Embracing concurrent realities: Revisiting the relationship between human rights and conflict resolution
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Citation for published version (APA):
Chapter 5: Two Field-Specific Organisations
After the more abstract review and comparison of the two fields, we now turn to the question of how the relationship between human rights and conflict resolution may play out in practice. This is the focus of this chapter and the next one, which take as their entry point the experiences of a number of actors, some field-specific and others less clearly defined. This chapter focuses on two South African civil society organisations, one from each field: Lawyers for Human Rights (LHR) and the Centre for Conflict Resolution (CCR). Besides illustrating many points made in chapters 2 and 3 about field thinking and practice, the discussion shows how the actual encounter of human rights and conflict resolution brings opportunities and challenges for the organisations and individual practitioners involved. Analytical insights and practical approaches from conflict resolution can be usefully brought to bear on initiatives seeking to enhance human rights, yet also seem to undermine rights protection at times. The reverse applies too, in that human rights can both help and hinder conflict resolution.

The practical examples considered here challenge the notion that 'human rights' and 'conflict resolution' are very separate fields with clear boundaries. In practice, the two endeavours turn out to be closely related. Actors find ways to combine rights advocacy and protection with conflict resolution, but also run into tough questions relating to 'the other field' that warrant engagement. A degree of fluidity can be observed, in that human rights and conflict resolution efforts flow into one another. This appears to be due to the context in which these organisations operate and the nature of their work. It is thus argued that the boundaries between human rights and conflict resolution are far less distinct than has been recognised so far – and as seemingly suggested by the previous chapters. While focusing on the experiences of these two field-specific organisations, examples from elsewhere are drawn upon to illustrate that the permeability of boundaries between the fields – 'crossing over', 'branching out', or 'stumbling into' the other field – may not be confined to these two South African NGOs.

The chapter contains two main sections, one for each organisation. The overall structure for these sections is roughly the same, though they do not wholly mirror one another in substance. This is due to the way in which much of the material discussed here came to my attention (through practice rather than formal research), which shaped later information-gathering. Each section starts with a brief preview of what will be discussed, after which it sets out some historical background to the organisation and the context in which it came to explore and/or grapple with conflict resolution (LHR) or human rights (CCR). The two sections then consider situations I was involved in while working in CCR’s Human Rights and Conflict Management Programme. They subsequently place the discussion in a contemporary context by considering more recent experiences related by interlocutors in interviews conducted for this study. This is followed by a more general discussion on the attention paid to conflict resolution or human rights (or the lack of it). Each section ends with a summary that outlines findings and briefly refers to examples from other contexts to
support certain points. The chapter as a whole concludes with a final section that notes overall insights and reflects on the fluidity between human rights and conflict resolution.

5.1 Lawyers for Human Rights (South Africa)

This section focuses on LHR’s experiences with addressing rights-related conflict in eviction cases, as part of the organisation’s efforts to enhance access to justice for the rural poor in South Africa’s Western Cape Province since the end of apartheid. After providing some background (in 5.1.1), it discusses how LHR staff came to question the use of adversarial human rights tactics tried and tested in the apartheid era, given the tense relationship dynamics in farming communities and the limited prospects of farmworkers if evicted (5.1.2). It explains how LHR sought to enhance the conflict resolution capacity of its staff and partners (paralegals, trade unionists and other activists) in support of its human rights work, yet also found that interest-based approaches are no panacea; at times, the full force of the law and the judicial system would be needed to ensure the protection of rights (5.1.3).

The focus then shifts to a later situation in which LHR did not play a third-party role itself, but acted as legal representative for a group of people in a process involving an external mediator. This raised questions for LHR related to the mediator’s role and approach, the issues prioritised for problem-solving, and the type of outcome resulting from the process (5.1.4). The section then considers the limited use of interest-based methods, despite recognition of their relevance for addressing rights-related conflict amongst rights actors and government (5.1.5). The final sub-section (5.1.6) comments on LHR’s encounters with conflict resolution, and links these to a few other examples of rights NGOs.

It should be noted that ‘conflict resolution’ is mostly equated here with mediation and negotiation, disregarding the field’s broader scope as set out in chapter 3. This is how the LHR actors I engaged with as a practitioner and while writing this study talk about conflict resolution; their understanding is what matters here. Also, this section only focuses on human rights lawyers as human rights practitioners; again, this is a consequence of the real-life example. Finally, it does not review mediation in eviction cases in detail or assess whether mediation lives up to its supposed benefits. Instead, it seeks to show why LHR sought to use conflict resolution and what questions it encountered in that regard.

5.1.1 Background

Lawyers for Human Rights was established in 1979 as an independent non-governmental human rights organisation, in the context of growing opposition by liberal, middle-class South Africans to the apartheid regime. Leading legal scholars and practitioners of the time were involved in its foundation, many of whom would
later fulfil important functions in post-apartheid South Africa. They were concerned about the country’s legal profession being implicated in upholding an illegitimate system. In their view, the law should become relevant for society at large, and should protect everyone, including black people (Pollec6ut 2009, 13-14). The name of the organisation was remarkable in that it referred explicitly to human rights. Earlier in the 1970s, terms like ‘human rights’ and ‘legal aid’ were unacceptable in South Africa, given its restrictive political environment. By 1979, however, “the word ‘human rights’ had entered South African life”, according to John Dugard, a prominent South African human rights lawyer involved in setting up LHR.1

From the outset, LHR sought to fight intolerance and injustice by mobilising lawyers to become involved in human rights activism and public interest litigation. Initially, it operated as a membership organisation, constituting an association of lawyers. They were mostly whites, who were willing to represent individuals accused of politically-related crimes (Handmaker 2009, 157); there were relatively few black lawyers and legal professionals in South Africa at the time.2 The organisation only acquired a secretariat in the late 1980s, after which it evolved into the professional NGO it is today: an organisation that “uses the law as a positive instrument for change and to deepen the democratisation of South African society” and “strives to promote awareness, protection and enforcement of legal and human rights through creation of a human rights culture”.3 A critical part of its work is providing free legal services to “vulnerable, marginalised and indigent individuals and communities, [...] who are victims of unlawful infringements of their Constitutional rights”.4

During the 1980s and the early 1990s, the organisation took practical and legal action to challenge apartheid and support those affected by detention and legislation, such as the Group Areas Act and the pass laws, so as to mitigate the system’s impact.5 It also played an important role in fighting the death penalty and uncovering the regime’s death squads, in line with its guiding principle of “human rights and justice for all”. In the post-1994 period, its focus shifted to enhancing access to justice for the rural poor and other vulnerable and marginalised groups. In 1998, this led to the development of a new project in the Western Cape province, geared towards protecting and

1 Interview, 25 August 2011, The Hague. A year before establishing LHR, its initiators had founded two other organisations focusing on protecting human rights through public interest litigation (the Centre for Applied Legal Studies at the University of Witwatersrand, and the Legal Resources Centre). They had not dared make explicit reference to human rights yet. The country’s first university courses on human rights (taught by Dugard in 1973) were titled ‘aspects of public law’, ‘international law’ and ‘criminal procedure’ to avoid scrutiny and censorship.
2 Ibid. According to Dugard, one of LHR’s first tasks was to establish a black lawyer association.
4 Ibid. LHR set up the first comprehensive paralegal training programme in South Africa. This later became an NGO in its own right (Handmaker 2009, 157).
5 The Group Areas Act (Republic of South Africa, Act 41 of 1950) enforced the segregation of different racial groups into specific areas in urban environments, and restricted ownership and occupation of land to a specific statutory group. The pass laws controlled the movement of black South Africans during apartheid, by requiring all above the age of 16 to carry a pass book everywhere and at all times (Republic of South Africa, Natives (Abolition of Passes and Co-ordination of Documents Act, commonly known as the Pass Laws Act, Act 67 of 1952).
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promoting the rights of rural dwellers and farmworkers, especially those threatened with eviction. To appreciate the significance of this initiative, it is necessary to provide some historical context to the conditions prevailing on South African farms, and in particular in the Western Cape, and to outline the changing legal environment at the time.

The province – the third largest in the country – had long exemplified the country’s severely skewed land ownership. As a result of the 1913 Natives Land Act⁶, which confined 80% of the South African population to 13% of the land, whites owned 87% of the country’s surface area despite making up only 15% of the total population (Sachs 1992). Arable land is scarce in South Africa, constituting just over one-tenth of the total surface area. Much of it is located in the Western Cape, where it is used for large-scale commercial farming, mostly for the production of wine and fruit juice. Unequal power relations and racial paternalism have historically reigned supreme here.

Labour relations on farms were unusual, due to the legacy of a labour tenancy system that, from the late 19th century onwards, had forced a form of contractual servitude on what was previously a squatter peasantry. The family, rather than the male representative, was the unit of production in this system. Over time, a situation had evolved in which the landowner/farmer and farmworkers perceived of themselves as living in a ‘community’, albeit one in which the former controlled virtually every aspect of the latter’s lives: their work and housing, their access to food, water, medical facilities, electricity and education, and the movement and labour of their children and spouses (South African Human Rights Commission n.d., 3-4). This persisted throughout apartheid: the formal labour relations machinery did not include farmworkers and their rights of residence on a farm were not regulated, leaving them with no legal protection.

In the Western Cape, the repercussions of another method of social control exacerbated the vulnerability of farmworkers and their families: the infamous dop or tot system, in which labour was paid in alcohol rather than cash. By the mid-1990s, this was no longer widely practised, yet the resultant alcoholism in farming communities remained. The consequences were many: high rates of violence, child and spousal abuse, malnutrition, tuberculosis, and a prevalence of foetal alcohol syndrome (idem, 58). Social exclusion, marginalisation and alienation marked farmworkers’ daily lives (idem, 3). Poverty and functional illiteracy were extremely common too (Nkuzi Development Association 2005, 10). Overall, farmworkers were at the mercy of landowners. This was reflected in evictions without notice or recourse, frequent assaults or deaths of farmworkers by farmers, systematic denial of access to

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health care, and arbitrary closure of schools located on farms by owners (South African Human Rights Commission n.d., 57-72).

The post-apartheid government made several policy and legislative changes to protect the interests of both farmworkers and farmers, enhance equity, and make the agricultural sector more competitive. It included farmworkers in the Labour Relations Act of 1995, abolished some tax breaks for farmers, and undertook land tenure reform efforts. These sought to clarify, fortify and secure the rights of people living on communal land and farm dwellers, including labour tenants. They were intended to give effect to sections 26(3) and 25(6) of the new 1996 Constitution, which respectively stipulate that no one can be evicted from their home or have their house demolished without a court order, and place a positive obligation on the state to provide for legislation to address the situation.

The Labour Tenants Act (LTA) of 1996 was enacted to help labour tenants to obtain security of tenure and gain ownership of land they occupy. The Extension of Security of Tenure Act (ESTA), promulgated in 1997, sought to regulate the conditions of residence on certain land, including farms, the conditions and circumstances under which the right of persons to reside on land is terminated, and the legal process that the landowner should follow before a farm worker may be evicted. LHR assessed ESTA as “an intricate and complicated piece of legislation” aiming to “avoid the past hardships and injustices that were caused by arbitrary evictions”. It observed that the legislation only provided for long-term security of tenure in some instances, and mostly prescribed “the requirements to be met, the procedures to be followed, and the factors to be considered by the court before granting an eviction order”. Thus, land tenure reform as initiated after 1995 focused on improving conditions of tenure as they existed rather than on transforming them. For some, this ratification of ‘marginal land rights’ effectively legitimised historically oppressive relationships between white owners and black workers (e.g. Mutua 1997, 95).

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7 The use of the past tense in this paragraph is not intended to suggest that these conditions have ceased to exist; they persist to date in many farming communities.

7 Section 26(3) states: “No one may be evicted from their home, or have their house demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary eviction”, Republic of South Africa, Constitution (Act 108 of 1996) (hereafter 1996 Constitution).

9 Section 25(6) states: “A person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled to the extent provided by an Act of Parliament either to tenure which is legally secure or to comparable redress”, 1996 Constitution.


11 Republic of South Africa, Extension of Security of Tenure Act (Act 62 of 1997), preamble. The legislation tries to make a clear distinction between farmworkers and labour tenants, yet “the reality is far less so and the distinction is murky at best” according to the South African Human Rights Commission (n.d., 4).

12 Funding Proposal, SFP, LHR, 1997, p. 3.

13 Ibid.
5.1.2 The Security of Farmworkers’ Project

Despite its limitations, the tenure reform offered LHR the opportunity to enhance access to justice for a particularly vulnerable constituency, in line with its new motto “making rights real”, adopted at the end of 1997. Prior to the promulgation of ESTA, the organisation had already considered addressing issues of farmworkers’ rights and land reform (an early project proposal had suggested focusing on providing legal services to the rural poor in relation to land restitution claims), civil litigation for assaults and deaths of farmworkers by owners, and rights education for farmworkers. The introduction of ESTA shaped LHR’s intervention, prompting a focus on security of tenure. The organisation was well aware that evictions had a ‘devastating impact’ on farmworkers and their families, also because of the major backlog in the province regarding the provision of houses. As the then regional coordinator of LHR, Judith Robb Cohen, puts it,

An eviction for the farm worker is not even a crisis, it's a catastrophe. It impacts [him and his family] in so many ways, particularly in terms of people's economic and social rights. It's literally either you have a roof over your head and food to eat, [or] you're literally on the side of the road.

Another interviewee familiar with the context, Rodney Dreyer, concurs. He mentions that those evicted “would become the people at the traffic lights”, i.e. people begging at intersections. With limited education and no professional experience other than working on farms, farmworkers were hardly able to create “new lives in dignity in relocation settlements” (Nkuzi Development Association 2005, 10).

Hence, soon after ESTA was promulgated, LHR established a Security of Farmworkers Project (SFP) to “assist rural indigent farmworkers and dwellers/occupiers in the Western Cape to enforce their rights in terms of [ESTA] by providing the capacity for activist legal intervention thereby giving effect to these persons’ constitutional rights”. Concentrating on enforcement and advocacy of tenure security rights of farmworkers, LHR started representing individuals facing possible eviction and engaged in litigation if need be. It complemented this with other practices, such as training farmworkers, facilitating networking, disseminating information and offering telephonic advice. The SFP worked closely with other civil society organisations focusing on land issues and the rights of the rural poor, including the paralegal

15 Draft Funding Proposal, LHR, n.d.
18 Interview, Rodney Dreyer, 14 June 2011, Cape Town. Dreyer is a former CCR colleague who later became very involved (on behalf of a conflict resolution consultancy firm) in the establishment of the government’s Land Rights Management Facility in 2008 and trained many of its mediators; see also below at 5.1.5 (and fn. 44).
19 LHR website, op.cit.
movement; paralegals were (and still are) usually the first point of contact for farmworkers faced with evictions.

It rapidly transpired that the context in which the SFP operated was even more volatile than the LHR lawyers had anticipated. Farm owners detested the new legislation, perceiving it as draconian, punitive and burdensome. In their view, it led farmworkers to believe that they were ‘untouchable’ and caused productivity to drop. Agri Wes Cape, the regional chapter of the farmer’s union, declared that it did not support ESTA and that its members would “circumvent the provisions within the boundaries of the law” (South African Human Rights Commission 2003, 61). Union representatives or paralegals from local Advice Offices seeking entry to farms to explain the new legislation to farmworkers were regularly chased off properties, at times with the use of dogs and/or guns. In general, owners were aggressive and verbally abusive towards paralegals and legal representatives acting on behalf of farmworkers.

