civil society actors working in this arena, considering migrant, refugee and asylum seekers’ organisations and organisations working on behalf of these populations.

While the violence of May 2008 represented a key opportunity for civil society organisations to advance migration issues and to build new, collaborative relationships with other civil society and state actors, the crisis also highlighted some important obstacles that continue to hold relevance for actors in this arena. Beyond this national eruption of violence and its legacies, these civil society actors face a host of further ongoing challenges in their work, some of which may be common to other sectors of civil society, while others are specific to the complex endeavour of advocating for these socially and politically marginalised populations in South Africa. In the current social and political climate, litigation has become one of the most important tools of civil society engagement and advocacy in this arena. While some very important victories have been gained through litigation, many legal challenges appear to have little systemic impact in curbing the illegal practices of Home Affairs or in moving migration debates away from the current zero-sum discourse of migrants as a national threat, towards a recognition of the developmental potential of a well-managed migration regime. Legal challenges are also often undertaken without a complement of meaningful non-legal collective action strategies, limiting their potential impact. Despite taking advantage of key opportunities
that have opened up important political and legal space for advocacy, civil society organisations have yet to forge a sustained, effective collective challenge to the *status quo* of migration management.

**May 2008: Crisis and Opportunity**

The violence of May 2008 was raised in interviews and in other interactions with civil society actors as being pivotal to any understanding of the more current and ongoing challenges and opportunities in their own work for advancing the issues of migrants. The national and international attention generated by the weeks of violence contributed to a heightened awareness and increased dialogue around migration issues. New opportunities for collaboration were created, and political attention turned to the many issues faced by migrants, refugees and asylum seekers in the country. However, the crisis also highlighted some important obstacles for advocacy and activism, with continued implications for civil society actors currently working in this arena. These included disagreements around how to best frame the violence and responses to it, which illuminated some of the challenges faced by this sector in terms of political mobilisation and advocacy that moves beyond a humanitarian response. Responses to the violence also highlighted a lack of direct connection between many civil society organisations working on migration and the communities most affected by migration, as well as the specific challenges faced by migrants, refugees and asylum seekers in advocating on their own behalf. Further, the crisis and its aftermath showcased the challenges presented by having to work with the strict legal categories of migrants, categories which guide the mandates of some organisations. Finally, the lack of a coordinated response to the violence amongst civil society actors led to confusion regarding mandates and roles, as well as mistrust around perceived
opportunism and funding competition, resulting in damaged relationships between civil society actors in this sector.

The May 2008 violence was in countless ways a tragedy for migrants, refugees and asylum seekers, as well as for South Africans, but for the purposes of advocacy, it also represented a potentially productive political crisis. Polzer and Segatti identify four key characteristics of the crisis that have potentially helped strengthen advocacy positions for migrants, refugees and asylum seekers’ issues, including new opportunities for audience expansion, symbolic and issue linkage, strengthened legitimacy claims and victim definition (Polzer and Segatti 2011, 203). The crisis was dramatic enough to cast the issues of xenophobia into both the national and international spotlight. This not only helped to forge a much larger audience for migration issues in South Africa, but it also helped to create a “repertoire” of easily identifiable and accessible terms (such as “xenophobia”) and images (most famously, the image of the “burning man,” 35 year-old Mozambican Ernesto Alfabeto Nhamuave, who was burned alive by attackers in Gauteng) (Polzer & Segatti 2011 203). The specific targeting of the violence against foreign nationals also cut across the divisions of nationality and legal status to forge a previously largely unrecognised and victimised “identity group” (2011, 203).

In Cape Town, civil society organisations that had previously been working on issues of migration found that the crisis of May 2008 provided a new opportunity for the recognition and legitimisation of their work, as well as new opportunities for networking more broadly with a wider array of civil society organisations and state actors. As the Director of one NGO reflected,

...to get any recognition as a refugee organization before the attacks was literally impossible. Everyone was like, what? Refugee? [...] So, as a Director of an organisation, I felt more included in civil society as a result of
the attacks. [...] You’re doing work that is relevant, whereas I think maybe before 2008 I never really strongly got that. So definitely one of the effects of the attacks was that it brought the problems to the fore.  

Another Cape Town-based civil society actor believed that responses to the violence revealed a much wider network of potential supporters and sympathisers than had previously been imagined by those working in the migration arena:

I was very much impressed by the response. Because I think sometimes you know, if there’s nothing happening, you think that people don’t care sometimes, but I think when it broke out, I think the response was very, very big – all civil organisations, even individuals, came to the table.

The issues of migration and the challenges faced by many foreign nationals in South Africa were now, at the very least, in the public eye in a way they had never been before.

Responses to the violence of May 2008 involved a broad array of civil society actors, including many individuals and organisations that did not normally focus on the issues of migrants, refugees and asylum seekers. Yet, there were important and sometimes divisive differences in terms of how to frame and define the violence as well as responses to it, which limited the potential for the building of collaborative approaches towards political change across a wide spectrum of civil society. This is illustrated by the responses of civil society in Cape Town to the May 2008 crisis, in which responses were mainly framed as a humanitarian endeavour, with only limited attempts “to develop more politicized and activist responses challenging the causes of the violence and promoting the rights of foreigners” (Peberdy & Jara 2011, 47). Peberdy and Jara note that even these limited attempts served to polarise and alienate some segments of civil society which were involved in relief efforts, but did not wish to be involved in anything other than a humanitarian response:

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132 Interview, Miranda Madikane, Cape Town, November 10, 2011.
133 Interview, Fwamba Mukole, Cape Town, September 1, 2011.
Some NGOs and FBOs [faith-based organisations] involved in the response saw the participation of other organizations [...] in more activist activities as too political, too adversarial, divisive, unnecessary, and a waste of money, time and energy that should have been spent on humanitarian relief. They were concerned about activities such as demonstrations and pickets, the printing of anti-xenophobia t-shirts and the legal challenge to improve conditions in the camps, as well as support for the protests of displaced people in the camps and elsewhere (2011, 47).

For many organisations that did not normally interface with migration issues, responses to the violence were constrained by limited resources and by their own organisational mandates (Peberdy & Jara 2011, 47). Such organisations generally lacked experience in migrant, refugee and asylum seeker issues, and did not think they should be involved in a campaigning role (Peberdy & Jara 2011, 47). However, the deeply embedded negative social constructions of migrants, alongside the widespread belief that South African issues should be prioritised over those of non-citizens, may also have significantly impeded the capacity of this segment of civil society to build alliances with other civil society actors who would normally work on less controversial and marginalised issues. The absence of a common and positive normative vision of migration makes it difficult for migration advocates to form strong and lasting alliances with other civil society actors.

Another challenge for successful advocacy and action during responses to the May 2008 violence was the fact that most formal civil society organisations were geographically removed from the communities they represented, and also disconnected from segments of the local populations that are most often directly affected by the challenges of migration. Peberdy and Jara’s research highlight this lack of progressive civil society and leadership in the “areas where people actually live in Cape Town. Formal NGOs do not have structures that are based in
communities. They work from the outside in (2011, 49). One civil society actor, herself a refugee living in Cape Town, noted how in her experience, this led to some confusion and mistrust surrounding civil society’s responses to the violence of 2008. She recalled the reaction of some onlookers in the townships, including some refugees and asylum seekers, to the sudden appearance of NGOs within the communities:

Many of the organisations just came, and others, maybe they were doing, like, marketing. I saw people, I don’t know where they were from – they brought food, and then they were taking pictures, posing next to the food, posing next to the people. [...] Yes, I know that we have to bring proof that you were on the field, but sometimes... even refugees themselves, some, those did approach me and said, “Why are they doing this? Maybe they are getting some, they are getting money on top of us, and we don’t see it?” So they took it in a different [way] – but I understand they were traumatized.

Without a grounded understanding of community dynamics, there is also some risk that interventions or actions by organisations can antagonise rather than ameliorate relations between nationals and non-nationals in some communities, increasing risk for migrants, refugees and asylum seekers who may live there. Speaking of an anti-xenophobia rally organised in one volatile community, one civil society actor recalled that non-nationals did not join the events:

...they said there’s no problem – they are trying to deal with their problem. Why, [...] even refugees or foreigners themselves, they were scared to join us. They said, why are you coming in our... you, you go to your suburb where you are staying, but us who are here will be in trouble when you are going, so look for another approach. [...] they didn’t join. So we were there, all the organisations. And the community themself [sic], they didn’t join us.

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134 Peberdy and Jara note the important exception of the Treatment Action Campaign (TAC), which has a very strong presence within the communities in which it works. TAC’s strength in this area positioned it as a key player in responses to the 2008 violence in Cape Town, with substantial international donor money and response efforts being coordinated through its structures, regardless of its organisational focus on HIV/AIDS and access to treatment (2011, 50).

135 Interview, Micheline Muzaneza, Cape Town, August 23, 2011.

136 Ibid.
Since 2008, there have been and continue to be a wide range of outreach and community engagement programmes and projects, yet most formal NGOs representing migrants, refugees and asylum seekers remain physically located outside the communities with which they work.

For migrants, refugees, and asylum seekers advocating on their own behalf, there are often even further obstacles to effective advocacy or activism, including the danger that their activism and rights-claiming can evoke negative or xenophobic responses from segments of society and the state. Robins, for example, notes how in Cape Town, soon after the violence of May 2008 erupted, refugees began to assert themselves with the support of activists and human rights organisations by making press statements and staging protests that,

challenged the government, camp management, and UNHCR for failing to adequately protect or provide for them in terms of internationally recognized standards. With the increasing levels of political organization and assertiveness of the refugee leadership and their NGO allies, the status of the refugees began to shift even further in official state discourse. Initially seen as innocent victims of xenophobia, they were increasingly represented by government officials as illegal, criminal, troublesome, ungrateful, and undeserving. By the end of 2008, the refugee problem had been translated by the state into an immigration problem to be sorted out by the Department of Home Affairs (Robins 2009, 641).

Further to this, the fragmentation, diversity and balances of power within migrant communities render issues of representation and the forging of any kind of collective identity amongst migrants, refugees and asylum seekers particularly problematic. External challenges include migrants’ potentially precarious legal status and vulnerability to arrest, detention and deportation, along with a lack of resources and familiarity with local political systems, processes and rights. Effective collective action is also challenged by internal obstacles, such as language barriers, as well as class and religious differences. Refugees and migrants living in South Africa also often come from competing political factions in their countries of origin, and demonstrate very different needs, demands and interests (Everatt 2010, 11). Polzer and Segatti argue that
such fragmentation may be further heightened due to the “division between refugee and migration policy and the resultant discrepancies in legal status and treatment” (2011, 207). These divisions raised difficult issues of representation and legitimacy in terms of migrants’ participation in formal structures or stakeholder meetings, such as those held following the May 2008 violence. While government actors and NGOs called for such participation, Polzer and Segatti note that the legitimacy of these migrant representatives were nonetheless simultaneously challenged on a range of criteria, including how representative they truly were of their local or national group, and whether the individual or group could provide practical assistance on the ground (2011, 209).

For migrants, refugees and asylum seeker organisations, and those who work on their behalf, the challenges of formulating the kinds of collective identities which help to build social and political salience are further exacerbated by the fluidity of the very categories of migrant, refugee and asylum seeker. Like policy-makers, civil society actors face ongoing conceptual and practical difficulties in working within these categories, and in determining whether their mandate ought to apply only to refugees and asylum seekers, or whether it ought to include other categories of migrants as well, including those who are undocumented and therefore, illegally present in the country. One civil society actor reflected that she did not believe this was something that many civil society organisations had clarified internally: “how,” she asked, “do you advocate for refugee rights without sidelining migrants’ rights, and how do you advocate for migrants’ rights without acknowledging the special case that refugees do have?”

Some of this confusion was brought into sharp relief during the response to the 2008 violence in Cape Town. As Robins notes, there were, “profound uncertainties, anxieties, and contestations over how to

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137 Interview, Cape Town, August 31 2011.
make sense of the waves of violence against foreigners and the crisis produced by population displacement” (2009, 640). There was also uncertainty about how to define populations for the purposes of aid:

for instance, were they refugees, asylum seekers, undocumented persons, or internally displaced persons (IDPs), and what were the legal, social, and political implications of using particular words and categories? These discourses, definitions, and representations of “the problem” included uncertainty about whether to use terms such as refugee camps, safety centers, or temporary shelters. It soon became quite clear that the state’s choice of the term temporary shelter was directly linked to its determination to close down the refugee camps and push ahead with the “reintegration” of the victims of violence into the communities from which they had fled (Robins 2009, 640).

The Head of the UNHCR field office in Cape Town recounted the challenges this posed to the UNHCR’s operations; while their mandate relates strictly to refugees and asylum seekers, he noted that it was next to impossible following the 2008 violence to determine who was an economic migrant and who was a refugee or asylum seeker, especially given that many had fled the violence without their documents.138 While many of those fleeing the violence more accurately could be described as internally displaced people (IDP), there was no UN office at the time with the mandate of dealing with IDPs; the UNHCR’s response to the humanitarian crisis necessarily entailed responding to foreign nationals outside of its normal purview.139

A lack of coordination and clarity of roles characterised responses to the violence from civil society and government actors at all levels, and civil society interviewees spoke of their own unpreparedness in coping with the violence and its aftermath. Many responses were ad hoc, reactive and necessarily spontaneous. In the Western Cape, Tutamike, the network of migrant, refugee and asylum seeker-focused organisations that had existed leading up to the violence, did not take on a coordinating role. Instead, it collapsed completely when the violence broke out, for

138 Interview, Patrick Kawuma Male, Cape Town, September 16, 2011.
139 Ibid.
reasons that will be explored further in this chapter. As one civil society actor recalled, “It vanished. It vanished when it needed to be at its strongest.” Instead, NGOs and other civil society actors identified the fractured response to the violence as having had significant impacts on contemporary relationships between civil society actors in this field:

I think between organisations in the Western Cape, it [the 2008 violence] completely ripped us apart. [...] there used to be the Tutamike – there used to a network and we used to meet, and our last meeting was in April 2008, and then the attacks happened, and I think that all that jockeying for position kind of destroyed civil society... it could have, should have gone the other way....

Interviewees also spoke about the mistrust and suspicion engendered by the emergence of a whole range of new players on the scene following the violence, with the perception that they were largely responding simply to the availability of new funding sources:

It also feels like there's a lot of mistrust around funding – who got funding. You'd see these small little organisations that would spring up out of nowhere to claim some project or programme that they were running to get funding, and [you’d see] that legitimate organisations that had legitimate work that they were doing weren't privileged above these other organisations. Also, organisations whose main focus wasn't on refugees or migrants [were] playing an active role.

This sentiment was echoed by another interviewee, who noted she had heard,

horror stories about certain civil society organisations jumping on the xenophobia bandwagon because they believed they could get funding. I mean, I’ve heard some really dodgy things about what went down during the xenophobia. There were serious turf wars.

The impacts of the 2008 violence were far from simply professional or funding-related – there were also personal, emotional implications for individual civil society actors involved in the responses. Commenting on this, one civil society actor noted, for example, how what she

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140 Interview, Cape Town, August 2011.
141 Interview, Cape Town, November, 2011.
142 Interview, Cape Town, August 2011.
143 Interview, Rebecca Chennells, August 2011.

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referred to as the “emotional fallout,” “baggage” and “trauma” from 2008 continues to have impacts on civil society in this arena.\textsuperscript{144} She commented that individuals who were involved at the time “still seem to be scarred, almost, from that experience and the fallout... [...] it’s made people so hesitant and sceptical and cynical now, and it’s understandable.”\textsuperscript{145} The director of one organisation, when asked whether the damage wrought on civil society during the 2008 violence healed over, replied, ”Not at all. Not at all. I mean, Western Cape is so divided. There is so much unspoken politics. I don’t know who my friends and enemies are, as an organisation. It’s so divided. Very bad.”\textsuperscript{146} Clearly, many of the challenges highlighted by civil society responses to the violence of May 2008 continue to shape the capacity of these actors to effectively engage in collective action towards progressive change in the migration arena. There are, however, a range of other, ongoing challenges that impact the work of these organisations, and their capacity for effecting systemic change.

\textbf{Advocacy and Action After May 2008}

After May 2008, civil society actors have continued to engage with the myriad issues facing migrants, refugees and asylum seekers in South Africa, but as chapter six illustrated, this is set against the continuing backdrop of the widespread negative social construction of migrants, blatant xenophobic sentiment, and the clear sense that the rights and unmet needs of South African citizens ought to be prioritised over the rights and unmet needs of non-citizens. This makes both programming and advocacy difficult for organisations whose work is focused on protecting and promoting the rights of migrants, refugees and asylum seekers, or in advocating for policies that highlight and harness the development potential of migration. This segment of

\textsuperscript{144} Interview, Cape Town, August 2011.
\textsuperscript{145} Interview, Cape Town, August 2011.
\textsuperscript{146} Interview, Cape Town, November 2011.
civil society is also far from united, and various organisations not only work within different mandates, but also employ different strategies and approaches in their engagements with the state. These different mandates and strategies mean that civil society, even within this relatively small sector, is far from a united, homogenous entity, working towards a common aim. Indeed, there is a wide range of relationships between organisations, including some degree of mistrust and competition, particularly around issues of funding. While organisations have made attempts to work collaboratively through network structures, unresolved issues of representation and accountability, in particular, inhibit the successful functioning of these networks.

Given widespread anti-foreigner sentiments and tensions in the country, civil society organisations are often careful to avoid the perception that they position the interests of migrants, refugees and asylum seekers above the interests of South African citizens in their own approaches to service provision and programming. This social and political climate imposes important limitations on the range of strategies and tactics of engagement available to civil society actors working on these issues. For many organisations, particularly those promoting a vision of integration between foreign nationals and South Africans, the turning away of South African citizens from services or programmes could potentially and counter-productively fuel the flames of resentment against foreign nationals. One civil society actor, for example, spoke about her organisation’s challenge in attempting to respond to foreign nationals’ requests for skills training through the setting up of a computer lab in the community, noting there was “no way we could set it up just for foreign nationals. That would be a huge, huge mistake. It would have to be opened up to everybody.” 147 Another organisation attempted to set loose quotas for programmes or services:

147 Interview, Christina Mitchell, Skype, August 4, 2011.
...our focus is on integration, and so, given that there are so many poor people who are South Africans, and some of them are often migrants themselves, internal migrants, [...] they don’t fall out of our mandate. But that aside, the migrant populations are integrating into those areas. It would be crazy to exclude them. So we put a 30% cap on our beneficiaries as an ideal. So 30% South African, 70% foreign. ¹⁴⁸

A similar sentiment was expressed by another interviewee, who noted that “we [even] work with South Africans, and with kids of South Africans. We don’t say, ‘don’t come to us because you are a South African' because we are promoting integration within the community, to stop xenophobia.”¹⁴⁹ This highlights an interesting dilemma in the work of both service provision and advocacy organisations working in this field in South Africa which may not be faced by similar organisations in countries where there is less poverty, inequality, and unemployment, and less obvious levels of resentment and mistrust of foreign nationals. The inclusion of South Africans into the mandates of migrant and refugee advocacy or service organisations is perceived to be a necessary element of programming for some organisations, and yet to varying degrees, this inclusivity also challenges the capacity of civil society actors to target migrant, refugee and asylum seeker populations exclusively in their work.

The capacity to specifically target these populations is further challenged by the complexity of the causal factors leading to xenophobia and the systemic breach of migrants’ rights in the country. Recognising the interconnectedness of issues such as poverty, inequality, unemployment, and xenophobia, some NGOs have attempted to develop interventions or programmes that move beyond a straight-forward anti-xenophobia message. This linkage between issues of migration and the broader issues of development, however, is neither explicit nor is it likely to grow, given the many challenges and lack of solidarity around issues of

¹⁴⁸ Interview, Miranda Madikane, Cape Town, November 10, 2011.
¹⁴⁹ Interview, Micheline Muzaneza, Cape Town, August 23, 2011.
migration. Interventions that do attempt to address migration issues from more of a holistic development approach also encounter the challenge of mission drift, or mission diffusion, from their respective mandates of addressing the issues of refugees, asylum seekers and other migrants. The De Doorns Integration Project, through the Scalabrini Centre of Cape Town, for example, was formulated in response to a November 2009 conflagration of violence against Zimbabweans living and working in the area on the farms and vineyards of the Western Cape town of De Doorns, as discussed in chapter two. In 2010, the Scalabrini Centre launched an ongoing outreach programme in De Doorns, using a participatory community development approach that brought together a group of local volunteers who were interested in working for change in their community. By the end of 2011, the group had named itself Tholulwazi Developmental Group, and had set a mission for itself of “providing information to community members and fostering social change.”