Tension also arose in relation to the rights of farmworkers laid down in ESTA, such as the right to receive visitors, to family life, and not to be denied access to health or educational services. When trying to exercise any of these rights, farmworkers might experience their electricity or water supply being cut off, a frequent tactic by owners to intimidate workers and get them to vacate their premises. This in itself would amount to an illegal eviction in terms of the legislation. As such, it could be the basis for farmworkers laying criminal charges against the farmer and seeking a civil remedy in terms of a court order to restore the service – which, in turn, would further infuriate owners. Tension between farm owners and farmworkers occasionally erupted into violence, requiring the police or local civil society actors, including LHR lawyers, to intervene to prevent escalation.20

Speaking years later of the kinds of situation experienced, Kamal Makan, who coordinated LHR’s Security of Farmworkers Project from 2001 to 2009, recalls an owner blocking a farmworker from accessing his dwelling by locking it up with a padlock:

Yes, he uses a padlock, that actually did happen! [You must realize] that conflictual context – there’s such one-sided dominance, such an imbalance of power, that [farmworker] was helpless, he was in a state of shock when he [got] back to the house. The farmworker [had been] in his house, and his wife was returning from work. He used to walk to the national road [where she was dropped off] to wait for her and walk back home with her. When they got back to the house, it was padlocked. Within that short time period! It was a helpless situation – he had to sleep at a neighbour’s. I think we had to obtain a court order to restore the house to him.

[There are] other instances... At this farm in Stellenbosch, a colleague and I did not go through the gate but went over the fence [of the farm] to see the client [a farmworker].

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20 Information drawn from discussions at the time with Judith Robb Cohen, LHR regional coordinator and founder-coordinator of the Security of Farmworkers’ Project, personal work notes.
Whilst at [his] dwelling, there we had the owner running down the hill. He was armed. He looked like one of those Butch Cassidy kids. He was very highly strung, that we got onto his property, that this farmworker was seeking assistance. We had to make an exit then, without speaking to the farmworker. We introduced ourselves, and managed to calm him down. But it was a life-threatening situation.21

Ongoing harassment of clients was another regular occurrence:

For example, this one farmworker, he and his wife - an innocent couple - were living on a farm; [they] had rights of residence. Both had lost employment but remained on the farm as they could not find alternative accommodation. The farmer constantly harassed them; his son - also the supervisor on the farm - used to park his car outside their dwelling, rev the car, shoot pellets. I think it was just to instil fear in them. This [farmworker] was a man who couldn't read or write. I guess almost 80% of the people we saw were illiterate, which makes their vulnerability all the greater. [And then the] cutting off of water, electricity as intimidation, to get [people to] vacate, [or] farmers used to complain that they had to pay for the water.22

Intimidation or obstruction was but one factor hindering effective implementation of ESTA. Another was a lack of knowledge and understanding of the new law amongst farmworkers and farm owners. Farmworkers were often unaware of their rights under ESTA and were too afraid to demand their enforcement (South African Human Rights Commission 2003, 60). LHR observed several ‘misconceptions’: for example, farmworkers seldom realised that ESTA did not prohibit or preclude evictions as such, but merely set out the procedures to be followed by a landowner seeking to evict individuals. Many also thought that the legislation granted them ownership of the houses they occupied on farms, rather than residency rights. Meanwhile, owners who had recently acquired their land were often unaware that the rights given to occupiers by the previous owner, passed on to them and hence remained in place, despite the property having changed hands (Lawyers for Human Rights n.d.).

Communication and information dissemination about the legislation were thus of great importance. They were, however, impeded by the high level of polarisation prevailing in the farming context. Interaction with owners was especially problematic; the racism commonly found amongst farm owners quickly turned engagement hostile.23 In addition, paralegals, trade unionists and other grassroots activists – many of whom had a farmworker's background themselves – tended to take a strong, adversarial stance when engaging with prospective, alleged or actual violators of rights. This approach was informed by experiences from the apartheid past, when confrontation had been a dominant way to challenge injustice. Paralegals were also very aware of the system's historical background and the past denial of land rights.

Their adversarialism was reinforced by awareness of the present situation: the tables had turned in South Africa's democratic dispensation. The law now finally offered

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21 Interview, 14 November 2010, through skype.
22 Ibid.
23 Interview, Judith Robb Cohen, 9 June 2011, Cape Town.
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some protection to those who had been disadvantaged for so long.\textsuperscript{24} As a result, many activists were keen to ‘teach a lesson’ to persons who were perceived to deny rights or be insufficiently observant of them. This turned their interactions with owners into potentially explosive situations. At the time, it seemed to me that knowledge of the legislative framework had become a weapon in countering the power imbalance experienced by both activists and their clients alike. Like Vaclav Havel, who had spoken ‘truth to power’ in the 1970s and 1980s during the communist regime in Czechoslovakia, these activists were now speaking ‘law to power’. They were doing ‘politics by other means’, much as law had been used in the struggle against apartheid (Abel 1995).

Yet the LHR staff in the Security of Farmworkers Project started to question whether this adversarial approach truly facilitated effective enforcement of farmworkers’ rights. A harsh confrontation about the illegal eviction of a farmworker between a paralegal from an Advice Office brandishing ESTA and a farmer might well lead to the worker’s reinstatement on the farmer’s land. However, the relationship between the owner and the worker would often deteriorate so badly that their co-existence and cooperation on the farm would be negatively affected. In the end, the worker’s rights would be formally enforced, but his/her living situation might have become untenable, with the owner acting out his resentment in various ways. He would also probably resent the legislation even more, afterwards.\textsuperscript{25}

According to Judith Robb Cohen, who founded the SFP and served as its first coordinator for three years, LHR also realised that “a legal adversarial battle in the court room would not create the solutions you want”.\textsuperscript{26} She reflects that:

It was absolutely clear from the start that [...] all that could be achieved through courts really was time. [The] relationship between the farm owner who had the power and the farmworker would be totally and utterly destroyed. [...] Also, farmers didn’t want to go to court, it just cost too much money. It makes no sense in the South African scenario. The court process just takes up so much time and you can never win. [...] The person is still going to be thrown off the farm. So [it] [was] more constructive to mediate within a human rights framework [when] it was clear that the court would ultimately come to a decision that the person would be evicted. You could achieve far more in securing that person’s rights, if you were to mediate with the landowner – who would ‘buy’ it because it would cost them less money. [...] Both sides could benefit from mediating solutions.

And [...] with the great power discrepancies – farmdwellers weren’t educated and [didn’t have] the social skills to interact and negotiate their departure with the farm owner, and because of the historical legacy it immediately became antagonistic when a farmdweller comes to speak to them. It just goes really really ugly and I think [it gets] very, very damaging in terms of dignity for the farmdweller. So, it would be way better for an external person to come in and to actually start negotiating some of these issues. That’s

\textsuperscript{24} Personal work notes, based on conversations with LHR staff members, June-July 1999, and on interactions with activists from various organisations and Advice Offices during pilot training workshop, 24-26 Aug. 1999.

\textsuperscript{25} Conversation with LHR staff, June-July 1999, also captured in Parlevliet (2002, 27-30).

\textsuperscript{26} Interview, 9 June 2011, Cape Town.
all I did at [LHR], negotiate conflicts between farmers in positions of power and farmworkers where the power imbalance is so great and where the [workers] – when they lose, they lose everything.27

Thus, human rights tactics that had been tried and tested in the apartheid era had limitations in securing sustainable settlements for LHR’s clients that took account of their rights and underlying interests and needs.

5.1.3 Exploring Interest-Based Conflict Resolution

Within a year of the SFP’s establishment, LHR’s Western Cape office approached the Centre for Conflict Resolution (CCR), previously mentioned in the introduction to this study, to explore how it could assist in strengthening the conflict resolution capacity of LHR staff members and its partners. This step, directed at the Centre’s Human Rights and Conflict Management Programme, was facilitated by the fact that the SFP coordinator and I had met before, when studying for a human rights law degree and a peace studies degree respectively at the same university in the United States. We had not kept in touch after graduating and had been surprised to find ourselves in one another’s vicinity some five years later. Realising that we were both heading a new initiative at our respective organisations, and that the SFP’s interest in using alternative methods to enhance rights protection matched ‘my’ programme’s interest in exploring the relationship between human rights and conflict resolution, we seized the opportunity to link our efforts.

Lengthy discussions – on the SFP’s context, work, clients, situations experienced, questions grappled with – led to the design and delivery of a first training workshop on human rights and conflict resolution for a group of people from various paralegal Advice Offices in the province, trade unions, and two other NGOs engaged in land rights issues and legal assistance to farm dwellers, the Legal Resources Centre and the Centre for Legal and Rural Studies. In keeping with the practice in the conflict resolution field, the training focused on developing conflict resolution skills and their application using experiential training methodology.

Participants engaged in role play and other exercises to practice interest-based negotiation, non-threatening communication, and problem-solving in typical conflict settings. Unlike most conflict resolution training however, the training also paid attention to human rights and applicable law. The scenarios used were based on actual evictions encountered by the SFP and its partners in Western Cape province; for example, a new landowner seeking to evict dwellers from a recently purchased farm, or an elderly couple threatened with eviction due to alleged misconduct by their son-in-law.

27 Ibid.
The participants were required to use their knowledge of ESTA to resolve certain substantive legal issues. The debriefing of the exercises focused on how the participants had used conflict resolution skills and applied the law. The participants also re-enacted an eviction-in-progress which, in reality, had led to a terse stand-off between the owner and farmworkers which had required police intervention. This illustrated how a situation can rapidly escalate and served to identify possible de-escalation measures for crisis intervention.\footnote{Role plays, ‘Troubled Son-in-Law,’ ‘The New Farmer,’ and case study ‘Eviction-In-Progress,’ Human Rights and Conflict Management Programme and Security of Farmworkers Project, CCR/LHR, August 1999.} Feedback at the end of the course reflected what the participants deemed most instructive: "I learned that there are different ways to handle conflict", "that it is not about settling scores or getting even with the farmer but about our clients", "that you do not have to reciprocate the farmer’s anger and let your emotions take over". One person noted that "we deal with many of these issues on a daily basis, but I was not aware of the skills and techniques to use. [...] I am now more conscious of taking certain steps", while another indicated that "the workshop was really good in boosting my self-esteem and validating my experiences". Some commented on the novel experience of ‘standing in the owner’s shoes’ when participating in role play; they had never before considered the owner’s perspective and interests in the situations they encountered.\footnote{Remarks from participants drawn from evaluation sheets completed at the end of the training, in HRCMP, 1999, Workshop Report. Pilot, Human Rights and Conflict Management with LHR, 24-26 August 1999. Cape Town: CCR, 9. See also Lawyers for Human Rights (1999, 1)}

Afterwards, SFP coordinator Robb Cohen assessed that the event had been a ‘mind blowing experience’ for most people, showing an alternative approach to conflict and challenging activists to engage with farm owners rather than just fight them. An independent evaluation conducted a few years later found that many former participants still felt that they had derived lasting benefit and had adjusted their approach to farmers accordingly (Roux 2002). The collaboration between LHR and CCR led to more joint training workshops for a similar audience; it also attracted the interest of the provincial Department of Land Affairs. Concerned with the limited number of lawyers willing to take on ESTA cases, the Department sought to expand the mediation capacity available in the province.\footnote{See HRCMP, 2000, Report. Training Session on Alternative Dispute Resolution, Department of Land Affairs, Western Cape, 29 January 2000. Cape Town: CCR. The Department was renamed the Department of Rural Development and Land Affairs in 2009 and is referred to as such below (see 5.1.5).}

LHR’s recognition of the value of interest- and dialogue-based methods for addressing rights-related conflicts did not make litigation irrelevant, however. This became clear when Robb Cohen contacted me for advice on an urgent matter. She was due to appear in court soon after concerning an application she had brought against an owner who had destroyed the houses of seven families living on his farm. She was acting on the families’ behalf. The presiding judge had contacted her to indicate that the owner had requested that the case be mediated instead. She now had to submit a report to the court setting out whether she accepted this request and the grounds for
her decision. She considered mediation completely inappropriate but did not quite know how to present her argument. Could CCR assist? I asked her to explain why she believed mediation was out of the question. Could she tell me more about the situation?

Robb Cohen proceeded to express her disbelief at the audacity of the owner in proposing mediation; for her, this was merely a stalling tactic. The owner had not been available to meet with her despite several attempts on her part to do so. He and his attorney had delayed responding to her application for more than a week, during which the families had been without shelter. Such behaviour did not suggest any concern for her clients’ wellbeing – not to mention the actual way in which he had demolished their housing. Without any notice, he had driven over them with a truck, dumping the rubble and any remaining possessions outside the grounds of his farm, on the side of the road. The families’ belongings had all been destroyed. Fortunately no one had been in the residences at the time, as they would certainly have been seriously injured. She said she took this case very seriously, all the more so because it was the third case in a few months in which a landowner had destroyed the housing of people legally residing on his land. If this practice were not explicitly prohibited through a ruling proclaiming its illegality, she feared that other owners would follow suit.

Her exposé allowed us to identify factors informing her belief about the inapplicability of mediation in this matter. One was the gravity of the offence (the destruction unleashed on the residents’ housing and belongings and the disregard for their dignity). Another was the nature of mediation as a voluntary process of joint problem-solving between conflicting parties that is geared towards relationship-building; in this case there was reasonable doubt about the farmer’s commitment to retain a relationship with the families and find a mutually acceptable solution (reflected in the aggressive manner in which people had been evicted and the owner’s lack of response to the efforts of the families’ legal representative to engage). Then there was a need to protect the weaker party (given the serious power imbalance between the parties and the farmer’s intimidation of the families, and the slim prospect of the latter being able to negotiate freely with the former in the context of mediation, even if assisted by an independent third party). Finally, it was necessary to establish a precedent to prevent similar infractions in future (a mediated agreement would carry little or no weight beyond this case and hence would not deter other owners in the region). These became the core of her submission to court.

The discussion made abundantly clear that interest-based approaches were at times far less suitable than rights-based ones involving the use of the judicial system and formal standards. While interest-based methods expanded the range of tactics at LHR’s disposal and met its desire to take existing conflict dynamics and resource

31 Based on conversation with Judith Robb Cohen and notes taken at the time; written up as a training exercise, following verification with Robb Cohen and published in Parlevliet (2002, 46).
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constraints into account, they were no panacea. At times, the full force of the law and the judicial system would be needed to ensure access to rights and prevent future rights violations; in certain instances interest-based processes ran the risk of undermining rights protection in the short and long term. In these instances, the benefits of litigation – protecting victims, securing redress, signalling the wrongfulness of a certain practice – would outweigh the drawbacks of this adversarial approach, in terms of increased tension, resources required, etc.

Overall, this interaction exposed the significance of grasping the respective strengths and limitations of the various methods, and of being able to assess what approach would be most suitable given the conditions at hand. In this instance, the pooling of our respective insights and experience paid off: the judge dismissed the landowner’s request for mediation, the case went ahead, and LHR obtained redress for the families and a precedent. Also, no further evictions of this kind seemed to take place in the months that followed.

5.1.4 Hangberg: A Complex Case Raising Questions

A more recent case demonstrating the interplay between human rights and conflict resolution, as experienced by LHR, sheds further light on challenges and opportunities that may arise in this regard. In this instance, LHR did not act as the intermediary, but represented a party to a conflict involving another mediator. According to Sheldon Magardie, who coordinated LHR’s Security of Farmworkers Project between 2009 and 2011, such a situation may well raise “all kind of complexities” that he and colleagues “are really grappling with”.32

The case in point is an urban eviction in a town adjacent to Cape Town. It concerns a piece of land where artisans and fishermen have historically settled, on a mountain slope overlooking the pristine bay of the town. It turned into “a very, very violent conflict” between the city’s law enforcement authorities and the people who had long resided on Hangberg mountain.33 The conflict erupted when the land – formally owned by the South African National Parks Authority – was sold and the city’s anti-land invasion unit sought to demolish structures erected by those living there. Faced with fierce resistance, the police used tear gas, water cannon and rubber bullets to disperse and subdue people. The city brought an application in the Cape Town High Court to evict those living on the land and to interdict them from occupying the land. When the case went to court, the parties agreed to engage through mediation, leading to the appointment of a mediator with the parties’ consent.

32 Interview, 14 June 2011, Stellenbosch.
33 Interview, Sheldon Magardie, 14 June 2011, Stellenbosch. See also for example, Glynnis Underhill, “Cape Town Riot Tactics Under Fire”, Mail and Guardian, 8 October 2010, and “Metro Cops Injured in Hout Bay Violence”, Mail and Guardian, 21 September 2010; available through http://www.mg.co.za.
For Magardie, who has long worked as a human rights lawyer, the mediation process – facilitated by a long-term conflict resolution practitioner – raised questions about the approach and role of the mediator, the issues prioritised for negotiation and problem-solving, and the extent to which the process recognizes the legal framework. His comments reveal the ‘complexities’ he is struggling with and also speak to his perception of conflict resolution:

We’re acting on behalf of quite substantial group of people. [...] Our clients have difficulties with the general approach to the mediation in these circumstances. [...] [The mediator] may have good reasons for this, but – his approach seems to be that he looks at the issue as a whole, to look at issues around development of the community, allocation of housing, etc. But the problem is, the only issue that is before the court is a case that will effectively make people homeless. Now there could be other aspects that are related to that, the underlying problem of homelessness and lack of access to adequate housing is in many senses linked to issues around resources, political will and so forth, but the problem that we have is how does a mediation operate in that kind of contested environment? [...] An important question that it raises, not just in the context of this case - it’s around the role of mediation in a legal setting, where there is a dispute. The fact that there is mediation does not make the dispute go away. There’s often an assumption that mediation is for parties to sit and be nice to each other and, you know, try and resolve the problems, but that’s not the point. [...] Where mediation occurs in an adversarial setting, like litigation, my view would be that the rules of that process don’t necessarily completely fall away, because then it becomes a free for all, it becomes a meeting and you know – what happens to meetings that are run by committees, nothing actually ever gets resolved.  

Without putting it in such terms, Magardie points to the risk of ‘process’ becoming a pacifier. He further questions the ‘big picture’ focus of conflict resolution, in the context of which an effort is made to examine underlying conditions. This reflects a difference noted earlier, between the human rights’ focus on examining and redressing specific rights violations and conflict resolution’s tendency to consider situations in context and probe underlying conditions. In this regard, he is concerned about the kind of outcome that may result from this process:  

You know, [...] the Terms [of Reference] get so broad, when one talks about issues of housing, development, and community upliftment and so forth –maybe it’s just that I’m looking at it from a specific legal perspective – the concern that would arise in those circumstances [is that] it’s in the interest of one group to make the Terms so wide that they can make promises, or undertakings that are effectively wide enough to operate in their favour. To say, “We are promising that we will focus on this community by looking at issues of development in the long term”, and then people that are sitting there are thinking “Wonderful, we’ve been left off the radar for so long and you now want to focus on us” – but what does it actually mean, what exactly do you mean?! Because – there’s 300 people. I want to know, does it mean you’re going to send 50 officials in two months’

34 Interview, 14 June 2011, Stellenbosch.
35 See chapter 4 (notably 4.1.3).
Magardie thus doubts whether the outcome will be sufficiently tangible. He fears that the process may enable those in positions of authority to evade responsibility for taking concrete and swift measures to ensure the rights of those victimised. He also questions whose role it is to determine which issues are to be dealt with, and the weight accorded to the voices of the people most directly affected:

My concern in these circumstances would be that – to what extent do the Terms of Reference of a mediation go into issues that are beyond the dispute of the parties? To what extent is it a role of the mediator to identify what he determines are the underlying issues - that’s the thing one must grapple with. I think when you’re going into that terrain, you’re identifying what you think is important; then if we come to the meeting and my client says or I say “I don’t agree that that is important” and then it becomes an issue between us and the mediator. Because we would then play a legal role and advise our clients – “This is not working in your interests, they haven’t spoken about how this issue is – what is in your interests, my role is to keep you in your house”. Yes, [my clients] may have concerns around the fact that there’s not enough schools in the area, not enough traffic signs – but what they’re coming to us [for], is to say “They’re trying to kick me out of my house, I’ve been on the waiting list [for housing] for ten years’, and our role would be to defend their rights in those circumstances, so I think – there will be that contestation, what will be in the interests of specific parties.

From a human rights perspective, various concerns are at stake here, including the right to an adequate standard of living, to a fair administration of justice, and to redress. The dignity of prospective evictees and their participation in decisions affecting their lives matter too. So does the degree of compliance by authorities with their legal obligations, and the extent to which they are held accountable. For Magardie, it is doubtful whether this mediation can address such concerns adequately. His account also speaks to the tension related to prioritisation, in terms of a concrete problem to be addressed in the here and now and the larger, structural conditions in which it is embedded, which require longer-term action.

However, while being concerned about what it means to mediate complex rights-related cases in a legal framework, Magardie emphasises that he is not opposed to mediation as such. He notes in fact that he is “looking at it in a number of cases”. In fact, he is:

Starting to seriously question whether [litigation] actually resolves anything. Because the reality is that in most of these cases [of farmworkers that come to our office], there is no actual legal defence. [...] These cases boil down to a question of [finding] alternative accommodation [for those who will be evicted.] With the general ESTA eviction case, where one is unable to establish that there is sufficient defence to the actual case – if you look at the jurisprudence of the Land Claims Court for example, in most of the cases where eviction orders are dismissed, it would be for some kind of technical problem

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36 Interview, 14 June 2011, Stellenbosch.
37 Interview, Sheldon Magardie, 14 June 2011, Stellenbosch.
with the papers. And all that then happens is that [those seeking eviction] bring it again. 38

Resource considerations are an important factor too:

I've got one matter – we've had protracted litigation for the last two weeks, involving interdicts to stop the demolition of structures on land where a group of small-scale farmers are farming vacant state land. They've been farming there for over ten years. The Department now wants to use the land for something else, and [has] been increasingly pressurizing our clients and the operations there. We had to bring an urgent application to interdict them from demolishing structures. They then brought an application to stop us from developing further structures on the land. It looks like we'll have to bring another application to stop them from putting the housing development on the site without consulting with us. So – just from a resource point of view, obviously, that [is] an important consideration. 39

This echoes Robb Cohen's comments (in 5.1.2.) on the limitations of litigation in eviction cases. Magardie also worries that litigating such cases "effectively [absolves] the state from any responsibility regarding the underlying, real problem with land reform in this country", relating to people living in insecure tenure and the availability of alternative accommodation. He explains that:

What happens in litigation, [is that] it becomes [a matter between] the applicant, the respondent – lawyers arguing over something. Out of the picture are the Departments that have a statutory responsibility for ensuring security of tenure, like the Department of Rural Development and Land Reform, the municipalities – they are excluded in most cases from that process. [...] In balancing [the rights of the owner and the worker], the courts have found in favour of the owner of the land, [saying] that it is not the responsibility of the private landowner to provide housing. 40

In his view, this might be different in a negotiation or mediation process in which all three parties – the farm owner, the worker and public authorities – jointly seek a solution when a worker is facing eviction; he indicated that he had some good experiences with this. 41 This is interesting given his earlier reservations about mediation in the Hangberg case in terms of potentially allowing authorities to defer taking remedial action by putting matters into a (long) dialogue process. The seeming contradiction is probably explained by the scope of that case and the extent to which broader conditions of deprivation are meant to be addressed: doing joint problem-solving to find alternative accommodation for one or a few families is different from doing so for hundreds of families, and is easier than delivering on broader development issues.

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38 Ibid. He notes that approximately 75% of the eviction orders sought by farm owners are granted by the Land Claims Court. This means that most evictions go ahead (interview, 16 November 2010, through skype).
39 Ibid.
40 Ibid.
41 Ibid; Magardie also made this point in an earlier interview, 16 November 2010, through skype.
Thus, this human rights practitioner recognises various reasons for using (dialogue- and interest-based) conflict resolution to address rights-related cases, while realising that doing so also raises challenging questions. For him, the *sine qua non* of effective and legitimate conflict resolution in such cases, is that:

> The whole mediation process must take account of the whole underlying legal framework. It requires mediators with the skills and background knowledge on what the legal position would be, and what are the legal issues that arise in these types of matters. In that scenario I think it can work.42

Thus, conflict resolution cannot escape ‘the shadow of the law’ when conflict parties choose mediation to address the issues between them (Kocken 2011, 242; Mnookin and Kornhauser 1979). Put differently, law and rights set the parameters for addressing conflict (Parlevliet 2002, 24).

### 5.1.5 Use of Mediation and Negotiation

While recognising the relevance of mediation and negotiation in facilitating access to economic and social rights, interviewees observe that such methods have been underutilised in handling eviction cases. ESTA provides for both litigation and alternative dispute resolution (ADR, the legal term for interest-based dispute settlement involving a third party), yet Makan refers to its ADR provisions as “a waste of paper”, and Magardie considers these methods “the orphans in the tools”.43 This section sheds some light on factors contributing to this underutilisation.

The limited use of conflict resolution methods seems to have partly have been a matter of resources, both human and financial. A pool of mediators was long lacking: the government did not establish a Land Rights Management Facility to provide legal and mediation services to farm dwellers until 2008.44 Also, district offices of the Department of Land Reform and Rural Development used to have a budget only for legal services, not for conflict resolution services.45

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42 Interview, 14 June 2011, Stellenbosch.
43 Interviews, respectively 16 November 2010 and 14 November 2010, both through skype. The legal description of interest-based methods as ‘alternative’ dispute resolution reflects that in law, dispute settlement through application of normative standards and judicial mechanisms (i.e. what the conflict resolution field refers to as ‘rights-based methods’) is considered the ‘normal’ or ‘standard’ method. (In the conflict resolution field, interest-based approaches are the rule rather than the exception; as such, the term ‘alternative’ does not apply there.)
44 Interview, Sheldon Magardie, 16 November 2010, through skype. Between 1995 and 2000, a National Land Reform Mediation and Arbitration Panel existed (see Bosch 2002) but there was no mechanism after that. The 2008 establishment of the Land Rights Management Facility (by the Department of Land Reform and Rural Development and the Department of Justice) was due to a Land Claims Court decision in 2001, providing that indigent ESTA occupiers (and labour tenants) facing eviction proceedings are entitled to legal representation at the state’s expense; see Hall (2003), Lahiff (2008), Land Claims Court, *Nkuzi Development Association v. Government of the Republic of South Africa and Another*, LCC 10/01, 6 July 2001.
45 Interview, Rodney Dreyer, 14 June 2011, Cape Town.
Meanwhile, a limited understanding of conflict resolution and questions about its applicability in a context defined by law and rights, also seems to have played a role. Magardie argues, for example, that “ADR and mediation very much depend on what the conflict is about, if it’s not a rights-based discussion. Interest-based disputes can be resolved by mediation, but rights disputes are very often to be resolved by arbitration and the courts”\(^{46}\). Yet in reality, rights and interests are intertwined, in that rights are “an instrument of individual and collective struggle to protect core interests” (Osaghae 1996, 172; Parlevliet 2002). Conflicts are seldom about one or the other; the notions ‘rights-based’ and ‘interest-based’ refer to approaches for resolving conflicts, not to the issues at stake between the parties. Magardie’s comment seems to imply that mediation may be ruled out on the basis of mistaken assumptions about the process.

Conflict resolution practitioner Rodney Dreyer, who helped to form and train the new Facility’s Mediation Panel and served as its coordinator for some time, asserts that litigation was long the standard in handling evictions, because such cases relate to law:

> Before 2008, most of the eviction cases were dealt with in court, the thinking here is – because it’s an Act promulgated in Parliament, the only way to deal with an Act and its regulations is in court. Many cases [still] go straight to litigation, because that was the process, the action that existed before. Even dwellers went to seek lawyers.\(^{47}\)

According to him, conflict resolution practitioners themselves grappled with questions about the applicability of mediation, especially when the outcome would disadvantage the weaker party (in full compliance with the law):

> Even us as practitioners have this tension between the law and ADR – because the challenge we have, when we say we go in there to provide a mediation service, and the outcome is that the farm dweller has to leave the farm, are we not assisting the perpetrator – the farm owner – to be successful in his attempts to evict? So confidence in dialogue, problem-solving, mediation, this kind of stuff, […] was very low, amongst parties but also amongst us as practitioners. Now, what we’ve come to terms with, is that it’s not an either/or, it’s a both/and. It’s not either you stay or you leave – both scenarios are acceptable, [and] supported by the legal framework that is ESTA. What’s happened in many cases, in the options generations stage, there are a few options, options relating to law. All of this is described in law [and] policy documents.\(^{48}\)

In other words, a process of learning was required, and of proving ‘that it can work’:

> Even those who wrote the Act weren’t sufficiently confident that within that framework mediation can be successful. As the senior practitioner, I had to convince both the [mediation] company I was working with and [the Department] that mediation is an appropriate strategy. Initially, I had to do all of the difficult cases in all of the provinces, so that the process – which is firstly a theoretical process, but also something that

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\(^{46}\) Interview, Sheldon Magardie, 16 November 2010, through skype.

\(^{47}\) Interview, 14 June 2011, Cape Town. Dreyer worked at the Centre for Conflict Resolution as the manager of its Mediation and Training Services Project in the late 1990s and early 2000s.

\(^{48}\) Ibid.
worked in practice, with taxis and housing, and human rights, it worked for us, right? – I had to convince the company and the client that it can work.49

An integral part of that learning process involved becoming familiar with the legal framework, according to Dreyer. He notes that:

I needed to familiarize myself, even more than that, I had to know and understand the rights framework – I needed to find the link between conflict resolution and the rights framework. All mediators [on the panel] needed to understand the rights framework and that the rights framework would sufficiently inform the conflict resolution intervention, the design of the conflict resolution intervention.50

With this, he echoes Magardie’s concern that the rights standards – the ‘rules’ – should not fall away, and that conflict resolution efforts must take account of the legal framework. In fact, he mentions that he now recognises and values the rights framework as a ‘tool’ in handling eviction cases.51 He thus confirms that mediators “who are good at mediation but who fall short” in areas such as applicable law and policy or understanding implementation difficulties, are problematic (Bosch 2002, 9). Nevertheless, Dreyer warns that lawyers may not completely understand what mediation actually entails:

The interesting thing is, lawyers also define the work they do as being mediation. So [say] I’m the lawyer of this group of people, and I’d take instructions from them and then I’d give them some options, from a legal perspective. You’re the lawyer from that group, take instruction, and so on. And then I will come to you as the lawyer, and I’ll say, “Here’s a couple of options, and what you think would best suit your client, have you checked out any options with your client?” So they’d meet on the steps of the High Court, or the magistrate’s court and have this conversation. They’d agree on two options, get a court date and put the two options before the magistrate or judge. They then say “That’s mediation”. Obviously, I have major process problems with that. I argue and debate it with these lawyers – without any success though, haha – just to get the word out there.52

Thus, as mediators without legal knowledge are found wanting, so too are lawyers that fail to grasp mediation as a process in which the parties come up with their own solutions through interest-based negotiation, with the assistance of a third party.