Group members have engaged in a variety of programmes in the community, some in conjunction with other NGOs from Cape Town, including documentary screening in schools, clinics and on farms, an HIV/AIDS awareness and sport programme, and the development of a community garden. The Scalabrini Centre mentoring and community development work with Tholulwazi attempted to integrate a message of tolerance, diversity, and respect of difference into its work. The programme also entailed initiating dialogue regarding the violence against Zimbabweans in De Doorns, and in focus group work associated with ongoing monitoring and evaluation of this project, some group members reflected on a positive shift in their own attitudes towards, and interactions with, foreign nationals. However, the main focus of the group’s work, largely self-directed according to what they felt to be local priorities, had little to do directly with xenophobia or the

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150 Author’s notes, November 2011.
151 Author’s notes, November 2011.
integration of foreign nationals within the community. Instead, group members addressed what they viewed as the most pressing issues of community education around social and health issues, and the development of a garden to help meet the food needs of some of the community’s most impoverished residents. This approach by the Scalabrini Centre has also been relatively resource and time intensive, and has involved a regular physical presence in the community and the forging of personal relationships between the Centre staff and members of the community in De Doorns. It also throws into sharp relief the challenges of programmes directly challenging xenophobia and supporting the integration of foreign nationals: targeting the issues in a direct, head-on fashion will likely have little systemic impact, while interventions that may potentially be more sustainable and community-led must also, or even principally, begin to address the underlying, root causes of anti-foreigner resentments in communities. In doing so, however, the outcomes and activities of such work, while necessary and important, may have little obvious, immediate, or direct relationship to the day-to-day issues of migrants, refugees and asylum seekers.

Another example of this dilemma is found in the work of the Social Justice Coalition (SJC), initiated by the Treatment Action Campaign as a civil society coalition located within Khayelitsha, as a response to the May 2008 violence. The SJC opted for a broad approach to addressing the underlying causes of the violence, ranging from gender issues, security and xenophobia, to the advocacy of international human rights, global citizenship, and accountable governance (TAC 2008). Translating such a broad mandate into achievable outcomes, however, is a difficult undertaking, and by 2010, the SJC’s efforts appeared to have lost their initial impetus (Everatt 2010, 10). As with the De Doorns project, the SJC was launched and spurred into action by the violence against foreign nationals, yet its contemporary work, largely around
sanitation and security, appears to have little to do directly with the specific issues and dangers facing foreign nationals in South Africa. The establishment of community gardens and sanitation issues are not unrelated to xenophobic expressions, and in fact, the culmination of such work across the country may be more effective over the longer term in ameliorating anti-foreigner tensions and addressing issues of integration. Such work does, however, represent a long-term vision. It is necessarily indirect in its trajectory, and speaks to the substantial challenges of any attempts to separate and directly address anti-foreigner sentiments and violence from the social, political and economic context in which they are embedded.

Given such complexities, it is unsurprising that the various civil society organisations working in this arena have developed a range of approaches and work within a diverse set of mandates. The differing mandates may be complementary at times, but they are also occasionally a source of tension amongst this sector of civil society. As chapter five argued, the conceptualisation of a homogenous civil society sharing an overarching common goal, mandate, and approach is analytically misleading. In the migration arena, some organisations, such as the Law Clinic at the University of Cape Town’s Refugee Rights Unit, or the Cape Town Refugee Centre (both implementing partners of the UNHCR), offer support and services to refugees and asylum seekers only, while other organisations offer various levels of support and services to all migrants. Various organisations engage not just in the provision of support and services to refugees, asylum seekers and sometimes other migrants, but are also involved in community outreach programmes and projects, advocacy, policy engagement with the state, research projects, and also litigation against the state. Different, and often shifting, mandates may be a function of funding, but they may also have ideological underpinnings. There are, for example, differences of opinion between some civil society actors regarding whether working with all
migrants, documented or not, detracts already scarce attention from the established humanitarian needs of *bona fide* asylum seekers and refugees.\footnote{152 Interview, Rebecca Chennells, August 2, 2011.} Organisations that work strictly with refugees and asylum seekers within the legal parameters of the Refugees Act, for instance, may not be engaged with ongoing issues of deportation of migrants, especially undocumented Zimbabweans, from South Africa, while for others the deportations represent a significant injustice, given the social, economic and political situation in Zimbabwe, and therefore constitute a significant focus of their work.

There are also diverse approaches within civil society regarding how best to engage with the state, which can also lead to tensions between organisations. This segment of civil society generally regards state management of migration very unfavourably overall, and many see themselves as attempting to provide a necessary counter-balance to the continuous breach of law and the rights of individual migrants. Some have all but given up on constructive engagement with the state. Speaking specifically of interactions with the City of Cape Town, for example, one interviewee noted that in her experience, civil society actors are,

so tired of the lack of efficiency and incompetence of the City that they won’t even attend a meeting that they ask, because first of all, they’ve given no notice… Second of all, they have given no agenda, and they haven’t invited all the people! So it’s just, it’s like what is the point of going there to waste my time, so they [civil society organisations] won’t even get involved in what the government is trying to do because the government is doing it wrong, with no basic etiquette and efficiency. So, I think the government just seems to be a complete waste of time and money in the way they are doing things at the moment.\footnote{153 Interview, Cape Town, October 2011.}

While many are vocal about the challenges they experience in terms of engaging with the state, and deeply skeptical of the motivations of many state actors and officials, certainly not all individuals and organisations have written off the potentials of engagement, while others
perceive engagement to be an absolutely critical component of their organisation’s work. Rather than taking a permanently adversarial stance against the state, the Director of one NGO argued that it is more important to engage in an issue-specific manner, and to assess the best way for each issue “to apply pressure to achieve meaningful change.” However, he also noted the challenges of attempting to move between a collaborative and more adversarial approach to engaging with the state:

We believe it’s important to engage before you point fingers. Right now we’ve worked closely with Home Affairs, and when we did, a lot of civil society organisations [...] would say we sold out, we’re pro-government, or ANC, or this or that, or whatnot. Now we’re fighting government, so a lot of government will say, oh, we’re anti-government now. So there’s no way of winning, because there’s a tendency [in civil society] to either be against or for [government].

Some perceive organisations that are government-funded and work collaboratively with government as sell-outs, while others bemoan a universally combative or contentious approach in dealing with the state, arguing that this reduces the space for collaborative work in the areas in which it may be the most effective approach. One civil society actor felt, for example, that a perpetual confrontational stance by civil society organisations led state actors, including Members of Parliament and Ministers, to view such organisations as opposition: “They’ll say [they are] anti-government. That’s what they say – they use the term “anti-government.”

The ongoing reliance of some NGOs working in this arena on foreign staff, volunteers and interns, may further undermine the legitimacy of these organisations from the perspective of state actors and policy-makers, wary of international influence and agendas. The former Shadow Minister of Home Affairs noted, for example, the perceptions of fellow Home Affairs Portfolio

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154 Ibid.
155 Interview, Braam Hanekom, Cape Town, October 17, 2011.
156 Interview, Cape Town, October, 2011.
Committee members regarding the presence of (mostly American and European) foreign nationals representing civil society organisations during meetings or presentations:

...for instance Scalabrini [the Scalabrini Centre of Cape Town] has a lot of foreign nationals as interns, and in fact, so do the Legal Resources Centre, for instance. When we had debates on the Immigration Amendment Bill and the Refugee Amendment Bill, when we had presentations by the public on their concerns, most of those presentations were in fact done by mostly Americans. Americans, Germans, Danish I would say. And I am afraid that actually doesn’t gel well with South Africans, when people from other countries say, well, this is not okay, and you are not doing your jobs properly, and you need to go back to the drawing board, you know?\(^{157}\)

The perception of foreign oversight and critique irks some policy-makers, but the high turn-over of such foreign staff or interns undoubtedly also hinders the potential continuity of relationships between policy-makers and civil society actors.

Civil society actors noted various challenges in terms of their own interactions with different levels of government, both within and between national, provincial and municipal levels of governments. Some organisations, even those engaged in sometimes adversarial or contentious approaches to advocacy or campaigning vis à vis the state, noted they had had largely positive experiences in their dealings with very senior level officials from the Department of Home Affairs, such as the Minister and Deputy Minister. This was not the case, however, with other segments of national government, especially (with noted exceptions) at the level of implementation. The director of one NGO argued, for example, that even in cases where there has been political will at high levels to implement decisions that civil society organisations supported, “the in-between [officials] can block it.”\(^{158}\) Others described ongoing difficulties of engaging at the parliamentary level through the Parliamentary Portfolio Committee for Home Affairs. Several individuals from different organisations also spoke about some of the

\(^{157}\) Interview, Hon. Annette Lovemore, Parliament, Cape Town, September 21, 2011.

\(^{158}\) Interview, Cape Town, November 10, 2011.
challenges they face in the specific political terrain of the Western Cape, which is an ongoing and often acrimonious political battleground at both the provincial and municipal levels between the ANC and the Democratic Alliance (DA).\textsuperscript{159} There is a broad agreement amongst civil society and some state actors that intergovernmental coordination around the issues of foreign nationals in Cape Town is deeply problematic. This lack of coordination between levels of government, and what some interviewees perceived as a lack of a willingness to even engage, has led to issues of overlap in terms of mandate and programming, and a lack of an integrated response to the issues of foreign nationals. It has also resulted in a lack of communication about policies and practice that ought to be filtering between levels, and disillusionment by some civil society actors in terms of working with different levels of government towards shared goals. One NGO actor, for example, angrily summarised her perception that in dealing with the issues of foreign nationals, for the City and the Province, “to achieve the goal is not one of their goals.”\textsuperscript{160} Another NGO actor acknowledged that even while there may be good intentions on behalf of government actors at all levels in terms of working with civil society, the relationship was an inherently challenged one, characterised by power differentials that made it difficult for them to act in concert; she noted that individuals in government had to contend with hierarchies and management and remain within the mandates of their own positions, and often could simply not take the kinds of decisions NGO actors had the leeway to take, and especially not in the same

\textsuperscript{159} During the May 2008 violence, for example, the city of Cape Town was held by the DA, while the province and national governments were under ANC control. Fraught relationships between the city and the province “led to paralysis in the early days of the violence, as well as disputes about the direction of the response;” the DA mayor of Cape Town and the ANC premier of the Western Cape would not even meet or work with each other in the response to this social and humanitarian crisis, each reluctant to relinquish any control of the disaster to the other (Peberdy & Jara 2011, 44).