5.1.6 In Sum

This section has discussed how and why LHR sought to use conflict resolution methods to ease its human rights work. It has further looked at LHR engaging with conflict resolution in another way, acting as legal representative in a case mediated by

49 Ibid. Dreyer’s reference to ‘taxis, housing, human rights’ relate to interventions he was involved in when working at CCR. From the late 1980s onwards, taxi associations and individual minibus drivers fought out violent turf wars. In 1991, CCR’s Facilitation and Mediation Services Project successfully mediated between two warring taxi associations in Cape Town (see Centre for Conflict Resolution, 2009, Forty Years of Peacebuilding at http://www.ccr.org.za/index.php/about/history?tmpl=component&print=1, hereafter CCR, Forty Years).
50 Ibid. Emphasis as spoken.
51 Ibid. See also further below at 5.2.5.
52 Ibid.
an external third party. In doing so, the discussion has also highlighted the extent to which this human rights NGO has encountered and dealt with conflict on an ongoing basis. This seems due to the context in which LHR has operated and to the nature of its work, in which conflict – not necessarily of the violent kind – has been omnipresent. It was noted that LHR’s Security of Farmworkers Project was founded in a setting marked by severe power imbalances, inequity and racial paternalism, which became more polarised as the political and legal environment changed. A high degree of structural and cultural violence existed, which provided fertile ground for the outbreak of direct violence. This came to pass through assaults, destruction of dwellings, and other rights abuses inflicted on farmworkers.\footnote{See chapter 3 (section 3.2), for an explanation of the distinction between structural, cultural and direct violence.}

The prevalence of conflict also seems related to the nature of LHR’s work: the discussion reflects that protecting and promoting human rights, especially to benefit persons who have been marginalised, can generate conflict in itself by challenging the status quo. As Robb Cohen says, “claiming and asserting human rights inherently gives rise to conflict. It’s inherently connected in the work you do. It cannot be avoided; you’re constantly using conflict resolution skills whether you realise it or not. The two are side by side”.\footnote{Interview, 9 June 2011, Cape Town.} For Magardie, human rights work and dealing with conflict are closely related, since different rights must be balanced against one another: “On the one hand, you have the right to security of tenure, on the other, the property rights of the owner. Whose rights trump the other? That’s a matter of managing conflict”.\footnote{Interview, Sheldon Magardie, 16 November 2010, through skype.}

The experience of LHR, in terms of continually encountering and addressing conflict while working on human rights, is not unique; something similar has been observed in the case of other human rights organisations. For example, a study of a dedicated land rights NGO in South Africa’s northernmost province, the Nkuzi Development Association, finds that:

Nkuzi’s work is strongly influenced by the large extent to which the organisation is confronted with power inequalities and conflict. [...] Negotiation and mediation in conflicts form a large part of [its] work. [...] The organisation tries to reduce the acute situations that give rise to conflict and to prevent and resolve conflict and ensure peace on the long term. [...] In practice, conflict, even if in a ‘softer’ version, plays such a large role in Nkuzi’s life that it cannot be ignored (Winnepeninckx 2005, 103-104, translated from Dutch).\footnote{Winnepeninckx speaks of ‘conflict in a “softer version”’ (quotation marks in original) to reflect that the conflicts encountered by the organisation are not large-scale, violent land-related conflicts (2005, 104).}

Hence, “Nkuzi occupies a permanent position of intermediary, between different individuals/ organisations/ institutions in conflict” (ibid). The publication speaks of the organisation having a “multiple mediator’s identity” because it mediates between so many different parties (ibid).
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The Nepali human rights NGO Informal Sector Service Centre (INSEC), constitutes another case in point. During Nepal’s 10-year civil war, INSEC’s fieldworkers were frequently called on to serve an explicit conflict resolution function due to the organisation’s credibility. Wearing blue vests marked ‘human rights defender’ in Nepali and English, they intervened in local stand-offs between the security forces and Maoist rebels to protect village populations, negotiated the release of persons who had been abducted, and organised peace rallies.\(^{57}\) One observer notes that “they were the mediators, the equivalent of [South Africa’s] local peace committee facilitators”,\(^ {58}\) while another recalls “they were constantly used to negotiate, to act as go-betweens”.\(^ {59}\) The Burundian human rights NGO League Iteka was also called on to intervene in conflict situations – so much so in fact that, like LHR, the organisation decided to seek conflict resolution training for its staff:

The need was very clear to them. Much of their work is conducted in polarised environments. They often need to negotiate access to political prisoners or sites where gross human rights violations were alleged to have been committed. They also facilitate meetings in communities throughout the country where atrocities have occurred and people are still coming to terms with loss, anger and fear. The government [also] asked them to intervene in a labour dispute between [itself] and the teacher’s union [...]. To perform this work effectively, Ligue Iteka recognised that they needed a better understanding of the theory and practice of conflict resolution. [...] Iteka felt that [such] understanding [...] would provide a much-needed service to the communities in which they work and it would promote their vision of human rights (Arnold 1998a, 2).

These examples are not to say that encountering conflict as a human rights actor is necessarily the same as actually doing conflict resolution; the two cannot be conflated as a matter of course.

Nevertheless, the above highlights that experiencing the former may well lead rights actors to become involved in the latter. Whether by choice or inadvertently, human rights actors may end up engaging in conflict resolution in terms of really trying to impact on existing conflict dynamics while working on human rights, and/or in trying to apply conflict resolution principles and methods, such as serving as a third party in interest-based problem-solving. (Whether they then explicitly label such activities ‘conflict resolution’, is a different matter and of less importance here).\(^{60}\) In any event,

\(^{57}\) Conversation with Bhola Mahat, INSEC regional manager, Mid-Western Development Region, Nepalgunj, November 2006; followed up through email correspondence September/October 2012, translated by Mukunda Kattel. It is worth noting that the Maoist insurgency started in this region in 1996. Also conversation with Subodh Pyakurel, one of the founders of INSEC and Board member of INSEC at the time, Kathmandu, December 2006.

\(^{58}\) Interview, Andries Odendaal, 9 June 2011. Odendaal is a South African conflict resolution practitioner – and former CCR colleague – who spent two weeks in Nepal as a consultant when the war was still ongoing, in 2005. In the early 1990s, he had worked with local peace committees in the Western Cape (see fn. 72 below).

\(^{59}\) Interview, Ingrid Massage, 11 November 2011, through skype. Between November 2005 and September 2006, Massage was the deputy chief of the protection division of the UN Office of the High Commissioner for Human Rights in Nepal.

\(^{60}\) INSEC initially did not ‘label’ its fieldworkers’ third-party intervention activities in any particular way, but started referring to them as ‘peacebuilding’ as time went on. Correspondence with Bhola Mahat, translated by
it seems appropriate to speak of LHR in such terms, as it sought to consider the wider context in which rights were to come alive (including relationship concerns), looked for solutions that would meet parties’ underlying interests, and facilitated dialogue and joint problem-solving to come to outcomes acceptable to all involved.

The above also highlights that a human rights organisation can benefit from exposure to the conflict resolution field. Conflict resolution presents certain opportunities to human rights actors; its insights and approaches can be usefully brought to bear on their efforts to enhance respect for human rights. In particular, interest-based methods like negotiation and mediation can serve as an alternative to litigation when addressing rights-related conflicts (Parlevliet 2002, 27-30). The LHR discussion suggests that this is especially relevant when there are serious resource or capacity constraints that limit the protection of rights through the judicial system, or when the rights of different parties need to be balanced against one another. Conflict resolution methods can then assist in arriving at solutions that uphold the rights of different parties and meet their underlying interests, through processes that may be less costly in terms of time, money and damage to relationships – and which might even be empowering or transformative by allowing parties to participate in problem-solving and by changing established patterns of interaction (e.g. Lederach and Thapa 2012).

Yet conflict resolution also raises challenges for human rights actors and human rights practice. For one, interest-based methods are no panacea for handling conflicts over rights issues, particularly when it comes to serious rights abuses, the need to establish a precedent and/or to protect a weaker party (e.g. Kocken 2011; Nader 1991). This relates to the earlier discussion on the tension in conflict resolution about dealing with power asymmetry. The ‘big picture’ focus of conflict resolution may (seem to) come at the expense of settling the concrete issue for which a remedy is sought. Other challenges brought to the fore relate to the question of what issues are prioritised for problem-solving (and who decides on that), the weight accorded to victims’ voices and preferences, and the risk that conflict resolution may lead to a prolonged process of dialogue without a tangible outcome. Finally, how much space and weight is afforded to formal rights standards and the legal framework, is a pressing question too that arises from a human rights perspective when encountering conflict resolution.

As to the last aspect, this section also speaks to the limitations of law and legal approaches when it comes to safeguarding human rights. As two former LHR practitioners noted, the legal circumstances of eviction cases were often such that an eviction was inevitable. Thus, a legal approach to rights (Chong 2010) does not necessarily result in an outcome that is desirable from a moral perspective, i.e.

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Mukunda Kattel, September/October 2012. The use of the term was probably due to developments in the peace process and a growing ‘peacebuilding’ discourse in the country.

61 See chapter 3 (notably 3.5.3).
protection of the weaker party or rectification of past injustices. Also relevant here is the fact that in most social conflicts, the claims of opposing sides can be framed as rights claims, yet there is usually no technical (legal) way of assessing the relative weight of the different interests involved. Resolving rights-conflict thus “presumes a place ‘beyond’ rights, [that] allows the limitation of the scope of the claimed rights” in light of certain public values and modes of human conduct and interaction (Koskenniemi 2011, 144, 159).

These concluding reflections highlight that no one approach to conflict – whether rights-based or interest-based – is automatically better or worse. Litigation and mediation are options on a spectrum of approaches to resolving rights-related conflict that all have strengths and flaws – much like the fields of human rights and conflict resolution do. In each case, an assessment must be made to determine which is most appropriate. This requires a nuanced grasp of the various approaches, which is important for human rights and conflict resolution practitioners alike.

5.2 The Centre for Conflict Resolution (South Africa)

This section focuses on the experiences of CCR and conflict resolution practitioners in engaging with human rights in various conflict situations. It first provides some background to the organisation (in 5.2.1) and explains that its leadership and practitioners, while not neutral on issues of peace and justice, perceived of justice primarily in moral, rather than legal, terms (5.2.2). It then discusses how practitioners found themselves facing human rights questions and actors in different instances of xenophobic violence in Cape Town. In 5.2.3, it focuses on the situation briefly set out at the beginning of this book, in which South African residents from two informal settlements forcefully chased out foreign nationals living there.

The use of rights language turned out to be particularly contentious between the parties, causing the practitioners involved in addressing the situation to wonder how to deal with this issue. Their approach to this intervention is set out, as well as doubts that emerged later as to whether rights aspects were adequately taken into account. 5.2.4 considers the involvement of a group of conflict resolution practitioners in handling a later bout of much more widespread xenophobic violence, in 2008. This reveals that many were not particularly attuned to human rights concerns arising in this context, and became frustrated with the adversarial advocacy encountered from human rights actors. Subsequently, in 5.2.5, the section looks further into the tendency to overlook the human rights aspects of conflict situations, which may well result from the conflict resolution field’s frames, as set out in chapter 3. Yet it also appears that practitioners who have had substantial exposure to or engagement with human rights standards and actors may come to appreciate human rights as an asset

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62 See chapter 2 (notably 2.5.3).
63 See also Gasper (2007, 15) and Uvin (2004, 186) on conflicts of rights; both assert that the human rights field has traditionally been reluctant to address this issue, not least in the realm of socioeconomic rights.
to their work, rather than a liability. The section concludes with a summary of findings (5.2.6).

5.2.1 Background

The Centre for Conflict Resolution (CCR), an independent NGO affiliated with the University of Cape Town, was established in 1968 to conduct research and education on race and language group relations. While initially intended to focus on relations between English and Afrikaans language groups and between whites and ‘coloureds’, it soon became concerned with interracial contact in South Africa more generally, seeking to contribute to understanding and improved relations among members of different population groups. The founding director, H.W. van der Merwe, crossed several boundaries in his personal life: descended from a traditional Afrikaner family and raised in a rural conservative environment, he became a Calvinist dissident and academic and gradually developed into an anti-apartheid activist and Quaker peacemaker (Mandela 2000; Van der Merwe 2000).

During the 1970s and the 1980s, the Centre pioneered conflict resolution in South Africa (Chan, Jabri, and Du Pisani 1993). It undertook research in peace and conflict studies, invited British and American scholars to conduct workshops (in conflict resolution, conflict analysis, mediation and negotiation), and provided third-party intervention, facilitating interaction between different political and community groups on request (Van der Merwe 2000). Conflict resolution was a contentious endeavour in South Africa’s polarised environment at that time. According to Taylor and others, “a commitment to peace and non-violence was widely interpreted to mean either acquiescence to apartheid, or a denial of the legitimacy of armed struggle as a means of resistance to the apartheid regime” (1999, 2). Andries Odendaal, who started working at CCR in the early 1990s, recalls that concepts like mediation, negotiation and conflict resolution carried connotations of ‘selling out’:

What troubled me in the 1980s was this sense of ‘I’m in the middle, neither fish nor flesh’. I often found myself mediating [at my then workplace, a black university predominantly staffed by white faculty and administration]. [I found] myself trying to explain one party to the other, on specific issues and the key question for me was – what does this mean about myself? Does it mean that I don’t have the guts to take a stand, shouldn’t I just move into the activist role? There were cases where I did, if the issues were clear, but more often than not the issues were not clear, and I saw my role as – needing to help and clarify the issues. I developed a lot of self-doubt about this [...]. Then I discovered through this workshop [at CCR] that there is a credible role that you can pursue with integrity. It was a very important discovery for me, to help [me] understand that it was possible to go and stand in the middle. The key question of course at the time

64 Its initial name was the Abe Bailey Institute of Inter-Racial Studies. In 1973 it was renamed the Centre for Intergroup Studies. In 1994 its name was changed once more, into the Centre for Conflict Resolution.

65 The term ‘coloured’ is contested and refers to individuals of mixed race descent. The term is used here (with some unease) because of its common usage in South African society.

66 See also CCR, Forty Years.
was ‘If you talk about mediation, are you not being a sell-out?’ Van der Merwe was often accused of this, that by opting for the middle, he was actually siding with the other side.67

Consequently the Centre had to exercise ‘great political sensitivity’ in trying to promote conflict resolution techniques and third party intervention (Van der Merwe 2000, 98). It thus initially used ‘conflict accommodation’ as a generic term, realising that ‘conflict resolution’ ran the risk of ending the struggle against apartheid’s injustices too early, before the system had been dismantled (idem, 217).68

In line with dominant thinking in the conflict resolution field and Quaker ideas, the Centre’s leadership rejected all forms of violence in principle. It nevertheless accepted violence as a fact and “steered clear of any moralistic role or preaching” (idem, 178). It recognised that violence could be a strategy in fighting for justice, but believed that the resulting damage in the long term cancelled out any short-term benefits. Violence was regarded as “a form of communication, albeit destructive” (ibid); CCR’s task was to promote less destructive communication among conflicting groups, by developing the concept and practice of conflict resolution. The NGO thus launched the country’s first training programme on communication skills for mediators and other third-party interveners in community and political conflict in 1982, later adding training in mediation and negotiation (ibid).69

Concerned about the “almost total absence of neutral mediating groups, peace initiatives or movements” in South Africa, the organisation also started to focus increasingly on mediation (Van der Merwe 1989). This was eased by a fading of the negative connotations attached to ‘peace work’, ‘conflict resolution’ and ‘negotiation’; an expanded notion of ‘peace’ emerged in South African civil society during the 1980s, which comprised notions of justice and social action (Cock 2004, 183).70 This expanded notion informed CCR’s activities; it was felt that its staff “could not remain neutral on important moral issues such as race discrimination and gross injustice” (Van der Merwe and Meyer 1993, 169; also Van der Merwe 2000, 89-97). Its first director argued that “there can be no peace without justice. Peacemaking should concern itself with the promotion of justice and removal of fundamental disparities in social, economic and political matters” (Van der Merwe and Odendaal in Taylor, Cock, and Habib 1999, 4). Yet the organisation was more a peace organisation than a ‘classic’ anti-apartheid one, according to an observer.71

The Centre’s emphasis on mediation consolidated in the early 1990s, when several staff members worked in regional and local peace committees established after the

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67 Andries Odendaal, in interview 9 June 2011, Stellenbosch; confirmed by Chris Spies, in the same interview.
68 This echoes the observation that peace can become a ‘dirty’ word (Fisher/Zimina 2009b, 102); see also 3.5.3.
69 See also CCR, Forty Years.
70 See further below at 8.1.2.
71 Interview with Jeremy Sarkin, Cape Town, 2 June 2011. Sarkin is a Senior Professor of Law at the University of the Western Cape and former Chair of the UN Working Group on Enforced Disappearances.
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signing of the National Peace Accord. Its approach to mediation was non-directive, which “assumes that the best solutions are produced when parties listen to each other in a new way, cooperate in the generation of options and jointly arrive at the preferred solution. [...] The role of the mediator is [...] to be a facilitator of communication” (Odendaal 1998, 11). Impartiality was a crucial tenet, although 'absolute impartiality' was considered impossible, since conflict resolution practitioners are motivated by personal, cultural and professional values. A distinction was thus made between 'technical impartiality' (a commitment to facilitate a process in a fair, even-handed and respectful manner) and 'moral impartiality.' Impartiality was hence connected to procedural fairness.

If the Centre’s mediators were unable to assume or maintain a non-partisan stance, they could refrain or withdraw from a mediating role – for example, if a party continued to engage in violence or was only interested in addressing the symptoms of conflict, not the underlying issues (Nathan 1999, 3; Odendaal 1998, 12; Henkeman 2010). In the late 1990s, Laurie Nathan, who served as CCR’s director between 1992 and 2003, summarised the organisation’s stance as follows: "[a]lthough the Centre is non-partisan when mediating, it is not neutral on matters of peace and justice. It has, for example, issued public protests and called for police action against parties, which repeatedly flout negotiated agreements and resort to violence. However [...] the functions of mediation, advocacy and enforcement should be kept separate" (1998, 10).

By the mid-1990s, the Centre’s mission was to “contribute to a just and sustainable peace in South Africa and other African countries by promoting constructive, creative and cooperative approaches to the resolution of conflict and the reduction of violence”.

5.2.2 Morality, Legality and Human Rights

Several interviewees who worked with CCR in the early 1990s emphasize that a strong sense of morality existed within the organisation and amongst practitioners – though this was not linked to law or human rights, however. In that, it resembled broader society; Jeremy Sarkin, a prominent human rights academic and practitioner, notes that, “before the mid 1990s, South Africans did not talk about human rights, or in terms of human rights. People here were fighting issues based on morality rather

72 In September 1991, a National Peace Accord was signed in South Africa, prompted by spiralling political violence as negotiations between the regime and the African National Congress got underway. A network of 11 regional peace committees and over 260 local peace committees was established; these bodies were meant to contain, address and prevent public violence. For description and analysis, see Olukotun (2009), Spies (2002), Marks (2000) and Gastrow (1995); see also 8.1.2.
73 Interview with Chris Spies, Stellenbosch, 9 June 2011.
74 See also the discussion on handling role tensions, in 7.3.
75 As printed on the back of CCR’s publication Track Two (e.g. Nathan 1999).
than on law”. 76 One former CCR practitioner mentions that he was not aware of the Universal Declaration of Human Rights in the 1980s; 77 another reflects that human rights “did not figure strongly” in his mind, despite his firm belief that apartheid was unjust.78 A third recalls:

At CCR, a lot of the stuff, the big community development-type mediations we were doing but also the taxi wars and the little ones – these were disputes that we were really trying to settle between the parties. There was a lot of talk about the settlements, [that those should be] what the parties agree upon and are happy with, etc. Very little reference to [the question] ‘is this legal?’ for example, at the time. [...] There was a sense of moral obligation. If there was something that felt morally wrong for you as a mediator, or that you knew was illegal – stuff like that you just wouldn’t countenance… but there was really no structured way of referring back to ‘does this accord to the legal framework,’ for instance. And I think at the time it was okay, because people [were] driven by their moral sense of right and wrong. Bear in mind that at the time of the late 80s, early 90s, you almost did not want to respect the law, so you needed to appeal to a higher authority – a moral authority, we had the moral high ground.79

Looking back, this practitioner reflects “Now I can see the problematic elements with that, they just jump out… If it is a moral right and wrong, and your morality and my morality aren’t the same, for example, then what?”80 In his view, this problem never arose at the time because “there was a synergy between the mediators’ morality and the parties’ morality” due to the “presence of a strong Christian background amongst the mediators and within the communities in which we worked. They could call on a common body of language, and you could hold them accountable to that”.81 Thus, the morality embedded in the Centre’s practice of conflict resolution had spiritual or religious overtones rather than legal ones.82

Yet, as the 1990s progressed, issues of law and human rights emerged more clearly for the organisation. This was not really pursued as a goal in its own right, at least not initially. Nathan, the then director of CCR, it was due to what was happening in South Africa at the time, notably in relation to the question of amnesty; the 1993 Interim Constitution had made specific provision for an amnesty process for crimes committed during apartheid, but left it up to the first post-apartheid government to work out what this would entail (e.g. Hayner 2011, 27-31; Asmal 2000). According to Nathan, this meant that “we were struggling with this [relationship between human rights and conflict resolution] as activists ourselves”.83 Another contributing factor
may have been the fact that CCR “began to look beyond South Africa’s borders” after 1995, and started working in other African countries.84

The Centre encountered advocacy by international human rights NGOs in that context, for example in Burundi, where a former South African politician now working at CCR helped to facilitate dialogue between warring factions. Nathan recalls being frustrated with Human Rights Watch’s insistence on war crimes trials in Burundi with seemingly little appreciation for something that for him was fundamental in any conflict resolution process: that it was ultimately up to the local population to decide.85 Sarkin, the human rights lawyer, recalls encouraging the Centre to start considering international law in relation to its international engagements:

We would talk, [the director] and I, and I would say – you won’t win the argument if you frame [the issues] in the way you do. Say, there would be a discussion about the peace process in Burundi, and I would say “This is the alternative view, if you want to win this debate, you’ll have to frame it in this way as well”. [...] I would highlight “[your line of argument] won’t fly for the UN, you need to consider international legal provisions”.86

Meanwhile, the Centre was occasionally approached to provide conflict resolution training for human rights NGOs like Ligue Iteka in Burundi, mentioned at the end of the previous section.

Such experiences led CCR to draft a handbook on human rights, conflict management and minorities for the UN Centre for Human Rights.87 According to Nathan, “it did not feel like big pioneering on our part; [it] was a consequence of what we were dealing with at the time”.88 For other conflict resolution practitioners, however, linking human rights and conflict resolution was less obvious; many of those contacted by CCR for its work on the handbook “did not see themselves as dealing with human rights issues to a significant degree” even though they frequently worked in systems of violent conflict (Arnold 1998a, 1). Working on the manuscript prompted CCR to create a Human Rights and Conflict Management Programme (HRCMP) in 1999, to take the thinking on human rights and conflict management further and put it into practice. I joined CCR a few months later to become the HRCMP’s manager, having done some groundwork for its establishment.89

84 Interview, Jeremy Sarkin, 2 June 2011, Cape Town. In 1996, the Centre established its Africa Project, which worked in other countries and with regional mechanisms on the continent (CCR, Forty Years).
85 Conversation, 11 June 2011, Cape Town. International criminal law was not so far developed at the time and the International Criminal Court did not yet exist.
86 Interview, Jeremy Sarkin, 2 June 2011, Cape Town.
87 The UN Centre for Human Rights put out a tender for this handbook, which CCR won. The manuscript (drafted by Kent Arnold and Jeremy Sarkin with contributions from others) was never published due to restructuring of the UN Centre (it became the Office of the High Commissioner for Human Rights). At the time, CCR used ‘conflict management’ as a generic term since conflict, as a political and social phenomenon, cannot be eliminated, prevented, or resolved; see Parlevliet (2002, 9).
88 Conversation Laurie Nathan, 11 June 2011, Cape Town.
89 While working as a researcher at the South African Truth and Reconciliation Commission (1997-1998), I had provided some assistance to CCR’s work on the manuscript. After it was finalised, and following discussion with
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5.2.3 Encountering Human Rights Questions in a Community Conflict Intervention

In early 2001, the Centre was asked to intervene in a conflict in two adjacent squatter settlements to the north of Cape Town where South African residents had forcefully evicted nonnationals living in their midst. This situation, briefly set out at the beginning of chapter 1, was brought to CCR’s attention by the local municipality, which was temporarily providing food and shelter to over a hundred distraught nonnationals at the local police station, where they had sought refuge. Those evicted lost their shacks and belongings through arson and other means, and were threatened with more violence should they try to return to the settlements. A few laid criminal charges. Others submitted complaints of human rights violations to the South African Human Rights Commission (SAHRC), which subsequently also requested CCR to intervene. Here, this case is discussed in more detail to show how human rights were considered in this intervention, and what questions it raised for CCR’s practitioners (including myself), at the time and afterwards.

As noted in the introduction, CCR’s mediators soon encountered rights-related challenges that led them to invite my HRCM colleague and me to join them. In particular, the use of human rights language proved to be contentious: while those chased out insisted on it, those who had done the chasing fiercely rejected it. The South Africans were inflamed by allegations that they had violated the evictees’ human rights and that xenophobia had fuelled their actions. In their view, rights were not relevant here; the foreigners had usurped ‘their’ houses, jobs and women, and had been involved in crime. They threatened to leave the dialogue process if their actions were framed as human rights abuses. For those evicted, however, the violence, destruction and disrespect they had suffered had to be talked about in such terms; not doing so would mean more victimisation, they insisted.

The intervention team thus wondered how to not alienate the South Africans without downplaying the treatment inflicted on the nonnationals. Put differently, how would we ensure that the process recognised the wrongfulness of what had happened while retaining the participation of both parties – and our impartiality? The case also raised questions about our own values and stance on the use of terms like ‘xenophobia’ and ‘violations’. Another challenge was the interaction between a possible criminal case, the complaints before the SAHRC, and the facilitated process. (In early internal discussions, one team member floated the idea of asking evictees to drop charges to reduce the level of polarisation between the two groups).

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CCR’s leadership, I developed a funding proposal to establish the HRCM and lobbied a prospective funder, which resulted in an initial three-year grant.

90 A summary discussion of this case was first published in Galant and Parlevliet (2005). I follow the South African Human Rights Commission in using the term ‘nonnationals’, as the term ‘foreigners’ (makwerewere in slang) has been used in a derogatory manner in South Africa; see also Matsinhe (2011) and Harris (2002).
At the time, violence against non-nationals was not new in South Africa but few incidents of this scale had been recorded until then, at least in Cape Town. Black foreigners, particularly from Africa, comprised the vast majority of victims. They were usually identified through profiling of skin colour, manner of dress, hairstyle, movement and language. This was widespread amongst ordinary citizens and public officials; the South African Police Service reportedly relied on people’s physical appearance in establishing citizenship, nationality and illegality (Matsinhe 2011, 302-304; Harris 2002). Media reports routinely represented refugees, immigrants and migrants in a negative light, implying that ‘masses from a troubled north’ were ‘flooding’ South Africa, as if a ‘plague was descending onto the country’ (Harris 2002; Danso and Mcdonald 2001). In 1998, Human Rights Watch thus noted that:

South Africa’s public culture has become increasingly xenophobic, and politicians often make inflammatory statements that the ‘deluge’ of migrants is responsible for the current crime wave, rising unemployment and even the spread of diseases. As the unfounded perceptions that migrants are responsible for a variety of social ills grows, migrants have become increasingly the targets of abuse (1998, 4; also Palmary 2002).

Perpetrators of violence against non-nationals were seldom charged. Very few were convicted, and at times, state agents “actively protected those accused of anti-foreigner violence” (Landau and Misago 2009, 104). Various factors were thought to fuel the violent aversion towards black foreign nationals, such as South Africa’s prolonged isolation during apartheid, dissatisfaction with the tardiness of redressing past inequalities, a desire for scapegoats, the nature of post-apartheid nationalism, and the legacy of white supremacy and violence (e.g. Matsinhe 2011; Harris 2002).

From our interactions with the SAHRC, it transpired that its representatives believed that a facilitated dialogue process might best address the complaints received. They recognised the validity of strategies such as documenting the abuse, highlighting flaws in the police response, preparing a case for litigation (or supporting the complainants in doing so), and monitoring its progress through the judicial system. In their view, this approach would send a clear signal about unacceptable behaviour, but would also take a long time and consume many resources, which were not readily available. Furthermore – and this was the crux for the Commission – it could fuel resentment among the local squatter residents and increase their hostility to those deemed ‘foreign’. It would probably not facilitate the evictees’ return to the settlements (which is what they wanted), or help to shift local attitudes. The SAHRC hoped that a dialogue process would work in this direction, and that it would enhance understanding amongst all involved about rights and responsibilities.92

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91 At times black South Africans who supposedly did not look/smell/dress/move like ‘South Africans’ were arrested or assaulted too. (This phenomenon continues to date). See Matsinhe (2011) and Moshoeshoe Monare and Melanie-Ann Feris, “Teacher assaulted for being too dark”, Independent On Line, 11 March 2001, at http://www.iol.co.za/news/south-africa/teacher-assaulted-for-being-too-dark-1.61776#.U7QhfShZGgE.
92 Notes from meetings recorded at the time; also captured in Galant and Parlevliet (2005).
Meanwhile, our internal preparatory team discussions revealed that we considered the actions and attitudes of the South African residents highly problematic. As in CCR’s past, moral concerns took precedence over legal ones. My three South African colleagues (two African, one ‘coloured’) referred to other African countries hosting South African freedom fighters during apartheid, and to the violence inflicted on black Africans in the past. They argued that South Africans ‘owed’ the people of other African countries. The only rights-related comments were a reference to the horizontal application of human rights in the South African Constitution (which means that private individuals are bound to uphold the rights of other individuals), and the observation that asking people to drop criminal charges would undermine their right to redress.93

Amongst ourselves we agreed with the SAHRC that the mediation process should facilitate some understanding of the rights of all persons living in South Africa, even if we were not clear on how to do so and did not want to be perceived as partisan. We had little time to consider this, as the local authorities were only willing to provide food and shelter for a limited time.94 Also, our analysis revealed intense frustration amongst the South Africans about flawed service delivery in the settlements: water and electricity were in short supply, as was police presence and access to housing. Our assessment was that these issues needed to be promptly addressed if future outbursts were to be prevented. This pointed to the role of local government.