\textsuperscript{160} Interview, Cape Town, October, 2011.
Such challenges have made it difficult for civil society organisations to foster sustained and productive relationships with policy-makers and other political elites.

Relationships with government actors remain problematic, but so too do some relationships amongst civil society actors in this sector. While there are many examples of positive and productive relationships between civil society organisations and actors working in the migration arena in Cape Town, almost all the NGO actors interviewed identified tension and conflict amongst civil society actors as a barrier to relationship-building and effective advocacy and action. Along with the perceived challenges of differing mandates and approaches to working with the state, most of these tensions and conflicts were identified as being related to specific challenges in personal or working relationships between individual actors and organisations, funding competition, as well as mistrust between organisations. Some interviewees spoke at length about personality clashes, perceived ego issues, and personal conflicts between different individuals and different organisations, but there was also a general consensus that these issues were deeply unfortunate and needed to be addressed. There are also perceptions held by some civil society actors regarding various degrees of corrupt or unethical practice within other organisations. Substantiating such allegations of corruption is beyond the scope of this work, but that the perception exists at all is important to understanding relationships in this sector. One civil society actor explained that their organisation, while feeling certain about an example of corrupt practice within another organisation, had taken a strategic decision to not engage in confrontations with other civil society actors in this field:

Not that we’re agreeing with everything they do, but we’re not clashing with any civil society, because it’s not worth the time. Even though there are some things that are much, much worse happening in civil society than there are happening in government! [...] You end up isolated if you fight

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161 Interview, Miranda Madikane, November 10, 2011.
government, [and] if you fight civil society, and so the one group that we’re not going to fight with is civil society. We will fight with government if they’re doing wrong things, but civil society – it’s not worth distracting [us from] our mandate. It’s not. It’s not.  

In this case, the decision not to confront or expose these allegations was also made by weighing up the perceived positive work being done by the organisations in question, and recognising that good work would also be sacrificed if exposure of corrupt practice were to force the closure of those organisations or otherwise limit their work.

One of the most commonly raised sources of contention amongst civil society actors in this arena was competition for funding, identified as a key impediment to individuals’ and organisations’ ability to work together. One interviewee described, for example, her experience of funding competition and the negative impacts it has on opportunities for network-building and collaboration amongst organisations:

when it comes to money and civil society organisations, the claws will come out and they will fight to maintain their territory. They will fight to get a hold of that money. And so all of this networking or collaboration will dissipate very, very quickly. Disintegrate. It's no longer there. That's one of the biggest...challenges, is simply overcoming competition for funding.

Another interviewee echoed this sentiment, arguing that "really a lot of the battles fall down to funding, and fights over resources, and who's doing the proper job, who's actually working, and who's not really working or serving refugees." While funding competition is by no means exclusive to this sector of civil society, the social and political unpopularity of migrants, refugees and asylum seekers, and the widespread prioritisation of the interests of citizens, may further constrain already limited funding sources and create more intensive competition between

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162 Interview, Cape Town, October 2011.
163 Interview, Cape Town, October 2011.
164 Interview, Christina Mitchell, Skype Interview, August 4, 2011.
165 Interview, Cape Town, August 2011.
organisations. For a number of these organisations, the European Union represents an important funding source, through earmarked monies channeled through the South African Department of Justice to the Foundation for Human Rights, and then finally dispersed to NGOs. Some organisations are designated UNHCR “implementing partners,” and receive UNHCR funding for service delivery programmes for refugees and asylum seekers, specifically. There is also some government funding to assist in specific service-based programmes within organisations, such as funding from the Department of Social Development for the Scalabrini Centre of Cape Town’s children’s home, Lawrence House. Generally, however, accessing domestic funding can be particularly challenging. As one civil society actor explained the difficulty of finding funding for refugee issues from South African donors: “You know, other organisations in other fields can look for corporate funding, but you don’t really get that for refugees. It’s not a priority.”  

This interviewee also noted that the outcomes or deliverables of work in this area were often difficult to show: "Who wants to fund it? Who cares? Where does the benefit show? You know, it's not like funding HIV/AIDS research, or research on children...”

Such challenges may help explain why this segment of civil society has had difficulty forging cohesive networks or coalitions around the issues of migrants, refugees, and asylum seekers. There have been attempts to forge such networks amongst civil society actors in the migration arena, both regionally and nationally. While civil society actors expressed a desire to know more about the work of other organisations, to uncover potential synergies, and to share experiences and lessons learned in their own work, they also consistently pointed to a number of significant obstacles to the successful functioning of such networks or coalitions, particularly

166 Interview, Rebecca Chennells, Cape Town, August 2, 2011.
167 Interview, Cape Town, August 2011.
168 Interview, Cape Town, August 2011.
unresolved disputes over issues of accountability and representation. In the Western Cape, as noted above, a network of organisations working in this arena, called Tutamike, existed prior to the May 2008 violence, but did not meet at all throughout the response to the violence. By late 2009, the network had not met since April 2008, and there was confusion about whether or not the network even still existed (Peberdy & Jara 2011, 54). By the end of 2011, there remained confusion and some contention amongst civil society actors about the formal status of the Tutamike network, though it appeared to be an entirely non-functional network. Given the *de facto* disbandment of Tutamike, civil society organisations in the Western Cape attempted to launch another network in late June 2011, called the Western Cape Refugee and Migrant Forum (WCRMF), with a proposed revolving secretariat, the first of which included the UNHCR, the Scalabrini Centre of Cape Town, and CoRMSA.

Interviewees indicated they found value in the sharing of information, and the explorations of potentials for collaborative approaches to issues, but expressed significant reserve regarding what they viewed as the dangers of being “spoken for” in a network. Regarding one of the first meetings of the WCRMF, one civil society actor commented,

“The forum, I found it very useful, just because we don’t see everything, we don’t know everything, and so I thought it was very informative to see what other organisations are doing, or what approach they’re taking. [...] definitely there shouldn’t be an umbrella organisation that speaks for everybody, but what I do think is very important is that there’s coordination, and at least people know what other organisations are doing and the approach they’re taking.”

Concern was expressed amongst some interviewees regarding what was viewed as a propensity for networks or coalitions, at both the regional and national level, to become the main vehicle through which communications were made and decisions taken between government and civil

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169 Interview, David van Burgsdorff, Cape Town, October 17, 2011.
society, but without proper organisational processes and accountability structures in place that would ensure that the communications were diffused among network or coalition members, or that the decisions taken were actually representative of all coalition members. This gave rise to the reluctance of some organisations to participate in such structures, even while the potential values of participation were recognised. As one interviewee noted,

> [t]here’s a misconception that organisations must agree on everything and there’s a misconception that any particular umbrella body can speak on behalf of a united civil society on an ongoing level, and the way they represent themselves is actually a misrepresentation, in that they do not speak on our behalf. They do not speak on behalf of civil society in the sector of refugees and asylum speakers and immigrants.\(^\text{170}\)

Some interviewees expressed the concern that networks or coalitions did not leave enough room for the scope of differing mandates and political approaches to work in the migration arena, and argued that a successful coalition would be one which did not purport to represent or speak on behalf of a united civil society, but which instead functioned as a body that strategically identified synergies in work and approaches, where they existed, that consistently shared relevant information, and that respected the spectrum of approaches to engagement in migration issues. From this perspective, there was a perceived critical difference between coordination and representation.

The challenge of accountability within networks or coalitions was identified as another obstacle to their success. For time and resource-constrained organisations, additional work in the form of network or coalition obligations may not take priority, and some civil society actors noted the problems this created in terms of taking the coalition or network structure seriously enough. As one civil society actor put it,

\(^{170}\) Interview, Cape Town, October 2011.
Nothing will be done. You know, “there is a threat in Khayelitsha, can you go and look at it? You know? Which organisations? Okay, you two.” But they don’t go there. They don’t go there. And then they come back at the next meeting and you ask them, okay, did you go there, and they say, “No.... we couldn’t meet, we’re so busy...” And then what? Nothing. That’s what. And that’s the issue with stakeholders. Because there’s no – I don’t know what the term. There’s no accountability. If there is any problem, if there is any negative outcome, what happens? Because if I fund you, I can say well, I withdraw funding, but if I don’t fund you, what are you going to do to me?171

Working towards effectively addressing these issues of representation and accountability could open up renewed space for collaborative network-based approaches to advocacy or activism, where appropriate.

The challenges of advocating by, or on behalf of migrant, refugee and asylum seeker populations are substantial. The strategies and tactics of various civil society organisations vary widely and are shaped and constrained by external factors, such as widespread anti-foreigner sentiments and funding constraints, and by dynamics between and amongst civil society actors. However, there is another important element of civil society engagement with migration issues that has sought to take advantage of the new legal space and protections opened up in the post-apartheid years. Rather than providing services, or engaging directly in community development or advocacy programmes, some civil society actors have looked to legal interventions as their preferred means of attempting to influence social and political change in the migration arena.

The Courts as an Arena of Engagement

One of the most important avenues of civil society engagement in the migration arena is the pursuit of legal advocacy and court challenges, framed by the new Constitution, Bill of Rights, Refugees Act of 1998, and the Immigration Act of 2002. Legal challenges have yielded some important victories in terms of the expansion and protection of the rights of refugees and

171 Interview, Cape Town, September 2011.
asylum seekers, in particular. However, in the context of widespread state mismanagement of migration, many contemporary cases brought against the state by civil society challengers revolve around attempts to uphold already-existing de jure rights and claims, and have little impact on the systemic, entrenched and often illegal practices of Home Affairs. While litigious engagement is perceived by some within civil society as one of the only effective tools of engagement left in the current migration management climate, it may also serve to polarise already strained relationships between state and civil society in the migration arena. Litigation is also a resource-intensive, financially risky, and highly technical approach to engagement, far from the reach of many NGOs or other civil society organisations. Further to this, without a successful complement of associated strategies and actions from other facets of civil society, litigation successes remain isolated from any broader coordinated and collective action towards progressive change.