In the actual process, we decided not to use the term ‘xenophobia’ up front, because of its inflammatory impact. We explained this to the evictees, and talked with the South Africans about the importance of addressing both parties’ grievances, which would mean consideration of rights, dignity and security concerns. We clarified that we could not interfere with proceedings in the criminal case. Over a series of meetings, the process created space in which those evicted spoke, face-to-face, about the violations they had experienced and how this had affected them. Later, we invited an SAHRC education officer to provide information about rights and responsibilities in the South African context with particular emphasis on the rights of non-nationals. By then, we had placed the South Africans’ concerns about water, security, housing and law enforcement in a rights context, by framing them in terms of human needs; this highlighted rights as a concern for all, not just for some.95

In an effort to address the underlying conditions we engaged with local government on development and delivery, and brokered an agreement between the squatters and the police about increased patrols. It soon became clear, however, that we could make little real progress in relation to housing and service delivery more generally, as this

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93 The ‘human rights’ people on the team (my HRCMP colleague, Victoria Maloka, and myself) made these two points (personal notes). On horizontal application, see Art. 8(2), 1996 Constitution, and below at 8.1.2.
94 Palmary quotes a public official as saying that local authorities withdrew food gradually, “to kind of force them... to become self-sufficient... what we do is try to force them to move by themselves” (2002, 19).
95 See chapter 7 (notably 7.4.2 and 7.4.3) for a discussion of framing rights as needs.
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depended on larger political and bureaucratic processes. We then focused on facilitating interaction between the settlement residents (national and non-national), civic organisations and public officials to increase the flow of information, improve relationships, and get service delivery and development higher on the political agenda. This approach allowed for collaboration between the two earlier conflict parties, and enabled us as interveners to point out the implications of poor service delivery in terms of the potential for conflict and violence. In the end, many non-nationals returned to the settlements, although some moved elsewhere.

Afterwards we felt that we had done well within the confines of what could be achieved. Yet later I questioned whether the process had encouraged ad hoc, reactive decision-making at the political level rather than a systematic approach to protecting non-nationals, development and service delivery. Furthermore, had our flurry of activity unwittingly promoted the negative behaviour of the South African squatters? After all, their violent outburst had produced some results, in terms of attention and resources allocated to the settlements (Galant and Parlevliet 2005, 124). More doubts emerged much later, after I had gained more experience. I started doubting whether we had adequately taken the rights dimension into account.

Had we enabled the local administration to pretend that it was meeting its obligations in this one instance, without challenging it to take measures to do so on an ongoing basis? Ideally, the facilitated discussions between the squatter residents and the local authority had served an accountability function, but only for the limited duration of the intervention. We did not follow-up to verify implementation of the commitments made by the authorities, nor did we refer the case to other organisations for monitoring purposes. In addition, aside from the invitation to the SAHRC education officer, we had paid little attention to rights questions after the initial stage nor had we reviewed the 1998 Refugee Act.96 Our efforts to address issues of housing, electricity and safety were informed by a commitment to address underlying causes; we did not analyse them in terms of rights standards. While we noted the conflict implications of poor service delivery in talks with local authorities, we failed to highlight that they are legally obliged to provide services to non-nationals. The SAHRC education session had only been targeted at the South African squatters, not at municipal officials – yet we must have noticed that they were just as prejudiced regarding non-nationals.

Finally, we did not think of clarifying roles and responsibilities between various tiers of government in addressing xenophobic violence and facilitating rights provision to non-nationals. This was stressed as a major shortcoming of the city’s approach to this and other events of xenophobic violence in a report published one year later (Palmary 2002). The report lauded the city for recognising that such “conflict cannot simply be

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tackled using a law enforcement approach” (idem, 19), but noted that its handling of the violence left much to be desired:

[Security services which were intended to protect refugee communities from further attacks by South Africans were gradually withdrawn [...]. No medium-term solution was developed to ensure that the future roles of the various tiers of government are clarified or that more violence would not occur. [...] The slow and often inadequate response to xenophobic conflict in the [...] incidents [...] was not only driven by a lack of awareness of whose responsibility it was to intervene; but also by a lack of knowledge about the rights of refugee communities and by xenophobia within the city authorities (idem, 19-21). 97

Admittedly, one can question whether addressing such shortcomings would or should fall within the scope of a conflict resolution intervention by an NGO. Nevertheless, our limited consideration of rights concerns – the actual rights violations, accountability, government’s limited rights awareness, protection mechanisms – may well have reduced the sustainability of our efforts.

Overall, this example shows how a particular conflict situation can have a range of human rights facets, for example in how grievances are framed, what underlying conditions give rise to conflict, or which actors get involved in an intervention process. It reveals that, as conflict resolution practitioners, we paid little attention to human rights beyond the initial challenge of how to handle the use of human rights language (and how to do so without being perceived as biased), and beyond the early decision to incorporate awareness-raising in the intervention process. As such, it lends credence to the claim that the human rights dimensions of conflict resolution are seldom adequately explored (Mertus and Helsingh 2006b, 9).

5.2.4 Large-scale Violence against Non-Nationals in 2008

A later and much more widespread spate of xenophobic violence in South Africa sheds more light on the challenges conflict resolution practitioners may experience in relation to human rights. These relate, *inter alia*, to the interaction with human rights activists, the role of facilitators in relation to raising human rights concerns, and – as in the case of LHR, the question of facilitating dialogue in a rights framework. The comments below are not intended as an in-depth discussion or assessment of the crisis itself or how it was handled by government and civil society; they serve only to illustrate how several conflict resolution practitioners in the Western Cape engaged with ‘human rights’ in this context. 98

97 According to Monson and Misago, government officials have generally perceived victims of xenophobic attacks as outsiders to the state, rather than as residents of South Africa in need of protection (2009, 30).

98 For analysis on the crisis itself and the state’s and civil society’s handling of it, see e.g. Peberby/Jara (2011), Everatt (2011), Misago and others (2009), Monson/Misago (2009), Igglesden and others (2009), Landau/Misago (2009), Steinberg (2008), and Pillay (2008).
In May 2008, South Africa experienced the "first sustained, nationwide eruption of social unrest since the beginning of [its] democratic era in 1994" (Steinberg 2008, 1), as a wave of xenophobic violence swept the country, killing 62 and displacing tens of thousands.99 Once more, "the mobs sang of foreigners stealing houses, women, and work" (ibid), while attacking (or threatening to attack) non-nationals, mostly of African origin, in the main urban centres of the Gauteng and Western Cape provinces. In the Western Cape, the violence was less severe than in the Johannesburg area, yet displacement and looting was still serious. According to Judith Robb Cohen, who was by then the SAHRC's regional coordinator, "one Friday afternoon, 20,000 people were displaced in Cape Town".100

Displacement in the Western Cape was mostly pre-emptive in nature: anticipating violence, foreign nationals sought protection (Igglesden, Monson, and Polzer 2009, 20). After the first few days, in which mostly faith-based organisations provided shelter in makeshift locations, the city set up six camps on the Cape peninsula, moving people from over 100 places elsewhere. The establishment of these centralised camps was controversial, partly because they were far from where displaced people had lived and public transport was absent (Peberdy and Jara 2011, 45).101

To facilitate reintegration of those displaced into local communities, and recognising the existence of strong disincentives for some to reintegrate (Igglesden, Monson, and Polzer 2009, 47), the provincial government appointed a team of approximately 25 facilitators. The senior official who had proposed this, Sifiso Mbuyisa, had previously worked at CCR as a practitioner and programme manager and was now responsible for 'human rights and social dialogue' in the province. His proposal stemmed from the realisation that "government was a party to the crisis – either because of actions it had taken or inaction on certain issues. So government could not be impartial, therefore we sourced a team of professional mediators".102 Several of these mediators were conflict resolution practitioners who had worked with the Centre for Conflict Resolution for many years as full-time employees or freelancers.103 In interviews, it

99 Estimates of the total number of people displaced range between 80,000 and 200,000. For an explanation of the wide range, see Igglesden and others (2009, 20). Most of those displaced were of African origin, although some were of Asian descent. Some South Africans were also affected; a third of those killed were South African (ibid).
100 Interview 10 June 2011. This is the same Judith Robb Cohen who featured in the previous section as the regional coordinator of LHR and founder of its Security of Farmworkers Project.
102 Interview, Sifiso Mbuyisa, 7 June 2011, Cape Town.
103 They were contracted into the facilitation team as individual consultants, not as CCR. The text below hence relates more to (these) conflict resolution practitioners than to CCR as an organisation.
emerged that they had found dealing with human rights questions, actors and advocacy, vexing.

Echoing the sentiments I heard from a number of them, Ghalib Galant, a practitioner who served for some time as the coordinator of the facilitation team, recounts:

Of course human rights came up. Suddenly, refugee rights, asylum rights, were [the] flavour of the day. They were advocated by all sorts of pressure groups [...] but also by the displaced people themselves, who just became even more bolshy... They were pushy, pushed their own agenda - I can't fault them for that, that's part of the thing with rights activism, you have to believe that your rights are the only ones that exist, and push [these] beyond everything – but it certainly hampered the efforts we were making. They were pushing for repatriation, knowing full well that they would never be repatriated, because you can't do that under international law. However, it sounds really good: “South Africa is dangerous, send me back home! Oh, you can't send me back home, well, then, send me to Canada”. They used how they understood the international rights framework in quite an aggressive way, and they would get angry because this particular thing they were wanting – resettlement – was not going to happen.104

The quote is telling; ‘human rights’ was perceived as enabling more aggressive posturing by the displaced, which was then experienced as hampering facilitators’ efforts.

Hindrance was also perceived in interaction with human rights activists from civil society, who, from the facilitators’ perspective, seemed not very problem-solving oriented or sensitive to process considerations. For example, Andries Odendaal speaks of rights activists interfering in the process of trying to defuse the crisis, commenting that they seemed more concerned with ‘grinding an axe’ with government than with addressing the crisis itself.105 Galant, the erstwhile coordinator of the team says:

I experienced the destructive effect of the lack of the knowledge – the lack of appreciation, the lack of understanding, of this process stuff, from human rights activists. They were jumping up and down, standing on tables and what not for their constituency, with very little appreciation for any other constituency, or that there was a broader project happening which was this readintegration of people into communities. It did not say, you had to reintegrate into the community from which you came; the idea was that we would help you to find a place where you would feel, in yourself, safe, [and that] might be in a different place. Yet many of the human rights activists couched their solutions in very specific terms, [like] “The police must guarantee the safety of the people I represent back in location X,” or wherever their shack or container was. So sure,

104 Interview, Ghalib Galant, 3 June 2011, Cape Town. Emphasis as spoken. Also interviews with Andries Odendaal, 9 June 2011; Sifiso Mbuyisa, 7 June 2011. Apparently, there were instances of government representatives organising ‘voluntary’ deportations and buses to return those willing to their country of origin (Monson/Misago 2009, 28). See also Igglesden and others (2009, 49) on demands (of mostly Somalis and nationals of the DRC) for resettlement to a third country.

105 Interview, Andries Odendaal, 9 June 2011, Stellenbosch. According to Peberby and Jara, legal activism by a few human rights-oriented organisations was frowned upon by many NGOs and faith-based organisations which considered the crisis primarily in humanitarian terms (2011, 46-47, 52).
they would be asking for the security of the person, which is a right, but without really exploring – maybe location X is not the place to go back to, you know – or being open to creative solutions.  

This reflects a difference between human rights and conflict resolution approaches noted earlier, between the human rights tendency to take a more prescriptive stance in relation to outcomes, and the conflict resolution emphasis on facilitated outcomes.  

It also reveals discomfort with a strong positional stance with demands that are purely focused on (a specific kind of) redress for (a specific group of) people without seemingly much regard for other people’s concerns or the broader context.

Galant continues:

One huge dispute that happened halfway through [related to] international minimum standards that apply when the UN sets up a camp. They were demanding these, and the guy from the UN [Office for Coordination of Humanitarian Affairs] said “Most of these standards you already have […] and nowhere in the world are these minimum standards applied in their entirety”. Yet it became this bone of contention, to the point that some people were calling […] the provincial government liars. The point they were making was a good one. There need to be minimum standards, clearly. But the way they went about it, did not help at all.

Thus, Galant does not contest the substance or relevance of this human rights advocacy, but only how it was done. His comment reflects another difference noted in the comparative review of the two fields, between more adversarial or cooperative approaches and alludes to the interdependence of process and outcome (Parlevliet 2002, 22-24).

Whether the facilitators themselves paid attention to human rights, seems to have largely depended on their individual personality, knowledge base and experience. According to Galant, some facilitators were aware of ‘the rights aspect’ but did not push it, while others “just glossed over it, it wouldn’t even come up in the conversation, it would really just be about dealing with the issues for these parties, right here”. He notes that the provincial government gave little guidance on whether or how they should take rights concerns and standards into account. He attributes this to the background of the provincial official responsible for the facilitation team: it “is very much on the dialogue side, he’s not as strong on the law

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106 Interview, 3 June 2011, Cape Town. Emphasis as spoken. Galant mentions that some non-nationals combined the monetary reintegration assistance they received and decided to jointly rent an apartment in town, to indicate that some preferred to seek accommodation at other locations than where they had been before.

107 See 4.1.3.

108 See also 7.2.3 on ‘anchoring’ by human rights actors and 8.3.2. on positional framing of human rights claims.

109 Interview, 3 June 2011, Cape Town. Emphasis as spoken. Two NGOs, the Treatment Action Campaign and the Legal Resources Centre, brought a legal challenge against the provincial and city governments arguing that the camps did not meet international humanitarian norms and standards and violated the constitutional rights of camp residents. The case was withdrawn after the provincial government released appropriate emergency guidelines (Peberby/Jara 2011, 46).

110 Interview, Ghalib Galant, 3 June 2011, Cape Town. Confirmed by other practitioners involved, notably Andries Odendaal and Eldred de Klerk; interviews, 9 and 10 June 2011 respectively.
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He also mentions that government officials generally did not appreciate being challenged by facilitators on their delivery regarding rights entitlements of displaced people. He comments that:

Facilitators in the field were being asked [by displaced people] “Well, how many South Africans who have looted, are now jailed? Or does the law not apply to South Africans?” So from the perspective that it would make [their] job in the field easier, I started pressing [the police] for information, to relay back to people … Part of the thing for me, representing the team of facilitators out in the field was to say [in meetings of the joint disaster management committee] “Now, Home Affairs, there’s a complaint from Somalis that they’re not getting their dockets, where is your response to this?” I know I pushed buttons for [government people], around ‘this is your responsibility, you’re provincial government, you need to do the following things, because in fact you’re asking us to go out there and say that that’s what you’re going to be doing, so why aren’t you delivering?’ And that – they did not like that.112

This suggests that facilitators were in a bind, between displaced people pressing for feedback on rights-related matters, and government officials resenting questions about their poor delivery on commitments. Interviews with Mbuyisa, the senior government official overseeing the process, and Robb Cohen, the regional coordinator of the SAHRC, confirm this. The latter notes that facilitators were caught in a difficult role; she argues that their mandate to facilitate reintegration turned them more or less into representatives of provincial government.113

Mbuyisa admits that while he had intended the facilitators to be independent, he found it very hard when “some in the team took up the position of the foreign nationals” and started challenging government. It made him doubt their impartiality – which reflects that challenging parties on rights issues as a conflict resolution practitioner easily gives rise to perceptions of bias; doing so can be tricky.114 He also concedes that government is not very familiar with its human rights obligations and that he himself was conflicted internally:

I think I had a sense of bias in me, as a resident, a South African citizen, and as an official. In retrospect, I see that some human rights issues cannot be compromised, such as safety… but we’re also dealing with general lawlessness – this displacement, is that then prioritised over people who are daily raped? How do I address it without sidelining other issues? From a government perspective, I was worried about [the fact] that we’re addressing this issue at the risk of getting criticized for only focusing on non-nationals,

111 Ibid. This refers to Mbuyisa’s background as a conflict resolution practitioner at CCR, before he joined the provincial government. Galant also points to public institutions’ general lack of consideration of facilitating dialogue in a rights framework, referring in this regard to the Independent Election Commission (which appoints a panel of mediators for each election) and the South African Human Rights Commission; see further 6.2.2.
112 Interview, Ghalib Galant 3 June 2011. By September 2009, only one murder case had led to a conviction and the National Prosecuting Authority had withdrawn the majority of cases (Monson/Misago 2009, 29-30).
113 Interview, 10 June 2011, Cape Town.
114 This is probably even more so when conflict resolution practitioners are independent in name but paid for their facilitation services by the very party that they challenge on human rights concerns, as happened here.
not nationals. South Africans feel marginalised – they also have rights for provision of basic services.115

His comment is particularly relevant given that the violence, threats and looting in Cape Town mostly occurred “in the areas of greatest deprivation, neglect, and contestation over limited resources” where “people live in overcrowded and underserviced townships and informal settlements” (Peberdy and Jara 2011, 37, 39).