The pursuit of legal challenges as a form of political engagement, particularly by liberal (and usually white) organisations or individuals, has a long history in South Africa, and even during the height of apartheid, the courts occasionally returned decisions that were singularly misaligned with the social and political imperatives of the apartheid state (Abel 1995). Handmaker writes that

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 (2009, 93).

Echoing some broader trends of state-civil society relations as explored in chapter five, early post-apartheid interactions between civil society actors and national state actors and institutions in terms of refugee rights were largely conciliatory. As discussed previously, civil society actors
played a pivotal role in the formation of the refugee legislation itself in the early post-apartheid years. However, as tensions and differences emerged, and as the gap between policy and practice began to widen, “conciliation gave way to the courts as the principal platform upon which refugee rights were mediated” (Handmaker 2009, 94). Unlike the legal challenges under apartheid, which largely aimed at challenging the legitimacy of apartheid legislation and undermining the broader systems of apartheid, legal challenges by civil society actors in the contemporary migration arena have largely been geared towards defining and expanding rights for refugees and asylum seekers, or challenging the contravention of existing laws. Given the scope and scale of persistent rights violations in the asylum system, and the various difficulties for many refugees and asylum seekers to access legal services, some cases are strategically selected on a public interest (or public impact) basis, meaning the case will impact law and policy for a group of people and not just an individual, thus “maximising resources to facilitate the rights of the poor, particularly in civil matters that relate to social and economic rights” (Bentley, Nathan, & Calland 2013, 35). Such legal challenges by, or supported by, civil society actors in this arena have dealt with issues such as access to social grants, the rights of asylum seekers to work and study, access to administrative justice and fair status determination procedures, and the special needs of migrant children.\footnote{For a more in depth exploration of legal challenges in the migration arena in post-apartheid South Africa, see Handmaker (2009), and the Refugee Case Law reader from the University of Cape Town’s Refugee Rights Unit: http://www.refugeerights.uct.ac.za/legal/case_law_reader}

Another important element of this new legal space has been the capacity to advance claims by way of administrative review, an avenue that Handmaker notes was almost non-existent prior to 1994, but which is now a visible component 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 of the government of South

\footnote{For a more in depth exploration of legal challenges in the migration arena in post-apartheid South Africa, see Handmaker (2009), and the Refugee Case Law reader from the University of Cape Town’s Refugee Rights Unit: http://www.refugeerights.uct.ac.za/legal/case_law_reader}
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 the [...] relationship between judicial and executive powers, civic actors have been able to sanction government successfully through court-ordered settlements, structural interdicts and judicial orders (2009, 25).

Given that many contemporary breaches of migrants’ rights are due to administrative shortcomings, this has been a particularly important avenue for civil society actors pursuing legal action in the migration arena.

Amidst perceived cross-purposes and widespread mistrust of state management of migration, some civil society actors choose to engage in legal challenges because they believe it to be the form of engagement with the state most likely to have an impact, where other avenues of engagement have fallen short. Legal challenges are considered by many to be the strongest tactic to push the government to adapt and to hold state misdeeds in check. Systemic state violations of the law leave it quite consistently vulnerable to litigation, and indeed, it is sued with regularity. Wa Kabwe-Segatti notes that the Department of Home Affairs spent its litigation budget almost completely between March and July alone for every year since 1998, a fact which she argues is indicative of Home Affairs’ lack of legal and strategic preparedness to manage asylum, alongside the increasing role of “a well-organised, far-reaching network of human rights and asylum seekers’ activists” (2008, 84). Indeed, one 2012 report by the African Centre for Migration and Society documents no less than 90 different legal challenges around illegal detention and deportation practices, brought against the DHA by Lawyers for Human Rights (LHR) between January 2009 and December 2010; the report noted that in every case that went to court, the judge found DHA’s actions to be unlawful, with an estimated financial cost to the
Department of R4.7 million\textsuperscript{173} (Amit 2012b). Civil society organisations have also recently undertaken successful legal challenges of DHA’s recent closures of Refugee Reception Offices in Port Elizabeth, Johannesburg and Cape Town in 2012 and 2013. In many of these cases, DHA practice is based on either internal directives or intended policy directions, as opposed to adhering to official policies and regulations as they actually exist, an issue explored in chapter seven.

There is, however, growing concern and mounting evidence that court decisions which find against the Department of Home Affairs are frequently ignored or have little systemic impact, raising important questions with potential implications for democracy and governance far beyond the scope of migration management. Handmaker finds that
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. [...] Not all legal challenges necessarily produce results (2009, 206).

To illustrate, the ACMS report examining LHR’s 90 legal challenges to Home Affairs’ illegal detention practices refers to the Department’s explicit refusal in court to be bound by the Immigration Act’s 120 day limit to detentions for the purposes of deportation, a view which “effectively rejects the idea that the law is binding” (Amit 2012b, 59). The report also chronicles numerous cases in which the DHA failed to adhere to the terms of court orders, which were obtained by agreement or by court decree, cases in which the Department pursued cases regardless of previous negative court rulings on the same issues, and even one case of contempt involving willful deception of the court (Amit 2012, 66, 71). Overall, Amit suggests that the actions of the Department of Home Affairs,

\textsuperscript{173} Approximately Canadian $478,000.
display a general contempt for the legal process: the Department fails to implement court orders, continues to act in direct contravention of judicial rulings, and openly states that its actions are not bound by the law in cases in which particular legal provisions would prevent it from undertaking actions it deems necessary, such as arbitrary and indefinite detentions (2012, 7).

Beyond the issue of illegal detention, the three separate court cases brought against the DHA by various civil society organisations contesting the closure of the Refugee Reception Offices in Johannesburg, Port Elizabeth and Cape Town in 2012 and 2013, resulted in the DHA’s decision being declared illegal and invalid, yet “in all three cases, DHA has ignored direct court orders to reopen RROs or to provide equivalent services in these municipalities” (ACMS & LHR 2013, 41). The DHA’s decision to ignore the court orders appears to have been based on its intention to appeal the decision, though in the case of the Cape Town closure, for example, the Western Cape High Court specifically ordered the Department to accept new asylum seekers pending final determination of an appeal (Scalabrini Centre vs. Minister of Home Affairs). Regardless of the court order, no such equivalent services were offered to new asylum seekers, and Refugee Reception Offices remain closed in these cities.

Legal challenges by civil society actors are also expensive, require significant technical and legal expertise, and may come with considerable financial risk, particularly given that the legal coffers of the state are undoubtedly deeper. For many migrant, refugee and asylum seekers’ organisations, and civil society groups that work on their behalf, litigation is not an easy or even feasible option. While there may be less risk with clear cases of administrative transgressions, the courts have often proven reluctant to wade into the merits of government policy or its exercise of discretion (Handmaker 2009, 206). This makes court challenges that do attempt to tackle questions of policy or discretion a particularly uncertain undertaking.
Further to this, legal action tends to be taken forward in relative isolation from concerted non-legal approaches to advocacy and change in the migration arena. For example, while various civil society organisations undertook legal action against the closure of the RROs, there was a dearth of complementary strategies or tactics that could help build the visibility or political traction of the issues. Handmaker also notes that there have been relatively limited efforts on the part of civil society actors to combine legal interventions with other strategies of engagement, such as advocacy, mass mobilisation or public shaming (2009, 187). He contrasts this with the success of strategies that have combined legal and non-legal strategies, such as the anti-apartheid movement, or more recent engagements around issues such as access to water, shelter, and access to anti-retroviral drugs for people living with HIV (Handmaker 2009, 187). However, as argued previously, advocacy and collective action by or on behalf of migrants, refugees and asylum seekers is impeded by a complex array of social, political and economic obstacles. While issues such as water, housing and health can generally rely on widespread public support and legitimacy, the issues of migrants, refugees and asylum seekers clearly cannot.

Finally, such litigious approaches are also contributing to an often already strained relationship between some civil society and state actors. The regular reliance on constitutionalism and the courts by civil society actors has created a situation in which dialogue between the department and civil society organizations is almost constantly the result of litigation and media pressure. Although this has increased transparency, it has also revealed the failures of constructive engagement by government and civil society actors on policy reform and monitoring (Segatti and Landau 2011, 49).

For some within the state, as previously discussed, “civil society” represents a force against transformation and change, a concern that is also, with some frequency, expressed in association with an “untransformed” judiciary and an emotive, ongoing and unresolved public debate about
the balance between the powers of the executive and those of the judiciary. For civil society to rely heavily on the courts to advance its interests is thus doubly sensitive. However, state sensitivity to the use of courts may also stem from a sense of being overwhelmed by the issues of migration, and of being unsure of how to actually meet its legal obligations. In a 2013 Home Affairs Portfolio Committee meeting in Parliament, for example, one governing party Portfolio Committee member accused CoRMSA, as one of the applicants in a (successful) case against Home Affairs’ decision to close the Crowne Mines Refugee Reception Office in Johannesburg, of “wanting impossible things,” and argued that instead of expecting Home Affairs to carry full responsibility for managing migration, NGOs and others should “share the responsibility” for the overflowing system. Whatever the reasons, the sense of frustration with such litigation amongst policy makers and other state actors is palpable. In the case of LHR’s litigation against Home Affairs’ illegal detentions practices, for example, the DHA’s Director of Litigation expressed the department’s frustrations in a September 2010 email to LHR:

[T]he continued onslaught by way of this incessant litigation may compel the Department to adopt a hardened attitude, something that the Department has pondered for some time and resolved to stay clear in the interest of the indigent and vulnerable people who may feel aggrieved by administrative decisions (Amit 2012, 64).

However, as Amit notes, not only had there been opportunities to avoid litigation in each case, but the very fact that the DHA lost all 90 cases brought against them confirms “both the legitimacy of the cases and the fact that litigation costs could have been avoided with the same outcomes achieved” (Amit 2012, 64).