It speaks to challenges noted earlier, of balancing different rights of different (groups of) people, of deciding which issues get prioritised, and of the broader context in which specific rights violations take place. As such, it reflects that the rights framework does not necessarily provide guidance for all matters related to human rights. At the same time, an implicit assumption seems to be at stake here which can be questioned: a notion that realising the rights of some people will unavoidably come at other people’s expense, as if human rights constitute a pie with limited slices or a zero-sum game – yet in theory, provision of services to non-nationals could be organised in such a way that nationals could benefit too.

5.2.5 Considering Human Rights

The examples discussed above suggest that many conflict resolution practitioners may be rather ‘blind’ when it comes to recognising and engaging with the human rights dimension of the conflict situations they address. It also seems that when rights aspects do become apparent (for example, because parties frame their demands in rights language, or because human rights actors are also involved in a given context), practitioners’ first impulse may be to view ‘human rights’ as a problem.116 This section looks further at the limited attention paid to human rights by conflict resolution practitioners. It confirms the first point above (about a possible ‘blind spot’) and qualifies the second, in that it appears that practitioners who have had substantial exposure to human rights standards, actors or training, may value ‘human rights’ as an asset for their work rather than a liability.117

The notion of a blind spot resonates with my own impression over the years, as issues of human rights and law have seldom featured prominently in the thinking and practice of conflict resolution practitioners with whom I have engaged (in South Africa and elsewhere), whether in relation to conflict analysis, process design, or another aspect of their work. This was also the case in interviews with practitioners conducted for this research. Few could easily recount examples of taking rights into account

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115 Interview, Sifiso Mbuyisa, 7 June 2011, Cape Town. This sentiment was probably widespread amongst government officials. Monson and Misago refer to a provincial Disaster Management executive citing a ‘high-level decision’ that assistance to foreign nationals displaced by the violence should not exceed the living conditions of South Africans living in poverty (2009, 25); they do not mention the province concerned.

116 This is not confined to the South African context; consider, for example, the experience of the fieldworkers of the Northern Ireland Parades Commission, as set out in 6.2.4.

117 See further 8.4.1.
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when intervening in conflict situations. Yet this mostly relates to human rights as law, i.e. formal standards. Many practitioners expressed commitment to facilitating processes according to certain values which are easily related to human rights (respect, dignity, fairness, empowerment, etc.), and those who served in South Africa's peace structures in the early 1990s felt that their work was motivated by a concern with justice.

According to Galant, many practitioners “just want to make things nice”.118 In his view, they do not really consider the legal context in which they work – which “allows some things, does not allow other things, gives me some leeway, constrains me in other ways” – or reflect on its impact on their practice.119 This reminded me of a training course that Galant, another HRCMP colleague and I conducted in 2004 with thirteen seasoned practitioners, most of whom were working in conflict resolution.120 A case in which he had intervened served as a training exercise. The setting had been a high school in a coloured township outside Cape Town where unemployment, drug abuse, gangsterism, crime, violence and alcoholism were rife. Over time the school had become replete with conflict as the principal and his staff clashed on various issues, including the selection of prefects, admission of black learners, and decision-making processes. Other concerns related to alleged gender and racial discrimination by the principal, his use of corporal punishment, and his managerial style, which was perceived as intimidating, humiliating and authoritarian. Eventually, the provincial Education Department asked CCR to intervene.121

After presenting the case, we asked the participants in our course to analyse it and design a suitable intervention process. In the debriefing, we found that our participants, working separately in four groups, had barely thought of rights and legal standards. In their analysis, they highlighted that relationships were strained, decision-making seemed problematic, the degree and quality of information-sharing was contested, and that all parties felt undermined and disrespected. In their process

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118 This echoes Magardie’s comment that “there’s often an assumption that mediation is for parties to sit and be nice to each other” (see 5.1.4). It also brings to mind the suggestion made by one of my CCR colleagues when preparing to intervene in the 2001 xenophobia case in Du Noon and Doornbach, that we ask those evicted to drop charges against South Africans who had chased them out of the informal settlements, so as to reduce polarisation (see 5.2.3).

119 Interview, 3 June 2011, Cape Town.

120 Galant was working at the time as a freelancer for CCR’s HRCMP, and was regularly contracted to provide (facilitation and training) support for the programme in light of its limited human resource capacity. The ten-day course sought to ‘induct’ individuals who might become resource persons for HRCMP afterwards. They were mostly South African facilitators with 3 to 8 years experience and different racial and educational backgrounds. The group also included one South African human rights lawyer, one Zimbabwean facilitator, and two persons from Northern Ireland (one conflict resolution practitioner from the Northern Ireland Parades Commission and one staff member of the Northern Ireland Human Rights Commission). The preponderance of conflict resolution practitioners in the group was due to the partners the HRCMP was working with at the time (the Office of the Public Protector and the SAHRC), and the type of support requested, which focused more on conflict resolution.

121 For a more extensive description of this case and intervention, see Galant and Parlevliet (2005, 119-121). Corporal punishment of learners has been outlawed since 1994, but many educators intend on maintaining discipline continue using the practice, also to date (interview, Judith Robb Cohen, 10 June 2011, Cape Town).
design, all groups focused on gathering more information and opening up dialogue between the various parties. Rebuilding relationships and getting parties 'into a process' to engage with one another seemed to be of utmost importance. Conflict resolution training was suggested for the staff and the principal to enhance the durability of any outcome reached.

The fact that a rights framework existed was not taken into account in any substantial way, as if it were regarded as being 'out there' but as having no direct consequences. Dealing with the alleged discrimination and corporal punishment fell outside the participants' purview. As did the question of ensuring awareness of and future compliance with their rights and obligations according to South African law. Finally, little attention was devoted to improving the functioning of the school's governance systems to allow for greater sharing of responsibility, power and decision-making and to facilitate the constructive handling of any conflict in future.\(^{122}\) Whether our participants' tendency to focus on process, relationships and communication reflects a general pattern amongst conflict resolution practitioners is of course debatable. It may have been influenced by how the case was presented to them – but it does largely reflect the field's frames as outlined in chapter 3.

In this regard it is noteworthy that the actual intervention as facilitated by Galant was more comprehensive. Besides dialogue- and relationship-oriented steps and communication skills training, as suggested by our participants, it entailed joint development of a code of conduct based on human dignity to guide interaction at the school, discussion with the Education Department about the alleged misconduct (leaving it up to them to gather evidence to substantiate the claims and decide on a course of action), an information session by the Department on the legal framework, a review of how the existing governing systems were functioning, elections for staff representatives on various governance bodies, and development of better feedback and communication mechanisms. Upon hearing how Galant had approached the case, the participants observed that his intervention had picked up on issues of law and structure that they had not considered but which would probably affect the intervention's sustainability and legitimacy.\(^{123}\)

When asked to explain the difference between his own more far-reaching approach and that proposed by a group of conflict resolution practitioners, Galant credits his legal background. He also points to the fact that he worked for several years at a statutory body focused on addressing labour disputes through conciliation, mediation and arbitration, which made “the question of dealing with conflict in a legal

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\(^{122}\) Ghalib Galant and Victoria Maloka, the HRCMP colleague who co-facilitated the workshop with Galant and myself, confirmed this recollection in separate interviews, respectively 3 and 13 June 2011, Cape Town.

\(^{123}\) Personal notes taken at the time.
framework quite present” for him. He concedes that another practitioner “could have arrived there also, just through the relationship stuff – saying, ‘going forward, how do we manage our relationships?’”, but argues that someone else may “come up with a completely different set of structures, rather than appreciating that there are some constraints already, [that] there is a structure in place, and [then focus on] how best to work with those.”

By way of explanation, he elaborates:

Oftentimes, the problem is that we come out, in a particular scenario, with something – because we’re now in the moment, in the process, and we sign off on a charter, a code of conduct, whatever. A good example is that about ten years ago, a consortium of refugee organisations engaged with the city and they signed off on a charter on dealing with refugees and asylum seekers in the city. So [in 2008] you have issues in the city, involving refugees and asylum seekers, and does anyone refer to this charter? No, not at all – and yet this was a process that they’d gone through. What people are referring to now, are these laws, these structures [national legislation, international instruments] that were always there. So that charter is a nice to have, it’s a nice document but really does not bear [out], it does not hold parties accountable.

I think that this is sometimes one of the problems with our mediation or facilitation processes – in the moment, it satisfies something for the parties but in the longer term, if you don’t take into account the context, the laws and the regulating framework, these school governing type things, that you have a Western Cape Education Department with rules and regulations – if you don’t take that into account, then pretty soon the agreement that you come up with, will sort of just fade away. [It is] a question of the durability of the agreement. Can this survive, the charter for refugees? This nice piece of paper, it comes from a particular feeling in that moment, and you’ve been able to engender this – lovely, short-term fluffy feeling, warm in the pit of your stomach, but it is not durable at all.

While not using the phrase, Galant speaks about conflict resolution practitioners needing to recognise that they operate in the shadow of the law; he suggests that failure to do so may well undermine the sustainability of their efforts. His comments about practitioners “just wanting to make things nice” and “engendering a lovely, short-term fluffy feeling” also link back to the conflict resolution field’s shadow side as discussed in chapter 3, in terms of being concerned with altering behaviour and attitudes, facilitating short-term improvements, and neglecting structural aspects of conflict situations. Such aspects encompass not only the underlying conditions that give rise to destructive conflict, but also the legal framework and rights standards that relate to a given situation.

According to Galant, it was only through working at a statutory body that he started to view “the legal framework, or the Constitution, for example” as “one of the tools in my

124 Interview, Ghalib Galant, 3 June 2011, Cape Town. He refers to the Commission for Conciliation, Mediation and Arbitration (CCMA), which replaced the former Industrial Court; see Republic of South Africa, Labour Relations Act (Act 66 of 1995) (and 8.1.2).
125 Ibid.
126 Ibid. Emphasis as spoken.
“toolbox” that “really can be used, which it wasn’t before”. For him, “the fact that our Constitution operates horizontally and vertically” has become “very important” in processes he facilitates: “it is about getting people to understand that the right to dignity is a fundamental right in the Constitution, so when we’re engaging with each other, in this process, we need to respect each other”. Human rights as law and as values are thus fusing, and turn into an instrument that helps him to achieve a certain type – or quality – of process.

Meanwhile, his involvement in the 2008 xenophobia crisis has taught Galant even more that his conflict resolution perspective is not sufficient to understand and address situations encountered. In his view, the crisis required three intervention strands: a human rights one, a humanitarian one, and a conflict resolution one that he also refers to as a social cohesion or process strand. He says that “really understanding the impact of these things on each other throughout is critically important. As an individual person [grounded] in one of those respects, I cannot do that by myself, I don’t think. Cause sometimes I don’t even know what question to ask”.129

The senior official who appointed the facilitators, Sifiso Mbuyisa, has learned a similar lesson; in future, he would include persons with a human rights perspective on the intervention team.130 Rodney Dreyer, the practitioner who featured in the previous section’s discussion on the use of conflict resolution in relation to land rights and eviction cases, expresses comparable sentiments. He notes that he has come to appreciate the rights framework as a ‘tool’ he uses in handling cases, even if mediating within this framework is “difficult” since “there’s a lot that [it] presents as non-negotiable”. Nevertheless, “it’s a tool that is so widely acceptable, not only in our country but globally, that the farmer has difficulty arguing against it”.131

These examples suggest that conflict resolution practitioners who engage extensively with ‘human rights’ (in some form or another, e.g. concrete standards, training, or specific actors) may overcome a tendency to overlook rights-related aspects of the situations they seek to address. They may recognise that not paying attention to human rights can negatively affect their conflict resolution efforts – and in fact, they may start considering human rights a resource for their practice. However, this is probably easier said than done, in that practitioners’ encounters with human rights may initially be perceived as a ‘bruising’ experience.

127 Ibid.
128 Ibid; Art. 10, 1996 Constitution, op.cit., providing the right to have one’s inherent dignity respected and protected. Horizontal application of human rights is provided for in Art. 8; see also 8.1.2.
129 Interview, Ghalib Galant, 3 June 2011, Cape Town. Emphasis added.
130 Interview, Sifiso Mbuyisa, 7 June 2011, Cape Town.
131 Interview, Rodney Dreyer, 14 June 2011, Cape Town. See 5.1.2 and 5.1.5 for previous references to Dreyer.
5.2.6 In Sum

This section has discussed experiences of CCR and associated conflict resolution practitioners in facing human rights issues, actors and practices in different conflict situations. It shows that practitioners are likely to encounter human rights in the context of their work, for example when they are requested to intervene in specific situations. At times, this is explicitly so, when human rights are “key components of parties’ interests and concerns” (Babbitt 2009a, 627) and one or more conflict parties use rights language to frame their grievances and demands. Such ‘explicit running into’ human rights also occurs when actors with a clear human rights mandate try to influence an intervention process or its outcome, for example because they act on behalf of specific parties or insist on certain standards being upheld. At other times, ‘human rights’ are more implicitly present, in that they matter in terms of both conflict symptoms and causes: conflict may manifest in ways that negatively affect the rights of parties involved yet may also arise from underlying conditions that relate to poor rights realisation, such as deprivation, social exclusion, or the absence of legitimate and fair mechanisms to raise dissent and seek redress (e.g. Parlevliet 2002; Babbitt idem).

It can thus be argued that it is in the nature of the work undertaken by conflict resolution practitioners that they will encounter human rights. The environment in which they work may add to this: in South Africa, for example, both human rights law and human rights talk spread rapidly after 1994, due in part to a constitution-making process that involved an extensive national consultation on a Bill of Rights, the adoption of various laws meant to enhance human rights, and the establishment of institutions intended to protect human rights and constitutional democracy, such as the Constitutional Court and the SAHRC. Attitudes towards human rights in South Africa underwent “a real revolution” around this time,132 and “human rights talk [was] in everybody's mouth and everybody’s ear” (Hornberger 2007, 18). This was a period of ‘bringing human rights home’ (Halliday and Schmidt 2004).

Yet such a rise in human rights law and/or prevalence of human rights talk does not imply that conflict resolution practitioners are necessarily sensitive to this rights dimension. It seems that they easily overlook rights aspects if these are not pointed out to them or if they have not learned to consider human rights in relation to conflict resolution. They then fail to grasp the relevance of rights to the substantive issues at stake and may regard concerns framed in rights language as unhelpful or even obstructive. They may disregard the state’s responsibilities regarding human rights, and be ignorant of regulatory frameworks impinging on the situation at hand – and the implications for the design of interventions or the solutions agreed upon. As such, this section highlights all the more that encountering a certain phenomenon does not per se equal making an effort to affect it: conflict resolution practitioners who ‘stumble

into’ or ‘encounter’ human rights do not automatically seek consciously to enhance human rights conditions in a specific context or for specific persons or groups. Nevertheless, in the examples discussed, practitioners sought at times to take human rights into account and to strengthen rights awareness and protection while engaging in conflict resolution (the school case was probably the most multi-faceted approach in this regard). They tried to do so by, for example, incorporating an educational element in the intervention process, creating space for parties to speak about the rights violations experienced, stressing human dignity as a core value to guide future interactions, considering systems of governance within a particular institution, or – in the case of the former coordinator during the 2008 xenophobia crisis – pressing duty bearers on delivery and accountability so as to relay relevant information back to rights-holders. Interestingly, practitioners, when including awareness-raising on human rights into a dialogue process, decided to draw in an actor with rights-related responsibilities (the SAHRC, the provincial Education Department) rather than assuming this function themselves. This differs from what was observed in relation to LHR (whose practitioners did take on conflict resolution functions). It begs the question whether the reverse is less likely – and if so, why.133

An overall finding is that conflict resolution actors can benefit from more understanding and technical knowledge of human rights and regulatory frameworks, including rights standards. The situations discussed here at least suggest this: overlooking human rights aspects may limit an intervention undertaken by conflict resolution practitioners to only some aspects of a conflict, which undermines its sustainability. Furthermore, failure to take rights into account may lead to outcomes being facilitated that unwittingly disregard rights standards or even flout them. The following example illustrates that this is not unique to South Africa:

Community mediators in Nepal have had to learn legal provisions pertaining to ownership entitlements of formally registered tenants tilling the land of someone else.134 Legally, such tenants are entitled to 50% of the land but few know this when registering a claim to ownership of a portion of that land. Consequently, many respond positively when the owner of the land offers them 25%, and are generally pleased when they settle at 30–33% of the land – only to become very angry when finding out later that they were entitled to half of the land.135

In sum, it is important to take human rights into account in the context of conflict resolution (Parlevliet 2002). This is not only so for the ‘negative’ reasons mentioned above – termed so because they relate to avoiding negative impact – but also for positive reasons. Considering human rights may enhance the durability of conflict resolution efforts, for example by drawing attention to the nature and functioning of

133 See in this regard the discussion in 7.3, notably 7.3.3.
134 Conversations with Preeti Thapa, Senior Programme Officer, Asia Foundation, Kathmandu, February-May 2007; personal notes.
135 Ibid, and further confirmed by Jagat Basnet, Director of the Community Self Reliance Centre (CSRC), a NGO and membership organisation involved in the national land rights movement in Nepal, Kathmandu, February-May 2007; also Parlevliet (2011a, 29). More discussion on land rights in Nepal and CSRC will follow in 7.1 and 7.2.
public institutions and systems of governance. In addition, human rights law and values can serve as tools that conflict resolution practitioners can draw on in their practice. They highlight the parameters within which conflict resolution must take place, and can help practitioners to bring parties together around issues of common concern, or to develop useful partnerships with organisations that may be better placed to raise particular issues.

Yet the above makes clear that putting this into practice is not without challenges. It is clear that paying attention to human rights – or incorporating an explicit human rights dimension – in conflict resolution practice raises several questions. Some relate to dealing with human rights claims made by conflicting parties and the potential polarisation resulting from such claims, as opponents are likely to resist allegations of being responsible for rights violations. Questions also arise regarding the role of conflict resolution practitioners in raising human rights issues in intervention processes. Other questions relate to addressing various rights concerns: this entails not only balancing the rights of different persons or constituencies, but also dealing with the fact that some rights concerns relate to the consequences of conflict, others to its underlying causes. Ignoring the latter will probably undermine any constructive solution for the immediate issues at hand, but affecting them will require longer-term political and developmental initiatives that are beyond the scope of non-governmental conflict resolution practitioners.

As such, this section has also illustrated some of the limitations of conflict resolution’s way of being, doing and thinking. It has been suggested that conflict resolution practitioners, in their efforts to engage parties in dialogue, improve relationships and ‘put issues into process’, may ignore important elements of a given conflict. Also, to what extent may such an approach lay the basis for similar conflict situations to emerge in future, however unintentionally, by not enforcing important standards, punishing certain behaviour, or holding authorities accountable for their failure to meet their obligations? One can only wonder whether a stronger human rights- or law-based approach to early incidents of xenophobic violence in South Africa might have deterred future violence against non-nationals and/or made authorities more aware of the rights of non-nationals and of their own responsibility to provide them with protection and other services.

A related matter of concern is the way in which authorities may use conflict resolution services provided by civil society organisations (like CCR) in a context like South Africa, where significant tensions generate a ‘societal propensity to violence’ (Nathan 2001). Whether by design or not, the use of such services may enable authorities to contain eruptions of violence or outbursts of protest by citizens (and non-nationals) without taking responsibility for their failure to deliver on rights obligations. Conflict resolution actors then run the risk of serving as fire-fighters and pacifiers – especially when any effort on their part to raise rights concerns is frowned upon by public
officials and perceived as bias. All in all, considering human rights in relation to conflict resolution raises some tough questions for practitioners.

5.3 Conclusion

This chapter has focused on the question of how the relationship between human rights and conflict resolution plays out in the practice of civil society organisations focusing on protecting and promoting human rights or the peaceful resolution of conflict. It has done so by examining the experiences of two South African civil society organisations, one from each field: Lawyers for Human Rights (LHR) and the Centre for Conflict Resolution (CCR). This concluding section summarises overall insights and reflects on the fluidity between these fields.

The situations described here, and the brief references to experiences of organisations elsewhere, demonstrate that human rights and conflict resolution efforts are closely related in practice. LHR’s human rights practitioners started to draw on insights and methods from conflict resolution in their efforts to ensure the rights of farmworkers in the Western Cape. They sought to enhance their own capacity and that of their partners in mediation and negotiation so as to handle eviction conflicts effectively and constructively. Meanwhile, CCR’s conflict resolution practitioners found that they could not ignore human rights concerns while intervening in various conflict situations. Doing so would negatively affect the credibility and sustainability of their conflict resolution efforts.

The actual encounter of human rights and conflict resolution in practice brought both opportunities and challenges for the organisations and practitioners involved. For the LHR practitioners, the use of conflict resolution methods expanded the range of strategies at their disposal. It allowed them to take relational dynamics and contextual constraints into account while seeking redress for their clients, in a way that did not seem possible when using traditional adversarial approaches or accessing the formal judicial system. The opportunities presented by conflict resolution thus seemed particularly apparent to them. However, questions later arose about the limitations of conflict resolution approaches, in terms of setting a precedent, enforcing standards, giving due regard to the applicable ‘rules’, and protecting the weaker party. It thus transpired that conflict resolution could both help and hinder human rights protection.

The CCR practitioners initially perceived more challenges than opportunities when ‘human rights’ cropped up in their work, as rights claims seemed to intensify polarisation between the parties and raised challenging questions about the meaning of impartiality and facilitators’ own stances. The interaction with rights activists also proved taxing: their adversarial approach and insistence on specific outcomes seemed at odds with the conflict resolution practitioners’ more facilitative approaches. Nevertheless, consideration of human rights could also benefit conflict resolution
practice, by, for example, drawing attention to aspects of conflict situations that might otherwise be ignored, facilitating useful partnerships with other organisations, clarifying the parameters within which interventions were to take place, or bringing parties together around issues of common concern. Some practitioners thus came to appreciate human rights as a tool they could use in conflict resolution. Noteworthy in this regard is that while LHR practitioners mostly conceived of human rights as 'law' or 'rules', CCR practitioners understood human rights in a more multi-faceted way, linking them not only to law, but also to values, the type of processes facilitated and to the quality of relationships.

The practical examples put forth attest to the relevance of considering 'human rights' and 'conflict resolution' as distinct fields with specific frames: different analytical perspectives and ways of approaching problems can be observed. Yet the discussion here also highlights that the boundaries between human rights and conflict resolution may be far more permeable than the 'field' notion recognises. Actors focused on the one may find themselves dealing with the other, whether by conscious choice or inadvertently. A degree of fluidity thus exists between the fields, which belies the seeming 'solidity' of the two lenses emerging from the earlier chapters. Human rights and conflict resolution flow into one another in multiple ways, and the impression that they are separate fields with clear boundaries warrants qualification.

This suggests that maintaining 'distinct human rights and conflict resolution operations' (Arnold 1998a, 1) may not only be untenable in various situations, but also undesirable at times – at least, if no attention is given to the way in which human rights and conflict resolution efforts interrelate. Of course, there are considerable differences in the situations, organisations and individual practitioners described in this chapter. Variation exists, for example, in the degree to which connections between human rights and conflict resolution are purposefully pursued or rather stumbled upon, to which they are recognised or ignored, and to which they are capitalized on or perceived as unwelcome interference. Such differences however do not detract from the observation that human rights and conflict resolution are very interwoven in practice; this manifests in all situations described here.

A common element in the discussion of LHR and CCR experiences is that practitioners responded to specific conditions or challenges encountered in their context; this is what brought the fluidity of human rights and conflict resolution to the fore. Staff members of LHR consciously decided to explore and use conflict resolution when they realised the limitations of classical rights strategies in a heavily polarised environment characterised by severe power imbalances. CCR’s practitioners had to start thinking about human rights when meeting parties that framed their grievances and demands in rights language. This 'element of response' suggests that actors do not necessarily explicitly connect or consider human rights and conflict resolution in conjunction from the outset. It is in their practice that these actors come across the permeable boundaries between the fields. Faced with specific, dynamic situations
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embedded in myriad relationships, and involving multiple perspectives, interests and entitlements, it may no longer be viable for practitioners to focus only on human rights or conflict resolution or to 'do' one without considering the other, at least to some extent.

This chapter has suggested that the fluidity between human rights and conflict resolution may stem in large part from the nature of the work undertaken by the actors considered here, and the context in which they operate. The situations described here point to a multi-faced relationship between human rights and conflict, especially when considering 'conflict' broadly. While the non-realization of human rights may be one of several causes of social-political conflict in a specific context, protecting and enforcing them can also generate conflict in itself. It can challenge existing power relations, alter the existing division of resources and opportunities, and highlight shortcomings on the part of the state to realise rights. Such change carries potential for conflict, especially when human rights are seen in zero-sum terms, as if one party's gain is another's loss. Recognition of the previously denied rights of a specific group may cause other groups whose rights had thus far been upheld to perceive this as limiting their own rights (Parlevliet 2002, 34).

Hence, as the LHR example and the references to other human rights organisations reflect, human rights actors are constantly dealing with conflict. They do so when representing a party in conflict or when encountering resistance or obstruction in their human rights work. They may also serve as intermediaries and facilitate negotiations between parties. Meanwhile, conflicts of rights cannot be solved only by reference to human rights alone (Koskenniemi 2011, 159). While it was noted that encountering conflict does not imply that human rights actors actually engage in conflict resolution, it has also transpired that one may lead to the other: frequently dealing with conflict may prompt human rights actors to start working on conflict more intentionally, using conflict resolution methods and principles.

Human rights may be equally inescapable for conflict resolution, if only because the substantive issues at stake in conflicts often pertain to human rights in one way or another. The context may add to this: legal frameworks exist that affect the solutions that can be negotiated, parties may couch their positions in rights language or question conflict resolution actors on how abuses are being addressed, and human rights activists may operate in the same setting, possibly focusing on the same conflict situations, so that conflict resolution actors are likely to encounter them. Such dynamics are especially likely in contexts where human rights are 'brought home' through the domestication of international instruments.

It can thus be argued that conflict resolution practitioners generally work 'in' human rights – i.e. in settings where human rights feature in one way or another, and in which their actions are likely to affect human rights. They do so even if they do not consciously work 'on' human rights in the sense of explicitly seeking to protect and
promote them – and even if they prefer to work ‘around’ human rights when perceiving formal legal standards and moral claims as cumbersome, complicated, or simply not their concern. The distinction made here – between working in, on, and around a particular phenomenon – stems initially from the development field. While not very sophisticated (Lange 2004), it helps to discern different ways in which actors may engage with a phenomenon that is a defining feature of their context but does not play a prominent role in their traditional frame of reference. The observation that human rights actors may work ‘in’ conflict and that conflict resolution practitioners tend to work ‘in’ human rights has certain practical implications. For example, as Babbitt asserts, those who design and implement conflict resolution processes “cannot assume that human rights are ‘not our issue’. [...] The question to answer is not if, but how, to use these norms in a constructive and appropriate way” (2009a, 627).

The types of problem focused on by the actors considered in this chapter probably add to the way in which human rights and conflict resolution are intertwined. Land reform, xenophobia, flawed service delivery – these can all be considered what Kahane has called “tough challenges” (2010, 5). They are dynamically complex (in that cause and effect are interdependent and far apart in space and time), socially complex (due to the different interests and perspectives of the various individuals, groups and organisations involved), and generatively complex (in that their future is basically unknown and undetermined) (ibid; Senge and Scharmer 2001, 204-205). These features affect how such challenges can be addressed: the first means that it is important to see the system as a whole rather than tackling aspects piece by piece; the second points to the need to engage all actors involved rather than relying on authorities or experts; and the third highlights the importance of growing new solutions rather than applying set recipes from the past (ibid).

While it is debatable whether all situations mentioned in this chapter qualify as ‘tough challenges’, the discussion suggests that even seemingly small-scale, distinct conflicts dealt with by actors considered here – a conflict at a school in a destitute area, the eviction of a farmworker, the demolition of structures erected by urban settlers – may be rooted in and symptomatic of larger conflict dynamics that do constitute such ‘tough challenges’, and that will impact on practitioners’ ability to address such situations effectively and sustainably. Hence, Kahane’s threefold complexity may be the rule rather than the exception, even if it manifests most clearly in the 2008 xenophobic violence and may be less obvious in other situations described here.

As such, this chapter endorses the point made elsewhere that many issues that manifest themselves as legal problems cannot be conclusively resolved through legal routes (International Council on Human Rights Policy 2009, 17). It can be argued, in the same vein, that issues that manifest as ‘conflict’ problems warrant an approach that goes beyond conflict resolution and that tackling ‘human rights’ problems requires more than human rights. The chapter suggests that whether a problem is
seen as a ‘human rights’ or ‘conflict’ issue may be in the eye of the beholder, determined by their perspective: it may be both at one and the same time.

In this regard, it is revealing that various practitioners featured here seem to have become aware that their own perspective and methods, their regular way of operating, may be insufficient to address the situations at hand. The lament of a conflict resolution practitioner ‘Sometimes I don’t even know what question to ask!’—(in 5.2.5) is the most potent and explicit reflection of this. In other instances too, practitioners have realised that their efforts could benefit from a combination of insights and approaches from both fields. Indeed, learning processes appear to have taken place for various actors, both organisational and individual. This is another way in which the fluidity of human rights and conflict resolution emerges: it relates to a willingness amongst actors working in these fields to reflect on their own lens and actions, to acknowledge limitations, and to explore different approaches – in sum, allowing new practices to emerge, or in Kahane’s terms, growing new solutions.