Despite the challenges, litigious approaches to engagement and advocacy continue to represent an important tool in the repertoire of contention available to civil society actors

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174 Home Affairs Portfolio Committee meeting, February 12 and 13, Parliament, Cape Town, 2013.
working in this area. While it is apparent that some DHA and other state officials regularly transgress the formal laws and policies of migration management, the legal vigilance of civil society actors may well also serve as an important yet unquantifiable check on the actions of others.

**Conclusion:**

Since 1994, civil society organisations working in the arena of migrant, refugee and asylum seeker rights and advocacy have achieved many important advances, including significant contributions to the formulation of the Refugees Act of 1998, the provision of much-needed services to migrant communities, and ongoing advocacy towards attempts to advance and expand migrants’ rights. More recently, civil society organisations played an integral role in responding to the violence against foreign nationals that erupted across the country in May 2008. This chapter has presented the argument that despite these achievements, many of the significant factors or attributes that shape civil society actors’ capacity for effecting systemic change in the migration arena are missing or significantly constrained in the migration arena in South Africa.

The eruption of xenophobic violence presented important political opportunities for civil society actors in this arena, but it also showcased some of the key challenges in moving beyond humanitarian responses to the violence, towards a more politicised advocacy approach to the issues facing migrants, refugees and asylum seekers. Beyond the violence of 2008, civil society actors continue to face a range of obstacles to their work, including the deeply poignant paradox that in targeting migrants, refugees and asylum seekers for service provision and advocacy, organisations risk stoking widespread local resentments even further. Organisations not only work within different mandates, but they also hold different strategic approaches and ambitions,
and hold conflicting ideas about how and when to engage with the state to achieve their respective goals. As a result, it is misleading to conceptualise this segment of civil society as a homogeneous whole, working in unity towards common ambitions. Instead, relationships between various actors and organisations in this arena are often challenging and complex. This, along with issues of representation and accountability, complicates the coming together of organisations in effective networks that could build traction for collaborative action in this arena. Some civil society actors have turned to the pursuit of legal challenges against the state, many of which have yielded important victories towards the protection and expansion of the rights of migrants, refugees and asylum seekers. However, here, too, there are important caveats and limitations to the effectiveness of this approach. While some public interest cases aim for systemic impact, many cases necessarily focus on the violation of individuals’ rights, and there is little evidence that court findings against Home Affairs are translated into systemic change. Legal challenges are also costly, potentially financially risky, and beyond the technical expertise of many civil society actors. Further, to this, such challenges are often undertaken in the absence of effective complementary non-legal strategies or advocacy campaigns, which can further limit their effectiveness and impact. Litigious engagement also appears to be contributing to a growing frustration and animosity between many state and civil society actors working in this arena.

Civil society actors have been quick to take advantage of important political opportunities that have opened up new space for advocacy and activism in the migration arena since 1994, but these opportunities have been significantly hemmed in by the kinds of challenges explored in this chapter. In the current social and political climate, organisations and activists struggle to even maintain past victories and already existing rights for migrants. Thus, while many organisations
are not directly engaged in advancing an explicit migration and development approach, they are nonetheless attempting to work towards the kinds of social, political and economic conditions that could help to unleash the developmental potential of migration.
Chapter Ten: Conclusions and Reflections

Despite the South African government’s ongoing general denial of the existence of xenophobia, it has nonetheless emerged as one of the most pressing social issues of the new democracy, as underscored by the weeks of unrest and violence against foreign nationals that made international headlines in May 2008. In no small measure, issues of xenophobia are deeply connected with how migration is both conceptualised and managed in the post-apartheid state. There has been significant inquiry into the causal roots of xenophobia and anti-foreigner sentiments in South Africa, but there has been much less inquiry surrounding potential sites of political change and the opportunities afforded to voices that challenge the status quo version of migration as a zero-sum game in which South African citizens are positioned as the unqualified losers, and migrants (including refugees and asylum seekers) as unwanted competitors and threats.

In recent years, migration has been re-cast by international organisations such as the UN and the World Bank as a potential tool for development, rather than as an indicator of the failure of development in migrant-sending regions or countries. However, some scholars have also recognised that migration, on its own, does not necessarily always lead to development. Instead, they recognise that the developmental potential of migration is often contingent on the social, political, and economic climate in both migrant-sending and receiving countries. In the absence of an environment that can foster this potential, the capacity of migrants to contribute to development remains circumscribed. Further to this, the impacts of migration, both positive and negative, are likely to be uneven and can shift according to one’s analytical focus and unit of analysis.
In South Africa, any significant debate about how best to harness the potentials of these various migration streams for development in the country and the region continues to be subsumed by the state-centric interests of sovereignty and security, and by a discourse that continues to position the presence of migrants in South Africa, particularly low- or unskilled documented or undocumented regional migrants, asylum seekers and refugees, as a social ill and an unwanted burden. Within this climate, a small segment of civil society actors and organisations have emerged as the strongest challengers of this discourse, and as advocates for migrants’ rights in contemporary South Africa. This dissertation has explored the kinds of opportunities and constraints that shape these actors’ capacity and efficacy, in order to gauge the broader social and political space that is available for progressive political change in this arena. This project has necessarily involved situating the work of these organisations within the wider social and political processes, policy debates, and every day practices that both shape and delimit the environment within which these civil society actors and organisations can operate.

At the heart of these debates lies the way in which migration is conceptualised, within both state and society. As South Africa transitioned from its previous pariah status under apartheid into the “new” democratic South Africa – the “Rainbow Nation” – it formally re-joined the international community not just in terms of its affirmation of a human rights approach to governance and the kinds of liberal values enshrined in its new Constitution, but also in terms of its early controversial embrace of a liberal macro-economic approach under the Growth, Employment and Redistribution programme in 1996. However, some of the constitutional rights and liberal values of post-apartheid South Africa do not necessarily reflect the actual values of many within both state and society. In migration politics, this is certainly the case, particularly in terms of a recognition of, and commitment to, the protection of the rights of migrants,
refugees and asylum seekers. Indeed, xenophobia and anti-foreigner sentiments are widespread, well-documented, and regularly expressed, amongst state and societal actors alike, and violence against foreign nationals is a regular occurrence. The social and political illegitimacy of migrants, refugees and asylum seekers sits uncomfortably with the rights and legal protections that they formally enjoy. As civil society actors work to bridge the gap between migration policies and practice, they encounter countervailing values and forces, either subtle or overt, within state and society that do not necessarily adhere to the vision laid out in the country’s formal immigration and refugee legislation. Many view migration not as a potential tool for South African and regional development, but rather, primarily as a threat and a security concern to the nation and its citizens. Thus, while migrants are being cast in contemporary international-level development discourse as resourceful agents of their own development who should be supported through domestic and regional policy, in South Africa they are instead routinely met with suspicion, exclusion, resentment, and sometimes violence.

Within this context, interviews revealed that both civil society actors and policy-makers alike experience significant difficulties in advocating on behalf of this socially unpopular population. Civil servants, politicians, and other decision-makers are conscious of the political sensitivity of migration, as an issue, and even those who may be sympathetic to the issues of migrants, including refugees and asylum seekers, recognise that despite the de jure existence of migrants’ rights, there is a de facto hierarchy of rights, in which South African citizens’ rights are regularly and naturally prioritised above those of non-citizens. South African citizens are recognised as holding the power of the vote, while migrant populations have very little political or electoral salience. Civil society actors also indicated an awareness of this de facto hierarchy, noting the difficulties it presents in terms of engaging in effective advocacy for migrant
populations amidst the myriad, pressing issues and domestic development challenges that continue to face South African citizens.

This study offers a vision of the post-apartheid state as a site of contention, conflict, and incongruence, with various components of the state pulling in multiple directions around the development and implementation of migration policy. Despite the new post-apartheid emphasis on human rights, one of the most progressive, liberal constitutions in the world, and new obligations incurred through the signing of various international conventions related to the rights of refugees and asylum seekers, the post-1994 South African state initially had little in the way of appropriate legislation, institutions and structures to effectively manage this migration in a way that was in keeping with the parameters and human rights vision of the new democracy. The processes of legislation-making, in terms of both the Refugees Act of 1998 and the Immigration Act of 2002, reveals much about competing interests and perspectives of migration from within state and society. The formulation of the Refugees Act of 1998 entailed significant involvement by civil society actors, and is widely considered a progressive piece of legislation. However, the process also revealed important differences in the priorities of state and civil society actors, tensions which have been exacerbated by the almost immediate shortcomings in the actual implementation of the Act. In practice, the asylum system has been a deeply flawed and under-resourced, beset by maladministration and the systemic violation of asylum seeker and refugee rights.

The management of the country’s immigration regime has also been plagued with challenges. The long delays in the contentious design of the first post-apartheid Immigration Act of 2002 and an ongoing lack of clarity regarding the country’s broad migration goals and policies has created an insecure, often confusing migration policy environment. While the notion that
migration could be managed to enhance national and regional development was put forward during policy-making processes, particularly through the Green Paper of 1997, state-centric and security-oriented management imperatives took priority. Nonetheless, contemporary immigration management, like the management of the asylum system, faces serious implementation shortcomings, underscored by significant issues of under-resourcing and lack of capacity within the Department of Home Affairs, and systemic gaps between policy and practice. The presence of unknown numbers of undocumented migrants, a deeply inadequate detention and deportation regime, systemic administrative failures, and the use of the faltering asylum system by ‘economic migrants,’ has led to widespread perceptions, real or perceived, that the state has lost control of migration management. Even bone fide refugees and asylum seekers are perceived and treated as an inherent security threat and as would-be abusers of the system. In response to these shortcomings, the state has continued to emphasize the control and securitisation of migration management, moving further away from potential policies that could help unleash or support the developmental potentials of migration.

Within this context, civil society efforts towards progressive change, while far from irrelevant, remain severely limited and constrained. Civil society, however, is far from a coherent or homogenous entity in contemporary South Africa, and under the broad umbrella of civil society, various actors operate with a wide range of purposes, and with different approaches to their relations and engagements with the state. In post-apartheid South Africa, the interests of many civil society actors and the state have diverged, and relationships that were largely cooperative and supportive in the early post-apartheid years have tended to shift towards more contentious or confrontational interactions. The management of migration is one of the areas in which state and civil society interests have diverged, and following the end of apartheid, a new
segment of civil society engaged in migration issues has emerged as an active voice in these debates.

The country-wide outbreak of xenophobic violence of May 2008 represented a significant opportunity for this segment of civil society – including organisations of migrants, refugees and asylum seekers and those who act on their behalf – to draw attention to the issues of asylum seekers, refugees and migrants, and to build domestic and international networks and alliances. This occurred, to some degree, but the violence also illuminated some important limitations and weaknesses in civil society. Most organisations working on issues of migration were removed from the communities in which the violence took place, and while many other NGOs and civil society actors who did not normally engage in migration issues responded to the violence, this response was largely humanitarian rather than politicised in nature. Responses to the violence also illustrated key challenges around how to define and categorise migrant populations, many of whom fled without documentation. The tensions and very real traumas of this period continue to affect individuals and relationships in this sector.

Beyond the violence, further significant challenges impede the effectiveness of such organisations’ work. Organisations are often overwhelmed by the sheer scale of the issues and the often urgent needs of migrants. Yet, paradoxically, the targeting of migrants, refugees and asylum seekers for both advocacy programmes and service provision can risk fuelling the resentments of local South Africans in a national context of widespread poverty, inequality and unemployment. Further, the complexity of the root causes of anti-migration sentiments and violence against foreign nationals can lead to potential mission diffusion, as projects and programmes attempting to address systemic and underlying causal factors may stray from directly addressing the immediate needs and issues of migrants. Different mandates amongst
civil society actors in this arena, alongside differing ideological and practical approaches to engagements with the state, also complicate prospects for collaboration and collective forms of engagement. This is exacerbated by competition over funding, one of the key difficulties in developing and sustaining positive relationships with other organisations. In part, this explains the difficulties that continue to be experienced in networking and building alliances with other civil society actors in this arena. These difficulties are also explained by unresolved issues of accountability and representation within such attempts at building networks.

Litigation has emerged as one of the most effective tools in the repertoire of civil society engagement and advocacy, and there have been important legal victories in this arena, particularly in terms of cases selected on a public interest basis. However, organisations working through legal avenues are also working within an environment of systemic failures and rights abuses embedded within a confusing and unstable policy framework, in which de facto and de jure rules often bear little resemblance to each other. Individual cases are often put forward from within a sea of rights abuses, with little evidence in many cases that changes in Home Affairs practice actually follow from court decisions. Extensive reliance on litigation as a tool of engagement may further strain the already challenged state-civil society relations, and many organisations are also unable to undertake such a resource-intensive, technical and sometimes financially risky approach to advocacy. Finally, in the absence of a range of effective, complementary advocacy and strategies, successful litigation outcomes remain isolated and disconnected from coordinated collective efforts towards a re-conceptualised and progressive vision of migration.

The study of migration management in post-apartheid South Africa offers a striking example of the disjuncture between the image of the state (particularly its capacity to maintain
control over its borders and to uphold refugee and immigration legislation) and the realities of everyday practices, raising important questions about both the nature and the limitations of the post-apartheid state. While public antipathy towards migrants is by no means an issue exclusive to South Africa, the country nonetheless presents a significant site of inquiry into some of the specific challenges of “South-South” migration in a context in which, despite the formal existence of laws and rights to protect migrants, refugees and asylum seekers, there is a lack of widespread social and political support for these endeavours, along with inadequate dedicated infrastructure, experience, capacity and resources to effectively uphold a rights-respecting and well-managed migration regime. South Africa’s comparatively high levels of economic development within a region of widespread poverty, combined with the formal legal protections of its constitution and migration legislation, have made it a popular migrant-receiving destination. However, the lure and the promises of South Africa are, for many, belied by the realities of migrants’ actual experiences in the country. While many migrants undoubtedly still manage to improve their circumstances, and potentially those of their families, South Africa is still far from developing and implementing an intentional approach to migration that would effectively foster and support its developmental potential. The many challenges and constraints faced by those organisations and individuals who are advocating for basic migrants’ rights and migration issues more broadly illustrate just how far from the country is from such an approach. In such a context, any discussion of migration and development in South Africa must also necessarily take cognisance of the potential costs and consequences of migration for individuals, which can include systemic exclusion, the inability to access rights, and even a lack of physical security in the face of systemic xenophobia and regular anti-foreigner violence.
How South Africa chooses to address the substantial gaps between policy and practice is also of significance not just for migration issues, but potentially for other policy areas as well. In the case of migration, the ongoing shifts in migration policy and practice, both formal and informal, continue to represent a securitised, control-oriented approach, and point to a conscious effort on behalf of the state towards the restriction of rights that have been won and defined in the post-apartheid era. This is significant in the context of a post-apartheid state which, until now, has been premised on the expansion and protection of individuals’ rights and freedoms. In this case, the state’s failure or inability to effectively implement policies and protect migrants’ rights have given way to a discourse of blaming migrants themselves for abuses of the systems, which in turn is held up as justification for the subsequent restrictions of migrants’ rights.

This research suggests that the impetus for progressive change in migration management in South Africa cannot be driven by civil society actors working in this arena (though they may contribute), but will instead require a fundamental re-thinking and re-positioning of migrants in contemporary policy debates and discourse. Until migrants are significantly re-cast not as economic threats and competitors in a zero-sum game, as harbingers of disease and criminals, civil society can only act as a breakwater against a tsunami of anti-foreigner sentiments and the translation of these sentiments into everyday practices within state and society. The picture of civil society engagement with the state in the migration arena that is presented in this research captures an interesting moment in relations between the two, in which civil society activism and advocacy is largely geared not necessarily towards advancing the rights and interests of migrants, refugees and asylum seekers, but rather in attempting to hold the government accountable for upholding and respecting rights that already exist in law. The most contentious forms of civil society activism in this arena, then, generally involve the struggle, through the
courts or otherwise, to push the state to uphold and implement its own existing legislation. What emerges from this study is a picture of a country that remains rife with competing sites of power and influence, and competing visions and values. Indeed, some of the principles and values underlying the new Constitution and the new democracy are far from being universally accepted and entrenched, both within state and society. While much progress continues to be made in the dismantling of apartheid’s many stubborn and seemingly intractable legacies, the idea of the reconciled “Rainbow Nation” is, perhaps, more an ideal and a symbol than a reflection of the realities of contemporary South Africa.

The complexities and multi-faceted nature of the topic of migration in contemporary South Africa, and the search for sites of potential progressive change, has required a broad lens in terms of this research. This broadness is, in one sense, a limitation of this study, as each chapter could undoubtedly be expanded into a separate dissertation of its own. In another sense, this broadness is its strength, as it allows for an exploration of the dialectic between state and society, in terms of contemporary migration politics. A further limitation of this work is that the focus on civil society and policy-makers engaged directly in migration politics necessarily entails a relatively small pool of actors, particularly with largely Cape Town-based field work. However, many of the issues in which Cape Town-based civil society actors are national and international in scope, and while there may be some information specifically applicable to Cape Town or the Western Cape, many of the challenges identified in this work are applicable well beyond city or regional boundaries. Under-represented in this work is the perspective of state actors from municipal and provincial levels of government. In part, this was a function of access and time, and in part, it was a matter of scope. Finally, the study is limited by the sometimes Orwellian nature of the subject itself; just as civil society organisations are challenged by the
constantly shifting terrain of *de jure* and *de facto* policies and practices in the migration arena, as a researcher, it can be equally challenging to make sense of the barrage of conflicting and often contradictory information that characterises the migration arena in South Africa. Statistics and figures are often unavailable or unreliable, it is not uncommon for government policy statements to blatantly contradict something said on record at an earlier time, timelines for the release of legislation or regulations are notoriously unclear, and the state’s implementation of migration-related policies is generally haphazard and also subject to change course with little or no notice. These kinds of factors render the study of migration politics and practice (perhaps fittingly) something of a moving target, and a perpetually difficult subject with which to engage.

Despite the challenges of this subject area, this research has inspired at least as many questions as it has answered, and probably more. Further research, for example, could delve deeper into the subject of the gap between migration policies and implementation, and the kinds of middle-management and street-level bureaucratic dynamics and processes that actually play out in this translation. To what extent, for example, does the gap between migration policies and practice, or the issuance of directives that bear little resemblance to law, derive from a lack of knowledge about the actual legislation, a lack of agreement with the legislation, or from another entirely different rationale altogether? Similarly, it would also be useful and interesting to further explore the relationship between individual legal challenges in this arena, and how court decisions are dealt with and translated by officials within Home Affairs. What are the obstacles to the translation of these decisions into changes in practice? What kind of checks and balances exist within the Department to hold officials accountable for either intentional or unintentional law-breaking activities, and how do we best account for the fact that court decisions regularly do not translate into changes in practice? From a policy perspective, this
research has also raised very difficult practical and ethical questions about the value of incrementalism in policy-making, and whether it is more effective to develop and enact progressive or ideal policies that have little chance of actually being implemented, or to develop less ambitious policies that can be implemented and expanded or developed slowly over time.

Further questions are raised by the lack of integration and physical presence of many NGOs and civil society organisations who are working in the migration arena within the communities with which they are concerned. Largely out of the reach of both state and civil society, how do migrants and members of the communities in which they live attempt to find their own balance or solutions to the tensions and pressures of migration? What kinds of agreements are reached that may not be in keeping with the laws of the state, but which may hold lessons for negotiating potential conflicts elsewhere, and may also have something to teach about different sites of power and potential social and political change that occur beyond the purview of both state and civil society organisations?

The relationship and interactions between multiple levels of government relating to migration management would be another interesting direction for future research. While this research entailed only limited interactions with municipal and provincial level state actors, research geared towards unravelling the complex relationships between these levels and the national level of government in terms of migration governance could help identify both existing obstacles and potential synergies for a more integrated and coherent approach to migration management.

This research has also raised even broader questions about the meaning and relevance of the kinds of administrative or bureaucratic definitions meant to categorise and regulate migrants,
particularly in this region of the world where the motivations for migration are often myriad and complex, and do not necessarily neatly fit within the tightly packaged definitions associated with the 1951 Geneva Convention or the domestic migration legislation of the state.

Finally, this research raises important questions about the contemporary global optimism surrounding the migration-development nexus, and the universal relevance of such optimism, particularly in a South-South migration context. For South Africa to begin to intentionally foster and harness the developmental potentials of migration, for example, would require a substantial and challenging shift in perspective and a fundamental reconceptualisation of migration. The current national discourse of migration as a security threat and a burden on society is reinforced by the state-centric approach to migration, which is largely hinged on sovereignty and illusions of control. Moving away from this, towards a more regional and development-oriented approach to the management of migration, will require strong political leadership, vision and commitment. Unfortunately, the vice grips of migration control in South Africa appear only to be tightening at present, and the discourse of migration as a threat appears, as yet, unyielding.
### Appendices

#### Appendix 1: Legal and Undocumented Immigrants in and Emigrants from South Africa, 1980-2009

(Segatti and Landau 2011, 156)

<table>
<thead>
<tr>
<th>Year</th>
<th>Legal permanent immigrants</th>
<th>Legal emigrants</th>
<th>Official estimates of undocumented immigrants (millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>29,365</td>
<td>11,363</td>
<td>—</td>
</tr>
<tr>
<td>1981</td>
<td>41,542</td>
<td>8,791</td>
<td>—</td>
</tr>
<tr>
<td>1982</td>
<td>45,784</td>
<td>6,832</td>
<td>—</td>
</tr>
<tr>
<td>1983</td>
<td>30,483</td>
<td>8,247</td>
<td>—</td>
</tr>
<tr>
<td>1984</td>
<td>28,793</td>
<td>8,550</td>
<td>—</td>
</tr>
<tr>
<td>1985</td>
<td>17,284</td>
<td>11,401</td>
<td>—</td>
</tr>
<tr>
<td>1986</td>
<td>6,994</td>
<td>13,711</td>
<td>—</td>
</tr>
<tr>
<td>1987</td>
<td>7,953</td>
<td>11,174</td>
<td>—</td>
</tr>
<tr>
<td>1988</td>
<td>10,400</td>
<td>7,767</td>
<td>—</td>
</tr>
<tr>
<td>1989</td>
<td>11,270</td>
<td>4,911</td>
<td>1.2</td>
</tr>
<tr>
<td>1990</td>
<td>14,499</td>
<td>4,722</td>
<td>—</td>
</tr>
<tr>
<td>1991</td>
<td>12,379</td>
<td>4,256</td>
<td>2</td>
</tr>
<tr>
<td>1992</td>
<td>8,686</td>
<td>4,289</td>
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</tr>
<tr>
<td>1993</td>
<td>9,824</td>
<td>8,070</td>
<td>0.245^3</td>
</tr>
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<tr>
<td>1995</td>
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<td>8,725</td>
<td>8.5^4</td>
</tr>
<tr>
<td>1996</td>
<td>5,407</td>
<td>9,708</td>
<td>2–3^</td>
</tr>
<tr>
<td>1997</td>
<td>4,532</td>
<td>10,079</td>
<td>2–8^</td>
</tr>
<tr>
<td>1998</td>
<td>4,371</td>
<td>9,031</td>
<td>2–4.1^</td>
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<td>1999</td>
<td>3,669</td>
<td>8,402</td>
<td>2–4.1^</td>
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<tr>
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<td>3,053</td>
<td>11,309</td>
<td>2.5–4.1^</td>
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<tr>
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<td>—</td>
<td>2.5–4.1</td>
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<tr>
<td>2006</td>
<td>9,235</td>
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<td>—</td>
<td>3–6^</td>
</tr>
<tr>
<td>2008</td>
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<td>—</td>
<td>3–6^</td>
</tr>
<tr>
<td>2009</td>
<td>4,083</td>
<td>—</td>
<td>3–6^</td>
</tr>
</tbody>
</table>

*Source:* Figures for legal immigrants and emigrants are from the Department of Home Affairs, 1980–2009. Figures for undocumented immigrants are from the *South Africa Yearbook*, except where otherwise indicated.

*Note:* — Not available.

- c. Minister of the Department of Home Affairs, Mangosuthu Buthelezi.
- e. South African Institute of Race Relations.
Appendix 2: Annual Work and Study Permits Issued by South Africa, 1984-2007
(Segatti and Landau 2011, 157)
Appendix 3: Number of Refugees and Asylum Seekers in South Africa, 2001-2009
(Segatti and Landau 2011, 158)

<table>
<thead>
<tr>
<th>Year</th>
<th>Refugees</th>
<th>Asylum seekers</th>
<th>Total</th>
</tr>
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<tbody>
<tr>
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<td>18,605</td>
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<td>23,465</td>
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<td>2003</td>
<td>26,558</td>
<td>84,085</td>
<td>110,643</td>
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<td>27,683</td>
<td>115,224</td>
<td>142,907</td>
</tr>
<tr>
<td>2005</td>
<td>29,714</td>
<td>140,095</td>
<td>169,809</td>
</tr>
<tr>
<td>2006</td>
<td>5,432</td>
<td>44,212</td>
<td>49,644</td>
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<td>2007</td>
<td>9,727</td>
<td>58,584</td>
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<td>3,746</td>
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<td>2009</td>
<td>9,000</td>
<td>364,638</td>
<td>373,638</td>
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Note: Figures for 2001–05 and 2009 are cumulative; figures for 2006–08 are for new permits only.
Appendix 4 South African Attitudes to Rights for Citizens, Migrants and Refugees
(Crush 2008b, 28)

| Table 8: South African Attitudes to Rights for Citizens, Migrants and Refugees |
|---------------------------------|------------------|------------------|------------------|------------------|
|                                 | Always (%) | Sometimes (%) | Never (%)       |                 |
|                                 | 1999      | 2006          | 1999            | 2006            |
| Right to Legal Protection       |           |                |                 |                 |
| Citizens                        | 91        | 94            | 9               | 5               |
| Migrants/Visitors               | 13        | 33            | 43              | 38              |
| Refugees                        | 13        | 24            | 44              | 39              |
| “Illegal Immigrants”            | 8         | 12            | 29              | 21              |
| Right to Police Protection      |           |                |                 |                 |
| Citizens                        | 93        | 94            | 7               | 5               |
| Migrants/Visitors               | 24        | 48            | 53              | 36              |
| Refugees                        | 17        | 27            | 41              | 36              |
| “Illegal Immigrants”            | 11        | 13            | 27              | 21              |
| Right to Access Social Services |           |                |                 |                 |
| (Education, Housing, Healthcare |
| Water)                          |           |                |                 |                 |
| Citizens                        | 96        | 96            | 4               | 3               |
| Migrants/Visitors               | 30        | 49            | 46              | 32              |
| Refugees                        | 17        | 27            | 41              | 34              |
| “Illegal Immigrants”            | 9         | 13            | 28              | 19              |
| Right to AIDS Medications and   |           |                |                 |                 |
| Treatments                      |           |                |                 |                 |
| Citizens                        | 97        | 2             | 2               | 2               |
| Migrants/Visitors               | 65        | 22            | 22              | 13              |
| Refugees                        | 50        | 24            | 24              | 27              |
| “Illegal Immigrants”            | 38        | 19            | 19              | 43              |
Appendix 5: Different Camps of Opinion/Interests in Migration Policy Arena
(Wa Kabwe-Segatti and Landau 2008, 80)
## List of Interviews

<table>
<thead>
<tr>
<th>Name</th>
<th>Location</th>
<th>Date</th>
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<tbody>
<tr>
<td>Ms. Rebecca Chennells (Scalabrini Centre of Cape Town)</td>
<td>Cape Town</td>
<td>August 2, 2011</td>
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<tr>
<td>Ms. Christina Mitchell (South African Media and Gender Institute)</td>
<td>Cape Town</td>
<td>August 4, 2011</td>
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<tr>
<td>Mr. Vincent Williams (Institute for Democracy in Africa/Southern Africa Migration Project)</td>
<td>Cape Town</td>
<td>August 17, 2011</td>
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<tr>
<td>Ms. Micheline Muzaneza (Sonke Gender Justice)</td>
<td>Cape Town</td>
<td>August 23, 2011</td>
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<tr>
<td>Mr. Fwamba Mukole (Cape Town Refugee Centre)</td>
<td>Cape Town</td>
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<td>Ms. Alice Wamundiya (Unity for Tertiary Refugee Students)</td>
<td>Cape Town</td>
<td>September 5, 2011</td>
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<td>Mr. Patrick Kawuma Male (UNHCR)</td>
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<td>September 16, 2011</td>
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<td>Hon. Annette Lovemore, MP (DA)</td>
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<td>September 21, 2011</td>
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<td>Hon. Mario Oriani-Ambrosini, MP (IFP) and Lyndith Waller</td>
<td>Cape Town</td>
<td>October 6, 2011</td>
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<tr>
<td>Mr. David von Burgsdorff (People Against Suffering Oppression and Poverty – PASSOP)</td>
<td>Cape Town</td>
<td>October 17, 2011</td>
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<tr>
<td>Mr. Braam Hanekom (People Against Suffering Oppression and Poverty – PASSOP)</td>
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<td>October 17, 2011</td>
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<td>Hon. Andre Gaum, MP (ANC)</td>
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<td>Hon. Wilmot James, MP (DA)</td>
<td>Cape Town</td>
<td>November 9, 2011</td>
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<tr>
<td>Ms. Miranda Madikane (Scalabrini Centre of Cape Town)</td>
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<tr>
<td>Mr. Ivan Lambinon</td>
<td>Cape Town</td>
<td>November 26, 2011</td>
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<tr>
<td>Mr. Julian Pokroy (written submission)</td>
<td>Pretoria</td>
<td>December 20, 2011</td>
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<td>Hon. Mike Waters, MP (DA)</td>
<td>Cape Town</td>
<td>October 9, 2012</td>
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<td>Date</td>
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<td>Hon. Manny de Freitas, MP (DA)</td>
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<td>Mr. Barry Gilder</td>
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<td>Mr. Awie van der Westhuizen</td>
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<td>Mr. Attie Tredoux</td>
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<td>Mr. Claude Schravesande</td>
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<td>Hon. Graham McIntosh, MP (Congress of the People)</td>
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<td>7 Anonymous Interviews</td>
<td>Cape Town, Johannesburg</td>
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